

IN THE COURT OF APPEAL OF ZAMBIA APPEAL 172/2020
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

201 ii.)

/ 1

FAUSTIN KABWE\ N
BIMAL THAKER

1ST APPELLANT
2ND APPELLANT

AND

NDOLA TRUST SCHOOL LIMITED
ATTORNEY GENERAL

1ST RESPONDENT
2ND RESPONDENT

Coram: Makungu, Sichinga and Banda-Bobo JJA
On the ^{26th} day of August 2021 and ^{28th} day of October, 2021

For the appellants: K. Wishimanga & R. Mwala both of AMW & Co Legal Practitioners
For the ^{Jst} respondent: C.K Bwalya of D.H Kemp & Company
For the 2nd respondent: C.Mulonda & N.Mwiya, both of Attorney General Chambers

JUDGMENT

MAKUNGU JA, delivered the Judgment of the Court.

Case referred to:

1. *Faustin Mwenya Kabwe and Francis Herbert Kaunda v. The People*
HPA/33/2008
2. *U-rest Foams Limited v. Puma Botswana (PTY) Limited and ColourFast Textile Printers (PVT) Limited* - SCZ selected Judgment No.27 of 2018
3. *African Banking Corporation Zambia v. Mubende Country Lodge* - SCZ Appeal No. 116/2016
4. *New Plast Industries v. Commissioner of Lands and the Attorney General*
SCZ Judgment No.8 of 2001
5. *David Moto Sikananu v. The Attorney General* - SCZ Appeal No. 16 of 2015

6. *Corpus Legal Practitioners v. Mwanandani Holdings Limited - SCZ Judgment No. 50 of 2014*
7. *Mutale v. Munaile (2007) ZR 118*
8. *Henry Kapoko v. The People 20161 CCI 0023*
9. *Access Bank (Zambia) Limited v. Attorney General 2018/CCZ/009*
10. *J.K Rambai Patel v. Mukesh Kumar Patel (1985) ZR 220*
11. *Finsbury Investments Limited v. Antonio Ventriglia & Manuela Ventriglia CAZ /08/126/2018*
12. *Motor Vessel "Lilians 5" v. Catex Oil (Kenya) Limited (1989) KLR1*
13. *Hakainde Hichilema v. The Attorney General SCZ*
14. *Chikuta v. Chipata Rural Council (1974) ZR 241 (SC)*
15. *Dr. Ludwig Sondashi v. Brigadier General Godfrey Miyanda, MP (sued as National Secretary of the Movement for Multi-Party Democracy) (1995) S.J 1.(S.C)*
16. *Minister for Immigration and Multicultural Affairs v. Bhardwaj (2002) HCA 11*

Legislation and Publications referred to:

- 1 *The Constitution of Zambia (Amendment) Act No.2 of 2016*
2. *Rules of the Supreme Court, 1999 Edition.*
3. *Halsburys Laws of England, Vol 10, ^{4th} Edition*
4. *Protection of Fundamental Rights and freedoms, Statutory Instrument No. 156 of 1969*
5. *The High Court Act, Chapter 27 of the Laws of Zambia*
6. *Anti - Corruption Commission Act No. 3 of 2012*
7. *Anti - Corruption Commission (Disposal of Recovered property) Regulations, Statutory Instrument No. 58 of 2004.*

1.0 INTRODUCTION

1.1 This is an appeal against the ruling of Judge S. Kaunda Nawa of the High Court on a preliminary issue dismissing the appellant's action pursuant to order 14A of the Rules of the

Supreme Court, 1999 Edition for want of jurisdiction due to the wrong mode of commencement.

2.0 BACKGROUND

2.1 The brief facts of the matter are that; the appellants who were the plaintiffs in the lower court commenced this action against the ^{1st} respondent, a company owned by the Republic of Zambia and the ^{2nd} respondent by virtue of being the Government's representative in suits. The amended writ of summons and statement of claim dated ^{19th} December, 2018 shows that they were seeking the following reliefs:

- 1) *An order for delivery up of management of Ndola Trust School.*
- 2) *An order to render account of all the monies had and received from the time the respondent took over the management and administration of the appellants' school and business wrongfully.*
- 3) *Damages by way of compensation against the ^{2nd} respondent for the expropriation of property legally belonging to the appellants without just cause and unlawfully and in violation of the rights enjoyed by the appellants under the law.*

4) *Any other order the court may deem fit.*

5) *Interest on the sum claimed and found due and*

6) *Costs*

2.2 The ^{1st} respondent filed a memorandum of appearance, defence and counterclaim on ^{19th} February, 2019 which was amended on 28th January, 2020. The ^{2nd} respondent filed a conditional memorandum of appearance without a defence.

2.3 On ^{10th} July, 2019 the ^{2nd} respondent filed a notice to raise preliminary issues pursuant to order 14A as read together with order 33 rule 3 of the Rules of the Supreme Court, 1999 Edition. On ^{14th} February, 2020 the ^{1st} respondent also filed a notice to raise preliminary issues pursuant to order 14A of the Rules of the Supreme Court, 1999 Edition.

2.4 The ^{2nd} respondent's notice raised the following questions for determination:

1. Whether property No. NDO/578/C should be declared forfeited to the state following the plaintiffs failure to claim the said property within three months of publication of Gazette Notice No.494 dated 24th November, 2006 issued pursuant to the Anti-Corruption

Commission (Disposal of Recovered Property) Regulations, 2004 Statutory Instrument No. 58.

2 Whether the plaintiffs could rely on the outcome of the criminal judgment in the case of **Faustin Mwenya Kabwe and Francis Herbert Kaunda v. The People**¹ **HPA/33/2008** delivered on 26th May, 2016 by Justices Lengalenga, Siavwapa and Chisanga as a fundamental basis of this matter, in light of the recent Supreme Court decision in the case of **U-Rest Foams Limited v. Puma Botswana (PTY) Limited & Colourfast Textile Printers (PVT) Limited;** whether the plaintiffs herein can rely on the said judgment in particular under paragraph 13 of the statement of claim for its effect to re-establish their ownership to the assets and management of the school, which is the main fact in issue in this matter.

3. Whether the plaintiffs could plead a direct violation of their legal rights as enshrined under part III of the **Constitution of Zambia, Chapter 1 of the Laws of Zambia** as read with **Act No. 2 of 1996**, in a matter

commenced by way of writ of summons and statement of claim.

4. Whether the plaintiffs could plead a direct violation of their legal rights as enshrined under part III of the **Constitution, Chapter 1 of the Laws of Zambia** as read with **Act No. 2 of 2016** in a matter commenced by way of writ of summons and statement of claim.

2.5 The ^{1st} respondent sought an order to dismiss the action as it was purportedly incompetent, an abuse of court process and/or did not disclose any reasonable cause of action against the 1st respondent on the following grounds:

1. The action constituted an attempt on the part of the plaintiffs to circumvent Gazette Notice No.494 of 2006 published on 24th November, 2006 and issued pursuant to the Anti-Corruption Commission (Disposal of Recovered Property) Regulations, 2004 by the Director General of the Anti-Corruption Commission dated 30th October, 2006 which was addressed to the Chairman, Board of Governors of Ndola Trust School, whose particulars were, among other things, that recovered property, namely property No. NDO/578/C, Ndola Trust

School and all its movable and immovable assets had been subject of and were recovered during the course of the investigation into an offence alleged or suspected to have been committed under Act No.42 of 1996 were to be forfeited to the state, if they were not claimed within three months from the date of publication of that notice.

2. That the action was entirely, materially and/or substantially founded on the inadmissible judgment of the High Court sitting as an appellate court in its criminal jurisdiction dated ^{26th} May, 2016, cause number HPA/33/2008, in which the 1st plaintiff and another person were acquitted of one count of conspiracy to defraud, contrary to **section 313** of the **Penal Code, Cap 87** of the **Laws of Zambia** and to which the defendants were and are strangers; and

3. That the action which was commenced by writ sought as a central claim, to enforce the plaintiffs alleged rights under part III of the Constitution, was instituted contrary to Article 28 of the Constitution and rule 2 of the Protection of Fundamental Rights Rules, 1969.

3.0 DECISION OF THE LOWER COURT

3.1 With regard to the ^{2nd} respondent's preliminary application the court applied the case of African Banking Corporation Zambia v. **Mubende Country Lodge**,³ and held that although the ^{2nd} respondent had filed a conditional memorandum of appearance, no defence or notice of intention to defend was filed. Therefore, the requirements of order 14A/2/3/ of the Rules of Supreme Court of England were not satisfied and the preliminary application was found to be incompetent and accordingly dismissed.

3.2 The ^{1st} respondent on the other hand was found to have satisfied the requirements of order 14A/2/3 of the Rules of the Supreme Court as it had entered an appearance on 30th January, 2019 and defence on ^{19th} February, 2019.

3.3 Nevertheless, the court found that the first issue was not suitable for determination without a full trial of the action and on that basis it failed.

3.4 Coming to the second preliminary issue, the lower court applied the principle in the case of U-rest Foams Limited v. Puma Botswana (PTY) Limited and ColourFast Textile Printers (PVT Limited' and found that it was untenable for

the 1st respondent to rely on the outcome of the criminal proceedings in establishing a cause of action. That in fact both defendants were not involved in the criminal proceedings.

3.5 The court noted that the appellants allegedly entered into a contract with ZCCM to purchase the property in issue. The court found that the success of the preliminary issue relating to the non-admissibility of the criminal judgment as the basis of the cause of action, would not fully and finally determine the matter, as an order for the amendment of pleadings could be made and on that basis, the second preliminary issue partially succeeded.

3.6 As regards the third preliminary issue, the court below found that the reliefs sought were all centered around the alleged illegal acts by the respondents in compulsorily taking possession of the property and managing it. As such, the appellants were seeking to enforce their rights under part III of the Constitution but instituted the action contrary to Article 28 of the Constitution and rule 2 of the Protection of Fundamental Rights Rules which prescribed a petition as the mode of commencement. The court held that the matter

should have been commenced by way of petition, in line with the case of **New Plast Industries v. Commissioner of Lands and the Attorney General.**' The court further held that it had no jurisdiction to hear the matter and dismissed the whole action with costs to the ^{1st} and 2^d respondents to be taxed in default of agreement.

4.0 GROUNDS OF APPEAL

4.1 Dissatisfied with the decision of the court below, the appellants have advanced the following grounds of appeal:

- 1. The learned honourable High Court Judge erred in law and fact when she dismissed the plaintiffs action pursuant to order 14A of the Supreme Court Rules of England 1965 of the 1999 Edition despite the 1st defendant failing to satisfy the conditions precedent under the said order.***
- 2. The learned honourable High Court Judge erred in law and fact when she dismissed the plaintiffs action despite the ^{1st} defendant having waived its right by filing its defence.***
- 3. The learned honourable High Court Judge erred in law and in fact when she found that the action in the court***

below is partially founded on the outcome of the High Court judgment in cause number HPA/33/2008 which said judgment is inadmissible contrary to evidence on record and the law.

4. The honourable High Court Judge erred in law and fact when she found that the action against the ^{1st} defendant should have been commenced by way of petition contrary to the evidence on record and the law.

5. That the learned honourable High Court Judge erred in law and fact when she awarded costs to the defendants despite the fact that the preliminary issues raised by the ^{1st} defendant partially succeeded and all the preliminary issues raised by the ^{2nd} defendant failed.

5.0 APPELLANT'S ARGUMENTS

5.1 The appellant raised a number of issues in the grounds of appeal, however for the purposes of this appeal, we will concentrate on the arguments to do with jurisdiction as it is the core issue in this matter.

5.2 The appellants' advocate relied on the heads of argument dated 25th September, 2020 submitting that the 1st

respondent's application which was premised on order 14A of the White Book did not meet the requirements set out under that order. Counsel opined that order 14(1) (a) and (b) should only be engaged if the issues being raised are suitable for determination without a full trial of the action and if such determination will finally determine the entire case or matter or any claim or issue at hand.

5.3 Counsel went on to explain that if the issue of law to be determined is not decisive of all the issues between the parties, then such a question of law cannot finally determine the entire cause. Consequently, such a question would need a full trial of the action in order for it to be determined.

5.4 He submitted that the trial judge did not finally determine the entire matter as some issues were left unresolved.

5.5 He further submitted that under order 14A (1) (a) and (b), a court has jurisdiction to determine matters summarily but such power is not open ended. Our attention was drawn to a number of cases including *David Moto Sikananu v. The Attorney General*⁵ to the effect that order 14A of the White Book is employed to determine questions which may bring a

matter to an end, without any need for a trial and it is not employed to summarily determine claims which may appear to be weak or misconceived.

5.6 Counsel further relied on section 13 of the High Court Act which enjoins the court to administer both law and equity as well as Article 118 of the Constitution of Zambia to stress the point that dismissing the action was not an equitable and just way of resolving the matter. He stated that if the learned judge was of the view that she had no jurisdiction, she should have ordered that the matter be recommenced so that it is determined on its merits.

5.7 Counsel contended that the matter was dismissed on an irregularity relating to the wrong form of commencement. Therefore it did not qualify to be brought under order 14A of the Rules of the Supreme Court as the disposal of an action under order 14A must go to the merits of the action and not technicalities. He argued that the court has no jurisdiction to dismiss an action pursuant to order 14A of the White Book on a finding of procedural incorrectness as such determination does not finally determine the matter on its merits.

5.8 In brief, the argument on ground two was that the 1st respondent waived its right to have the action dismissed when it filed its defence instead of applying to have the action dismissed for irregularity and/or want of jurisdiction at the appropriate time, as the action by the Pt respondent satisfied the requirement of waiver set out in order 2 of the White Book in relation to matters of procedural irregularity. The 1st respondent is therefore estopped from claiming that the appellants used a wrong mode of commencement.

5.9 In ground three, counsel contended that the court below erred when it found that the preliminary issue succeeded in relation to non-admissibility of the criminal judgment. He pointed out that the pleadings, when read together, show that the appellants do not seek to rely on the outcome of the criminal judgment but the evidence that sometime in 2004 or 2005, the Anti-Corruption Commission began to investigate the 1st appellant's acquisition of Ndola Trust School. We were therefore urged to make an order for the appellants to produce and tender in evidence the criminal judgment not for purposes of using its outcome to prove the appellants' case,

but as evidence of the process or evidential material leading to its outcome.

5.10 On the ^{4th} ground, counsel argued that contrary to the finding by the lower court that the reliefs sought were all centered on the alleged illegal acts by the respondents of taking possession of the property and starting to manage it, the reliefs were distinct from each other, made against the respondents distinctly and in any event a party is at liberty to use whatever lawful means available to enforce his or her rights under the constitution.

5.11 He submitted that no constitutional issues were raised in the writ and statement of claim. That the appellants seek delivery up and possession of a property that is currently held by the 1st respondent, a private company under the law. The 2nd respondent was only joined to the proceedings for purposes of challenging the title of the third party that transferred such property to the ^{1st} respondent. That it is inconceivable that, such recovery of property against an individual and not the state would be achieved by way of petition. Based on this, counsel contended that the action was rightly commenced by writ of summons. To support this position, counsel relied on

the case of *Corpus Legal Practitioners v. Mwanandani Holdings Limited* where the claim was for removal of a caveat and for cancellation of a certificate of title. The Supreme Court in that case noted that the correct mode of commencing proceedings for removal of a caveat is by originating summons. However, it held that the trial judge was not at fault to allow an amendment of pleadings, which were commenced by way of writ of summons to include the relief of an order for removal of a caveat.

5.12 Counsel contended that Article 28 of the Constitution was not intended to be a bar to other methods of enforcement of one's rights. A party is at liberty to commence an action either by petition or writ of summons. According to counsel, the appellant had to refer to the Constitution to establish that there was no just cause for depriving them of their property. This does not entail that the action should have been commenced by way of petition.

5. 13 In addition, that the seizure and forfeiture of the appellant's property was purportedly made pursuant to the Anti-Corruption Commission (Disposal of Recovered Property) Regulations, 2004 as read together with the Anti-

Corruption Commission Act. The said statutes do not stipulate that an aggrieved party must bring a claim by way of petition. Reliance was placed on the case of **Mutale v. Munaile**⁷ where the Supreme Court affirmed that a petition is a rare form of bringing proceedings and is used in cases where it is required by statute or by rule.

5.14 Counsel further contended that the High Court should not have dismissed the case on a technicality such as mode of commencement. In support of this, he cited the case of Henry Kapoko v. The People' where the Constitutional Court held that Article 118 (2) (e) of the constitution is intended to avoid a situation where paying unjustifiable regard to technicality would do a manifest injustice.

5.15 Counsel further submitted that after making a ruling that the matter was wrongly commenced, the High Court had no jurisdiction to pronounce itself on the limitation period as the issue of limitation was not one of the questions raised by the 1st respondent.

5.16 In support of ground 5, it was submitted that the court should not have awarded costs to the 2' respondent who did not succeed on any preliminary issue.

5.17 Counsel opined that since the ^{1st} respondent only succeeded on one preliminary issue which led to the dismissal of the action, costs should have been awarded in relation to the successful claim and not the entire action.

5.18 Additionally, counsel argued that the matter is of public interest and no order for costs should have been made.

5.19 We were urged to allow the appeal with costs to the appellant.

6.0 1st RESPONDENT'S ARGUMENTS

6.1 The ^{1st} respondent's counsel relied on the heads of argument dated ^{26th} October, 2020. In opposing ground one, it was submitted that the ^{1st} respondent had met the requirements under order 14A of the White Book when it entered a memorandum of appearance and defence.

6.2 It was argued on the third preliminary issue, that the matter was suitable for determination without a full trial, having been commenced wrongly by writ instead of a petition as prescribed under rule 2 of the Protection of Fundamental Rights Rules, 1969 as read with Article 28 of the Constitution. Since the High Court had no jurisdiction to entertain the matter, it had to dismiss the action in its

entirety. Reliance was placed on the case of **New Plast Industries v. Commissioner of Lands and Attorney General**' which emphasizes:

"The correct position is that the mode of commencement of any action is generally provided by the relevant statute. Thus, where a statute provides for the procedure of commencing an action, a party has no option but to abide by that procedure."

6.3 Counsel went on to state that there is nothing in Article 118 of the Constitution that assists the appellants. In the case of **Access Bank (Zambia) Limited v. Attorney General**,¹ the Constitutional Court provided an authoritative interpretation and application of Article 118 (2) (e) of the constitution when it held that:

"The Supreme Court was well within the law and jurisdictional mandate when it dismissed the petitioners appeal as rules of the court are intended to assist in the orderly administration of justice and as such must be strictly followed. Parties who choose not to comply with the rules do so at their

peril. Parties must not hide behind Article 118 (2) (e) of the constitution to flout the rules of procedure with impunity and expect to get away with it."

6.4 Counsel went on to state that, to argue that the High Court should have made an order enabling the matter to be recommenced is to misunderstand the consequences of lack of jurisdiction and the role of the court in an adversarial system. The function of the court is not to dispense legal advice to parties with competent legal representation.

6.5 Counsel submitted further that the appellants' advocates misunderstood the application of order 11 rule 1 of the High Court Rules, Cap 27. He explained that, the procedure available to a defendant to set aside a writ on account of jurisdiction is the first opportunity that the defendant has to object to the jurisdiction of the court after entering conditional appearance but it is not the only procedure available. To argue that this was the only procedure available would lead to an absurdity which is that if the question is not raised at that stage, then it can never be raised at all.

6.6 In response to ground two, counsel submitted that the question of jurisdiction is treated differently from mere defects in proceedings or irregularities in a writ. The subject of jurisdiction can be raised at any stage of the proceedings, even on appeal. It is for this reason that a party cannot waive the right to object to the jurisdiction of the court by entering an unconditional appearance and a defence. To buttress this point, counsel relied on Haisbury's Laws of England, (4th¹ Edition) where it was stated at page 718 that:

"Where by reason of any limitation imposed by statute, charter or commission, a court is without jurisdiction to entertain any particular action or matter, neither the acquiescence nor the express consent of the parties can confer jurisdiction upon the court, nor can consent give a court jurisdiction if a condition which goes to the jurisdiction had not been performed or fulfilled."

6.7 In light of the foregoing, it was submitted that the condition that would have given the High Court jurisdiction to entertain the matter would have been the commencement of the action by petition. Since a waiver cannot arise under the

circumstances, the consideration of whether the appearance and defence or any other similar action on the part of the 1st respondent constitutes a fresh step in the proceedings after noticing the irregularity is irrelevant.

6.8 We were further referred to Haisbury's Laws of England where it was stated that:

"At any rate, the Rules of the Supreme Court are mere rules of practice and procedure, and their function is to regulate the machinery of litigation: they cannot confer or take away or diminish any existing jurisdiction or any existing rights or duties. Since they are procedural in character and effect, they cannot enable an action to be brought which could not otherwise have been brought."

6.9 In the light of the foregoing, it was submitted that entry of an appearance and delivery of a defence could not confer the High Court with jurisdiction that it did not possess in the first place.

6.10 On ground three, it was argued that the statement of claim pleaded the outcome of the criminal judgment to establish

title to the property in issue aside from the purported contract with ZCCM. It is this pleading (reliance on the criminal judgment to assert title) that was found to be offensive by reason of the respondents not being parties to those criminal proceedings.

6.11 On ground four, it was submitted that the rationale given by the High Court in holding that the proceedings before it ought to have been commenced by petition is unassailable as the matter was centered around the compulsory acquisition of the property and ultimately the deprivation of the said property, in breach of the rights under part III of the Constitution. All the appellant's reliefs before the High Court would have borne a connection to the alleged infringement of part III rights under the Constitution had they been granted.

6.12 It was further argued that under article 28 (4) of the Constitution and The Protection of Fundamental Rights Rules, 1969 an application for redress for violation of part III rights can only be brought by petition.

6.13 On ground 5, it was submitted that costs are awarded in the discretion of the court. In this case, the appellant's action was

dismissed meaning the respondents had successfully defended the matter, although the action was dismissed based on the success of the 1st respondent's third preliminary issue.

6.14 Citing the case of J.K Rambai Patel v. Mukesh Kumar Patel,¹⁰ counsel argued that there was nothing in the nature of the claim or conduct of the ^{1st} and ^{2nd} respondent that would have compelled the court not to exercise its discretion to award them costs.

6.15 It was further submitted that it cannot be a matter of public interest that a party whose action has been dismissed for want of jurisdiction should not bear the costs of the proceedings. We were urged to dismiss the appeal with costs.

7.0 ^{2ND} RESPONDENT'S ARGUMENTS

7.1 The 2nd respondent relied on the heads of argument dated 9¹¹ November, 2021. Grounds 1, 2 and 4 were argued together as follows: that the High Court Judge was on firm ground when she dismissed the appellant's action pursuant to order 14A of the Supreme Court Rules, 1999 Edition because the 1st respondent had satisfied the conditions precedent to invoking

the provisions of order 14A by filing a memorandum of appearance and defence.

7.2 It was further submitted that a challenge of contravention of the rights contained under part III (Articles 11 to 26) of the Constitution ought to commence by way of petition according to Article 28 of the Constitution and Rule 2 of the Protection of Fundamental Rights, Rules 1969. Since the matter was wrongly commenced, the High Court had no jurisdiction to hear and determine it.

7.3 The ^{2nd} respondent's argument on ground 3 were similar to the ^{1st} respondent's argument in that it also took the view that the Lower Court was on firm ground when it held that the second preliminary issue succeeded partially because the appellant's claim for ownership of the subject matter was based on the outcome of the criminal judgment and contract of sale.

7.4 In ground 5, it was submitted that even though the 1st respondent's preliminary application partially succeeded, the net result was that the matter commenced by the appellants

was dismissed in its entirety. Therefore, the court below was on firm ground when it awarded costs to the respondents'.

7.5 On the basis of the foregoing arguments we were urged to dismiss the appeal.

8.0 ARGUMENTS IN REPLY

8.1 The written arguments were a repetition of the arguments made in support of the grounds of appeal and so were the oral arguments.

9.0 DECISION OF THE COURT

9.1 Having considered the record of appeal and counsel's arguments, we shall deal with the issue of jurisdiction raised in grounds 1 to 4 first as it is crucial and our determination of the same has the potential of disposing of the matter efficiently.

9.2 Our stance is supported by the case of **Antonio Ventriglia & Manuela Ventriglia v. Finsbury Investments Limited** where the Supreme Court dealt with an issue of jurisdiction at great length and quoted the Kenyan Court of Appeal in the

**case of owners of Motor Vessel "Lilians S" v. Catex Oil
(Kenya) Limited¹²**

"With that I return to the issue of jurisdiction and to the words of section 20 (2) (m) of the 1981 Act. I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized with the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction..... where a court takes upon itself to exercise a jurisdiction, which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."

9.3 We hasten to hold that the lower court misdirected itself by failing to tackle the jurisdictional issue in the first place. The

question of whether order 14A RSC was properly invoked is neither here nor there as a question of jurisdiction can be raised formally or informally at any stage of the proceedings and the main issue was whether the originating process was correct.

9.4 Our understanding of the appellants' position is that this matter was rightly commenced by writ instead of petition as Article 28 of the constitution does not bar a party from commencing an action by any other means other than by petition. They have also argued that mere reference to the Constitution does not mean that the litigant is claiming violation of their rights under the Constitution.

9.5 In order to fully appreciate the appellant's claims we perused the statement of claim. In paragraph 11, the appellants claimed that the ^{1st} defendant which is beneficially owned by the Government of the Republic of Zambia; under the guidance and express direction of the 2nd defendant took compulsory possession and charge of the school. Under paragraph 12 they alleged breach of their constitutional rights. For avoidance of doubt the paragraph is framed as follows:

"12. The plaintiff will also aver that the actions of the 2nd defendant as set out in paragraph 11 above were taken without any legal basis and in direct violation of the plaintiffs moral and legal rights as enshrined under part III of the Constitution of Zambia and also under the Lands Acquisition Act, Cap 189 of the Laws of Zambia."

9.6 In light of the above, we have no doubt that the appellants' were alleging breach of their rights as enshrined under part III of the Constitution. We derive guidance from the case of *Hakainde Hichilema v. The Attorney General*" where the Supreme Court stated that:

"The clear and natural import of the words used in Article 28 as can be discerned from the language of the latter part of Article 28(1) is that it provides an avenue for the enforcement of the rights contained in the bill of rights. The High Court, in this respect has to be moved by an aggrieved person; or one who fears or is apprehensive that his/her rights under the bill of rights may be infringed in relation to him

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or her. Such a person may apply for redress under Article 28(1) of the constitution."

9.7 Article 28(1) of the Constitution of Zambia states as follows:

"28. (1) subject to clause (5), if any person alleges that any of the provisions of Article 11 to 26 inclusive has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply for redress to the High Court which shall-

Hear and determine any such application;

Determine any question arising in the case of any person which is referred to it in pursuance of clause (2);

And which may, make such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of Article 11 to 26 inclusive."

9.8 In addition, Rule 2 of the Protection of Fundamental Rights Rules 1969 prescribes the mode of commencement of such an action as follows:

"An application under section 28 of the Constitution shall be made by petition filed in the Registry of the High Court."

9.9 We therefore cannot fault the court below for finding that this matter should have been commenced by way of petition as all the reliefs sought were centered on the alleged illegal acts by the defendants in compulsorily taking possession of the property purportedly in contravention of the appellants' constitutional rights to own property.

9.10 Since there were no other distinct reliefs sought, this case was distinguishable from the case of *Corpus Legal Practitioners'* suprarelied on by the appellants.

9.11 Having found that the matter should have commenced by way of petition, we accept the ^{2nd} respondent's submission that in line with *New Plast Industries v. Commissioner of Lands and the Attorney General'* *supra* the court below was on

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terrafirma when it found that it had no jurisdiction to hear the matter and accordingly dismissed it.

9.12 The appellants have argued in the alternative that the High Court should not have dismissed the entire matter on a technicality as some issues were left unresolved. They have relied on article 118 (2) (e) of the Constitution and the Kapoko⁸ case *supra* where the constitutional court interpreted Article 118 (2) (e) and stated that it was intended to avoid a situation where paying unjustifiable regard to technicality would do a manifest injustice.

9.13 However, the same court in the case of Access Bank (Zambia) Limited v. Attorney General' cited by the respondents, guided that parties must not hide behind Article 118 (2) (e) of the constitution to flout the rules of procedure with impunity and expect to get away with it.

9.14 We have had occasion to consider cases which were dismissed on technicalities and recently in the case of Finsbury Investments Limited v. Antonio Ventriglia & Manuela Ventriglia¹² Mr. Justice M.M. Kondolo stated inter alia that:

"....A jurisdictional issue is a technical issue and one might be swayed into concluding that any matter dismissed for want of jurisdiction can never see the light of day. We opine that it depends on the peculiar circumstances of each case."

9.15 In the case of *Chikuta v. Chipata Rural Council*,⁴ the Supreme Court held that it had no jurisdiction to hear the matter because it had been commenced by writ of summons when it should have been commenced by originating summons. The plaintiff was allowed to go back to the High Court to commence the matter using the correct procedure.

9.16 A similar approach was taken in the case of **Dr. Ludwig Sondashi v. Brigadier General Godfrey Miyanda, MP (sued as National Secretary of the Movement for Multi-Party Democracy)**¹⁵ where the appellant who was expelled from the political party commenced the action by way of judicial review. The High Court dismissed the action. On appeal, the Supreme Court agreed that the matter should have been commenced by writ and after referring to the editorial notes under order 53 RSC proceeded to dismiss the appeal but

ordered that the action be sent back to the High Court so that it proceeds as if it was commenced by writ of summons.

9.17 In the Australian case of **Minister for Immigration and Multicultural Affairs v. Bhardwaj**,⁶ it was aptly stated as follows:

"A decision involving jurisdictional error has no legal foundation and is properly to be regarded, in law, as no decision at all, which means that the duty to make the decision remains unperformed."

9.18 Similarly, we take the view that as the duty to decide the matter on its merits still remains unperformed, there is nothing that bars the appellant from descending to the High Court and commencing a fresh action using the proper procedure.

9.19 The lower court had rightly dismissed the appellants' case as a whole and did not misdirect itself by not ordering that the appellants were at liberty to commence a fresh action. Where a court does not make such an order, it is the duty of a party or his advocates to decide on the next course of action. It follows that all other pronouncements made by the court

below on the merits of the case are to be considered to be null and void. See the Ventriglia'² case *supra*. Grounds 1 to 4 therefore have no merit and are dismissed accordingly.


9.20 As for the issue of costs raised in the ^{5th} ground of appeal, we take the view that both respondents were entitled to costs incidental to the main action even though the 2nd respondent's preliminary application was dismissed because both respondents had apparently attended to the matter upon being served with the writ and statement of claim. There is no public interest in this matter which would warrant an order that each party bears its own costs. However, the 2nd respondent is only entitled to out of pocket expenses. As for the preliminary issue, the 2nd respondent will bear his own costs. The lower court did not properly exercise its discretion when it awarded costs to the 2d respondent for the failed preliminary application. As a result ground 5 partially succeeds.

10.0 CONCLUSION


10.1 In closing, for the foregoing reasons, the appeal is dismissed as the partial success of ground 5 is not a substantial win for the appellants.

10.2 The costs payable to both respondents may be agreed upon between the parties or taxed in default of agreement.

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C.K. MAKUNGU
COURT OF APPEAL JUDGE



D.L. . SIC INGA
COURT OF APP L JUDGE



A.M. BANDA-BOBO
COURT OF APPEAL JUDGE