

IN THE CONSTITUTIONAL COURT OF ZAMBIA  
HOLDEN AT LUSAKA  
(Constitutional Jurisdiction)  
IN THE MATTER OF:

2023/CCZ/003

ALLEGED CONTRAVENTION OF ARTICLE 1 (5) OF  
THE CONSTITUTION OF ZAMBIA (AS AMENDED BY  
ACT NO. 2 OF 2016)

AND

IN THE MATTER OF:

ALLEGED CONTRAVENTION OF ARTICLE 128(1)(a)  
AND 128 (1)(b) OF THE CONSTITUTION OF ZAMBIA  
(AS AMENDED BY ACT NO. 2 OF 2016)

AND

IN THE MATTER OF:

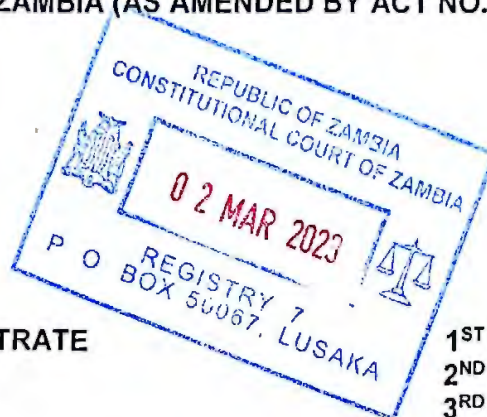
ARTICLE 183(3)(d) OF THE CONSTITUTION OF  
ZAMBIA (AS AMENDED BY ACT NO. 2 OF 2016)

BETWEEN:

FREDSON KANGO YAMBA

AND

THE PRINCIPAL RESIDENT MAGISTRATE  
ANTI-CORRUPTION COMMISSION  
THE ATTORNEY GENERAL



PETITIONER

1<sup>ST</sup> RESPONDENT  
2<sup>ND</sup> RESPONDENT  
3<sup>RD</sup> RESPONDENT

*Before the Honourable Deputy President Constitutional Court, Professor Justice M. M. Munalula in Chambers on 20<sup>th</sup> February, 2023 and 2<sup>nd</sup> March, 2023*

For the Applicant:

Mr. L. Mwamba and Mr. M. S. Desai of Messrs  
Mwamba & Milan Advocates

For the 1<sup>st</sup> and 3<sup>rd</sup> Respondent:

Mr. C. Mulonda and Mr. N. Mwiya, Principal State  
Advocates of the Attorney General's Chambers

For the 2<sup>nd</sup> Respondent:

Mr. E. Mbewe from the Anti-Corruption Commission

## RULING

### Cases referred to:

1. Milingo Lungu v Attorney General and Others 2022/CCZ/006
2. Republic v Permanent Secretary, Ministry of Energy and Others (2014) eKLR, Judicial Review No. 1 of 2012
3. Equity Bank Limited v West Link Mbo Limited (2013) eKLR, Civil Application 78 of 2011
4. Reuben Malindi and Another v The Attorney General Appeal No. 224 of 2020
5. C & S Investment Limited, Ace Car Hire Limited, Sunday Maluba v The Attorney General (2004) Z.R. 216
6. Rajan Lekhraj Mahtani and John Sangwa v The People SCZ No. 21/2019

7. Zambia Revenue Authority v Professional Insurance Corporation Zambia Appeal No. 34/2017
8. Nkandu Luo and Another v Doreen Sefuke Mwamba and Another Appeal No. 10/2016
9. Kenson Kapemba v Mwango Chileshe 2021/CCZ/A0016
10. Henry Kapoko v the People 2016/CC/43 Selected Judgment No 43
11. Lloyd Chembo v Attorney General Selected Judgment No 15 of 2018

#### **Legislation referred to:**

The Constitutional Court Rules, S. I. No. 37 of 2016  
 The Constitution of Zambia (Amendment) Act No. 2 of 2016

#### **Other works referred to:**

Halsbury's Laws of England, 4<sup>th</sup> Edition (Re-issue), Vol. 37.

### **INTRODUCTION**

[1] On 14<sup>th</sup> February, 2023, the Petitioner (the Applicant) filed *Ex parte* Summons accompanied by a certificate of urgency for an Order for Stay of Proceedings pursuant to Order X rule 2 (1) and (2) of the Constitutional Court Rules, 2016 (CCR) and the inherent jurisdiction of this Court. Through the summons, the Applicant seeks an order that criminal proceedings against him before the Subordinate Court be stayed pending the hearing of the main matter herein. I directed that the summons be heard *inter partes* on 20<sup>th</sup> February, 2023 on which date all the parties were present, with the Respondents' responses on record.

### **APPLICANT/PETITIONER's CASE**

[2] The Affidavit in Support of the application was deposed by the Applicant who stated that he was arrested by the 2<sup>nd</sup> Respondent and charged with 1 count of wilful failure to comply with the law. That on 28<sup>th</sup>



November, 2022, the 2<sup>nd</sup> Respondent served and circulated an amended charge sheet where the Applicant has now been charged with violating or breaching Article 183(3)(d) of the Constitution of Zambia (Amendment) Act No. 2 of 2016. That the matter is scheduled to come up for hearing on 9<sup>th</sup> March, 2023.

[3] The application was also accompanied by skeleton arguments. It was argued that following the amendment to the charge sheet which discloses an offence flowing from an alleged breach or violation of the Constitution, a Petition was filed before this Court which necessitated the filing of this application. It was submitted that in accordance with Order X rule 2 (1) of the CCR, this Court has power to grant the order sought staying the proceedings in the Subordinate Court pending determination of the Petition.

[4] Reliance was placed on the Ruling delivered on 19<sup>th</sup> May, 2022 by a single judge of this Court in the case of **Milingo Lungu v Attorney General and Others**<sup>1</sup> where a similar application was granted. That the conditions set by the single judge in that case for such an order to be granted have been met by the Applicant. That the order will ensure that he does not suffer any prejudice.

[5] The Applicant also referred to the case of **Republic v Permanent Secretary, Ministry of Energy and Others**<sup>2</sup> and **Equity Bank Limited v West Link Mbo Limited**<sup>3</sup> where the court in Kenya considered the

inherent jurisdiction of superior courts to issue orders of stay. On that footing, it was contended that this Court has inherent power to grant the application sought as the Petition before this Court challenges the constitutionality of the criminal prosecution. That this is a proper case for this Court to grant the application sought.

[6] When the matter came up for hearing on 20<sup>th</sup> February, 2023 in chambers, Counsel for the Applicant, Mr. Mwamba, reiterated the earlier written arguments and added that a distinction ought to be drawn between criminal investigations and criminal prosecution as stated in the case of **Reuben Malindi and Another v The Attorney General**.<sup>4</sup> That the matter in the lower court had graduated from a criminal investigation into criminal prosecution for which this Court has power to grant the relief sought.

#### **1<sup>ST</sup> AND 3<sup>RD</sup> RESPONDENTS's CASE**

[6] The 1<sup>st</sup> and 3<sup>rd</sup> Respondent filed an Affidavit in Opposition and skeleton arguments. It was deposed by Josiah Simachela that civil proceedings cannot be used to arrest criminal investigations and proceedings. That no prejudice will be occasioned to the Applicant if the proceedings in the Subordinate Court were to proceed.

[7] In their skeleton arguments reliance was placed on the cases of **C & S Investment Limited, Ace Car Hire Limited, Sunday Maluba v The**



**Attorney General<sup>5</sup> and Rajan Lekhraj Mahtani and John Sangwa v The People<sup>6</sup>** to buttress the point that civil proceedings cannot be used to arrest criminal investigations and proceedings in this jurisdiction. That this Court has no jurisdiction to grant the order sought which has the potential to jeopardize the criminal justice system. That the Supreme Court in the case of **Zambia Revenue Authority v Professional Insurance Corporation Zambia<sup>7</sup>** frowned upon constant shifting of positions by superior courts which would be inconsistent with predictability of court judgments and the credibility of the justice system.

[8] It was further contended that even the grounds specified in the case of **Milingo Lungu v Attorney General and Others<sup>1</sup>** for an order staying prosecution to be granted have not been met by the Applicant to warrant the exercise of this Court's discretion as he has not demonstrated that he will suffer any prejudice if proceedings continue.

[9] It was argued that there are other avenues open for the Applicant to use if he is dissatisfied with the decision of the Subordinate Court such as an appeal as provided for in section 321 of the Criminal Procedure Code Chapter 88 of the Laws of Zambia. This Court was therefore urged to dismiss this application with costs to the 1<sup>st</sup> and 3<sup>rd</sup> Respondents.

[10] At the hearing the 1<sup>st</sup> and 3<sup>rd</sup> Respondent echoed their written arguments which I shall not recite for the sake of brevity.

## 2<sup>ND</sup> RESPONDENT's CASE

[11] The 2<sup>nd</sup> Respondent also filed an Affidavit in Opposition and written skeleton arguments whose contents mostly attacked the merits of the main matter which are not the subject of this application.

[12] The 2<sup>nd</sup> Respondent did however submit that in respect of the decision in **Milingo Lungu v Attorney General**<sup>1</sup> the Court had found cogent reasons like violation of the Constitution during criminal investigations warranting the stay of criminal proceedings in that case. That the Applicant has not demonstrated any such cogent reasons to warrant the exercise by this Court of such discretion.

[13] Further reliance was placed on **Halsbury's Laws of England** 4<sup>th</sup> Edition Volume 37 at page 290 that speaks to the effect of an order for stay and under what circumstances the same can be granted. It was contended that this is not a proper and fit case for this Court to grant the interim relief sought. This Court was therefore beseeched to dismiss this application.

[14] At the hearing, the 2<sup>nd</sup> Respondent relied entirely on the documents before court and made no oral submissions.



## CONSIDERATION AND DECISION

[15] I have fully addressed my mind to the application, the accompanying affidavit in support, affidavits in opposition and the lengthy arguments by the parties. I will begin with my jurisdiction to make the order sought for reasons that will become apparent as the ruling unfolds.

[16] This application is made pursuant to Order X rule (2) (1) of the CCR which provides that:

**Despite any provision to the contrary, the Court may hear and determine an application for an interim order.**

The Applicant has argued that based on this provision, this Court has power to stay the criminal proceedings against him that are currently ongoing before the Subordinate Court until the main matter *in casu* is determined on the merits. The 1<sup>st</sup> and 3<sup>rd</sup> Respondents, have on the other hand, contended that this Court lacks jurisdiction to stay the proceedings before the Subordinate Court.

[17] With these arguments, the parties have raised a fundamental question which is whether, I have the jurisdiction to stay the impugned criminal proceedings. In my considered view, this question takes the application before me out of the domain of a mere interlocutory application

governed by Order X rule 2 (1) of the CCR to one that requires a prior determination by the full Court.

[18] I say so because the issue of jurisdiction is paramount. This Court stated in the case of **Nkandu Luo and Another v Doreen Sefuke Mwamba and Another**<sup>8</sup> at page R17 that:

Article 128(1)(e) of the Constitution as read together with section 8(1)(h) of the Constitutional Court Act, mandates this Court to determine whether or not a matter falls within the jurisdiction of the Court. In **Samuel Kamau Macharia and Another v KCB Limited and 2 Others**, the Supreme Court of Kenya aptly put it as follows:

“A court’s jurisdiction flows from either the Constitution or legislature or both. Thus, a court can exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

[19] This position was re-affirmed in the case of **Kenson Kapemba v Mwango Chileshe**<sup>9</sup> where the President of the Constitutional Court, Lady Justice Chibomba, as she then was, stated that a court’s jurisdiction is not a matter of procedural technicality but one that goes to the root of the court’s adjudication process. That if a court lacks jurisdiction to entertain a matter, it downs its tools.

[20] It is trite that my mandate as a single judge of this Court is to deal with interlocutory matters. Although the application before me appears to be such a matter it has an impact on another court of law. Further there are implications for the Constitutional Court and the criminal justice



system that may flow from my decision because of the settled principle that civil proceedings should not be used to arrest criminal investigations or proceedings.

[21] Thus until the Constitutional Court pronounces itself on the fundamental question of whether it has the jurisdiction to grant a stay of criminal proceedings I am of the firm view that I have no comfort to consider the merits of the application.

[22] There is good reason to be cautious. The approach that this Court took in the case of **Henry Kapoko v The People**<sup>10</sup> is never far from my mind. At page J27 we said:

**We are alive to the fact that the decisions of this Court should never turn the justice delivery system on its head. Our decisions should generate incremental improvements in both substantive and procedural justice, but they must not jeopardise what has worked well in the past.**

[23] Neither do I treat lightly, what we said in **Lloyd Chembo v Attorney General**<sup>11</sup> that:

**There is comity between the courts constituting the judiciary. This court works hand in hand with other courts so that matters before it and before other courts are heard and determined in an orderly and efficient manner.**

[24] For the foregoing reasons, I am unable to consider the merits of this application for a stay of criminal proceedings and I dismiss it for want of jurisdiction. I order that each party bear their own costs.



Prof M. M. Munalula (JSD)

Deputy President Constitutional Court