

IN THE SUPREME COURT OF ZAMBIA

SCZ/8/02/2023

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

AARON CHUNGU



APPELLANT

AND

PETER CHANDA

1ST RESPONDENT

WRIGHT MUSONA

2ND RESPONDENT

OTHER UNKNOWN PERSONS

3RD RESPONDENT

ATTORNEY GENERAL

4TH RESPONDENT

SHARON MWENGE MWANSA

5TH RESPONDENT

BENJAMIN MWANGALA KABANDA

6TH RESPONDENT

MOFFAT LUNGU

7TH RESPONDENT

MARVIN MATUNGA

8TH RESPONDENT

BUPE MULENGA

9TH RESPONDENT

TAPIWA MSUSA

10TH RESPONDENT

CORAM: Malila CJ, Wood and Mutuna JJS
On 9th May, 2023 and 22nd June, 2023

FOR THE APPELLANT: P. Songolo, Messrs Philsong & Patners

FOR THE 1ST, 2ND AND 3RD RESPONDENT: B. Mukatuka, Messrs Robson Malipenga & Co

FOR THE 4TH RESPONDENT: Ms. A.Chisanga and Ms. N.A. Chongo
Senior State Advocates, Attorney
General's Chambers

FOR THE 5TH, 6TH, 7TH, 8TH, 9TH AND 10TH RESPONDENT: Ms. N. Banda Messrs Ganje
Mhango and Company

J U D G M E N T

Wood JS, delivered the Judgment of the Court.

CASES REFERRED TO:

1. *Polythene Products Zambia Limited v Cyclone Hardware and Construction Limited, and The Attorney General* Z.R (2012) Volume 3, 396.
2. *Paton v The Attorney General and Chona* (1968) Z.R. 246 (Reprint)
3. *Kalvic Bakery v The Attorney General and Another*, Appeal No. 178 A/2017
4. *Faramco v Camel Freight Limited and four others* SCZ/8/341/2015 (Appeal No. 136/2016)
5. *Attorney General, Commissioner of Lands, Livingstone City Council and Captain John Mwamulima v Ambex Clothing Manufacturing Limited* Appeal No. 134 Of 2013
6. *Beatrice Mulamfu v Kelvin Mukuka Mwamba*, Appeal No. 80 of 2014
7. *Yakub Falir Mulla, Fazila Mulla Allo and Mwila Mumbi Jabi v Mohammed Jabi*, Appeal No. 75 (Selected Judgment No. 1 of 2018)
8. *Chikuta v Chipata Rural Council* (1974) Z.R. 241
9. *Barclays Bank (Zambia) v Walisko & Company and Mohamed Ashrof Mansoor* (1980) Z.R. 9 (Reprint)
10. *Newplast Industries Limited v Commissioner of Lands and The Attorney General* (2001) Z.R.51
11. *Zambia National Holdings Limited and UNIP v Attorney General* (1993)- 1994) Z.R. 115
12. *Union Gold (Zambia) Limited v The Attorney General* SCZ Judgment No. 141/2016 (Appeal No. 50/2016)

LEGISLATION REFERRED TO

1. *The Lands Act Chapter 184 of the Laws of Zambia*
2. *The Lands Tribunal Act, No. 39 of 2010*
3. *The Lands and deeds Registry Act, Chapter 185 of the Laws of Zambia*
4. *The Court of Appeal Act No. 7 of 2016*
5. *The Supreme Court Act Chapter 25 of the Laws of Zambia*
6. *The Constitution of Zambia (Amendment) Act No. 2 of 2016*

WORKS REFERRED TO

1. *Orders 14A, 33 and 62/3/5 of the Rules of the Supreme Court of England 1965 (White Book) RSC 1999 edition*
2. *Black's Law Dictionary Eighth Edition by Garner*

1. INTRODUCTION

- 1.1 This appeal essentially seeks to overturn our decision in the case of *Polythene Products Zambia Limited v Cyclone Hardware and Construction Limited, Attorney General*¹ and harmonise our decisions in land matters in relation to the jurisdiction of the High Court and the Lands Tribunal as established under the Lands Tribunal Act No. 39 of 2010.
- 1.2 In the *Polythene Products* case we held, *inter alia*, that Section 13(3) of Lands Act Cap 184 of the Laws of Zambia provided that a party aggrieved by a certificate of re-entry in the register may within thirty days appeal to the Lands Tribunal for an order that the register be rectified. A trial judge therefore has no jurisdiction to hear an aggrieved party's challenge of the re-entry process of the Commissioner of Lands.
- 1.3 We must at the outset state that while the appellant's appeal may appear to be an insurmountable exercise as this Court is bound by its decisions, we note that Article 125 (3) of the Constitution of Zambia (Amendment) Act No. 2 of 2016 allows this Court, in certain cases, in the interest of justice and development of jurisprudence, to depart from its earlier decisions.

In the case of *Paton v The Attorney General and Chona*² the then Court of Appeal held that it was not absolutely bound by its previous decisions. It further held that a previous decision would not be followed only for very compelling reasons and only where the Court clearly considered that the previous decision was wrong.

2. BACKGROUND

- 2.1 Mr. Aaron Chungu, the appellant herein, purchased Subdivision No.4 of Subdivision 'G' of Farm No. 4142 in extent 4.1345 hectares from Mr. Keith Singumbe Mutupo for K6,000.000.00 (unrebased), and was issued a certificate of title No. L7109d dated 16th December, 1996 by the Registrar of Lands.
- 2.2 The appellant initially constructed a caretaker's structure on his neighbor's land in error. Upon realizing his error, he relocated to his land and constructed another caretaker's structure. In addition, he fenced the property, and erected a steel gate. His intention was to relocate his organic fertilizer plant which initially was planned to be located in the Lusaka Multi Facility Economic Zone.

- 2.3 On the weekend of 16th and 17th of June, 2018, he visited his property and found that it had been subdivided by a surveyor under the instructions of the Commissioners of Lands and the Surveyor General's Office.
- 2.4 Upon making enquiries at the Ministry of Lands and Natural Resources on what was happening to this land, the appellant was informed that the Commissioner of Lands re-entered his property on 21st March, 2018 after he had allegedly failed to make appropriate representations, following the registration of the Commissioner of Lands intention to re-enter his property in August, 2016.
- 2.5 The appellant protested the development and informed the officers in the Commissioner of Land's Office that he had not received any notice of re-entry and had never lived at House No.10 Kapwepwe Road in Chingola where the notice of re-entry had been sent to a Mr. Aaron Chungu.
- 2.6 The Lands Register relating to his property still showed that his address was P.O Box 35490 Lusaka.
- 2.7 He then decided to commence court proceedings in the High Court against the respondents claiming the following:

- (i) *An order and/or declaration that the plaintiff is the Legal Owner of Subdivision No.4 of Subdivision 'G' of Farm No. 4142 Lusaka and which land is held on certificate of title No. L7109.*
- (ii) *An order and or declaration that the Notice of Intention to re-enter and the certificate of re-entry registered against the subject property by the Commissioner of Lands were fraudulently, illegally and or unlawfully processed and are therefore Null and Void ab initio.*
- (iii) *An order setting aside the Notice of Intention to re-enter and the certificate of re-entry registered against the property by the Commissioner of Lands on 21st March, 2018.*
- (iv) *An order and or a declaration that the subsequent subdivisions, created out of the Plaintiff's property at the instance of the Commissioner of Lands and approved by the Surveyor General following the fraudulent and or illegal registration of the certificate of re-entry against the plaintiff's property aforesaid and subsequently offered to the 1st, 2nd and 3rd defendants, are null and void.*
- (v) *An order directing the cancellation of all the subdivisions referred to in paragraph (iv) above together with the subsequent offer letters issued by the Commissioner of Lands to the 1st, 2nd and 3rd defendants.*
- (vi) *An injunction restraining the 1st, 2nd and 3rd defendants and their agents or Servants from taking possession of the land they have illegally been offered and or allocated, from trespassing on the Land, from developing it or selling or attempting to sell or convey howsoever the pieces of land referred to in paragraph (i) above or interfering in whatsoever manner with the plaintiff's peaceful enjoyment of the said piece of land until this matter is determined by this honorable court.*
- (vii) *Damages for trespass to land.*
- (viii) *Damages for mental anguish and inconvenience.*

- (ix) *Costs*
- (x) *Further or other relief that the court may deem fit.*

3. MATTER BEFORE THE HIGH COURT

- 3.1 When the matter came up in the High Court, the 5th to 10th respondents filed a notice of motion to raise a preliminary issue pursuant to Order 14A and Order 33 Rules 3 and 7 of the Rules of the Supreme Court on whether the High Court had jurisdiction to hear the matter in view of Section 13 (3) of the Lands Act Cap 184 which states that:

"A lessee aggrieved with the decision of the President to cause a certificate of re-entry to be entered in the register may within thirty days appeal to the Lands Tribunal for an order that the register be rectified."

- 3.2 The learned High Court Judge reviewed a number of cases and came to the conclusion that while the High Court had unlimited jurisdiction in land disputes and that the Lands Tribunal Act No. 39 of 2010 does not oust the jurisdiction of the High Court to determine disputes over land as a court of first instance, it was clear that the appellant was challenging the re-entry. Since that was the case, the proper cause of action was to appeal to the Lands Tribunal as was held in the *Polythene Products Case* which was followed in *Kalvic Bakery v The Attorney General and*

*Another*³. She accordingly upheld the preliminary issue raised and disposed the case on a point of Law.

4. MATTER BEFORE THE COURT OF APPEAL

4.1 On appeal to the Court of Appeal, the appellant filed four grounds of appeal as follows:

- (i) *The learned Puisne Judge erred in fact and in law when she dismissed the appellant's case and held that commencing this matter by way of writ of summons and statement of claim was irregular and misconceived in face of recent jurisprudence by the highest court in the land to the effect that the entire Lands Tribunal Acts No.39 of 2010 does not oust the jurisdiction of the High Court to hear and determine land disputes as a court of first instance.*
- (ii) *The learned Puisne Judge erred in fact and in law when she failed to give effect to the Rules of the High Court that direct that unless otherwise stated by any written law, every action in the High Court shall be commenced by writ of summons endorsed and accompanied by a full statement.*
- (iii) *The learned trial Judge erred in law and in fact when she dismissed the appellant's case in its entirety in the court below with costs holding that this was a proper case to dispose of on a point of law when in fact not.*
- (iv) *In the alternative, the learned trial judge erred in law and in fact when she neglected to take note that the appellant was also seeking other reliefs that were properly before the court below by way of a writ of summons supported by a statement of claim other than just challenging the illegal re-entry of the appellant's land in accordance with the Rules of the High Court on commencement of matters.*

4.2 After considering the arguments by the parties on the narrow issue of jurisdiction in relation to Section 13 (3) of the Lands Act Cap 184, the Court of Appeal held that:

"Furthermore, our take from the Faramco Limited case, is that although the Supreme Court acknowledged the Polythene Products Zambia Limited case, it did not overrule or vacate its earlier decision in the Polythene Products Zambia Limited case and neither did it deem it bad law. The Polythene Products Zambia Limited case in our view is still good law and applicable to the matter before us taking into consideration the facts of the case. In the view that we have taken, Section 13 (3) of the Lands Act, ousts the jurisdiction of the High Court in respect to challenging a re-entry as held in the Polythene Products Zambia Limited case, which was followed in the Kalvic Bakery case."

The Court of Appeal accordingly dismissed the appeal.

5. APPEAL TO THIS COURT AND THE ARGUMENTS BY THE PARTIES

5.1 The appellant has now appealed to this court on five grounds as follows:

- (i) *That the Court of Appeal erred in law and fact when it dismissed the appellant's appeal on the premise that the four grounds of appeal lacked merit in the face of recent binding jurisprudence created by the Supreme Court to the effect that the Lands Tribunal Act No. 39 of 2010 and in particular Section 13 (3) of the Lands Act Chapter 184 of the Laws of Zambia do not oust the jurisdiction of the High Court to hear and determine land disputes in Zambia as a court of first instance.*
- (ii) *That the Court of Appeal erred in law and fact when it dismissed the appellant's appeal for lack of merit and in particular that it*

would seem that (at the time the Supreme Court decided the *Faramco* case,) the Supreme Court was oblivious to the *Polythene Products Zambia Limited Vs. Cyclone Hardware and Construction Limited and The Attorney General*¹ case which exhaustively dealt with the issue (whether or not Section 13 (3) of the Lands Act ousts the jurisdiction of the High Court?), as no reference was made to it when in fact the Supreme Court at pages 20 of the *Faramco Limited v Camel Freight Limited and 4 others* made specific reference to the said *Polythene Products Zambia Limited* case and thereafter held that the said Section 13 (3) of the Lands Act Chapter 184 of the Laws of Zambia does not oust the jurisdiction of the High Court as a court of first instance to determine land disputes.

- (iii) That the Court of Appeal erred in law and fact when it dismissed the appellant's appeal for lack of merit and held that although the Supreme Court acknowledged the *Polythene Products Zambia Limited* case, it did not overrule or vacate its earlier decision in the *Polythene Products Zambia Limited* case and neither did it deem it as bad law and further held that the *Polythene Products Zambia Limited* case in their (Court of Appeal) view is still good law and applicable to the matter before the Court of Appeal taking into consideration the facts of the case without drawing any distinction whatsoever between the facts on record, how these facts were different from the *Faramco* case decided by the Supreme Court and the facts in the *Polythene Products Zambia Limited* case.
- (iv) That the Court of Appeal erred in law and fact when it dismissed the appellant's appeal for lack of merit and held that although the Supreme Court acknowledged the *Polythene Products Zambia Limited* case, it did not overrule or vacate its earlier decision in the *Polythene Products Zambia Limited* case and neither did it deem it as bad law and further held that the

Polythene Products Zambia Limited case is still good law and applicable to the matter before them taking into consideration the facts of the case without applying the doctrine of stare decisis which entails that where there are two contradicting superior court decisions, the latest decision is binding.

- (v) *The Court of Appeal erred on a point of law when it dismissed the appellant's appeal with costs to be paid forthwith when the appellant was merely following the guidance of the Supreme Court in two decided cases presented to the court.*

5.2 On behalf of the appellant, Mr. Songolo, in his oral arguments bemoaned the lack of consistency, and clarity in relation to Section 13 (3) of the Lands Act. He implored the court to clearly state the position of the law as it was not possible for advocates to properly advise their clients in view of the seemingly inconsistent and contradictory judgments on the same issue. He then indicated that he would rely on the appellant's heads of argument which he filed on 13th April, 2023.

5.3 Mr. Songolo generally submitted that despite knowing that there was a judgment on all fours with the appellant's case before it, the Court of Appeal condemned the Supreme Court's decision in the *Faramco* case by holding that section 13(3) of the Lands Act ousts the jurisdiction of the High Court when challenging a re-entry as was held in the *Polythene Products*

case which the Court of Appeal followed in the *Kalvic Bakery* case. This, he submitted, was against the principle of *stare decisis* which requires lower courts to follow judicial precedent set by superior courts.

- 5.4 He then went on to argue the five grounds of appeal collectively. He started his argument by pointing out the fact that this Court has in the recent past in the case of *Faramco v Camel Freight Limited and four others*⁴, clearly addressed and settled the question of whether the High Court has jurisdiction to determine disputes in land matters. He quoted the following passage from the *Faramco* case to support his argument:

"It is quite clear that although section 13 (3) specifically provides for an appeal to the Lands Tribunal...both sections use the permissive word 'may' and the mandatory word 'shall'.

Indeed we held in the Polythene Products case, (following our decisions in the Newplast Industries Limited case and Chikuta v Chipata Rural Council), that the 1st defendant being aggrieved by the certificate of re-entry on Stand 12094 had no option but to appeal to the Lands Tribunal in its challenge of the certificate of re-entry; and that on the facts of that case, the learned trial judge had no jurisdiction to entertain the counterclaim on fraud and negligence, which was commenced by writ of summons.

However, we had occasion again, seven years later in the case of Attorney General, Commissioner of Lands, Livingstone City Council and

*Captain John Mwamulima v Ambex Clothing Manufacturing Limited*⁵ to consider the question of whether Section 13 (3) of the Lands Act has served to oust the jurisdiction of the High Court in land matters. In our judgment delivered on 15th November 2017, we held, applying our decision in the *Union Gold (Zambia) Limited* case... that the High Court's jurisdiction is not ousted by the Lands Tribunal in land matters and that an aggrieved party can choose between proceeding in the High Court or the Lands Tribunal to have his grievances redressed. Therefore, we found no merit in the argument that it was improperly commenced.

*In view of the above, the core issue raised by this appeal is settled and we find that the respondents can maintain their counterclaim in this action. Obviously, we have restated the dual jurisdiction of the High Court and Lands Tribunal in land matters in other cases such as Beatrice Mulamfu v Kelvin Mukuka Mwamba*⁶ *and Yakub Falir Mulla, Fazila Mulla Allo and Muila Mumbi Jabi v Mohamed Jabi*⁷."

5.5 Arising out of the *Faramco* decision, Mr. Songolo argued that:

- (i) *The High Court's jurisdiction is not ousted by the Lands Tribunal in land matters and that an aggrieved party can choose between proceeding in the High Court or the Lands Tribunal to have his grievances redressed.*
- (ii) *The appellant can maintain his action against the respondents and that the concurrent jurisdiction of the High Court and Lands Tribunal in land matters still stands as decided in other cases such as Beatrice Mulamfu v Kelvin Mukuka Mwamba*⁶ *and Yakub Falir Mulla and others v Mohamed Jabi*⁷.
- (iii) *A party wishing to challenge the re-entry and the cancellation and renumbering of property can legitimately take his case*

before the High Court for determination as the High Court still possesses jurisdiction to hear such matters.

- 5.6 He referred us to a quotation by the High Court Judge where she held in her judgment that:

"It is clear from the foregoing provision that the proper course of action when one is challenging the decision to re-enter is to appeal to the Lands Tribunal and this position was settled by the court of last resort in the case of Polythene Products Zambia Limited v Cyclone Hardware and Construction Limited and Attorney General¹ cited above. The Supreme Court stated in effect that the litigant affected by the certificate of re-entry had no option but to appeal to the Lands Tribunal in its challenge of the Certificate of re-entry."

- 5.7 He also referred us to the following passage from the judgment of the Court of Appeal where it held that:

"It would seem, the Supreme Court, without analysing the provisions of section 13 (3) quickly found comfort in the Union Gold case which as earlier alluded to was addressing a totally different issue. It would also seem at the time, that, the Supreme Court were oblivious to the Polythene Products Zambia Limited case which exhaustively dealt with the issue, as no reference was made to it. We also note that, reliance on the Faramco case seems to have been placed heavily on the cases of Union Gold, Beatrice Mulamfu and Yakub Falir Mulla which cases as earlier alluded were dealing with a totally different issue for determination.

Furthermore, our take from the Faramco Limited case, is that although the Supreme Court acknowledged the Polythene Products Zambia Limited case, it did not overrule or vacate its earlier decision in the

Polythene Products case and neither did it deem it bad law. The Polythene Products Zambia Limited case in our view is still good law and applicable to the matter before us taking into consideration the facts of the case. In the view that we have taken, section 13 (3) of the Lands Act ousts the jurisdiction of the High Court in respect to challenging a re-entry as held in the Polythene Products Zambia Limited case, which case we followed in the Kalwic Bakery case."

- 5.8 Counsel for the appellant submitted that this was a serious misdirection by the court below which created serious confusion at the bar. He contended that this Court has already settled the point of law in question in the *Faramco* case. The Court of Appeal, therefore, fell into grave error when it refused to follow a clearly binding judgment of this Court in less than dignified language. Contrary to the findings of the Court of Appeal, the law regarding the High Court's jurisdiction in land matters was also settled in in the case of *Yakub Falir Mulla, Fazila Mulla Allo and Mwila Mumbi Jabi v Mohammed Jabi*⁷ in which this Court held that it was settled that the Lands Tribunal Act Number 39 of 2010 does not oust the High Court's jurisdiction to hear land disputes as a court of first instance. Arising out of this decision, the appellant has argued that section 13(3) of the Lands Act does not oust the High Court's original and unlimited jurisdiction to hear and determine land disputes. Counsel further submitted,

on behalf of the appellant, that the cases of *Polythene Products* and *Kalvic Bakery* relied upon by the Court of Appeal are now bad law in view of the *Faramco* case and *Yakub Falir Mulla* cases because the *Polythene Products* case was decided in 2012 while the appellant was relying on more recent decisions.

5.9 Counsel argued that the Court of Appeal did not distinguish the *Faramco* case and did not also thoroughly address the provisions of section 13 (3) of the Lands Act which was the issue this court was considering in the *Faramco* case. No distinction exists between the *Faramco* case and the *Yakub Falir Mulla* case. The court below fell into error because the dispute between the appellant and the respondents is a land dispute as envisioned by this Court in the *Yakub Falir Mulla* case and the *Faramco* case.

5.10 Mr. Songolo referred us to the wording of section 13 (3) and submitted that it is clear from the use of the word “may” that an appeal to the Lands Tribunal is not mandatory but optional. The statute does not restrict the High Court from exercising its original and unlimited jurisdiction over matters concerning land. Moreover, the Tribunal envisaged in the Lands Act is the same Tribunal envisaged in the Lands Tribunal Act and it is clear from section 4 of the Lands Tribunal Act that the

Tribunal's mandate is subject to the Constitution which Constitution gives the High Court original and unlimited jurisdiction.

5.11 The issues envisaged in section 4 (1) (e) and 4 (1) (f) of the Lands Tribunal Act are more or less the same preliminary issues that were presented before the High Court. Subsections (e) and (j) are "disputes relating to land". It is for that reason, that he argued that the lower court's distinction between the *Yakub Falir Mulla* and this case and was a serious misdirection.

5.12 The Supreme Court considered the Lands Tribunal Act as a whole and not particular provisions, when it decided that the entire Lands Tribunal Act does not oust the High Court's jurisdiction in land matters including claims involving the Commissioner of Lands' decision to cause a certificate of re-entry relating to the appellant's property as rightly guided in the *Faramco* case. Any attempt to distinguish the *Yakub Falir Mulla* case and or the *Faramco* case from the current appeal is totally artificial and serves no useful purpose to the development of our jurisprudence at this point.

5.13 The thirty days stipulated by the Lands Act only applies in matters where a party elects to commence an action before the

Lands Tribunal. Counsel argued that the thirty days limitation does not affect the jurisdiction of the High Court, which has jurisdiction to entertain all land disputes for up to a period of 12 years from the time when the dispute arose in accordance with section 4(3) of the Limitations Act 1939.

5.14 Counsel contended that the court below failed to deliver justice in this matter by aiding the respondents in their quest to avoid a trial at which the actions of the Commissioner of Lands would have been examined and their legality established.

5.15 In conclusion, counsel submitted that the order for costs made was rather harsh given the fact that the appellant was merely following the guidance of this Court in the *Yakub Falir Mulla* and *Faramco* cases. In addition, the appellant was raising a very important point of law which should not have led to an order for costs being made against the appellant.

5.16 There are ten respondents in this appeal. It would, in our view, serve no purpose to reproduce all their heads of argument because they all have a common position and have by and large cited similar cases. Their common position in opposing this appeal is as follows:

- (i) The High Court has no jurisdiction to hear matters relating to re-entry as the procedure to challenge a decision is specifically provided for under section 13 (3) of the Lands Act Cap 184 of the Laws of Zambia. Further, section 15 (1) stipulates that any person aggrieved with a direction or decision of a person in authority may appeal to the Lands Tribunal for determination.
- (ii) Section 4(1) of the Lands Tribunal Act sets out the Lands Tribunal's jurisdiction to hear and determine matters relating to land.
- (iii) *Chikuta v Chipata Rural Council*⁸, *Barclays Bank (Zambia) v Walisko & Company and Mohamed Ashrof Mansor*⁹, *NewPlast Industries v Commissioner of Lands and The Attorney General*¹⁰, have all held that where an Act of Parliament has specifically laid the method by which proceedings must be commenced; there is no option as to which procedure to adopt.
- (iv) The *Polythene Products* case can be distinguished from the *Yakub Falir Mulla* case on the basis that that the *Polythene* case dealt with re-entry while the *Yakub Falir*

Mulla case was merely a dispute relating to land and did not arise from a re-entry as in this appeal.

- (v) The *Faramco* case, *Yakub Falir Mulla* case and the *Beatrice Mulamfu* case dealt with the concurrent jurisdiction of the High Court and Lands Tribunal in land matters.
- (vi) The *Faramco* case did not overrule or vacate the *Polythene Products* case nor did it deem it bad law.
- (vii) The jurisdiction of the High Court is unlimited but as was held in *Zambia National Holdings Limited and UNIP v Attorney General*¹¹, the High Court is not exempt from adjudicating in accordance with the law. In this appeal, the relevant law is section 13 (3) of the Lands Act which provides for an appeal mechanism to the Lands Tribunal within thirty days.
- (viii) The *Faramco* case dealt with facts and circumstances different from those in the *Polythene Products* case and the Court of Appeal was not bound to blindly follow the decision in the *Faramco* case merely because it was a later decision, without considering the particulars and

facts of the case before it, as required by the principle of *stare decisis*.

- (ix) The word “may” in section 13 (3) relates to the desire to appeal and not the choice of forum.
- (x) The appellant should not blame the Court of Appeal when he did not choose the correct forum.
- (xi) The other reliefs sought by the appellant could have been dealt with by the Lands Tribunal pursuant to section 4(1) of the Lands Act.
- (xii) Costs are in the discretion of the court and that the general principle is that costs should follow the event.
- (xiii) In *Paton v Attorney General and Chona*² the then Court of Appeal held that it was not absolutely bound by its previous decisions. A previous decision would not be followed only for very compelling reasons and only where the Court clearly considered that the previous decision was wrong.

6. CONSIDERATION AND DECISION BY THIS COURT

6.1 Several issues have emerged from the facts and arguments relating to this appeal. The first issue is whether the High Court

has unlimited jurisdiction or concurrent jurisdiction with the Lands Tribunal in land matters. The second issue is what is the correct interpretation and application of section 13 (3) of Lands Act. The third issue is whether our numerous decisions on land disputes and the interplay between the jurisdiction of the High Court and the jurisdiction of the Lands Tribunal have been contradictory and inconsistent. The fourth and last issue is whether the *Polythene Products* judgment is still good law.

6.2 Article 134 of the Constitution of Zambia (Amendment) Act No.2 of 2016 stipulates that;

"134. The High Court has, subject to Article 128-

- (a) Unlimited and original jurisdiction in civil and criminal matters;*
- (b) Appellate and supervisory jurisdiction, as prescribed; and*
- (c) Jurisdiction to review decisions as prescribed."*

6.3 We have in the past held in several judgments that the concept of the High Court having unlimited and original jurisdiction does not mean that its jurisdiction is limitless because it must operate within set boundaries which are stipulated in statutes, rules and common law. This position was quite eloquently stated by Doyle

C.J. in the case of *Chikuta v Chipata Rural Council*⁸. It was held as follows at page 243 in that case:

"The matter was brought before the court by means of an originating summons. The practice and procedure in the High Court is laid down in the High Court Rules, and where they are silent or not fully comprehensive, by the English White Book. Under Order 5 of the English Rules of the Supreme Court, rule 2 lays down what proceedings must be begun by writ; rule 3, the proceedings which must be begun by originating summons; rule 4, the proceedings which may be begun either by writ or originating summons; and rule 5, proceedings that may be begun by motion or petition. The Zambian Rules are much more rigid. Under Order 6, rule 1, every action in the court must be commenced by writ, except as otherwise provided by any written law or the High Court Rules. Order 6, rule 2, states that any matter which under any written law or the Rules may be disposed of in chambers shall be commenced by originating summons. Rule 3 provides for matters which may be commenced by originating notice of motion. It is clear, therefore, that there is no case where there is a choice between commencing an action by a writ of summons or an originating summons. The procedure by way of an originating summons only applies to those matters referred to in Order 6, rule 2, and to those matters which may be disposed of in chambers. Chamber matters are set out in Order 30 of the High Court Rules. It is clear that these proceedings have been misconceived.

As the matter was not properly before him the judge had no jurisdiction to make the declarations requested even if he had been so disposed..."

6.4 Sakala J, as he then was, followed the *Chikuta* case when in *Barclays Bank (Zambia) Limited v Walisko and Company and Mohamed Ashrof Mansoor*⁹ he held that:

"The court dismissed the appeal on procedural reasons having pointed out that the proceedings were misconceived. It is therefore quite clear from that decision that where an Act of Parliament has specifically laid down the method by which proceedings must be begun whether by a writ, an originating summons or an originating notice of motion, there is no choice of which procedure to adopt. I am bound by the decision of the Supreme Court."

6.5 In *Zambia National Holdings Limited and UNIP v The Attorney General*¹¹, this Court held as follows at page 120:

"The expression 'unlimited' jurisdiction should not be confused with the powers of the High Court and the various laws. As a general rule, no cause is beyond the competence and authority of the High Court; no restriction applies as to the type of cause and other matters as would apply to the lesser courts. However the High Court is not exempt from adjudicating in accordance with the law including complying with procedural requirements as well as substantive limitations such as those one finds in mandatory sentences or other specifications of available penalties or, in civil matters, the types or choice of relief or remedy available to litigants under the various laws or causes of action."

6.6 In *Newplast Industries v The Commissioner of Lands and The Attorney General*¹⁰ which was an appeal against a ruling of the High Court on a preliminary issue involving procedure, the Supreme Court held at page 54 that:

"In our view, it is not entirely correct that the mode of commencement of any action largely depends on the relief sought. 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."

- 6.7 The issue of commencement of proceedings arose again in the case of *Polythene Products Zambia Limited v Cyclone Hardware and Construction Limited and The Attorney General*¹. The question in that case was whether in view of section 13 (3) of the Lands Act which gave jurisdiction to the Lands Tribunal in matters involving re-entry, a party had a choice of forum. The Supreme Court held as follows:

"...we hold that the 1st defendant, being aggrieved by the certificate of re-entry on Stand 12094, had no option but to appeal to the Lands Tribunal, in its challenge of the certificate of re-entry. The 1st defendant did not do so. On the facts of this case, we hold that the learned trial judge had no jurisdiction to entertain the 1st respondent's counterclaim on fraud and negligence in this action, which was commenced by writ of summons."

- 6.8 It can be seen from these decisions over the years that this Court has not wavered, but has been consistent in its application of the rule that the mode of commencement of any action is generally provided by the relevant statute.

6.9 With regard to the argument relating to the *Faramco* case which Mr. Songolo relied on so heavily, we take the view that the *Faramco* case did not in any way overrule the *Polythene Products* case. The unlimited jurisdiction which the High Court enjoys is subject to section 13 (3) of the Lands Act when it comes to claims involving re-entry. This is so because section 13 (3) specifically states that:

"(3) A lessee aggrieved with the decision of the President to cause a certificate of re-entry to be entered in the register may within thirty days appeal to the Lands Tribunal for an order that the register be rectified."

6.10 The use of the word 'may' in section 13 (3) does not refer to the choice of forum but rather to the decision to be taken by an aggrieved party. This is so, because an aggrieved party has a choice whether or not to accept a decision which is not in his favour. We must also mention here that although the word 'may' means something is possible, *Black's Law Dictionary, Eighth Edition* by Garner, points out that in dozens of cases, courts have held 'may' to be synonymous with shall or must, usually in an effort to effectuate legislative intent.

6.11 Coming to the cases which Mr. Songolo has referred us to as forming the basis of his argument that we have by implication overruled the *Polythene Products* case, we note that those cases discuss in general terms whether the Lands Act ousts the jurisdiction of the High Court in land matters. We said in those cases that it does not. The fact that we have stated so in general terms, does not mean that the unlimited jurisdiction of the High Court goes to the extent of dealing with claims relating to re-entry under section 13 (3), because that is the preserve of the Lands Tribunal. We do not, therefore, agree with his argument that this Court in the *Yakub Falir Mulla* case decided that the entire Lands Tribunal Act does not oust the High Court's jurisdiction as that must be understood within the limitation set by section 13 (3) of the Lands Act.

6.12 All the cases referred to by Mr. Songolo are distinguishable primarily because they do not specifically deal with re-entry. Even the *Faramco* case upon which much reliance was placed dealt with the question of a declaration as the main relief sought. In the *Faramco* case the Court referred to *Union Gold (Zambia) Limited v Attorney General*¹² as the basis for the High Court's jurisdiction not being ousted by the Lands Tribunal in

land matters. It should be noted that the *Union Gold* case involved a declaration and not a re-entry under section 13 (3) of the Lands Act. The explanation which followed with regard the High Court's jurisdiction did not cover section 13 (3) and the unlimited jurisdiction of the High Court should be understood within that context. The correct position therefore is that, while the High Court has unlimited jurisdiction in land matters; its jurisdiction is limited as in this case by section 13 (3) of the Lands Act.


6.13 On the question of costs, we take the view that, while costs generally follow the event, the position on the interpretation of section 13 (3) of the Lands Act was rather unclear owing to the interpretation of the High Court's jurisdiction in our earlier judgements.

6.14 Order 62/3/5 of the Rules of the Supreme Court requires a judge in exercising his discretion on costs to do justice in all the circumstances of the case, bearing in mind the underlying principle that the winner, whoever may be described as the winner, is in general entitled to be paid his costs.


6.15 In view of the facts of this case, and the nature of the arguments advanced, we take the view that the appellant cannot be condemned in costs through no fault of his own.

7 CONCLUSION


7.1 For the foregoing reasons, we dismiss this appeal for want of jurisdiction. The parties shall bear this respective costs in this Court and in the courts below.



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M. MALILA
CHIEF JUSTICE



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A. M. WOOD
SUPREME COURT JUDGE



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N.K. MUTUNA
SUPREME COURT JUDGE