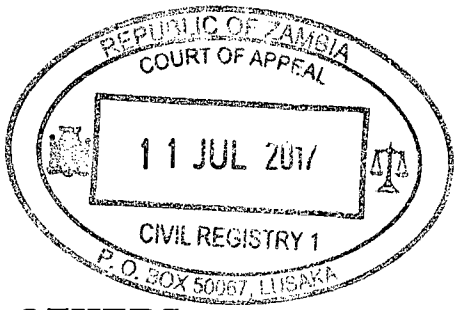
IT

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

APPEAL NO. 18 OF 2016



BETWEEN:

DAVID MOONGA AND OTHERS **APPELLANTS**

AND

JONATHAN HAMWEENDA AND OTHERS **RESPONDENTS**

CORAM: Mchenga, SC DJP, Chashi and Chishimba JJA
on 6th, 15th and 29th March 2017 and 11th July 2017

For the Appellants: *In Person*
For the Respondents: *Messrs Legal Aid Board (N/A)*

JUDGMENT

CHASHI, JA delivered the Judgment of the Court.

Cases referred to:

1. ***Isaac Tantameni C. Chali (executor of the Will of the late Mwala Mwala) v Liseli Mwala (1999) SJ. 22 (SC)***

Legislation referred to:

2. ***The Court of Appeal Act, No. 7 of 2016***
3. ***The Lands Tribunal Act, No. 39 of 2010***

This appeal is against the Judgment of the Lands Tribunal which was delivered in favour of the Respondents who were the applicants on 27th August 2013 and replicated on 2nd September 2013 as shown at pages 166-171 of the Record of Appeal. In that Judgment the Tribunal made the following Orders:

1. That the Applicants are entitled to and were legally settled on the land under dispute.
2. That the Respondents have no legal rights to encroach and/or trespass on the Applicants' land in issue.
3. That the Respondents are ordered to vacate the Applicants' land which they have illegally encroached and/or invaded.
4. That an injunction is hereby granted from entering on the Applicants' land and/or interfering with the Applicants' quite enjoyment of their land.

The Appellants' sole ground of appeal is that the Tribunal erred when they heard and delivered Judgment against them when they were not parties to the proceedings or cited as Respondents in the complaint and affidavit in support which were filed under Cause Number LAT/13/2010 on 9th June 2010.

According to the relevant portions of the Appellants' heads of argument, they were not party to the Cause before the Tribunal. The Appellants cited the case of **Issac Tantameni C. Chali v Liseli Mwala**[1] where it was held that:

> *"According to the rules of practice governing joinder of parties and due to non-joinder of parties before trial of action, other than the Respondent the learned trial Judge was legally and effectively precluded from considering the interests of non parties".*

The Appellants also submitted that there was never any application before the Tribunal for substitution of parties. They contended that the Tribunal misapprehended the law when it delivered a Judgment against persons who had no *locus standi* as far as the originating process was concerned.

The Appellants' further submitted that they cannot benefit or suffer the consequences of a Judgment in a matter to which they were not parties. According to them, they were not given any notice of the originating process and they cannot be said to have had any thereof.

Although the Appellants' heads of argument were copious, we have restricted ourselves and deftly only extracted those portions of the argument which are germane to the sole ground of appeal.

In concluding, the Appellants have urged us to invoke the provisions of Section 24 (1) (a) of ***The Court of Appeal Act***[2], which empowers the Court to vary or set aside the Judgment appealed against or give Judgment as the case may require.

The Respondents vide their heads of argument which were filed by Messrs Legal Aid Board submitted that the Tribunal was on firm ground when it delivered its Judgment against the Appellants as they were listed in the schedule to the complaint filed on 9th June 2010 and were therefore party to the complaint.

It was also submitted that the Appellants were notified of the hearing of the matter but chose not to attend. According to the Respondents, as reflected in the Judgment of the Tribunal, the Tribunal verified that the process had been served and the Appellants intentionally failed or neglected to appear before it.

The Respondents argued that the failure by the Appellants to appear before it, did not preclude the Tribunal from proceeding to hear and determine the matter on its merits.

In concluding, the Respondents submitted that the Tribunal exercised its jurisdiction by virtue of Section 4 (1) (a) of ***The Lands Tribunal Act***[3].

We have considered the submissions of the parties, the Judgment of the Tribunal and the record of appeal. The issue which arises is whether the Appellant's were parties to the proceedings before the Tribunal and if it was in order, to proceed and determine the complaint and deliver Judgment against them.

A perusal of the record of appeal reveals that the respondents cited in the complaint filed before the Tribunal were The Department of Resettlement (Kabwe office), The District Commissioner (Kabwe) and Chief Nkole as the 1st, 2nd and 3rd respondents respectively. The record does not show that there was at any one time an application for misjoinder or substitution of the parties. Contrary to the submissions by the Respondents, there was no schedule of the Respondents attached to the complaint.

What we see thereafter is a sudden change of respondents vide a notice of hearing dated 26th February 2013, in which the Appellants appear as respondents, which is also captured as a schedule of the respondents in the Tribunal's Judgment.

We note from the Judgment at page 11 of the record that the Tribunal verified that the process had been served. In doing so, this is what the Tribunal said:

> *"On behalf of the Applicants, Jonathan Hamweenda, testified that he had served process on the Respondents and that the Respondents had refused to appear before the Tribunal.*
>
> *The Tribunal verified that process had been served and that the Respondents had intentionally failed or neglected to attend before the Tribunal."*

We cannot find any proof of service of the originating process and/or the notice of hearing on the record.

It is therefore not clear what process, if any, was served and on which respondents. The situation is worsened by the absence of a record of the Court proceedings which preceded the Judgment of the

Tribunal. Although the Lands Tribunal does not provide rules for service and like any other Tribunal it is unfettered by procedural technicalities, our understanding of service as in any other Court or tribunal is that, after issuance of the complaint by the Tribunal, the applicants were to effect service of the originating process on the respondents by way of personal service and if that was not practicable by way of substituted service. This was to be followed by the applicants filing an affidavit of service as proof of service. The same procedure applies to service of the notice of hearing and there must be an acknowledgment of service by the respondents. The record does not show any of the aforestated happenings.

The aforestated apart, what is sine qua non to the proceedings before the Tribunal is that the Appellants were supposed to be parties to the proceedings. There is no evidence on record as earlier alluded to that they were ever party to the proceedings. It is apparent that if determination of issues before the Tribunal or the grant of the relief sought is likely to affect a person who is not a party to the proceedings, the Tribunal must join such a person to the proceedings.

In actions for recovery of land, strictly speaking all persons who are actually in physical possession of the property should be made defendants or respondents.

Therefore any person whose presence before the Tribunal was necessary, to ensure that all matters in dispute in the cause or matter, may be effectually and completely determined and adjudicated upon, or any person between whom and any party to the cause or matter, there may exist a dispute or issue arising out of or relating to or connected with any relief or remedy claimed, which in the opinion of the Tribunal it would be just and convenient to determine, as between him and that party, as well as between the parties to the cause or matter, ought to have been joined as a party to the proceedings.

The Appellants not having been cited and/or joined to the proceedings before the Tribunal, they were non-parties and we agree with them that being non parties, they cannot benefit or suffer consequences of a Judgment in a cause or matter to which they were not parties.

We invoke the provisions of Section 24 (1) of ***The Court of Appeal Act***[2] and allow the appeal. We also set aside the Judgment of the Tribunal.

As regards the costs, we are of the view that the problem in this matter was due to the Tribunal's misapprehension of the law and we therefore order that each party shall bear its own costs.

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C. F. R. MCHENGA, SC
DEPUTY JUDGE PRESIDENT
COURT OF APPEAL

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J. CHASHI
COURT OF APPEAL JUDGE

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F. M. CHISHIMBA
COURT OF APPEAL JUDGE