

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

BISALOMO MUMBA *(Suing on behalf of the
Kalindawalo Mndikula Royal family)*

APPELLANT

AND

MICHAEL NSANGU

26 JAN 2022

1ST RESPONDENT

CHIEFTAINESS MWAPE

2ND RESPONDENT

PETERKIN TEMBO *(Sued in his capacity as
Chief Mumbi)*

3RD RESPONDENT

ERIC FEST LAVU MWANZA *(Sued in his capacity
as Chief Nyampande)*

4TH RESPONDENT

SHADRECK MALAMULA ZULU *(Sued in his capacity
as Chief Sandwe)*

5TH RESPONDENT

QUEEN MOTHER NYALUNGALE *(Acting Chieftainess
Mwanjawanthu)*

6TH RESPONDENT

FERDINAND MTHAZIKO BANDA

7TH RESPONDENT

ATTORNEY GENERAL

8TH RESPONDENT

CORAM: KONDOLO SC, CHISHIMBA AND NGULUBE, JJA.

On 19th May, 2021 and 26th January, 2022.

For the Appellant: M.Z. Mwandenga, Messrs M.Z. Mwandenga and Company

For the 1st to 7th Respondent: M. Mulenga, Messrs A.M.C. Legal
Practitioners.

For the 8th Respondent: No appearance

J U D G M E N T

NGULUBE, JA delivered the Judgment of the Court.

Cases referred to:

1. *Michael Nsangu and others vs Ponisano Mwanza, SCZ Appeal Number 78 of 2012*
2. *Adam Peter Bousfield vs Charmaine Bousfield, CAZ Appeal Number 73 of 2019*
3. *Indeni Petroleum Refining Company Limited vs Kafco Oil Limited, Andrew Bungani, Silas Mumba and Emmanuel Shikaputo, Selected Judgment Number 29 of 2017*
4. *David Moto Sikananu vs Attorney General SCZ Appeal Number 16 of 2015*
5. *Newplast Industries vs Commissioner of Lands and Authority and Attorney-General (2001) Z.R.51*
6. *African Banking Cooperation Zambia Limited vs Mubende Country Lodge, SCZ Appeal Number 116 of 2016*
7. *Mususu Kalenga Building Limited and Winnie Kalenga vs Richman Money Lenders Enterprises (1999) Z.R.22*
8. *Oscar Chinyanta and 31 others vs Alsia Building Construction Limited and Tap Zambia Limited Appeal Number 158 of 2015*
9. *Henderson vs Henderson (1843 – 1860) ALL ER 378*
10. *B. P. Zambia Plc vs Interland Motors Limited (2001) Z.R 37*

Legislation referred to:

1. *The Rules of the Supreme Court, 1965 (White Book) RSC, Volume 1, 1999 Edition.*

INTRODUCTION

1. This is an appeal against a ruling of the High Court (Chawatama, J) delivered on 10th June, 2020 which declined to grant the

appellant's application to determine the matter on a point of law.

2. The lower court dismissed the application to raise preliminary issues and the application for misjoinder.
3. The appeal discusses the requirements for making an application to dispose of a case on a point of law under ***Order 14A of the Rules of the Supreme Court, 1999 Edition (RSC)***.

BACKGROUND TO THE APPEAL

4. The appellant commenced an action by way of originating summons under Cause Number 2013/HP/1498, seeking a declaration that the re-installation of the first respondent, Michael Nsangu by the other respondents as Senior Chief Kalindawalo was illegal, null and void. The appellant sought the determination of the following questions-

- (1) Whether the purported re-installation of the 1st defendant (the 1st respondent herein), Michael Nsangu by the 2nd defendant, Chieftainess Mwape, 3rd defendant, Peterken Tembo, 4th defendant Queen Mother Nyalungale (Acting Chieftainess Mwanjawanthu) as Senior Chief Kalindawalo

on Tuesday, 1st October, 2013 at old Kalindawalo Headquarters at Kaulu is not illegal, null and void.

The claim by the first respondent to the throne of Senior Chief Kalindawalo of the Nsenga people of Petauke District in the Eastern Province of Zambia was dismissed with costs by the High Court of Zambia in Cause Number 1998/HP/2180 on 14th December, 2001 and was confirmed by the Supreme Court in Appeal Number 78/2002 on 30th June, 2004.

- (2) Whether the 1st defendant, Michael Nsangu should not be restrained by court order from holding himself out as Senior Chief Kalindawalo such as by raising the Zambia national flag at his house or using the chief's date stamp, or from performing functions of Senior Chief Kalindawalo or in any way playing any chief's traditional role pending trial or until final order.
- (3) Whether the second defendant Chieftainess Mwape, the third defendant Peterkin Tembo, the fourth defendant Eric Festo Lavu Mwanza, the fifth defendant Shadreck Malamula Zulu, the sixth defendant Queen Mother Nyalungale (Acting Chieftainess Mwanjawanthu) and the

seventh defendant, Ferdinand Mthanziko Banda should not be restrained by court order from agitating, organizing, campaigning or canvassing among headmen and subjects that the first defendant should be reinstated and re-installed as Senior Chief Kalindawalo or from in any way holding himself out or portraying himself as Senior Chief Kalindawalo pending trial or until further order.

5. In the affidavit in support of originating summons, the appellant averred that he is a member of the Kalindawalo Mndikula Royal family and that he had been authorized to sue the defendants in the High Court on behalf of the family and on his own behalf. The appellant deposed that the first respondent was Senior Chief Kalindawalo as caretaker to the throne until his recognition as Senior Chief was withdrawn by the Republican President in 2006.
6. The appellant deposed that the second respondent, Chieftainess Mwape, Chief over the Ambo people of Nyimba District, Eastern Province was the chairperson at the re-installation ceremony of the first respondent as Senior Chief

Kalindawalo on 1st October 2013. According to the appellant, the seventh respondent, Ferdinand Mthanziko Banda, Chairperson of the Nsenga Royal Establishment and the Nsenga Indunas meeting has been actively campaigning on radio and in the print media for the re-instatement and re-installation of the first respondent as senior Chief Kalindawalo. It was further stated that between 1953 and 2000, there have been three caretakers on the Kalindawalo throne, these being Michael Chamanga Nsangu, Lingililani Chamanga Nsangu and the first respondent herein, Michael Nsangu respectively.

7. According to the appellant, between 1998 and 2001, the Kalindawalo Mndikula Royal family through Ponisano Mwanza sued the first respondent and others in the High Court under Cause Number 1998/HP/2180, for a declaration that the Mndikula Kalindawalo Royal family and not the Nsangu family are entitled to the Kalindawalo throne and that the selection of Michael Nsangu as Senior Chief Kalindawalo be declared null and void.

8. The appellant deposed that on 14th December, 2001, the High Court dismissed the claim by Michael Nsangu and declared his selection and installation as Senior Chief Kalindawalo null and void. The court further found that Paramount Chief Kalonga Gawa Undi was the creator of the Kalindawalo chieftainship.
9. The first respondent was dissatisfied with the decision and appealed to the Supreme Court against the judgment of the High Court in Appeal Number 78/2002 and on 30th June, 2004, the Supreme Court upheld the High Court judgment, dismissing the first respondent's claims to the throne of Kalindawalo.
10. The appellant deposed that Everson Mumba, a member of the Mndikula Kalindawalo Royal family was selected maternally by the Mbumba to the Senior Chief and his selection was validated by Paramount Chief Kalonga Gawa Undi. The Republican President recognized the said Everson Mumba as Senior Chief by Statutory Instrument Number 35/2006.

11. It was stated that following representations by the respondents, the Republican President Mr Michael Sata withdrew the recognition of Everson Mumba as Senior Chief by Statutory Instrument Number 77/2012. Subsequently, Everson Mumba applied for judicial review challenging the President's decision to withdraw his recognition in the High Court under Cause Number 2012/HP/1410, and on 8th August, 2013, the High Court dismissed Everson Mumba's application.
12. The appellant deposed that only a member of the Kalindawalo Mndikula Royal family may be selected maternally to succeed Everson Mumba as Senior Chief. The appellant urged the court to declare that the purported re-instatement and re-installation of the first respondent as Senior Chief Kalindawalo is illegal, null and void, has violated the legal right of the Mndikula Royal family and has violated the appellant's legal right to ascend to the throne as he is eligible to be selected as a member of the Mndikula Kalindawalo Royal family.
13. The appellant urged the court to restrain the respondents from undermining the traditional authority of Kalindawalo

Mndikula Chieftainship and further restrain them from holding out the first respondent as Senior Chief Kalindawalo.

14. On 14th January, 2020 the appellant filed a notice of motion to raise preliminary issues at law, pursuant to **Order 14A of the Rules of the Supreme Court** and **Order 33 Rule 3 of the Rules of the Supreme Court, 1999 Edition**.
15. The appellant sought the hearing and determination of the following issues at law-

- (1) Whether the purported re-installation of the first defendant, Michael Nsangu by the second, third, fourth, fifth and sixth defendants as Senior Chief Kalindawalo on 1st October, 2012 at old Kalindawalo headquarters at Kaulu in the Petauke District of the Eastern Province of Zambia is not illegal, null and void by reason of the determination by Honourable Lady Justice I.C. Mambilima (as she then was) under High Court Cause Number 1998/HP/2180 by which the court found that the said Michael Nsangu not entitled or eligible to the Kalindawalo Chieftaincy.

- (2) Whether the recognition of the said Michael Nsangu as Senior Chief Kalindawalo by the President of the Republic of Zambia by Statutory Instrument Number 19 of 2014 on 21st February, 2014 is not irregular, null and void having regard to the High Court Judgment under Cause Number 1998/HP/2180 and Supreme Court Judgment in SCZ Appeal Number 78/2002 by which it was held that, the selection and installation of Michael Nsangu as Senior Chief Kalindawalo was null and void.
- (3) Whether the counterclaim by the said Michael Nsangu should not be dismissed with costs.
- (4) Whether the President of the Republic of Zambia may reverse the determination of the findings by the High Court and Supreme Court in the Judgments referred to above.
- (5) Whether the disqualification of the said Michael Nsangu to hold the office of Senior Chief Kalindawalo is not *res judicata*.

16. In the affidavit in support of notice of motion, the appellant deposed that sometime in 1998, David Daka Mndikula, on behalf of the Kalindawalo Mndikula Royal family petitioned the High Court under Cause Number 1998/HP/2180 between himself and Michael Nsangu and others, seeking a determination that he was entitled to succeed the Kalindawalo throne and not Michael Nsangu the first respondent.
17. It was deposed that on 14th December, 2001, the High Court delivered Judgment in favour of Kalindawalo Mndikula Royal family and dismissal the counterclaim by Michael Nsangu as he failed to prove his lineage maternally up to Mndikula Kalindawalo the first. The court held that the selection and installation of Michael Nsangu as Senior Chief Kalindawalo was null and void.
18. Michael Nsangu and others were dissatisfied with the Judgment of the High Court and appealed to the Supreme Court and on 30th June, 2004, the Supreme Court, in Appeal Number 78/2002 upheld the High Court decision and dismissed the appeal for lack of merit.

19. Subsequently, the Kalindawalo Mndikula Royal family through the Mbumba, selected Everson Mumba the nephew of David Daka Mndikula to ascend to the Kalindawalo throne. He was recognized and installed by Paramount Chief Kalonga Gawa Undi as Senior Chief Kalindawalo Mndikula.
20. The President of the Republic of Zambia His Excellency Levy Patriotic Mwanawasa then recognized Everson Mumba as Senior Chief Kalindawalo. However, Everson Mumba was later removed as Senior Chief Kalindawalo on the ground that he paid homage to Paramount Chief Kalonga Gawa Undi who is Chewa.
21. On 16th November, 2012, the President of the Republic of Zambia, Mr Michael Sata withdrew the recognition of Everson Mumba as Senior Chief Kalindawalo by Statutory Instrument Number 77 of 2012. On 21st August, 2013, some Nsenga Chiefs held a meeting and resolved that Michael Nsangu be re-installed and gazetted as Senior Chief Kalindawalo.
22. The appellant deposed that Michael Nsangu was a member of the Nsangu family who were caretakers of the Kalindawalo throne but was not a member of the Kalindawalo Mndikula

Royal Family and had no entitlement to the chieftaincy. A traditional ceremony was held on 1st October, 2013, to instal Michael Nsangu as Senior Chief Kalindawalo.

23. It was deposed that the defendants installed Michael Nsangu as Senior Chief Kalindawalo. On 21st February, 2014 and that President Michael Sata recognized Michael Nsangu as Senior Chief Kalindawalo by way of Statutory Instrument, Number 77 of 2012.
24. It was deposed that at the re-installation ceremony of the first respondent, the second respondent, Chieftainess Mwape chaired the ceremony and informed the gathering that the chiefs were not installing the first respondent as senior chief because he was already senior chief.
25. He was then handed the instruments of power, these being the fly whisk, the chief's staff (Ndodo) and the Zambian National flag was raised at the 1st respondent's residence. It was deposed that according to Nsenga custom and tradition, only a member of Mndikula Royal family may be selected by the Mbumba to succeed the chief and that Nsenga chiefs may not

select or re-install such a successor on the throne of Senior Chief Kalindawalo.

26. The appellant stated that the court is entitled to declare that the purported re-instatement and re-installation of the first respondent as senior Chief Kalindawalo by the respondents is illegal, null and void.
27. The appellant lamented that the respondents have violated his legal right to succeed to the throne as he is eligible to be selected since he is a member of the Mndikula Kalindawalo Royal family.
28. The appellant stated that he will suffer irreparable damage if the first respondent is not restrained from holding himself out as chief and performing the functions of a senior chief. He prayed that the first respondent be restrained from holding himself as Senior Chief Kalindawalo.
29. The first respondent filed an affidavit in opposition to the notice of motion to raise preliminary issue and deposed that the appellant is not a member of the Mndikula family or the Kalindawalo Royal Family. The first respondent stated that the Republican President exercised his powers correctly upon

due inquiry being conducted. He stated that there was no illegality, irrationality and impropriety on the part of the President. The first respondent urged the lower court to proceed to trial so that all the parties can be heard in the interest of justice as there are areas of contention between the parties.

30. The lower court considered the matter and stated that it was of the view that the matter needed to be heard at a full trial so that all the issues would be resolved once and for all. On the issue of whether the appellant had sufficient interest in the matter, the court ruled that he had sufficient interest and the court dismissed both applications.

THE APPEAL

31. Dissatisfied with the decision of the lower court, the appellant appealed to this court, advancing three grounds of appeal couched as follows-

1. *The learned trial Judge erred in law and fact when she failed, refused or neglected to determine the preliminary points of law which were raised by the appellant.*
2. *Having ostensibly stated that she would address the preliminary issues raised by the appellant in her*

judgment after hearing the matter, the learned trial judge misdirected herself when she concluded the Ruling complained of by dismissing the appellant's application to raise preliminary issues.

3. *Further having failed, refused or neglected to determine the points of law as complained of in ground one, hereof, the learned trial Judge erred in law and fact when she concluded the ruling complained of by dismissing the appellant's preliminary issues.*

APPELLANT'S CONTENTIONS

32. In arguing ground one, it was submitted that the learned trial Judge had primed herself to hear the proceedings before her and it appeared that she intended to address the preliminary issues raised by the appellant in her Judgment. The court deferred consideration of the preliminary points of law to a later date.

33. It was submitted that the issue of Michael Nsangu's entitlement or eligibility to the Kalindawalo chieftaincy was dealt with in the proceedings under cause Number 1998/HP/2180 between Ponisano Mwanza (Administrator of the Estate of the late David Daka Mndikula Kalindawalo) and Michael Nsangu, Shadreck Daka Kawemba, Angel Mphamba and Wallace Banda (Sued in his capacity as Chief

Nyamphande). The matter in the High Court was decided by the Honourable Mrs Justice I.M.C. Mambilima (as she then was) in a Judgment that was delivered on 14th December 2001. The court declared that the first respondent failed to prove his eligibility to the throne of Kalindawalo and he was then removed.

34. The appeal that was lodged in the Supreme Court by Michael Nsangu which was Appeal Number 78/2002 between **Michael Nsangu and others vs Ponisano Mwanza**¹ was unsuccessful as it upheld the High Court Judgment. It was submitted that the Supreme Court conclusively dealt with the issue of Michael Nsangu's entitlement to the throne of Kalindawalo Chieftaincy. The High Court Judgment of Mrs Justice I.M.C. Mambilima found that-

“On the totality of the evidence before me, I find that the respondent's right to the throne of Senior Chief Kalindawalo has not been proved. The legitimacy of his right to the throne of senior Chief Kalindawalo through the late Michael Chimanga Nsangu and Lingililani Nsangu through whom he is claiming the chieftainship cannot stand because the connecting link to Lavu Chipenda Kalindawalo the 4th has not been proved.”

35. The Supreme Court considered the 1st respondent's appeal and was of the view that-

“The findings made by the learned trial Judge were fully supported by the evidence that was placed before her. As Mr Zulu submitted, the evidence called on behalf of the Petitioner was overwhelming and the learned Judge could not have conceivably come to any other finding.”

36. It was submitted that the High Court Judgment and the Supreme Court Judgment concluded that Michael Nsangu is not entitled or eligible to the throne of Kalindawalo Chieftaincy. It was argued that the Supreme Court Judgment is still binding and the lower court ought to have adhered to it.

37. It was contended that the notice of motion to raise preliminary issues at law filed in the court below on 14th January, 2020 raised points of law and it was not necessary for the learned trial Judge to have primed herself to hear a matter which had already been heard, determined on the merits and affirmed by the Supreme Court.

38. It was submitted that the power of the court to determine questions of law is set out in ***Order 14A rule 1 of the Rules of the Supreme Court, 1999 Edition*** which provides that-

“(1) The court may upon the application or its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the court that-

(a) Such question is suitable for determination without a full trial of the action.

(b) Such determination will finally determine subject only to any possible appeal the entire cause or matter or any claim or issue therein.

(c) Upon such determination, the court may dismiss the cause or matter or make such order or judgment as it thinks just.

(d) The court shall not determine any question under this order unless the parties either-

(a) Had an opportunity of being heard on the question or

(b) Consented to an order or Judgment on such determination.”

39. The court’s attention was drawn to the case of **Adam Peter**

Bousfield vs Charmaine Bousfield² where the court stated that-

“In our understanding a point of law is a question that can be answered by strictly interpreting the law, while a question of fact must be answered by reference to facts and evidence as well as inference arising from those facts.”

40. Counsel referred to the explanatory notes under **Order 14A Subrule 2 of the White Book** which state that-

“The court may proceed to make such determination at any stage of the proceedings.”

41. It was submitted that the requirements for employing the procedure under this order are that-

- (a) The defendant must have given notice of intention to defend.
- (b) The question of law or construction is suitable for determination without a full trial of the action.
- (c) Such a determination will be final to the entire cause or matter or any claim or issue therein.
- (d) The parties had an opportunity of being heard on the question or have consented to an order or judgment being made on such determination.

42. It was submitted that the respondents filed their affidavit in opposition sworn by Michael Nsangu on 11th March, 2020 and that this connotes an intention to defend in the sense of Order 14A of the Rules of Supreme Court. Our attention was drawn to the case of ***Indeni Petroleum Refining Company Limited vs***

Kafco Oil Limited, Andrew Bungoni, Silas Mumba and Emmanuel Shikaputo³.

43. Counsel also referred to the case of ***David Moto Sikananu vs Attorney General⁴*** where the court stated that-

“This order is employed to determine questions which may bring a matter to an end without any need for a trial. It is not employed to summarily determine claims which may appear to be weak or misconceived.”

44. Counsel submitted that there is a question whether the purported re-installation of the first appellant by the second, third, fourth, fifth and sixth appellants as Senior Chief Kalindawalo on 1st October 2013 at Kalindawalo headquarters is not illegal, null and void by reason of the determination by Honourable Lady Justice I.M.C Mambilima (as she then was) in the cause number 1998/HP/2180 by which the court found that Michael Nsangu was not entitled or eligible to the Kalindawalo chieftaincy.

45. It was submitted that the High Court had already determined that Michael Nsangu is not entitled to the Kalindawalo chieftaincy and the question was whether his re-installation was not illegal, null and void.

46. The second question raised a specific legal point, whether the recognition of the said Michael Nsangu as Senior Chief Kalindawalo by the President of the Republic of Zambia under Statutory Instrument Number 19 of 2014 on 21st February, 2014, is not irregular, null and void having regard to the High Court Judgment in Cause Number 1998/HP/2180 and Supreme Court Appeal Number 78/2002, by which the courts held that the selection and installation of Michael Nsangu as Senior Chief Kalindawalo was null and void.
47. Question three raised a specific legal point whether the counterclaim or defence by Michael Nsangu that he is entitled to the Kalindawalo chieftaincy should not be dismissed with costs, as the determination of the question does not require interpretation of facts on the traditions pertaining to the enthronement of senior Chief Kalindawalo.
48. The fourth question raised a specific legal point whether the President of the Republic of Zambia may reverse the determination of the finding of the High Court and Supreme Court by the judgments referred to above.

49. The fifth question raised a specific legal point whether the disqualification of Michael Nsangu to hold the office of Senior Chief Kalindawalo is not *res judicata*. Counsel submitted that *res-judicata* means-

“An issue that has been definitely settled by Judicial decision.”

The following definition was also referred to-

“An affirmative defence barring the same parties from litigating a second lawsuit on the same claim arising from the same transaction or a series of transactions.”

50. According to Counsel it is not in dispute that the issue of the eligibility of Michael Nsangu on the throne of Chief Kalindawalo was settled by the High Court and the Supreme Court. As such, the respondents cannot raise a defence that is at variance with the High Court and Supreme Court judgments aforesaid.

51. The case of ***Adam Peter Bousfield vs Charmaine Bousfield (supra)*** was referred to, where the court stated that-

“We take the view that at preliminary stage, the court should not have concerned itself with making findings of fact with regard to the affidavit evidence but should have focused on answering the question of law.”

Counsel contended that the learned trial Judge failed, refused or neglected to determine the preliminary points of law which were raised by the appellant.

52. In arguing ground two and three, it was submitted that in declining to hear and determine the appellants application to raise preliminary issue, the learned Judge said that she would address the preliminary issues raised by the appellant after trial. However, the court went on to state that-

“Both applications to raise preliminary issues and the application for misjoinder are hereby dismissed.”

53. It was submitted that it was incumbent for the learned trial Judge to give reasons why she dismissed the application to raise preliminary issues and that the reason should have been revealed in the Ruling. The case of ***Austin Chibwe vs Rosemary Chibwe***⁵ was referred to, where the Supreme Court stated that-

“The courts must be alive to the well-established principle of giving reasons for their decisions.”

54. Counsel argued that the learned trial Judge should have given reasons why and how she dismissed the appellant’s application to raise preliminary issues. It was argued that the learned trial Judge misdirected herself when she concluded

the ruling complained of by also dismissing the appellant's application to raise preliminary issues.

55. It was submitted that on the totality of the matters adumbrated, the appeal be allowed and that the matter be remitted to the High Court for determination of the preliminary points of law raised by the appellant preferably before another Judge, with costs to the appellant in this court and in the lower court.

RESPONDENT'S CONTENTIONS

56. The respondents relied upon heads of argument dated 22nd March, 2021. The respondents began by responding to ground one. In that regard, it was submitted that the trial court was within its right to defer the determination of the issues raised by the appellant in the notice of motion to raise preliminary issues as they were the same issues in the originating summons for which a date of trial had already been set.
57. The respondents' Counsel referred to what the lower court stated in its Ruling, which was that-

“I have perused the affidavits filed herein and I have noted that they raise a lot of facts particularly touching on tradition that I need to verify at trial for me to come up with a fair determination of the matter. I will address the issues raised by the plaintiff in my Judgment.”

58. It was argued that what amounts to the hearing of parties in any proceedings can take either the form of oral or written evidence. The case of ***Newsplast Industries vs Commissioner of Lands and Authority and Attorney-General***⁵ was referred to.
59. The respondents’ Counsel submitted that the lower court elected to have a trial at Chipata so as to arrive at a fair determination of the matter and that the lower court was within its rights to do so as the notice of motion to raise preliminary issues was a duplication of the main action which was already scheduled to be heard in Chipata.
60. The respondents’ Counsel argued grounds two and three together and submitted that the learned trial Judge was on firm ground when she concluded the Ruling and dismissed the preliminary issues. According to Counsel, the appeal falls short of the condition precedent for making an application under ***Order 14A of the Rules of the Supreme Court***.

61. It was argued that the condition precedent for making an application under **Order 14A of the Rules of the Supreme Court 1999 Edition**, as set out in the explanatory notes under **Order 14A rule 2 and subrule 3** is that-

(a) The defendant must have given notice of intention to defend.

62. It was contended that the giving of notice of intention to defend is a prerequisite to making an application under Order 14A, whether by summons, motions or orally at the hearing of the cause or matter or at an interlocutory application. The court's attention was drawn to the case of **Indeni Petroleum Refinery Company Limited vs Kafco Oil Limited, Andrew Bungoni, Silas Mumba and Emmanuel Shikaputo (supra)** and that of **African Banking Cooperation Zambia Limited vs Mubende Country Lodge⁶**.

63. Counsel contended that no affidavit in opposition to the affidavit in support of originating summons was filed on behalf of the respondents prior to the time the preliminary issues were raised and that as such, the appellant was precluded from raising a preliminary issue and consequently it ought to have been dismissed as was the case in the trial court.

64. According to Counsel, the affidavit in opposition to the notice of motion to raise preliminary issues does not qualify as a notice of intentions to defend as it is not a declaration of intention to defend the substantive matter or action commenced by originating summons and the supporting affidavit. It is merely an opposition to the affidavit in support of notice of motion to raise preliminary issues.
65. It was submitted that the lower court was on firm ground when it deferred the determination of the preliminary points of law as the appellant did not comply with Order 14A of the Rules of the Supreme Court. The court was urged to dismiss the appellant's appeal for the aforesaid reasons.

APPELLANT'S HEADS OF ARGUMENT IN REPLY

66. The appellant filed heads of argument in reply on 1st April, 2021.
67. On ground one, the appellant's reply to the respondent's submissions was that the lower court did not give reasons why she dismissed the appellant's application after she deferred the decision on preliminary issues to her judgment. Counsel submitted that the lower court contradicted itself in this

regard by deferring the preliminary issue raised to her judgment and then subsequently dismissing the issue raised as this amounted to an error in law.

68. It was argued that the learned trial Judge neglected to determine the preliminary points of law which were raised by the appellant and erred when she dismissed the appellant's application.
69. On grounds two and three, it was submitted that on 11th March, 2020, the respondents filed a lengthy affidavit in opposition to the affidavit in support of notice of notice of motion to raise preliminary issue. It was argued that the deponent did not raise any issues about the irregularity or otherwise of the appellant's application under Order 14A of the Rules of the Supreme Court. According to Counsel, the lower court did not have an opportunity to rule on this issue and that it cannot be raised on appeal. The case of ***Mususu Kalenga Building Limited and Winnie Kalenga vs Richman Money Lenders Enterprises***⁷ was referred to, where the court held that-

“We have said before and we wish to reiterate here that where an issue was not raised in the court below, it is not competent for any party raise it in this court.”

70. It was contended that by filing an affidavit in opposition, the respondents were intent on opposing the appellant's application. It was further argued that the respondents believed that the appellant's application was regular or valid. The court's attention was drawn to Note 2/2/4 of the White Book which states-

“The steps taken with knowledge of an irregularity either with a view to defending the case on the merits... or obtain an advantage such as security for costs will waive irregularity in the institution of service of proceedings since they could not usefully be taken on the basis that the proceedings were valid.”

71. The case of ***Oscar Chinyanta and 31 others vs Alsia Building Construction Limited and Tap Zambia Limited***⁸ was referred to, where the Supreme Court state that-

“We can safely say that the appellants had waived their right to object when they took fresh steps in the action after becoming aware of the irregularities. It was argued that in casu, the respondents waived their rights to object on a procedural issue and cannot do so at this stage in the proceedings.”

72. It was submitted that Order 14A of the Rules of The Supreme Court should be interpreted expansively and not restrictively or constrictively. According to Counsel, that the respondents

had an opportunity to be heard on the preliminary issues that were raised by the appellant as they filed an affidavit in opposition. The appellant prayed that the appeal be allowed and that the respondents be condemned in costs.

CONSIDERATION OF THE MATTER BY THE COURT AND DECISION

73. We have considered the record of appeal, the ruling appealed against, the parties' heads of argument and authorities relied upon. We have also considered the brief oral arguments made by both Counsel at the hearing.
74. The appellant's grievance in ground one is that it was a misdirection by the court below to refuse to determine the preliminary points of law which were raised by the appellant. The contention of the appellant is that the issue of Michael Nsangu's eligibility to the Kalindawalo chieftaincy was dealt with in the proceedings under Cause Number 1998/HP/2180 between Ponisano Mwanza (Administrator of the Estate of the late David Daka Mndikula Kalindawalo) and Michael Nsangu, Shadreck Daka Kawemba, Angel Mpemba and Wallace Banda (sued in his capacity as Chief Nyampande). The matter was

decided by the Honourable Mrs Justice I.M.C Mambilima (as she then was) on 14th December, 2001, and the court found that the first respondent's right to the throne of Senior Chief Kalindawalo had not been proved. He was accordingly removed for failing to prove his legitimacy to the said throne. The Supreme Court, in Appeal Number 78/2002 confirmed this position on 30th June, 2004.

75. By notice of motion to raise preliminary issues filed on 14th January, 2020, the appellant sought a determination of the question whether the re-installation of the first respondent by the second, third, fourth, fifth and sixth respondents as Senior Chief Kalindawalo on 1st October, 2013, is not illegal, null and void by reason of the determination by Justice I.M.C Mambilima in 2001 and the Supreme Court's decision on 30th June, 2004 which declared the first respondent not entitled or eligible to the throne of Kalindawalo.

76. On the other hand, the respondent's position is that the lower court was within its right to defer the determination of the issues raised by the appellant in the notice of motion as they were the same issues raised in the originating summons to

which a date of trial had been set. According to the respondent, the notice of motion to raise preliminary issues is a duplication of the main action which was scheduled for trial at Chipata.

77. In determining ground one, we consider a discourse on the provisions of **Order 14A rule 1 of the Rules of the Supreme Court** which provides that-

“(1) The court may upon the application or its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the court that-

- (e) Such question is suitable for determination without a full trial of the action.***
- (f) Such determination will finally determine subject only to any possible appeal the entire cause or matter or any claim or issue therein.***
- (g) Upon such determination, the court may dismiss the cause or matter or make such order or judgment as it thinks just.***
- (h) The court shall not determine any question under this order unless the parties either-***
 - (c) Had an opportunity of being heard on the question or***
 - (d) Consented to an order or Judgment on such determination.”***

78. Most relevant to this appeal is **Order 14A rule 2 and subrule 3, Rules of the Supreme Court** which states that-

“The requirement for employing the procedure under this Order are the following-

(a) The defendant must have given notice of intention to defend.

(b) The question of law or consideration is suitable for determination without a full trial of the action.”

79. The paragraph referred to above indicates that there are requirements that must be satisfied prior to a matter being disposed of on a point of law, one such requirement as per Order 14A rule 1 subsection 2 Rules of the Supreme Court is the giving of notice of intention to defend. However, a perusal of the originating process in the lower court indicates that the matter was commenced by way of Originating Summons under Cause Number 2013/HP/1498 accompanied by an affidavit in support, sworn by the appellant. The record from the lower court shows that the first respondent did file an affidavit in opposition to that of the appellant in response, as the matter was commenced by originating summons.

80. **Order 11 rule 11 of the High Court Rules** provides for the mode of entering appearance to a writ of summons by a defendant.

However, the appellant's action was commenced by originating summons and as such the filing of a notice of intention to defend by the defendant is, not a requirement.

81. We note the historical background of the matter and are of the view that as per page 690 of the record of appeal, the respondents were given an opportunity to be heard, which is the reason why the court adjourned the matter for ruling once the parties would file the necessary documents.
82. On the question whether the re-installation of the first respondent by the second, third, fourth, fifth and sixth respondents as Senior Chief Kalindawalo on 1st October, 2013 at Kalindawalo headquarters is null and void, we note that the Honourable Mrs Justice I.M. C Mambilima's (as she then was) rendered a Judgment under Cause Number 1998/HP/2180 in which her Ladyship found that, the first respondent's right to the throne of Senior Chief Kalindawalo had not been proved.
83. The court was of the view that the connecting link to Lavu Chipinda Kalindawalo the fourth was not proved and further found the selection and installation of the first respondent as Senior Chief Kalindawalo was null and void. The Petition

against the installation of the first respondent as Senior Chief Kalindawalo succeeded for the aforestated reasons.

84. The first respondent was dissatisfied with the decision of the High Court and appealed against the said decision, resulting in the Judgment delivered by the apex court on 30th June, 2004. The Supreme Court upheld the High Court decision and dismissed the appeal for lack of merit.
85. Our position is that by its very nature, an application under Order 14A of the Rules of the Supreme Court, 1999 Edition seeks to determine the cause or dispose of it on a point of law, without a full trial.
86. We are of the considered view that the issue of Michael Nsangu's entitlement or eligibility to the throne of Kalindawalo Chieftaincy was dealt with the proceedings under Cause Number 1998/HP/2180 by the Honourable Mrs Justice I.M.C. Mambilima (s she then was) in a judgment that was delivered on 14th December, 2001. The Supreme Court further dealt with the first respondent's appeal under Appeal Number 78/2002 and upheld the High Court decision of Mambilima, J (as she then was).

87. The Supreme Court concluded that the first respondent was not eligible to the throne of Kalindawalo. We are of the view that the lower court misdirected itself when it decided not to determine the preliminary issues that were raised by the appellant. If the court had determined the preliminary issues raised by the appellant, it would have come to the conclusion that the entitlement or eligibility of Michael Nsangu, the first respondent to the Kalindawalo Chieftaincy was already determined by the High Court and the Supreme Court.
88. It was therefore an error for the lower court to have decided not to hear the preliminary issue raised as the matter should have been disposed off by way of Order 14A of the Rules of the Supreme Court.
89. Having taken the view that the matter relating to the re-installation of the first respondent was already adjudicated upon with finality by the High Court and the Supreme Court, we will now determine whether the matter is *res judicata*.
90. *Res judicata* means that an issue has been adjudicated upon. It aims at ensuring the good administration of justice in the interests of justice to the public and litigants by prevention of

abuse and duplicity of actions. As submitted by Counsel for the appellant, *Res Judicata* also means-

“The principle that a matter has been finally adjudicated upon by a court of competent jurisdiction it may not be reopened or challenged by the original parties or their successors in interest.”

91. It is not in dispute that the eligibility of the first respondent to the throne of the Kalindawalo chieftaincy was determined by the High Court and confirmed by the Supreme Court and was thus settled in finality. We note that in the first respondent’s affidavit in opposition dated 11th May, 2020, he deposed that he intended to call five witnesses to help the court verify and show that the President’s decision to recognize him as Chief Kalindawalo after the High Court and Supreme Court declared that he was ineligible was made in the interest of justice and in line with Nsenga customary law.
92. We form the view that the lower court should have addressed and determined the preliminary points of law that the appellant raised rather than appearing to give the first appellant a rehearing of a matter that was already determined by the courts.

93. We are fortified by the case of *Henderson vs Henderson*⁹, where the court discussed the principles of res judicata in the following terms:

“Where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole cases, and will not, except in special circumstances, permit the same parties to open the same subject of litigation, in respect of the matter which might have been brought forward as part of the subject in content, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points on which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.”

94. The earlier judgments by the Honourable Mrs. Justice I.M.C Mambilima (as she then was) and the Supreme Court were both in favour of the appellant and they have not been set aside. They still remain in force. We therefore form the view that if the lower court reheard the matter, and judgment was entered in favour of the respondents, that would amount to re-

litigating and overturning the earlier Judgments of the High Court and the Supreme Court.

95. In the case of ***B. P. Zambia Plc vs Interland Motors Limited***¹⁰, the Supreme Court stated that it would be an abuse of the court process if the same parties re-litigate the same subject matter from one action to another or from one judge to another judge. This will be so especially when the issues would have become res judicata or when they are issues which should have been resolved once and for all by the first court as enjoined by ***Section 13 of the High Court Act***. The Supreme Court opined that in terms of the section and in conformity with the court's inherent power to prevent abuses of its processes, a party in dispute with another over a particular subject, should not be allowed to deploy his grievances piecemeal, in scattered litigation and keep hauling the same opponent over the same matter before various courts. The administration of justice would be brought into disrepute if a party managed to get conflicting decisions or decisions which undermine each other from two or more different Judges over the same subject matter.

96. We, accordingly, find that this matter is *res judicata* and that rehearing it would amount to multiplicity of actions and an abuse of the court process. We find merit in ground one of the appeal and we allow it.
97. Ground two and three attack the lower court's decision to dismiss the application to raise preliminary issues after stating that the court would address the preliminary issues in the judgment that it would render after hearing the matter in Chipata.
98. Having held earlier that the eligibility of the first respondent to the throne of Kalindawalo is *res judicata*, the issues raised by the appellant in grounds two and three are *otiose* as the lower court cannot rehear the matter which is *res judicata*.

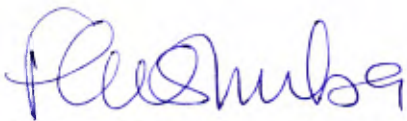
CONCLUSION

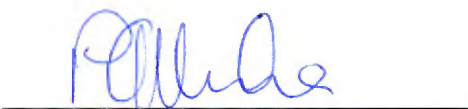
99. The net result is that the appeal succeeds. The preliminary issue succeeds as we are of the view that the re-installation of the first respondent by the 2nd, 3rd, 4th, 5th and 6th respondents as Senior Chief Kalindawalo is null and void as it is *res judicata*.

100. We also form the view that the recognition of the first respondent as Senior Chief Kalindawalo by the Republican President was irregular and null and void as it was against the decisions of the High Court and the Supreme Court on the matter. We dismiss the first respondent's counterclaim as he is not entitled to the Kalindawalo Chieftaincy.

101. The net result is that the first respondent, be removed from the Kalindawalo throne as he is not eligible. Costs are awarded to the appellant, to be taxed in default of agreement.


M.M. KONDOLO SC
COURT OF APPEAL JUDGE


F.M. CHISHIMBA
COURT OF APPEAL JUDGE


P.C.M. NGULUBE
COURT OF APPEAL JUDGE