IN THE SUPREME COURT OF ZAMBIA **SCZ/08/06/2022**
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

BETWEEN:

MICHAEL NSANGU **APPLICANT**

AND

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

Coram: Musonda DCJ, Wood and Chinyama JJS
On the 11th July, 2022 and 24th August, 2022

For the Applicant: No Appearance

For the Respondent: Mr. M. Z. Mwandenga of Messrs M.Z. Mwandenga & Company

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RULING

WOOD, JS, delivered the Ruling of the court

Cases referred to:

(1) **Richard Mofya v Staylon Employment and Investment Limited. & Eco Bank Limited SCZ judgment No. 37 of 2014**

(2) **Murray & Roberts Construction Limited and Industrial Kaddoura Construction Limited v Lusaka Premier Health Limited and Industrial Development Corporation of South Africa SCZ Appeal No. 141/2016**

(3) **Nixon Mabvuto and Others v Ital Terrazzo Limited and CAZ Appeal No. 27/2021**

(4) **Chishala Karabasis Nivet & Another v Mwale (Appeal) 161 [2018] ZMSC 321 (25 September 2018)**

(5) **Margaret M.S. Mulemena v Benny Chiholyonga and others - Appeal No. 165/2017**

(6) **Hermanus Philipus Steyn v Giovanni Gnecchi-Ruscone, Sup.Ct. Appl. No.4 of 2012**

(7) **Concrete Pipes and Products Limited v Kingsley Kabimba and Christopher Simukoko – Appeal No. 014 of 2015**

(8) **Chishala Karabasis Nivel & Another v Mwale (Appeal 161 of 2015) [2018] ZMSC 321**

(9) **John Sangwa v Sunday Bwalya Nkonde Appeal 2/2021**

Legislation referred to:

(1) Order 14A and Order 33 rule 3 of the Rules of the Supreme Court

(2) The Supreme Court (Amendment) Act No. 24 of 2016, section 4 of Cap 25 of the Laws of Zambia

(3) Section 24(1) (a) of the Court of Appeal Act No.7 of 2016

(4) Order X rule 20 of the Court of Appeal Rules

INTRODUCTION

1. This is a renewed motion by the applicant before this Court for leave to appeal pursuant to section 24(B) of the Supreme Court (Amendment) Act No. 24 of 2016, section 4 of Cap 25 of the Laws of Zambia as read with rule 48(1) of the Supreme Court Rules.

BACKGROUND

2. This matter's history can be traced back to sometime in 1998 when the then plaintiff in cause number 1998/HP/2180 petitioned the High Court under section 4(2) of the Chiefs Act against the installation and recognition of the applicant as Senior Chief Kalindawalo of the Nsenga people. The High Court in its judgment dated 14th December, 2001 found on the totality of the evidence before it that the applicant's right to the throne of Senior Chief Kalindawalo had not been proved and declared that the applicant's selection and installation as Senior Chief Kalindawalo was null and void. The applicant was not satisfied with the result and therefore decided to escalate the matter to the Supreme Court. The Supreme Court in its judgment of 30th June, 2004,

upheld the judgment of the High Court and dismissed the appeal on the ground that it had no merit.

3. Those judgments notwithstanding, on 1st October, 2013, the Nsenga Chiefs purported to re-install the applicant to the throne of Senior Chief Kalindawalo. That development is what prompted the respondent to issue an originating summons in Cause No. 2013/HP/1498 in which he was seeking determination of the following issues:

    3.1 Whether Michael Nsangu (first defendant) should not be restrained by court order from holding himself out as Senior Chief Kalindawalo.

    3.2 Whether the other six named Nsenga Chiefs (2nd - 6th defendants) should not be restrained by court order from agitating, organizing, campaigning or canvassing among headmen and subjects that the first defendant should be re-installed as Senior Chief Kalindawalo.

4. On 14th January, 2020 the respondent filed a notice of motion to raise preliminary issues. In addition to the claims stated at paragraph 3 above, the respondent further questioned:

4.1 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 at paragraph 3 above.

4.2 Whether the disqualification of Michael Nsangu to hold the office of Senior Chief Kalindawalo is not *res judicata.*

4.3 Whether the applicant had sufficient interest in the matter.

5. In view of the High Court and Supreme Court judgments which pronounced the selection and installation of the applicant, Michael Nsangu, as Senior Chief Kalindawalo, null and void, the respondent questioned whether the exercise of power by the President of the Republic of Zambia to recognize the applicant as Senior Chief Kalindawalo, by Statutory Instrument No. 19/2014, was not irregular.

6. In response to the preliminary issues, the applicant urged the High Court to allow the matter to proceed to trial so that the parties could be heard and for all issues to be resolved with finality.

7. The High Court considered whether the matter could be resolved on preliminary issues pursuant to Order 14A and Order 33 rule 3 of the Rules of the Supreme Court and came to the conclusion that the matter needed to be heard at a full trial so that all issues could be resolved with finality. On the question whether the respondent had sufficient interest in the matter, the High Court ruled that he had such interest and dismissed both preliminary points of law.
8. The respondent appealed against the decision of the High Court to the Court of Appeal on the following grounds:
   - 8.1 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(respondent)
   - 8.2 Having ostensibly stated that she would address the preliminary issues raised by the appellant (respondent) in her judgment after the hearing of the matter the learned trial judge misdirected herself when she concluded the ruling complained of, by dismissing the appellant's (respondent's) application to raise preliminary issues.

8.3 Further, having failed 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 (respondent's) preliminary issues.

9. The Court of Appeal was of the view that an application made pursuant to Order 14A of the Rules of the Supreme Court seeks to determine the whole cause; or dispose of it, on a point of law without a full trial. On the facts of this case which was commenced by originating summons, the Court of Appeal noted that the applicant had filed an affidavit in opposition and other necessary documents in reaction to the preliminary issues raised by the respondent and was therefore, given an opportunity to be heard.

10. On the issue of the applicant's eligibility to ascend to the throne of the Kalindawalo Chieftaincy, the Court of Appeal found that the issue was dealt with by the High Court in the 1998 matter as earlier alluded to and he was found to be ineligible. Dissatisfied with the High Court judgment, the applicant

appealed to this Court but his appeal was dismissed in a judgment delivered on 30th June, 2004.

11. It is against that background that the Court of Appeal found that the issue of the installation of the applicant was already adjudicated upon with finality, by both the High Court and this Court. That on the issues before it, the only question which remained to be determined was whether the matter was *res judicata.*

12. The Court of Appeal observed that, as both the High Court decision and that of this Court were determined in favour of the respondent, if the High Court were to re-hear the matter and entered judgment in favour of the applicant, such an eventuality would amount to re-litigating and overturning the earlier judgments. The Court of Appeal decided to resolve the whole appeal on the basis that, the matter was *res judicata* and that re-hearing it would amount to multiplicity of actions and an abuse of the court process. The recognition of the applicant as Senior Chief Kalindawalo by the Republican President was further found to be irregular, and null and void for being against both the judgment of the High Court and that of the Supreme

Court. The Court of Appeal also ordered the removal of the applicant from the Kalindawalo throne for being ineligible.

The application for leave before a single judge

13. Undeterred by all these outcomes, the applicant sought leave to appeal from the Court of Appeal which was declined. The applicant renewed his application for leave to appeal before a single judge of this Court on the basis that his application satisfies the rigid threshold set in section 13 of the Court of Appeal Act, in that the proposed grounds of appeal:

    13.1 raise a point of law of public interest;

    13.2 the appeal would have reasonable prospects of success; and

    13.3 there is a compelling reason for the appeal to be heard by the Supreme Court.

14. The applicant filed proposed grounds of appeal before the single judge as follows:

    14.1 The Court of Appeal misdirected itself and reached incorrect conclusions when it decided, on the merit, the main matter and the preliminary issue which had not been heard in the court below contrary to, among others, the

decision of **Richard Mofya v Staylon Employment and Investment Limited & Eco Bank Limited**[1]; **Murray & Roberts Construction Limited and Industrial Kaddoura Construction Limited v Lusaka Premier Health Limited and Industrial Development Corporation of South Africa**[2]; and **Nixon Mabvuto and Others v Ital Terrazzo Limited and CAZ**[3].

14.2 The Court of Appeal erred both in law and fact in hearing the matter, over which it did not have jurisdiction by virtue of the wrong mode of commencement contrary to the case of **Chishala Karabasis Nivet & Another v Mwale**[4].

15. From the affidavits and arguments, the single judge narrowed down the issue calling for determination in the application before her to whether the proposed grounds of appeal meet the threshold envisaged in section 13 of the Court of Appeal Act, as to entitle the applicant escalate his case to this Court. This was on the basis that the intended appeal raises a point of law of public importance; has reasonable prospects of success; or that there is a compelling reason for the appeal to be heard.

16. With regard to whether or not the Court of Appeal did not have jurisdiction to determine a matter which was not heard by the High Court, the single judge was of the view that the High Court after considering the preliminary issues decided that the issues could only be properly determined after hearing evidence. The issues were accordingly deferred to the trial of the matter but the High Court went on to dismiss the two applications.

17. On appeal to the Court of Appeal, it was determined that the real issue in dispute was the re-installation of the applicant as Senior Chief Kalindawalo on 1st October, 2013 contrary to the High Court Judgment. The single judge went on to hold that if it was accepted that the respondent's eligibility to the throne of Senior Chief Kalindawalo had already been decided upon by our Court system with finality and is, therefore, *res judicata,* then there is not and cannot be a main matter to be decided on the merits.

18. In the event, the only issue before the Court of Appeal was whether determination of the re-installation to a throne, of someone earlier ruled ineligible for that throne, could be decided on points of law pursuant to Order 14A of the Rules of

the Supreme Court. The Court of Appeal found it could, and as such it fell within matters that could be commenced by originating summons.

19. It was also not in dispute that what was being questioned in the High Court in cause No. 1998/HP/2180 and in Appeal No. 78/2002 was the applicant's entitlement to the Kalindawalo throne. The single judge added that the applicant's challenge on the respondent's *locus standi* on the basis that, the respondent was not a party to all the previous judgments could not assist the applicant's case when the respondent had indicated that he is pursuing the matter in a representative capacity 'on behalf of the Mndikula Royal family' as this was the same family that was adjudged to be entitled to the throne of Senior Chief Kalindawalo in the judgments earlier alluded to. The single judge took the view that this demonstrated sufficient interest in the matter, to question the installation of 1st October, 2013 which was undertaken contrary to the judgments of the courts. As a result, the single judge was of the view that the applicant had not satisfied the section 13 threshold under the

three grounds which had been advanced and dismissed the application for leave with costs.

The renewed application for leave before this Court

20. The applicant was not satisfied with the decision of the single judge and renewed his application for leave before this Court.

21. When this matter came up for hearing on 12th July, 2022, we proceeded to hear the application in the absence of the applicant's advocate as the parties had filed their respective affidavits and heads of argument. Mr. Mwandenga indicated that he was relying on his detailed heads of argument and urged us to dismiss the renewed application for leave as it lacked any merit.

The applicant's heads of argument

22. The applicant's affidavit in support of the renewed application has raised two grievances. The first grievance was that the High Court had indicated, with regard to the preliminary issues raised, that it needed to verify at trial the full facts of the matter first and dismissed the two applications on the preliminary issue and joinder by the parties, whereas the Court of Appeal

proceeded to determine the very matter which had not been heard.

23. The second grievance was that the Court of Appeal erred in both law and fact in hearing the matter which it did not have jurisdiction by virtue of the wrong mode of commencement.

24. Although the applicant's arguments in support of the motion are 18 pages long, they can be summarised as follows:

24.1 Based on these two grievances the applicant has broadly argued that he has met the threshold set out in section 13 of the Court of Appeal Act, as his proposed grounds of appeal raise a point of law of public interest; the appeal would have reasonable prospects of success and that there is a compelling reason for the appeal to be heard by the Supreme Court;

24.2 The Court of Appeal Act does not define what constitutes a point of law of public importance and neither does it define the compelling reasons but leaves the same to be defined by reference to authorities;

24.3 Irreconcilable decisions as was shown in **Margaret M.S. Mulemena v Benny Chiholyonga and others**[5] are a basis

for granting leave to appeal. In this case, the inconsistency hinges on whether the Court of Appeal can determine an issue which was not determined by the High Court. This Court will need to clarify whether the Court of Appeal has that mandate as the procedure adopted has far reaching consequences to the administration of justice.

24.4 The mode of commencement was contrary to procedure as this was a contested ascendancy to a Chieftaincy and should have been commenced by writ and not by originating summons. Further, the parties are different;

24.5 The case of **Hermanus Philipus Steyn v Giovanni Gnecchi-Ruscone**[6], which broadens what should be considered when granting leave to appeal should have been found to have been of great persuasive value for purposes of granting leave to appeal.

24.6 The Court of Appeal had no jurisdiction to determine a matter which the High Court did not hear.

25. The applicant has argued that the intended appeal raises a point of law of public importance because it raises the question of irreconcilable outcomes which need to be clarified by this

Court. The inconsistencies in the decisions range from whether the Court of Appeal can determine an issue which was not determined by the High Court. The applicant then drew our attention to our decision in the case of **Concrete Pipes and Products Limited v Kingsley Kabimba and Christopher Simukoko**[7] in which we considered and came to the conclusion that a court has the discretion to defer consideration of a preliminary issue. The applicant drew a parallel with this matter by pointing out that in the present matter, the High Court declined to determine the issue and instead preferred to deal with it at trial which meant that the Court of Appeal proceeded to determine the matter which was not determined by the High Court.

26. Additionally, the respondent commenced the action by originating summons in a matter dealing with the contested ascendance to the throne of Senior Chief Kalindawalo which was contrary to what we held in **Chishala Karabasis Nivel & Another v Mwale**[8]. The ascendance to the chieftaincy is not a matter which can be resolved in chambers and consequently jurisdiction needs to be ascertained by this Court.

27. The Kenyan Supreme Court decision in the case of **Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone**[9], was relied upon to demonstrate what needs to be considered when determining an application for leave to appeal. The Kenyan Supreme Court set out the considerations as follows:

27.1 Where the application for certification has been occasioned by the state of uncertainty in the law, arising from contradictory precedents, the Supreme Court may either resolve the uncertainty, as it may determine, or refer the matter to the Court of Appeal for its determination;

27.2 Issues of law of repeated occurrence in the general course of litigation may, in proper context, become "matters of general public importance," so as to be a basis for appeal to the Supreme Court;

27.3 Questions of law that are, as a fact, or as appears from the very nature of things, set to affect considerable numbers of persons in general, or as litigants, may become "matters of general public importance," justifying certification for final appeal in the Supreme Court;

27.4 Questions of law that are destined to continually engage the workings of the judicial organs, may become "matters of general public importance" justifying certification for final appeal in the Supreme Court;

27.5 Questions with a bearing on the proper conduct of the administration of justice may become "matters of general public importance," justifying final appeal in the Supreme Court."

28. Arising from the above Kenyan case, the applicant has argued

that from the proposed grounds of appeal he has shown the irreconcilable decisions and also that the issues regarding succession to a chieftaincy are with us and need clarity on how the public ought to deal with them and as such transcend the situation now before this Court. In addition, issues of procedure are issues which engage the workings of judicial organs which need to be addressed by this Court as they have a bearing on the administration of justice.

29. On the probability of success, the applicant has argued that the test is whether there are reasonable prospects and not whether there are definite prospects of success. The applicant has as a result, argued that the grounds of appeal show that the prospects of success are high.

30. Another point raised by the applicant related to the *locus standi* of the respondent who was not in the initial proceedings and the jurisdiction of the Court of Appeal which determined a matter which was not heard by the High Court.

The respondent's heads of argument

31. The respondent on the other hand has argued that the

applicant's motion is misconceived as it does not meet the threshold set in section 13. A perusal of the applicant's grounds of appeal reveals that they do not raise issues that go to the substratum of the judgment complained of. The respondent has pointed out that whether the Court of Appeal has the mandate to proceed to hear and determine issues that the High Court has not determined as the Court of Appeal allegedly did in casu is not an extraordinary issue that needs the attention of this Court. This is especially so when the circumstances of the case before the Court of Appeal are taken into account wholesomely.

32. According to the respondent, the applicant has ignored the fact that the Court of Appeal has vast powers when hearing and determining appeals. The respondent drew our attention to section 24(1)(a) of the Court of Appeal Act which states that the Court of Appeal may on the hearing of an appeal in a civil matter "confirm, vary, amend, or set aside the judgment appealed or give judgment as the case may require." Additionally, the Court of Appeal has discretionary power pursuant to section 24(1)(b)(iv) where it is necessary or expedient to remit a case to the court below for reconsideration. This power is equally very

wide and it does not prevent the Court of Appeal from hearing a matter on the record as this is provided for in Order X rule 20 of the Court of Appeal Rules which is couched in mandatory terms. Invariably, the Court of Appeal is obliged to consider the entire record and thereafter it is required to pronounce itself in the manner provided for in section 24(1) (a) of the Court of Appeal Act.

33. The Court of Appeal was therefore within its remit to render the judgment after rehearing the matter on the record. The rehearing of an appeal on the record does not require a Supreme Court judgment pronouncement and neither is the Court of Appeal in its judgment required to state that as a prelude to rendering a judgment, it reheard the matter on the record as required by the Court of Appeal Rules.

34. The respondent has for the proposition in paragraph 32 relied on our decision in **John Sangwa v Sunday Bwalya Nkonde**[10] in which when dealing with section 25 of the Supreme Court Act, we held that we have powers, to, inter alia, remit a record back to the court below for rehearing or consider it and give

judgment that merits the case and drew a parallel with section 24 of the Court of Appeal Act which is similarly worded.

35. Similarly, in this motion, the Court of Appeal elected to consider the matter on the record and gave judgment on the merits. In any event, according to the respondent, the Court of Appeal properly set out the basis upon which it decided to deal with the matter. In the circumstances, ground one of the intended grounds of appeal cannot be said to be one that raises a point of law of public importance at all. In addition, the Court of Appeal has vast powers as can be seen from Order X Rule 9(3) which provides that the Court of Appeal shall not be confined to the grounds put forward by an appellant.

36. The respondent does not believe that the appeal has any reasonable prospects of success because the dispute regarding the throne of Senior Chief Kalindawalo has been raging in the Zambian courts for a long time and has been decided in cause No. 1998/HP/2180 and confirmed by this Court in Appeal No. 78/2002. The applicant lost in the High Court and this Court confirmed the findings of fact made by the High Court. As such, the facts surrounding the entitlement or eligibility of the

applicant to ascend to the throne of Senior Chief Kalindawalo were and are not in dispute. Simply put, the applicant was and is not entitled to ascend to the throne of Senior Chief Kalindawalo on account of the High Court and this Court's judgments. The passage of time cannot erase or obliterate the purport and meaning of the High Court and Supreme Court judgments.

37. The re-installation of the applicant as Senior Chief Kalindawalo on 1st October, 2013 was a blatant disregard of the Supreme Court decision which upheld the decision of the High Court. The proceedings in the High Court were commenced to, inter alia, challenge the re-installation. As the entitlement or eligibility of the applicant ascend to the throne of Senior Chief Kalindawalo had already been decided by the High Court and this Court, a dispute concerning the applicant's re-installation was and is unlikely to raise any substantial dispute of fact. In such an instance it was and is appropriate for the proceedings to be commenced by originating summons in accordance with Order VI Rule 2 of the High Court Rules which provides that "Any matter which under any written law or these Rules may be

disposed of in chambers shall be commenced by an Originating Summons."

38. Further, Order 5 rule 4 of the Rules of the Supreme Court, provides that proceedings (such as this one) in which there is unlikely to be any substantial dispute of fact can be commenced by originating summons. The proposed memorandum of appeal only raises a moot point and is certainly not going to succeed. Above all, it does not raise a point of law of public importance and neither does it provide evidence that there is some compelling reason for the appeal to be heard by this Court.

39. On the issue of irreconcilable decisions which was raised by the applicant, the respondent's response was that it was a wrong approach to the issue of chieftaincy because issues relating to the succession to chieftaincy are issues that are dependent on customs and norms of various tribal groupings and it is folly for the applicant to suggest that clarity be provided by this Court on this issue.

40. Mr. Mwandenga on behalf of the respondent, pointed out that

even though the respondent was not a party to the earlier proceedings, both judgments were emphatic about the ineligibility of the applicant to the throne of Senior Chief Kalindawalo. The judgments were still valid and subsisting. The proceedings in the High Court were meant to challenge the re-instatement of the applicant as Senior Chief Kalindawalo. Therefore, the Court of Appeal judgment gave effect and meaning to the decisions that had already completely sealed the applicant's claim to the throne of Senior Chief Kalindawalo. If the proceedings had not been commenced in the High Court it would have meant that the re-instalment of the applicant as Senior Chief Kalindawalo would have meant that the judgments of the High Court and Supreme Court were or are useless or nugatory and could and can be ignored regardless. Such a situation should not be allowed to prevail otherwise the administration of justice in the country would be held in ridicule as people would be ignoring court judgments.

41. With regard to the argument that the High Court did not hear the matter which was the subject of the appeal in the Court of Appeal, Mr. Mwandenga argued that this was not entirely

correct as the judge in her ruling of 10th June, 2020 stated that she had perused the affidavits and had taken the liberty to make a determination on the affidavits filed and dismissed the preliminary issue and the application for a misjoinder. This in itself was a determination on the preliminary issues that were before her. In conclusion, Mr. Mwandenga argued that the application for leave is misconceived.

Our analysis of the various arguments and our decision

42. We have considered the various affidavits and arguments in support and against this motion. We take the view that even though both parties argued at length on whether or not the applicant has met the section 13 threshold, the peculiar undisputed facts of this case should narrow down the issues and resolve the dispute.

43. The facts show that initially, there was a challenge as to who should ascend the throne of Senior Chief Kalindawalo. The High Court in Cause No. 1998/HP/2180 resolved the dispute in favour of the then petitioner Ponsiano Mwanza who was suing as administrator of the estate of the late David Daka Mndikula Kalindawalo. The applicant appealed to the Supreme Court in

Appeal No. 78/2002 and had his appeal dismissed in a judgment dated 30th June,2004.

44. Those judgments notwithstanding, on 1st October, 2013 the Nsenga Chiefs adopted self-help and purported to re-install the applicant to the throne of Senior Chief Kalindawalo. The matter did not end there. The then President of the Republic of Zambia in exercise of his powers recognized the applicant as Senior Chief Kalindawalo, by Statutory Instrument No. 19/2014.

45. On the basis of these basic facts alone it was patently clear that the applicant had no basis whatsoever for laying claim to the chieftaincy regardless of Statutory Instrument No.19/2014 which recognised him as such, or indeed the Nsenga chiefs who disregarded valid judgments of this Court and the High Court.

46. There would be mayhem if parties to disputes do not respect and recognize judgments of our courts no matter how unpalatable the decision maybe. If a decision is made in a lower court, a party has the option of appealing and if it is pronounced by an apex Court the parties have to live with it or wait for legislative intervention or a rare opportunity to depart from it, as there can be no such thing as self-help at law. It follows from

what we have just stated, that had the parties respected the decisions of our courts, they would have been no further litigation.

47. The applicant has attempted to persuade us that he has met the threshold set out in section 13 of the Court of Appeal Act. We take the view that nothing could be further from the truth. To start with, as has been argued by Mr. Mwandenga, there are no reasonable prospects of success for the simple reason that this matter was decided by two courts in favour of the then respondent. The principle of *res judicata* applies.

48. The argument by the applicant that the respondent is different does not find any favour with us as this matter was determined in finality and in any event, as was held by a single judge of this Court, the current respondent is suing in a representative capacity on behalf of the Kalindawalo Mndikula Royal Family. Cause No. 1998/HP/2180 shows that Potsiano Mwanza, the Petitioner in that case, was suing as administrator of the estate of the late David Daka Mndikula.

49. Much has been said by the applicant about there being irreconcilable differences and the need for this Court to make a pronouncement on it. We agree with Mr. Mwandenga's argument that that there is no issue in relation to succession to chieftaincy as this is dependent on customs and norms of various tribal groupings.

50. We do not agree with the applicant that there are any procedural issues worthy of resolution by this Court. The Court of Appeal quite properly dealt with the appeal within its mandate as provided for in section 24(1)(a) and section 24(1)(b)(iv) of the Court of Appeal Act, Order VI Rule 2 and Order XXX Rule 11 of the High Court Rules. Order VI Rule 2 of the High Court Rules provides that any matter which under any written law or the rules may be disposed of in chambers shall be commenced by originating summons. The facts of this matter fall squarely into this category as two judgments had been delivered earlier and what needed to be resolved was the status of the applicant since he was holding himself out as Senior Chief Kalindawalo and whether the Nsenga chiefs should be restrained by court order from agitating or canvassing among headmen and subjects that

the applicant should be re-installed as Senior Chief Kalindawalo. These issues did not require a full trial as the matter had earlier been decided and therefore an originating summons was the appropriate procedure to adopt. Again, this does not require this apex Court to pronounce itself on basic procedure.

51. Mr. Mwandenga has pointed out that the Court of Appeal has vast powers when hearing and determining appeals. We agree. Section 24(1)(a) of the Court of Appeal Act gives power to the Court of Appeal in civil matters to "confirm, vary, amend, or set aside the judgment appealed or give judgment as the case may require." It is quite clear to us that on the facts of this case, that the decision of the Court of Appeal cannot be faulted so as to seek the intervention of section 13 of the Court of Appeal Act.

52. The applicant has argued at length that the Court of Appeal erred when it proceeded to determine a matter which was not determined by the High Court. A perusal of Mr. Mwandenga's argument on this issue shows that the High Court judge actually dealt with the preliminary issue and mis-joinder. It is quite plain to see that in spite of there being a contradiction in

her approach, the judge dealt with the matters and made a decision. The judge states in her ruling 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 with a fair determination of the matter.*
>
> *I took the liberty to make a determination on the affidavits filed because, firstly this matter is an old matter which has dragged due to a number of interlocutory applications..."*
>
> *The judge then concluded as follows:*
>
> *"Both applications to raise preliminary issues and the application for mis-joinder are hereby dismissed."*

53. The ruling quite clearly shows that the judge had made a decision and unequivocally dismissed both the preliminary issues and the application for mis-joinder. What remained for the parties was either to apply for review or to appeal. The respondent decided to appeal and the Court of Appeal agreed with him, and allowed the appeal. In its decision, the Court of Appeal dealt with the fact that the matter had been decided twice earlier and was thus *res judicata* thus paving the way for it to be heard by way of originating summons. Given the vast powers of the Court of Appeal, we see nothing wrong with the approach taken by the Court of Appeal to the appeal as a whole.

Conclusion

54. This matter has technically been in our court system in one form or another since 1998 which makes it 24 years. The delay has been caused by and large by the applicant, yet his right to ascend to the chieftaincy was nullified many years ago. This is a classic example of litigation going on *ad infinitum.* There should be an end to litigation. We can only hope that the applicant will learn to live with his loss and move on and not haul the parties connected to this dispute back to court. For the reasons given above we find no merit in the motion and dismiss it with costs to be agreed or taxed in default of agreement.

M. MUSONDA
DEPUTY CHIEF JUSTICE

A. M. WOOD
SUPREME COURT JUDGE

J. CHINYAMA
SUPREME COURT JUDGE