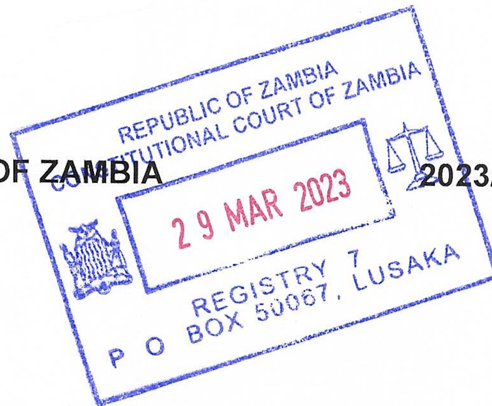
IN THE CONSTITUTIONAL COURT OF ZAMBIA 2023/CCZ/005

HOLDEN AT LUSAKA

(CONSTITUTIONAL JURISDICTION)



IN THE MATTER OF: ARTICLES 1, 2, 92 (2) (e), 120, 121, 122, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, Q35, 140, 141, 210 (1), 220 (2) (b) AS READ TOGETHER WITH ARTICLES 128 (1) (a) &. (b); 128 (3) (b) &. (c) AND 9 (1) OF THE CONSTITUTION OF ZAMBIA, CHAPTER 1 OF THE LAWS OF ZAMBIA.

IN THE MATTER OF: APPOINTMENT OF THE DEPUTY PRESIDENT AND JUDGES OF THE CONSTITUTIONAL COURT IN CONTRAVENTION OF ARTICLE 140 (1) (b) AS READ TOGETHER WITH ARTICLE 173 (1) (i) and (j) OF THE CONSTITUTION OF ZAMBIA, CHAPTER 1 OF THE LAWS OF ZAMBIA.

IN THE MATTER OF: APPOINTMENT OF THE PRESIDENT OF THE COURT OF APPEAL AND OTHER JUDGES IN CONTRAVENTION OF ARTICLE 173 (1) (i) and (j) AS READ TOGETHER WITH ARTICLES 210 (1) AND 8 (d) and (e) OF THE CONSTITUTION OF ZAMBIA, CHAPTER 1 OF THE LAWS OF ZAMBIA.

IN THE MATTER OF: INTERPRETATION OF THE TYPE OF SPECIALISED TRAINING AND EXPERTISE REQUIRED FOR APPOINTMENT OF JUDGES OF THE CONSTITUTIONAL COURT AND SPECIALISED COURTS.

IN THE MATTER OF: INTERPRETATION OF WHETHER OFFICES OF THE PRESIDENT AND DEPUTY PRESIDENT OF THE COURT OF APPEAL ARE ADMINISTRATIVE IN NATURE WHOSE VACANCY IS FILLED BY APPOINTMENT FROM AMONG JUDGES BY THE CHIEF JUSTICE.

BETWEEN:

ISAAC MWANZA	**1ST PETITIONER**
MAURICE MAKALU	**2ND PETITIONER**
AND	
ATTORNEY GENERAL	**RESPONDENT**

Before the Honourable Mrs. Justice J. Z. Mulongoti

in Chambers on the 29th day of March, 2023

For the 1st Applicant:	**In Person**
For the 2nd Applicant:	**Mr. J. Zimba of Makebi Zulu Advocates**
For the Respondent:	**Mr. M. Muchende, SC, Solicitor General**
	Mr. C. Mulanda, Principle State Advocate
	Mrs. M.K. Phiri, Assistant Senior State Advocate

RULING

Cases referred to:

1. **Milingo Lungu v The Attorney General – 2022/CCZ/006.**
2. **Gatirau Peter Munya v Dickson Mwenda Kithinji, The Independent Electoral and Boundaries Commission and Fredrick Njeru Kamundi County Returning Officer, Meru County – Application No. 5 of 2014.**

3. **Board of Management of Uhuru Secondary School v City County Director of Education and 2 Others (2015) eKLR.**
4. **Wilson Kaberia Nkunja v The Magistrate and Judges Vetting Board and others (Nairobi High Court – Constitutional Petition No. 154 of 2016 (eKLR).**
5. **Wilson Bursen Mokua v Central 4 Kenya Conference of the Seventh Day Adventist and another; Nairobe Cosmopolitan Conference Limited (Interested Party) (2021) eKLR.**
6. **Wanuri Kahiu and Creative Economy Working Group v CEO Kenya Film Classification Board, Attorney General and 3 others, Kenya High Court at Nairobi – Petition No. 313 of 2018.**
7. **Katiba Institute v Judicial Service Commission, The Chief Justice of the Republic of Kenya and The Attorney General – Petition No. E128 of 2022.**
8. **The Law Society of Kenya & Katiba Institute v State Law, delivered on 24th March, 2023.**
9. **Embassy Supermarket v Union Bank Zambia Limited (In Liquidation) – Supreme Court of Zambia Judgment No. 25 of 2007.**
10. **American Cyanamid Company v Ethicon Limited [1975] A.C. 396.**
11. **Doctor J.W Billingsley v J.A Mundi (1982) ZR 11**

Legislation and Works referred to:

1. **Order IX Rule 20(1) and Order X Rule 2 (1) and (2) of the Constitutional Court Rules.**
2. **Section 16(2) of the State Proceedings Act**

[1.0] Introduction and Background

[1.1] This is a ruling on the applicants´ application for a Conservatory Order. The facts leading to this application are that on 17th March, 2023, the applicants filed a petition in which they challenge the President's appointment of twenty (20) judges to the superior courts, alleging that the said appointments were done in contravention of constitutional provisions, its values and principles as enshrined in Articles 8 (d) and (e), 141 (1) (b) and 173 (1) (i) and (j) of the Constitution of Zambia.

[2.0] The application:

[2.1] The application for a conservatory order was made pursuant to Order IX Rule 20(1) as read with Order X Rule (2) (1) and (2) of the Constitutional Court Rules. The application is by summons, supported by an affidavit sworn by the applicants. In the joint Affidavit in Support, it was deposed that the petition would be rendered nugatory and academic once the appointed judges are ratified and sworn in by the President hence the application for a conservatory order to preserve the status quo until determination of the main matter.

[2.2] The applicants filed skeleton arguments in support of the application for a conservatory order. The case of **Milingo Lungu v Attorney General**[1] was relied on to support the argument that the Court has jurisdiction to hear and grant the application.

[2.3] In submitting on conservatory orders, counsel referred me to the Kenyan High Court decision in **Gatirau Peter Munya v Dickson Mwenda Kithinji, The Independent Electoral and Boundaries Commission and Fredrick Njeru Kamundi County Returning Officer, Meru County**[2], in which the Kenyan High Court distinguished a conservatory order from an interlocutory injunction in that a conservatory order is granted on the inherent merit of the case, taking into consideration the public interest, constitutional values and the proportionate magnitudes attributable to the relevant causes.

[2.4] I was also referred to **Anthony DiSarro´s article entitled ´A Farewell to Harms Presuming Irreparable Injury in Constitutional Litigation´** where the author wrote that:

> **A court should be free to preserve the status quo so that it can adjudicate constitutional claims in an orderly fashion. It should not permit a plaintiff's claim to become moot by refusing to enjoin unlawful action before the claim is determined.**

[2.5] Further reference to Kenyan authorities was made when counsel cited the case of **Board of Management of Uhuru Secondary School v City County Director of Education and 2 others**[3] and that of **Wilson Kaberia Nkunja v The Magistrate and Judges Vetting Board and Others**[4] in which the Supreme Court of Kenya summarized the principles for granting a conservatory order as follows:

i. **the need for the applicant to demonstrate an arguable prima facie case with a likelihood of success, and to show that in the absence of the conservatory orders, he is likely to suffer prejudice;**

ii. **whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights;**

iii. **the court should consider whether, if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory; and**

iv. **whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.**

[2.6] On the basis of the above, it is submitted that in establishing a prima facie case, an applicant needs only disclose an arguable but not frivolous case. The case of **Wanuri Kahiu and Creative Economy Working Group v CEO Kenya Film Classification Board,**

Attorney General and 3 others[5] was also cited in which the Kenyan High Court stated that what the applicant needs to demonstrate is that there is an arguable case. To augment reference was made to the case of **Wilson Bursen Mokua v Central 4 Kenya Conference of the Seventh Day Adventist and another; Nairobi Cosmopolitan Conference Limited (Interested Party)**[6] wherein it was stated that in determining a prima facie case, the whole case must be looked at, albeit preliminarily.

[2.7] In light of the above cited authorities, it is the applicants' submission, that the case before court was arguable as it seeks to defend the Constitution from being overthrown, abrogated or illegally suspended. That the case raises serious and novel constitutional issues that seek to promote the rule of law and constitutional values and principles premised on constitutionalism, good governance, accountability for administrative acts and transparency in the appointment of judges.

[2.8] It was further submitted that the action seeks to protect and promote the national values and principles contained in Article 8 which are the cornerstone of the Constitution. That this

submission was in line with the case of **Katiba Institute v Judicial Service Commission, The Chief Justice of the Republic of Kenya and The Attorney General**[7] that conservatory reliefs are sought to enhance those constitutional values and principles.

[2.9] That the Petitioners allege breach of Constitutional values and principles in the appointment of the twenty judges, which is an arguable case for this Court to hear as it has exclusive jurisdiction to hear and grant the reliefs sought by virtue of Article 119 of the Constitution, by which it is empowered to protect and promote the Constitutional values and principles.

[2.10] It was submitted that if the Conservatory Order is not granted, it would render the petition nugatory and an academic exercise which would prejudice the Petitioners. That judges of the superior courts have a hallowed role in the delivery of justice and the life of the nation. Thus, it would serve public interest if the conservatory order is granted so as to preserve the status quo on the bench.

[2.11] In conclusion it is submitted that granting the conservatory order would enhance constitutional values such as good governance, uphold the adjudicatory authority of this Court to determine this

matter in the public interest and protect the sanctity of the Constitution of Zambia.

[3.0] Respondent´s Affidavit in Opposition

[3.1] In the Affidavit in Opposition filed on 28th March, 2023 and sworn by Marshal Muchende, in his capacity as Solicitor General, it was deposed that the process of appointment was currently before the National Assembly's Parliamentary Select Committee and that the Petitioners had not aired their grievances before the said Committee.

[3.2] Further that, seeking to stop the ratification process is a usurpation of the powers of the Legislature and the Petitioners should wait for the entire process to run its course and see if there would be any errors and omissions on the part of the Legislature with regards to the Constitutional requirements. That he believed that the effect of granting the Petitioners´ application will determine the petition at an interlocutory stage.

[4.0] **The Hearing**

[4.1] At the hearing of the application on 28th March, 2023, Mr. Mwanza, the 1st applicant herein, submitted that there were four issues for consideration for a conservatory order to issue.

[4.2] Firstly, the applicants had an arguable matter as it concerns alleged constitutional violation, in particular, the values and principles in the public service. Placing reliance on Article 118 (2) (f) of the Constitution, he submitted that this Court has a duty to protect the values and principles in the Constitution. The only way to ensure protection of the values and principles would be for this Court to grant the conservatory order.

[4.3] Whilst agreeing with the Respondent's assertion in paragraph 7 of its Affidavit in Opposition to the effect that the appointments had already been done and being scrutinized by the Parliamentary Select Committee and that the applicants should air their grievances there, Mr. Mwanza submitted that Parliamentary processes were not a matter of right, that by Article 177, the Constitution allows the National Assembly to regulate its own proceedings and persons who are not invited cannot insist on appearing before the Select Committee.

[4.4] In reacting to paragraph 10 of the Respondent´s Affidavit in Opposition, the 1st applicant stated that the said paragraph 10 was a misconception as their intention was not to stop the ratification process but rather seeking to preserve the status quo of the number of judges before determination of the main matter. Further that, a conservatory order can be granted even where officers have been sworn into office as happened in Kenya in the judgement delivered on 24th March, 2023 of **The Law Society of Kenya and Katiba Institute v State Law**[8].

[4.5] Mr. Mwanza submitted that the question would be whether the grant of the order would enhance the Constitutional values and the objects of the Constitution. He submitted that the Court would have an opportunity to examine the processes by the statutory institutions in accordance with the values enshrined in Article 173 (1) (g) of state institutions being held accountable for their administrative acts.

[4.6] The second issue would be for this Court to determine the effects of granting the order versus those of not granting. It was his submission that a refusal to grant the order would mean the

matter will be rendered academic as the judges will have taken office and started performing their duties.

[4.7] Thirdly, this Court would have to determine whether public interest will be served if the order is granted. It was submitted that there would be no prejudice to public interest as what amounts to public interest in constitutional matters is that the constitution is respected. That on the basis of the four grounds, a *prima facie* case had been established and that the Court should grant the order.

[4.8] For the Respondent, the Solicitor General, Mr. M. Muchende, SC, submitted that they would rely on the Affidavit in Opposition dated 28th March, 2023 for matters of fact. He submitted in terms of the law that the Court was faced with a very serious application whose effect would be to grant an order akin to an injunction against the State. It was the learned Solicitor General's submission that in Zambia, the legislators had put in place the provisions of section 16 (2) of the State Proceedings Act, Chapter 71 of the Laws of Zambia.

[4.9] Thus the question was whether there was any relief in the Petition to the effect that the number of judges in the superior

courts should be maintained as they stand now. According to the Solicitor General, there was no such relief and therefore, the State Proceedings Act kicked in to proscribe the grant of this order being sought by the Petitioners.

[4.10] The learned Solicitor General further submitted that it was not clear from the Summons the target of the conservatory order. Thus, he contended that the Court cannot grant a relief which is so broad and so vague that it would lead to serious absurdities. It was submitted that one of the substantive reliefs was for an order to quash the recommendations and appointments which had already been made and the request for ratification was already passed to National Assembly and therefore, there would be no purpose served by the interlocutory order. He submitted that the application was late in the day insofar as it concerned to the Judicial Service Commission and the Republican President in the appointment of judges.

[4.11] Furthermore, that the reliefs being sought can still be heard and determined without the necessity of the conservatory order which order is at variance with section 16 (2) of the State Proceedings Act. That, the State institutions involved in the process of

appointing judges, namely, the Judicial Service Commission, the President and the National Assembly, perform duties ascribed to them by the Constitution and attendant statute. In that regard, the case of **Embassy Supermarket v Union Bank Zambia Limited (In Liquidation)**[9] in which the Supreme Court stated that where a statute imposes a duty on a person, the person charged with the performance of the duty cannot be estopped from exercising his statutory powers was called in aid for the submission that these State institutions should be allowed to work notwithstanding a challenge.

[4.12] Learned Solicitor General distinguished cases to do with violation of human rights which pose a threat to the life, limb or liberty of a person which would cause irreparable damage from the case before Court which cannot be said that irreparable damage would be caused if the conservatory order is not granted. That there was no urgency which necessitates or warrants the granting of a conservatory order as the appointments could be nullified once this Court finds that the process of appointment was unconstitutional.

[4.13] On the question of whether there was even merit in the application, it was submitted that there was nothing on record which showed that the Petitioners were denied an opportunity to air their grievances before the Parliamentary Select Committee which is scrutinizing the appointments. **American Cyanamid Company v Ethicon Limited**[10] was referred to.

[4.14] To augment, Mr. C. Mulonda submitted that in addition to being vague, this Court cannot make an order that goes against the Superior Courts (Number of Judges) Act No. 9 of 2016 which prescribes the number of judges in the Supreme Court, Constitutional Court, Court of Appeal and the High Court. He submitted that the application lacks merit and should be dismissed.

[4.15] In reply, Mr. Mwanza, reiterated that the reliefs he seeks are two (1) to maintain the status quo on the number of Judges and (2) any other relief. This was objected to by the Solicitor General and sustained by Court as the summons are clear as to what order is sought.

[4.16] Mr. Mwanza maintained that the applicants seek an order to quash all recommendations for appointments which supports the

grant of a conservatory order. That the order is not vague as it targets the respondent, the President, the Court itself and the Judges appointed. On irreparable damage, he argued that this is to the Constitution which has been violated, as the process was shrouded in secrecy and mystery.

[4.17] It was also his submission that a *prima facie* case has been established. That there is an arguable case which the Court ought to determine whether the process protects Article 173 of the Constitution. Furthermore, that this case will enhance constitutional values and the Court by granting the relief or not is enjoined to protect values of the Constitution.

[4.18] On section 16(2) of the State Proceedings Act, Mr. Mwanza argued that, this Court has guided in its decisions that it would grant interim reliefs against the State.

[4.19] On issue of separation of powers, Mr. Mwanza submitted that the Court ought to check the excesses of the Executive and Legislature which this conservatory order seeks to do.

[5.0] **Determination**

[5.1] I have considered the affidavit evidence, the written arguments and oral submissions by the parties. The pertinent issue for my determination is whether the applicants have proved their entitlement to a conservatory order.

[5.2] The applicants seek a conservatory order on the premise that:

> **the current status quo on the number of Judges in the superior Courts is preserved until the final determination on the main matter on the grounds set out in the affidavit herewith**

[5.3] In their joint affidavit in support of the application for a conservatory order, the applicants deposed in paragraphs 5 and 6 as follows:

> **5. That we have been advised by counsel for the 2nd petitioner that the appointed Judges, once ratified by Parliament and sworn in by the President would begin to perform functions of Judges of the Superior Courts which would render this petition nugatory and academic.**
>
> **6. That we have been advised by counsel and verily believe that this Court has jurisdiction to grant a conservatory order as an interim relief to preserve the status quo of the Judges of the Superior Courts to allow the Court to adjudicate until the matter is determined.**

[5.4] The applicants have relied heavily on decisions of the High Court in Kenya for persuasive value. I have noted the arguments and principles espoused in those cases.

[5.5] It is trite law that at interlocutory stage the applicant or party should demonstrate the right to the relief it seeks clearly. Triable issues or matters for the main matter ought not to be dealt with at interlocutory stage. I am fortified by the Supreme Court decision in **Doctor J.W Billingsley v J.A Mundi**[11] for that general proposition. There is, therefore need for the Court to be cautious at this stage hence the need for the parties to prove or meet the conditions for the grant of an interlocutory relief.

[5.6] I note the applicants´ arguments and the guiding principles or conditions to be met for the grant of a conservatory order. Both parties argued on the first one on the *"need for the applicant to demonstrate an arguable prima facie case with a likelihood of success and to show that in the absence of the conservatory orders, he is likely to suffer prejudice"* like aforestated the applicant must demonstrate his right to relief clearly which is to be done by proving an arguable *prima facie* case otherwise he will not be entitled to the relief. To determine whether a *prima facie* case

with likelihood of success has been established on the material before me, it is imperative for me to consider, preliminarily, the Petition, the Answer and the Affidavits. In so doing I am to exercise caution not to delve into the main matter as to make findings of fact which can only be done after trial of the matter by the full Court.

[5.7] Having scanned through the Petition and other materials placed before me, I am of the considered view that the applicants have not demonstrated that they have an arguable, *prima facie* case with a likelihood of success and that in the absence of the conservatory order they are likely to suffer prejudice. I say so because they have failed to prove a clear breach of the Constitution or Legislation which the Judicial Service Commission has breached or violated for not advertising the vacancies for position of Judge of the various courts. In fact in paragraph 11 the Petition acknowledges that the Constitution and the Law is silent on the processes to be undertaken by the Judicial Service Commission in recommending legal practitioners for appointment.

[5.8] Furthermore, the Petition appears to be speculative for instance it does not state the Judge who is less than 10 years experience as required by Article 141 (1) (d). I will not at this stage pin point or comment in detail on all the paragraphs of the petition suffice to state that in my view the allegations do not demonstrate likelihood of success. As matters stand now the Petition is contradictory and speculative such as that it has no likelihood of success. The petitioners´ case is unclear for me to grant the conservatory order sought. As argued by the Solicitor General, once the applicant fails to prove a *prima facie* case, then they are not entitled to interlocutory relief per **Lord Diplock in American Cyanamid**[10] case. It follows therefore, that I will not proceed to consider the other three principles suffice to state that I agree with the Solicitor General that the order sought is vague and global.

[5.9] I must state that I do not agree with Solicitor General's argument on section 16(2) of the State Proceedings Act as that section is specific to injunctions.

[5.10] I accordingly, refuse to grant the conservatory order as the material placed before me do not warrant it. I order each party to bear own costs.

J. Z. MULONGOTI

CONSTITUTIONAL COURT JUDGE