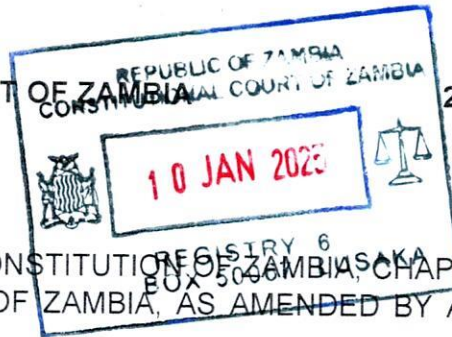


IN THE CONSTITUTIONAL COURT OF ZAMBIA
HOLDEN AT LUSAKA

(Constitutional Jurisdiction)



2024/CCZ/007

IN THE MATTER OF: THE CONSTITUTION OF ZAMBIA, CHAPTER 1 OF THE LAWS OF ZAMBIA, AS AMENDED BY ACT NO. 2 OF 2016

IN THE MATTER OF: ALLEGED VIOLATION OF ARTICLE 67 (2) (a) OF THE CONSTITUTION OF ZAMBIA

IN THE MATTER OF: ALLEGED VIOLATION OF ARTICLE 199 (2) OF THE CONSTITUTION OF ZAMBIA

IN THE MATTER OF: ALLEGED VIOLATION OF ARTICLE 199 (3) OF THE CONSTITUTION OF ZAMBIA

IN THE MATTER OF: FAILURE OF THE LUSAKA CITY COUNCIL TO PUBLISH THE COUNCIL RESOLUTION DATED 27TH SEPTEMBER, 2023 IN THE GOVERNMENT GAZETTE WITHIN 28 DAYS AND FAILURE TO REPORT THE LUSAKA CITY COUNCIL RESOLUTION DATED 27TH SEPTEMBER, 2023 TO PARLIAMENT WITHIN THE PRESCRIBED PERIOD.

IN THE MATTER OF: FAILURE OF THE LUSAKA CITY COUNCIL TO VARY THE PLANNING PERMISSION FEES THROUGH A STATUTORY INSTRUMENT.

BETWEEN:

CHIPA CHIBWE (Suing in his capacity as Chairman of the Outdoor Advertising Association of Zambia)

PETITIONER

AND

LUSAKA CITY COUNCIL

RESPONDENT

CORAM: MUNALULA, PC, SHILIMI, DPC, MULIFE, JC ON 6TH NOVEMBER 2024 AND 10TH JANUARY, 2025.

FOR THE PETITIONER: Mr. P. Chulu and Mr. T. Chembo of Messrs Patrick Chulu Legal Practitioners.

FOR THE RESPONDENT: Ms. K. Sikwibele, Director - Legal Services, Ms. A Mwanamakondo, Council Advocate and Mr. A. Nsama, In - House Counsel.

RULING

Mulife, JC, delivered the Ruling of the Court.

Cases referred to:

1. R v Inland Revenue Commissioners, Ex parte National Federation of Self-Employed and Small Business Limited [1982] A.C. 619.
2. Shipe (Trustee for and on behalf of the Salvation Army of Zambia) and Others v Victor Nalisa Mung'ambata and others (suing on behalf of the Parents Community School Committee, Appeal No. 150/2019).
3. Chikuta v Chipata Rural Council (1974) Z.R. 241 (SC).
4. New Plast Industries v Commissioner of Lands and the Attorney General (2007) Z.R. 58.
5. Crossland Mutinta and Others v Donovan Chipanda, SCZ Judgment No. 20 of 1999.
6. Hakainde Hichilema and Others v The Government of the Republic of Zambia, 2017/CCZ/0006.
7. BP Zambia Plc v Zambia Competition Commission, Total Aviation and Export Limited and Total Zambia Limited (2001) Z.R. 22.
8. Hamalambo v Zambia National Building Society, Appeal No. 64/2013.
9. Nkumbula v Attorney General (1979) Z.R. 267.
10. Frank Bwalya (suing on behalf of himself and in his capacity as Executive Director of Change Zambia) v Attorney General, Katele Kalumba (sued in his capacity as the Secretary General of the Movement for Multi-party Democracy) and William Banda, (2012) 1 Z.R. 354.
11. Richard Mumba and 3 Others v Electoral Commission of Zambia, 2015/HP/0967.
12. Zambia Wildlife Authority and 3 Others v Muteeta Community Resources and Board Development Co-operation Society (2009) Z.R. 159.
13. Citi Bank Limited v Suhayl Dudhia, SCZ Appeal No. 6 of 2022.
14. Zambia Extracts Oils and Colorants Limited and Another v Zambia State Insurance Pension Trust Fund Board of Trustees (2016) 2 Z.R. 316.
15. Mukumbuta and Others v Mongu Meat Corporation Limited (2003) Z.R. 55.
16. Development Bank of Zambia and KPMG Peat Marwick v Sunvest Limited and Sun Pharmaceuticals Limited (1995/97) Z.R. 187 (S.CC).
17. The Registered Trustees of the Archdiocese of Lusaka v Office Machine Services Limited, SCZ No. 18 of 2007.
18. Kelvin Hang'andu and Company (A Firm) v Webby Mulubisha (2008) 2 Z.R. 82 (S.C.).
19. Fredson Kango Yamba v The Principal Resident Magistrate, Anti-Corruption Commission and Attorney General, 2023/CCZ/003.
20. Joseph Malanji v Charles Abel Mulenga and Electoral Commission of Zambia, 2020/CCZ/A0021.

21. Nyasaland Trade Union Congress v Nkolokosa [1963] R. & N. 184.
22. Campbell v Thomson and Another [1976]1Q.B. 445.
23. Kabisa Elizabeth Handia Ngwira v National Pension Scheme Authority 2019/CCZ/17

Legislation referred to:

The Constitution of Zambia, Chapter 1 of the Laws of Zambia as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016.

Constitutional Court Act No. 8 of 2016.

Registration of Societies Act, Chapter 119 of the Laws of Zambia.

Constitutional Court Rules, Statutory Instrument No. 37 of 2016.

Works referred to:

Bronsteen, J and Fiss, O., 'The Class Action Rule'. Notre Dame Law Review, Volume 78:5, 2003.

Garner B.A. (ed), Black's Law Dictionary, 8th Edition. 2004.

Rules of the Supreme Court of England, 1965, White Book.

INTRODUCTION

[1] This is a Ruling on the respondent's Notice of Motion for Determination of Questions of Law arising in the Cause (Notice of Motion). The Notice of Motion was filed on 10th September, 2024. It is anchored on Order 14A/1/2 of the Rules of the Supreme Court of England, 1965 (White Book). It is accompanied by an affidavit in support (affidavit in support) and skeleton arguments.

[2] The Notice of Motion had posed the following questions for determination by this Court:

(i) Whether the petitioner has *locus standi* to institute this action on behalf of the Outdoor Advertising Association of Zambia when the petitioner is not registered as an office bearer as per Rule 15 (1) and (2) of the Societies Act, Chapter 119 of the Laws of Zambia?

(ii) Whether this Honourable Court has the requisite jurisdiction to entertain this action considering that the said action is not properly before this Honourable Court? And,

(iii) Whether instituting this petition amounts to multiplicity of actions and abuse of court process?

BACKGROUND

[3] Antecedents to the Notice of Motion are as follows: pursuant to Order IV, Rule 1 (1) of the Constitutional Court Rules, Statutory Instrument No. 37 of 2016 (CCR), the petitioner, on 31st May, 2024, filed a petition in this Court, against the respondent.

[4] The petition was amended by leave of Court on 11th June, 2024. It is accompanied by an amended affidavit verifying facts, answer and skeleton arguments.

[5] The petitioner filed the petition in a representative capacity of Chairperson of the Outdoor Advertising Association of Zambia (the OAAZ), a society engaged in the business of erecting advertisement

billboards and duly registered under the Registration of Societies Act, Chapter 119 of the Laws of Zambia (the Societies Act).

- [6] In the petition, the petitioner is alleging that the respondent, a local and planning authority for the Lusaka District, breached Articles 67(2)(a) and 199(2) (3) of the Constitution of Zambia, Chapter 1 of the Laws of Zambia as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016 (the Constitution).
- [7] That on 27th September, 2023, the Respondent passed a resolution under minute no. SC/09/09/2023 (the Resolution) increasing advertising fees by 100% and introducing a new planning permission fee called annual billboard management fee, fixed at an amount of K1,000. The stated fees are payable to the Respondent by members of the OAAZ.
- [8] Further, that the respondent began to implement the Resolution without first publishing it in the government gazette within a timeframe stipulated by Article 67(2)(a) of the Constitution and submitting an explanatory report to the National Assembly as required by Article 199(3) of the Constitution.
- [9] In the alternative, that the respondent has contravened Article 199 (2) of the Constitution on the ground that it did not issue a statutory instrument in order to vary its planning permission fees.

[10] Arising from the alleged breaches, the petitioner is seeking the following remedies:

- (i) A declaration that the Respondent's resolution dated 27th September, 2023 introducing the new annual billboard management fees and increasing the advertising fees by 100% is null and void for contravening the Constitution; and
- (ii) Costs for this action.

[11] The respondent is opposed to the petition and in doing so, it filed an answer, affidavit verifying the answer and skeleton arguments. Relevant to this Ruling, the respondent filed the Notice of Motion which seeks to dismiss the petition.

THE RESPONDENT'S NOTICE OF MOTION

[12] Particulars verifying the Notice of Motion are outlined in the affidavit in support sworn by Thelma Mafumba (the deponent), in her capacity as Senior Legal Assistant in the employ of the respondent.

[13] The deponent avers as follows: that the petitioner lacks *locus standi* to launch the petition because contrary to his assertion, he is neither a member nor chairperson of the OAAZ. That this is according to records kept by the Chief Registrar of Societies namely, a print-out and a letter dated 4th June, 2024, addressed to the Town Clerk of the respondent by the Acting Chief Registrar of Societies. The two

documents are collectively marked exhibit 'TM1' in the affidavit in support.

- [14] Of relevance to the Notice of Motion, the print-out in exhibit 'TM1' was generated by the office of the Registrar of Societies dated 3rd June, 2024. It is a list of office bearers for the OAAZ and the petitioner is not one of them. It shows that the chairperson of the OAAZ is Jennifer Njeri.
- [15] That being destitute of *locus standi* to launch the petition, the Court lacks jurisdiction to entertain the petition.
- [16] The respondent adds that the petition is a multiplicity of actions because it is anchored on the same subject matter and involves the same parties as Cause No. 2024/HP/0406 which the petitioner had previously instituted in the High Court. In support of this averment, the respondent exhibited an originating notice of motion marked exhibit 'TM2' in the affidavit in support of the Notice of Motion.
- [17] In the skeleton arguments, the respondent submitted that Order 14A of the White Book empowers this Court to entertain the Notice of Motion.
- [18] Citing Rule 15(1)(2) of the Societies Act, Chapter 119 of the Laws of Zambia (the Societies Act), the respondent reiterated that the petitioner lacks *locus standi* to sue on behalf of the OAAZ. That this

is because he is not a chairperson of the OAAZ as demonstrated by exhibit 'TM1' in the affidavit in support of the Notice of Motion. Accordingly, the petition is incompetently before the Court.

[19] In defining the term *locus standi*, the respondent adverted to Black's Law Dictionary, 8th Edition, that it is **'the right to bring an action or to be heard in a given forum'**.

[20] Reference was further made to the case of **R v Inland Revenue Commissioners, Ex parte National Federation of Self-Employed and Small Businesses Limited**¹, that *locus standi* is

the ability of the party to demonstrate to the court sufficient connection to and harm from the law and action challenged to support that party's participation in the issue.

[21] The respondent went on to submit that the absence of *locus standi* is fatal and the petition should on that basis be dismissed. For this proposition, we were referred to the holding of the Supreme Court in the case of **Shipe (Trustee for and on behalf of the Salvation Army of Zambia) and others v Victor Nalisa Mung'ambata and others (suing on behalf of the Parents Community School Committee)**² that **'locus standi goes to the root of the whole matter, which if resolved in favour of the defendant, will result into the whole case not proceeding any further'**.

- [22] Further, that the absence of *locus standi* entails that the petition is incompetently before this Court thereby divesting the Court of jurisdiction to entertain it. In support of this proposition, we were referred to the holdings of the Supreme Court in the cases of ***Chikuta v Chipata Rural Council***³, ***New Plast Industries v Commissioner of Lands and the Attorney General***⁴ and ***Crossland Mutinta and Others v Donovan Chipanda***⁵.
- [23] It is the respondent's further submission that the petition is a product of multiplicity of actions since the petitioner had previously instituted Cause number 2024/HP/0406 in the High Court, involving the same parties and subject matter.
- [24] It was stressed that courts in this jurisdiction frown upon multiplicity of actions as the practice has the potential to embarrass the administration of justice through the possibility of courts making conflicting decisions on the same subject matter.
- [25] In support of this argument, the respondent cited the cases of ***Hakainde Hichilema and 5 Others v Government of the Republic of Zambia***⁶; ***BP Zambia Plc v Zambia Competition Commission, Total Aviation and Export Limited and Total Zambia Limited***⁷ and ***Hamalambo v Zambia National Building Society***⁸.

THE PETITIONER'S RESPONSE

- [26] The petitioner is opposed to the Notice of Motion. In doing so, he filed an affidavit in opposition accompanied by skeleton arguments and list of authorities, on 16th September, 2024.
- [27] In his affidavit in opposition, the petitioner avers that contrary to the respondent's assertion, he is the chairperson of the OAAZ having been elected to the position on 11th November, 2021. In support of this averment, the petitioner exhibited a document marked 'CC6', to his affidavit in opposition.
- [28] The exhibit is a letter jointly signed by Mr. Kizito Mulaisho and Mr. Gary Rutherford, in their capacities as 'out-going chairperson' and 'out-going secretary' of the OAAZ, respectively. It is addressed to all members of the OAAZ. It states that Mr. Chipa Chibwe was elected as the new chairperson of the OAAZ at the annual general meeting of the OAAZ that was held on 11th November, 2021 and that he would take-over from Mr. Kizito Mulaisho.
- [29] The petitioner averred that the OAAZ has however not yet notified the Registrar of Societies about the change in the association's office bearers. This notwithstanding, the petitioner has been engaging the respondent in his capacity as chairperson of the OAAZ and the respondent has never questioned that capacity.

- [30] Further, that his name could not be found on records kept by the Registrar of Societies because the Registrar of Societies does not keep a list of members of the OAAZ. That Jennifer Njeri appearing as chairperson of the OAAZ on exhibit 'TM1' in the respondent's affidavit in support of the Notice of Motion, is no longer the chairperson of the OAAZ and has since confirmed this status in writing. In support of this position, the petitioner tendered documents marked exhibits 'CC8' and 'CC9' in the affidavit in opposition.
- [31] Exhibit 'CC8' is a letter dated 25th June, 2024, signed by a secretary of the OAAZ and addressed to Ms. Jennifer Njeri in which the former is asking the latter to confirm, for purposes of court proceedings, that the petitioner and not Ms. Jennifer Njeri, is now the chairperson of the OAAZ.
- [32] Exhibit 'CC9' is a letter dated 25th June, 2024 signed by Ms. Jennifer Njeri and addressed to the secretary of the OAAZ. The letter is a response to exhibit 'CC8' above to the effect that Ms. Jennifer Njeri is no longer the chairperson of the OAAZ and she understands that the petitioner is the serving chairperson.
- [33] The petitioner avers that his *locus standi* to launch the petition is derived from his interest in the outcome of the matter and cannot

therefore be extinguished by the failure of the OAAZ to register its office-bearers with the Registrar of Societies.

- [34] The petitioner disputed the respondent's assertion that the petition is a multiplicity of actions in view of Cause No. 2024/HP/0406. That this is because although the parties are the same, the petition and Cause No. 2024/HP/0406 relate to different causes of action namely, breach of constitutional provisions on the one part and breach of statutory provisions on the other, respectively.
- [35] In support of this averment, the petitioner exhibited the Originating Notice of Motion, affidavit in support thereof as well as skeleton arguments and list of authorities constituting Cause No. 2024/HP/0406. They are collectively marked as exhibit 'CC10' in the affidavit in opposition.
- [36] In a nutshell and relevant to the Notice of Motion, Cause No. 2024/HP/0406 is challenging the implementation of the increased outdoor daily advertising rates by 100% and the introduction of the annual billboard management fee of K1,000, conveyed by the Resolution. That this is because the new measures were imposed in breach of the procedure laid down by the requisite regulatory legal framework namely, sections 6 and 7 of the Business Regulatory Act No. 3 of 2014.

- [37] Further, that the petitioner is a member of the OAAZ by virtue of being a majority Shareholder, Director and Company Secretary of TC Promotions Limited, a company involved in outdoor advertising, duly registered with the Patents and Companies Registration Agency (PACRA) and enjoying membership of the OAAZ since 2012. In support of this averment, the petitioner exhibited documents marked exhibits 'CC1', 'CC2', 'CC3' and 'CC4', in his affidavit in support.
- [38] Exhibit 'CC1' is a computer printout from PACRA indicating that TC Promotions Limited was incorporated on 11th December, 2006. It further indicates that Chipa Kaunda Chibwe is a Shareholder, Director and Company Secretary of the company.
- [39] Exhibit 'CC2' is a letter dated 10th April, 2006 addressed to TC Promotions Limited by the respondent's Acting Director for City Planning. It is conveying the latter's approval of the former's application to erect directional signs billboards on major roads in the City of Lusaka.
- [40] Exhibit 'CC3' is titled 'TC Promotions Limited Billboard List 2021' and goes on to list 11 locations. Exhibit 'CC4' is an internal memorandum of the OAAZ dated 24th June, 2024 and signed by its Secretary. It indicates that TC Promotions, is one of its members.

- [41] In his skeleton arguments and list of authorities, the petitioner responded to the Notice of Motion by posing the following questions: First, that whether or not failure to notify the Registrar of Societies of the change in office-bearers of an association undermines the *locus standi* of the new office-bearers to sue on behalf of the association? This relates to the respondent's assertion that the petitioner lacks *locus standi* to launch the petition because he is not registered with the Registrar of Societies, as the chairperson of the OAAZ.
- [42] Second, whether or not the petition is a multiplicity of actions in view of Cause No. 2024/HP/0406.
- [43] Regarding the first question, the petitioner, as did the respondent, relied on Black's Law Dictionary, 8th Edition, for the definition of the term '*locus standi*'. He went on to submit that according to the Supreme Court in the case of **Nkumbula v The Attorney General**⁹, before the individual has *locus standi* to seek redress, there must be an actual, or threatened action in relation to himself.
- [44] The High Court cases of **Frank Bwalya (suing on behalf of himself and in his capacity as Executive Director of Change Life Zambia) v Attorney General**, **Katele Kalumba (sued in his capacity as the Secretary General of the Movement of Multi-**

party Democracy) and Willaim Banda¹⁰ and Richard Mumba and 3 Others v Electoral Commission of Zambia¹¹, were cited to stress the submission.

[45] The petitioner submitted that the question of 'sufficient interest' is a question of law mixed with facts. For this proposition, he cited the case of **Zambia Wildlife Authority and 3 Others v Muteeta Community Resources and Board Development Co-operation Society**¹².

[46] It was further submitted that notwithstanding that the petitioner has not been registered by the Registrar of Societies as the chairperson of the OAAZ, he nonetheless has sufficient interest in the matter and this is by virtue of his election as chairperson of the association. That this is more so because Rule 15(1)(2) of the Societies Act or any other law, does not divest a member of an association of *locus standi* on the ground of lack of registration with the Registrar of Societies. That the only penalty for non-compliance with Rule 15 of the Societies Act, is a fine. Therefore, to suggest that the provision includes stripping an office-bearer of *locus standi*, is to stray courts into legislating. The cases of **Citi Bank Limited v Suhayl Dudhia**¹³ and **Zambia Extracts Oils and Colourants Limited & Another v**

Zambia State Insurance Pension Trust Fund Board of Trustees¹⁴, were cited in support of this proposition.

- [47] The petitioner submitted that in the event we find that he lacks *locus standi*, we should invoke Order V of the CCR to substitute him with Jennifer Njeri who is still appearing on the Registrar's records as chairperson of the OAAZ.
- [48] Regarding the question of multiplicity of actions, the petitioner cited the cases of **Mukumbuta and Others v Mongu Meat Corporation Limited**¹⁵ and **Development Bank of Zambia and KPMG Peat Marwick v Sunvest Limited**¹⁶, to posit that the practice results from causes of actions involving the same parties and subject matter. Further, that courts in this jurisdiction disapprove of the practice.
- [49] Citing the cases of **Registered Trustees of the Archdiocese of Lusaka v Office Machine Services Limited**¹⁷ and **Kelvin Hang'andu and Company (A Firm) v Webby Mulubisha**¹⁸, the petitioner concurs that courts of law in this jurisdiction, frown upon multiplicity of actions. That however, the petition is not a multiplicity of actions relative to Cause No. 2024 /HP/0406 because the two Causes relate to different subject matters as outlined above.
- [50] That in any event, this Court lacks jurisdiction to entertain disputes involving contravention of statutory provisions, which is the subject

matter in Cause 2024/HP/0406. Similarly, the High Court lacks jurisdiction to entertain allegations of constitutional breaches which is the subject matter in the petition.

[51] That therefore, the issues in both Causes cannot be combined and brought either in the High Court or this Court as envisaged in the **Kelvin Hang'andu**¹⁸ case.

[52] The petitioner cited Articles 1(5) and 128(1) of the Constitution as well as the case of **Fredson Kango Yamba v The Principal Resident Magistrate, Anti-Corruption Commission and Attorney General**¹⁹ to posit that, except for matters that fall within the Bill of Rights, all matters relating to the Constitution, are a preserve of this Court.

THE RESPONDENT'S REPLY

[53] On 1st October, 2021, the respondent filed an affidavit in reply to an affidavit in opposition to the Notice of Motion accompanied by skeleton arguments which are fundamentally a recital of the averments and arguments in support of the Notice of Motion. For avoidance of repetition, they will not be rehashed.

THE HEARING

- [54] At the hearing on 6th November, 2024, counsel for both parties informed the Court that they would rely on their respective documents on record. They also made oral submissions which were essentially a recital of the same.
- [55] On behalf of the petitioner, Mr. Chulu additionally submitted that in the event we find that the petitioner is not the chairperson of the OAAZ, we should find that he is still entitled to institute the petition on the basis of Article 2 of the Constitution. That this is because Article 2 of the Constitution has extended *locus standi* to 'every person' to defend the Constitution.
- [56] When asked by the Court to address it on section 11 of the Constitutional Court Act No. 8 of 2016 (CCA), Mr. Chulu submitted that the provision is in favour of the petitioner in as far as it permits a party to sue in person or on behalf of an association.
- [57] Counsel added that dismissing the petition on grounds of *locus standi* would violate Article 118 (2)(e) of the Constitution which provides that matters should be heard on the merits.
- [58] In reply and on behalf of the respondent, Ms. Sikwibele essentially repeated the respondent's averments and skeleton arguments, save for the addition of the following: that Article 2 of the Constitution and section 11 of the CCA does not apply to the petitioner because

he has not instituted the petition in person as envisaged by the provision. Rather, the petitioner has instituted the petition in a representative capacity of chairperson of the OAAZ, which he is in fact not.

CONSIDERATION AND DETERMINATION.

[59] We have considered the Notice of Motion, the parties' respective affidavits, skeleton arguments and oral submissions. The Notice of Motion is beseeching us to dispose of the petition pursuant to Order 14A of the White Book to which our jurisdiction is endeared by Order 1, rule 3 of the CCR.

[60] Suffice it to state at the outset, that the Notice of Motion is properly before us because Order 14A of the White Book empowers us to dispose of a matter on a question of law, without the necessity of a full trial. Quoting only relevant portions, the provision provides as follows:

1(1) The Court may upon the application of a party or of 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 operation is suitable for determination without a full trial of the action, and**
- (b) Such determination, will finally determine (subject only to any possible appeal) the entire cause or matter on any claim or issue therein.**

(2) Upon such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just...

2 An application under rule 1 may be made by summons or motion...or may be made orally in the course of any interlocutory application to the Court.

[61] In the present case, the Notice of Motion, has presented three questions set out in paragraph 2 of this ruling. Questions (i) and (ii) shall be determined together because they are intertwined. In the result, the combined question shall be, 'whether the petitioner has *locus standi* to institute the petition on behalf of the OAAZ and consequently whether this court has jurisdiction to entertain the petition?'

[62] Thereafter, we shall state our position on question (iii).

Whether the petitioner has *locus standi* to institute the petition on behalf of the OAAZ and consequently whether this court has jurisdiction to entertain the petition?

[63] We shall not labour into defining *locus standi* because parties are in consensus and rightly so on this aspect. We agree with them that *locus standi* is the gateway to courts. Without it, a claimant has no access to a court and neither does the court have jurisdiction to host his or her claim.

[64] It is for this reason, that whenever a challenge to *locus standi* arises, the court should resolve it in priority to a determination of the merits

of the main dispute. The rationale being that judicial powers are constitutionally limited to cases in which the parties have legal capacity or standing.

- [65] In pursuit of questions (i) and (ii), the respondent has contended that the petitioner lacks *locus standi* to institute the petition. That this is because the capacity of chairperson of the OAAZ pursuant to which he launched the petition, is not supported by records kept by the Registrar of Societies namely, exhibit 'TM1' in the affidavit in support of the Notice of Motion.
- [66] This aspect is not in dispute because exhibit 'TM1' indicates that the chairperson of the OAAZ is Ms. Jennifer Njeri. Under the circumstances, the respondent has established a *prima facie* case that the petitioner has not substantiated the representative capacity in which he has launched the petition. The suggestion that the petitioner is the chairperson of the OAAZ therefore solely lies in the petitioner's peculiar knowledge.
- [67] In the case of **Joseph Malanji v Charles Abel Mulenga and Electoral Commission of Zambia**²⁰, this Court, *inter-alia*, held that where a *prima facie* case has been established, or where a matter lies in the peculiar knowledge of a party, the evidential burden shifts onto that party.

- [68] Applied to the present case, this principle entails that the evidential burden to prove that the petitioner is the chairperson of the OAAZ, lies on the petitioner since this aspect is within his peculiar knowledge.
- [69] On his part, the petitioner contends that he does not appear on the Registrar of Societies' records (the print-out in exhibit 'TM1' in the affidavit in support of the Notice of Motion) because the OAAZ did not effect the change as required by Rule 15 of the Societies Act Rules.
- [70] This notwithstanding, the petitioner contends that he has *locus standi* to launch the petition and this is derived from his election as chairperson of the OAAZ on 11th November, 2021. For this proposition, he relied on exhibits 'CC6', 'CC8' and 'CC9' in his affidavit in opposition of the Notice of Motion. That this is further supported by his shareholding, directorship and secretariat in TC Promotions Limited which is itself a member of the OAAZ. In support of this argument, the petitioner relied on exhibits 'CC1-CC4' in his affidavit in opposition to the Notice of Motion.
- [71] The petitioner further contends that there is no law (Rule 15 of the Societies Act Rules inclusive) that strips him of *locus standi* to

launch the petition, on the ground of the OAAZ's failure to effect the change.

- [72] We find it appropriate, at this stage, to underscore the settled principle that a body that is registered under the Societies Act, can only sue or be sued in a representative capacity.
- [73] According to the Malawian case of **Nyasaland Trade Union Congress v Nkolokosa**²¹ and the *English case of Campbell v Thomson and Another*²², with which we are persuaded, a suit that is commenced in a 'representative capacity', is one that is instituted by persons fairly representing the body.
- [74] In this regard and applied to the present case, a suit instituted by a chairperson of an unincorporated body on behalf of the body, can be said to have been instituted in a representative capacity.
- [75] It is not in dispute that the petitioner instituted the petition in the representative capacity of chairperson of the OAAZ. It is also not in dispute that the petitioner does not appear in that capacity or at all, on the records kept by the Registrar of Societies.
- [76] It is not enough for an individual to be appointed or elected as an office-bearer for a registered association. Rather, formal recognition of such an office-bearer is completed upon successful registration by the Registrar of Societies. It is trite that this is what settles the

status of persons claiming to represent an organisation registered under the Societies Act. We underscore the requirement for a successful registration because the Registrar of Societies has discretion to either accept or decline registration of an office-bearer.

- [77] In the present case, the exhibits tendered in support of the petitioner's claim that he is the chairperson of the OAAZ, are irrefutably internal communications within the OAAZ. This is confirmed by the petitioner's own admission that changes in office-bearers of the OAAZ have not yet been effected with the Registrar of Societies.
- [78] Having not demonstrated that he has been successfully registered as the chairperson of the OAAZ by the Registrar of Societies, we are of the view that the petitioner lacks *locus standi* to launch the petition in such a representative capacity.
- [79] We are mindful of the petitioner's argument that regardless of the finding whether or not he is the chairperson of the OAAZ, Article 2 of the Constitution and section 11 of the CCA bestow him with *locus standi* to institute the petition.
- [80] We have carefully examined both provisions. They provide for *locus standi* and mechanism of defending the Constitution or invoking the Court's jurisdiction bestowed by Article 128 of the Constitution. They

effect. Thus, whereas Article 2 of the Constitution lays down a principle governing the defence and preservation of the Constitution, section 11 of the CCA provides the mechanism for implementing the principle. Put differently, to give effect to Article 2 of the Constitution, a person must comply with section 11 of the CCA by approaching the Court under one of the subsections.

[81] Accordingly, Article 2 mandates 'every person' to defend the Constitution and to resist or prevent its overthrow, suspension or illegal abrogation by any person.

[82] Section 11 of the CCA provides for the mechanism of implementing this mandate. Thus, section 11(1) provides for actions instituted in person. By this provision, an applicant or petitioner seeking to defend the Constitution or to invoke this Court's jurisdiction pursuant to Article 128 of the Constitution, can approach the Court in person or by a practitioner.

[83] For avoidance of doubt, we thus reproduce the provision: **'11(1) The parties to a matter before the Court may appear in person or be represented by a practitioner and appear by a practitioner'**.

[84] Section 11(2) of the CCA relates to representative actions. It provides as follows:

(2) Subject to subsection (1), a Court proceeding may be instituted by—

(a) a person acting on behalf of another person who cannot act in their own name;

(b) a person acting as a member of, or in the interest of, group or class of persons;

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members.

[85] Our understanding of section 11(2) of the CCA is that it empowers a person seeking to defend the Constitution or to invoke this Court's jurisdiction bestowed by Article 128 of the Constitution, to institute an action:

(i) on behalf of another who is incapable of acting in person. In other words, a person does not have *locus standi* to institute an action on behalf of a person who is capable of petitioning in their own behalf;

(ii) on behalf of a class or group of persons to which he or she is a member. Put differently, a person has no *locus standi* to institute proceedings on behalf of a group or class of persons to which he or she is a stranger. On the other hand, an association can act on behalf of one or more of its members. And;

(iii) in the public interest.

- [86] Section 11(3) of the CCA empowers the Public Protector to institute an action before this Court, in accordance with the Constitution.
- [87] Turning to the petition, it is clear that section 11(1) of the CCA does not apply to the petitioner because he did not institute the petition in person. Similarly, the following provisions of the CCA are not applicable in the circumstances of this case: section 11(3) of the CCA because the petitioner is not a Public Protector; section 11(2)(a) of the CCA because the petitioner has not instituted the proceedings on behalf of a person who cannot petition in their own behalf, and section 11(2)(c) because there is no evidence that the petitioner is acting in public interest.
- [88] The provisions which appear to relate to the petitioner's argument, are sections 11 (2) (b) and (d) of the CCA. This is in light of the petitioner's claim that he instituted the petition in the capacity of chairperson of the OAAZ. However, as explained already, the entire section 11(2) of the CCA requires a person seeking to defend the Constitution or to invoke this Court's jurisdiction, to firstly demonstrate the representative capacity in which he or she has instituted the proceedings. Otherwise, there would be no way the Court would ascertain if the beneficiary of the action is incapable of instituting the action in person; whether the applicant or petitioner is

a member of the class or group of persons on whose behalf he or she has instituted the proceedings or whether the petitioner is acting in public interest.

[89] The requirement for a person instituting an action in a representative capacity to first demonstrate his or her representative capacity, is supported by the principle that the resulting judgment will bind the persons he or she is representing. Accordingly, John Bronsteen and Owen Fiss in their article entitled 'The Class Action Rule' published in Notre Dame Law Review, 2003. Volume 78:5, state as follows at p.1419:

in this way the class action provides for the private enforcement of laws that are aimed at protecting the public. Yet it contains a risk: if the named plaintiff loses in court then all of the members of the class have lost and cannot relitigate their claims. Some people who might never even have known about the law suit and who certainly never participated in it will suddenly find themselves denied access to the court system, on the theory that they were already represented by the named plaintiffs who litigated the action on their behalf.

[90] Flowing from the foregoing, our finding is that contrary to the petitioner's argument, Article 2 of the Constitution and section 11 of the CCA, do not aid his position. This is because ultimately, section 11(2)(b) and (d) of the CCA, which seems to relate to his circumstances, require him to prove his alleged position of

chairperson of OAAZ pursuant to which he instituted the petition. However, the petitioner has failed to prove this aspect.

[91] Our finding therefore is that he has no *locus standi* to institute these proceedings.

[92] In the event we find that he lacks *locus standi* to institute this petition, the petitioner urged us to invoke Order V of the CCR and thereby substitute him with Jennifer Njeri, the individual appearing on exhibit 'TM1' in the affidavit in support of the Notice of Motion, as the chairperson of the OAAZ.

[93] Order V of the CCR states as follows:

1. Where the petitioner or applicant is in doubt regarding the persons from whom redress should be sought, the petitioner or applicant may join two or more respondents in order that the question as to which of the respondents is liable, and to what extent, may be determined between or among all parties.
2. An originating process shall not be defeated by reason of the misjoinder or nonjoinder of parties, and the Court may, in every proceeding deal with the matter in dispute.
3. Where proceedings have been instituted in the name of the wrong person or petitioner or applicant, or where it is doubtful whether proceedings have been instituted in the name of the right petitioner or applicant, the Court may, at any stage of the proceedings, if satisfied that the proceedings have been instituted through a mistake made in good faith and that it is necessary for the determination of the matter in dispute, order any other person to be substituted or added as a petitioner or applicant upon such terms as it thinks fit.

- [94] Having examined the provision, we find that it is not applicable to the circumstances of this case. This is due to the following: Order V, rule 1 envisages a situation where a petitioner or applicant is uncertain regarding persons from whom redress should be sought. Such a situation is not in issue in the petition.
- [95] Order V, rule 2 of the CCR is about misjoinder and non-joinder. Similarly, this aspect is not in issue in the petition. What is in issue is whether or not the petition was instituted by a correct petitioner.
- [96] Relevant to the present case, Order V, rule 3 of the CCR applies to situations where proceedings were instituted in the name of a wrong person, through a mistake made in good faith. To the contrary, this petition was not instituted through a mistake as clearly, it was instituted with knowledge (demonstrated by the petitioner's own admission), that the petitioner is not formally recognised as chairperson of the OAAZ since he does not appear in the records kept by the Registrar of Societies.
- [97] Based on the foregoing, we find merit in questions (i) and (ii) posed in the Notice of Motion. Accordingly, the petitioner lacks *locus standi* to institute the petition and the result divests this Court of jurisdiction to entertain the petition. Flowing from this, we wish to address the petitioner's argument that dismissing the petition on the basis of lack

of *locus standi*, would violate Article 118(2)(e) of the Constitution. Article 118(2)(e) of the Constitution obligates courts to administer justice without undue regard to procedural technicalities. In the circumstances of this case, we understand the petitioner to suggest that lack of *locus standi* on his part to institute this petition and consequently lack of jurisdiction on the part of this Court to entertain the petition, is a procedural technicality. We find this suggestion misconceived because jurisdiction is not a procedural technicality. This, we guided in a plethora of cases such as ***Kabisa Elizabeth Handia Ngwira v National Pension Scheme Authority***²³ in the following terms:

the mode of commencement of a matter affects the jurisdiction of the court, therefore, a matter that is wrongly commenced cannot be considered as a procedural technicality to fall under the provisions of Article 118 2(e) of the Constitution.

[98] In the circumstances, we find it otiose to consider question (iii) namely, whether or not the petition is a multiplicity of actions.

CONCLUSION

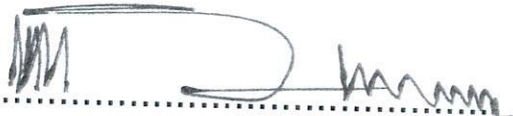
[99] The petitioner lacks *locus standi* to institute this petition as he has failed to substantiate his capacity of chairperson of the OAAZ. For this reason, Article 2 of the Constitution read with section 11 of the CCA, do not aid the petitioner's position because in the

circumstances of the case, the two provisions ultimately require the petitioner to demonstrate his capacity of chairperson pursuant to which he has instituted the petition.

[100] For the reason stated above, we find this, a proper case for which we should invoke our powers bestowed by Order 14A of the White Book, to dismiss the petition for lack of *locus standi*.

[101] The parties shall bear their respective costs.


.....
M.M. MUNALULA (JSD)
PRESIDENT OF THE CONSTITUTIONAL COURT


.....
A.M. SHILIMI
DEPUTY PRESIDENT OF THE CONSTITUTIONAL COURT


.....
K. MULIFE
CONSTITUTIONAL COURT JUDGE