

IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
(CIVIL APPEALS JURISDICTION)

2023/HP/A32



BETWEEN:

EMMY MOONGA (SUED IN HIS CAPACITY AS  
CHIEF SIMAMBA)

1<sup>ST</sup> APPELLANT

VANESSA CHIBOOLA HOPE-LEWIS

2<sup>ND</sup> APPELLANT

AND

MATTHEWS MALUFU

1<sup>ST</sup> RESPONDENT

PATSON MALUFU

2<sup>ND</sup> RESPONDENT

Before the Hon. Mrs. Justice R. Chibbabbuka on the 11<sup>th</sup> day of June,  
2024

For the Appellant: Mrs. M.K Kombe, Legal Aid Counsel, Legal Aid Board

For the Respondents: In person

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## JUDGMENT

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### Cases referred to:

1. *Upton Vs Walker* (1971) Z.R 192
  2. *Frank Bwalya (suing on behalf of himself and in his capacity as Executive Director of Change Life Zambia Limited) Vs Attorney General, Katele Kalumba (sued in his capacity as the Secretary General of the Movement of Multi-Party Democracy) William Banda* (2012) Z.R
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3. *Daniel Mwale Vs Njolomole Mtonga (sued as Administrator of the Estate of the late Gabriel Siwanamutenje Kapuma Mtonga), The Attorney General SCZ Judgment No. 25 of 2015*
4. *BP Zambia Plc Vs Zambia Competition Commission, Total Aviation and Export Limited Total Zambia 2012 Volume 3*
5. *Shell & BP Zambia Limited Vs Conidaris & Others (1975) Z.R 174*
6. *The People Vs The Registrar of the University of Zambia, Ex Parte Chitalu Gozo Lumbwe SCZ/8/40/1997*
7. *Faustine Kabwe and Another Vs Justice Ernest Sakala and 2 others SCZ No. 25 of 2012*
8. *African Banking Corporation Zambia Limited Vs Copper Harvest Foods Limited and 3 others Court of Appeal No. 18 of 2021*
9. *Derrick Chitala (as Secretary of the Zambia Development Congress) Vs The Attorney General (1995) Z.R*
10. *City Express Service Limited Vs Southern Cross Motor Limited (2007) Z.R 263, 265*
11. *Wilhelm Roman Buchman Vs The Attorney General (1993-1994) Z.R 131*

**Legislation referred to:**

*The High Court Act, Chapter 27 of the Laws of Zambia*

*The Lands Tribunal Rules Statutory Instrument No. 90 of 1996*

*The Local Court Act Chapter 29 of the Laws of Zambia*

*The Rules of the Supreme Court of England 1965*

**Other works referred to:**

*Black's Law Dictionary, Bryan A. Garner*

*G. Thornton on Legislative Drafting, Fourth Edition at page 103*

*Zambian Civil Procedure Commentary and Cases, Volume 1, Patrick Matibini, LexisNexis, 2017*

**1.0 Introduction**

This is an appeal by the 1<sup>st</sup> appellant, Emmy Moonga in his capacity as Chief Simamba, against the granting of an injunction by the Lands Tribunal in its Ruling dated 17<sup>th</sup> May, 2023.

## 1.1 Background

**1.1.1** The respondents who are complainants in the Lands Tribunal filed a complaint before the Lands Tribunal on the 24<sup>th</sup> March, 2022 against Emmy Moonga (sued in his capacity as Chief Simamba), the 1<sup>st</sup> appellant in this matter, and Vanessa Chiboola Hope Lewis who is cited as the 2<sup>nd</sup> appellant herein. The respondents in their complaint claim the following reliefs:

- i) A declaration that the complainants are the rightful and legal owners of the 140 hectares of land situate in Chilongo Village in Simamba Chiefdom Siavonga, southern province;
- ii) An order directing the 1<sup>st</sup> respondent to give consent to the complainants herein in order for them to process title deeds and all other documents for the 140 hectares of land situated in Chilongo Village in Simamba Chiefdom, Siavonga, Southern province, in the name of the complainants herein;
- iii) An order directing the 2<sup>nd</sup> respondent to vacate the disputed land in Chilongo Village in Simamba Chiefdom, Siavonga, Southern Province;
- iv) An order of injunction restraining the respondents, their agents, servants or whomsoever from entering upon, interfering, selling or carrying out any developmental activities on the 140 hectares of land situated in Chilongo Village in Simamba Chiefdom, Siavonga in southern province until final determination from this honourable court.

**1.1.2** The complainants in the court below filed an application for an injunction before the Lands Tribunal on the 24<sup>th</sup> March, 2022 where in their affidavit in support they aver that the 1<sup>st</sup> respondent (the 1<sup>st</sup> appellant herein) *inter alia* chased them from the disputed land and has persisted in stopping the complainants from carrying out developmental activities on the said land.

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**1.1.3** The complainants being administrators of the estate of their late father, a subject of Chief Simamba and having acquired the subject land in 1978, at the time of his demise was in the process of having the said land converted to leasehold.

**1.1.4** The 1<sup>st</sup> appellant did not file an affidavit in opposition to the injunction but instead raised preliminary issues which issues were not determined by the Lands Tribunal.

**1.1.5** The Lands Tribunal instead went ahead to hear the injunction based on the complainants' application and the opposition that was filed by the 2<sup>nd</sup> respondent therein and it confirmed the ex parte order of an interim injunction it had granted on the 24<sup>th</sup> March, 2022.

## **2.0 The grounds of appeal**

The 1<sup>st</sup> appellant has raised four grounds of appeal as follows:

1. The Honourable Tribunal erred in law when it ordered for an injunction in favour of the respondents before hearing and determination of the preliminary issue that was raised and filed by the 1<sup>st</sup> appellant on 4<sup>th</sup> October, 2022.
2. That the Honourable Tribunal erred in law and in fact when it ordered an injunction in favour of the respondents before determination of the preliminary issued that dealt with the locus standi of the respondents bringing the matter before it.
3. That the Honourable Tribunal erred in law and fact when it ordered for an injunction against the appellants before determining the question of the cause or matter brought by the respondents being statute barred as it deals with the jurisdiction of this Honourable Tribunal to hear and issue any order in this matter.

4. That the Honourable Tribunal erred in law and in fact when it ordered an injunction in favour of the respondents herein despite them failing to exhibit any documentation of ownership of the land.

### **2.1 The Appellant's Heads of Arguments**

The 1<sup>st</sup> appellant filed into Court supporting **heads** of arguments on the 27<sup>th</sup> July, 2023.

**2.2** Counsel argued grounds one and two together. For the jurisdiction of the Lands Tribunal to make a determination of a preliminary question of law reference was made to *Rule 20* of the *Lands (The Lands Tribunal) Rules Statutory Instrument No. 90 of 1996* which provides as follows:

*“(1) The Chairperson may, on the application of any party to the proceedings, order any point of law, which appears to be in issue in the proceedings to be disposed of at a preliminary hearing of the Tribunal.*

*“(2) If, in the opinion of the Tribunal, the decision on the point of law substantially disposed of the proceedings, the Tribunal may order that the proceedings be treated as the hearing of the case or make such other order as may be just.”*

**2.3** The court was also referred to *Order 14A* of the *Rules of the Supreme Court of England, 1965* for the argument that the court may determine any question of law or construction of a document if such determination will finally determine the proceedings or an issue therein. Counsel also referred to **Black's Law Dictionary, Bryan A. Garner** for the definitions of the terms “jurisdiction” and “locus standi” as follows:

*“jurisdiction – court's power to decide a case or issue a decree”*

*“locus standi – the right to bring an action or to be heard in a given forum.”*

Counsel argued that not anyone can bring an action before a court of law as they need to possess *locus standi* to bring that cause or action before court and that one cannot therefore bring an action before a court of law if they do not have *locus standi*.

**2.4** It was counsel’s submission that the 1<sup>st</sup> appellant made an application for the determination of preliminary issues *in limine videlicet* as follows:

- 1) *Whether the complainants who are beneficiaries to the deceased estate can sue in their own capacity?*
- 2) *Whether the complaint is supposed to demonstrate administrators suing on behalf of beneficiaries?*
- 3) *Whether the local court can appoint administrators for an estate involving land whose value is more than K50.00?*
- 4) *Whether this Honourable court should dismiss the complaint and supporting affidavit for irregularity?*

Counsel went on to submit that the aforementioned questions require determination *in limine* but the tribunal proceeded to grant an injunction before determination of the preliminary issues.

**2.5** That it is trite law that causes of action other than for defamation survive the claimant’s death, and personal representatives of the estate can litigate the matter. The court was referred to **Zambia Civil Procedure (Commentary and Cases) Volume 1** where the learned author **Patrick Matibini on page 56** states that an administrator of an estate is appointed by grant of letters of administration, and the executor named in the will is appointed by the court through a grant of probate. That, therefore where the estate of the deceased is suing or being sued, the full names of the deceased personal representative

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(either executor or administrator) should be given followed by the words as representative of X deceased. Counsel contended that it was laid down in the case of **Upton Vs Walker**<sup>1</sup> that where a suit is instituted by a purported representative, when there is no such representative, such is a nullity. That as such, the law is that one who brings an action in their capacity as a personal representative should possess a valid grant of either letters of administration or probate.

**2.6** Counsel argued that one of the issues raised for determination in the Lands Tribunal has to deal with *locus standi* of the complainants (the respondents herein). That the question raises an issue of whether the respondents rightly brought the action before the Lands Tribunal as the respondents did not exhibit valid letters of administration as the value of the estate exceeds K50.00, which exceeds the limit. For this argument, reference was made to *Section 43 (2)* of the *Local Court Act Chapter 29* of the *Laws of Zambia* which provides that the Local Court cannot deal with estates that exceed K50,000.00 (un-rebased). It was counsel's considered view that the respondents do not have valid letters of Administration. Further, that these are pertinent questions that require the determination *in limine* and it was a misdirection for the Lands Tribunal to proceed to issue an order of injunction before determining the preliminary issues raised.

**2.7** The court was referred to the case of **Frank Bwalya (suing on behalf of himself and in his capacity as Executive Director of Change Life Zambia Limited) Vs Attorney General, Katele Kalumba (sued in his capacity as the Secretary General of the Movement of Multi-Party Democracy) William Banda**<sup>2</sup> where it was stated as follows:

*"It is trite law that in order to sue in a court of law, a litigant requires locus standi in judicio, or standing. The issue of standing is one to be decided in limine. That is, before the substance of the case is*

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*presented. Thus, standing concerns whether the person who approaches a Court is the appropriate person to present the matter to the Court for adjudication. The common law rules of standing are fairly rigid. An applicant must be able to show a sufficient personal and direct interest in a case. The common law recognizes no actiones populares, or class action.”*

**2.8** Counsel argued that issues *in limine* have to be determined before the substance of the matter is determined and that as it was brought out in the **Frank Bwalya** case, the party to approach the court to present a matter for adjudication should be appropriate. That not just anyone can present a matter for adjudication before the court as they must have sufficient interest and that *locus standi* is pivotal to litigating a matter as such all issues *in limine* have to be determined before the substantive issues are determined. It was counsel’s further argument that rules regarding standing are rigid and a person seeking to litigate or have a matter adjudicated before the courts of law must have *locus standi*. That as such, the Lands Tribunal erred when it granted an order of injunction before determining the preliminary questions raised that deal with *locus standi* and the court should not have granted an interim injunction to litigants whose *locus standi* is being challenged.

**2.9** In relation to ground three, reference was made to *Section 4 Rule 3* of the *Limitations Act* which provides that:

*“No action shall be brought by any other person to recover land after expiration of twelve years from the date of which the right of action accrued to him or, if it first accrued to some person through whom he claims to that person.”*

Counsel contended that the respondents in their affidavit before the Lands Tribunal deposed to the fact that they first saw the 2<sup>nd</sup> respondent on the land in dispute between 2005 and 2006. Further that they only brought this action

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to the Lands Tribunal on the 24<sup>th</sup> March, 2022 which is beyond the 12 year time period within which an action for recovery of land can be litigated before a court of law. That the Lands Tribunal at paragraph 4.10 of its Ruling addressed the question of the matter brought by the respondents being statute barred and concluded that this was an issue that fell to be determined at the hearing of the complaint by the parties leading evidence. It was counsel's considered view that the Tribunal erred in so holding as the question whether the matter is statute barred has to be determined *in limine* as it hinges on jurisdiction.

**2.10** Counsel contended that the law through the *Limitation Act* provides for periods within which causes of action can be litigated and that if an action is not brought to court within the period provided for by law, then that action is statute barred and the court ceases to have jurisdiction to preside over such matter. For this argument, the court was referred to the case of **Daniel Mwale Vs Njolomole Mtonga (sued as Administrator of the Estate of the late Gabriel Siwanamutenje Kapuma Mtonga), The Attorney General**<sup>3</sup> where the Supreme Court held that:

*"...The Statute of Limitation when raised, brings forth a serious legal question as to whether the court has jurisdiction to entertain the action before it, given that it was brought outside the limit period. It hardly bears repeating that the issue of jurisdiction is a threshold question and a lifeline for continuing any proceedings. Where a court holds the opinion that it has no jurisdiction, the very basis for continuation of the proceedings before it – it must forthwith cease to deal with that matter. In our view, the issue of statutory bar when raised is as much about the jurisdiction of the court as it is a statutory defence for a party. It is a legal point touching on both the court's jurisdiction and a provision of a statute..."*

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**2.11** It was counsel's further argument that in the **Daniel Mwale** case it was also stated that:

*"...time begins to run when there is a person who can sue and another to be sued, when all facts have happened which are material to be proved to entitle the plaintiff succeed..."*

That from the foregoing case, it was clear that the issue of limitation is of fundamental importance and has to be adhered to strictly. Reference was also made to the case of **BP Zambia Plc Vs Zambia Competition Commission, Total Aviation and Export Limited Total Zambia**<sup>4</sup>, wherein it was emphasized that time limitations have to be strictly followed when the court held that:

*"Although Order 3/5/1 of the Rules of the Supreme Court empowers the court to extend or abridge the time within which certain acts should be done, the court has no discretion to extend or abridge time where a statute provides no such discretion."*

**2.12** It was counsel's submission that the Lands Tribunal erred when it held that the question of whether the matter is statute barred falls to be determined on hearing of the complaint. This is due to the fact that this question hinges on the jurisdiction of the Tribunal to preside over the matter and to grant or issue orders. It was counsel's considered view that the Tribunal should have determined the question on whether the matter or cause is statute barred before issuing the injunction as it would have determined whether they possess the jurisdiction to issue the order of interim injunction.

**2.13** With regard to ground four, counsel argued that the respondents omitted to exhibit any documentation to support their claim for an interest in the land or that their father owned the land in that village. Counsel argued further that the Tribunal should have considered whether the respondents have sufficient

interest in the land before ordering for an injunction in their favour. For this argument, the court was referred to the case of **Shell & BP Zambia Limited Vs Conidaris & Others**<sup>5</sup> where the Supreme Court held that:

*“A court will not generally grant an interlocutory injunction unless the right to relief is clear and unless the injunction is necessary to protect the plaintiff from irreparable injury...”*

**2.14** From the foregoing case, counsel argued that the respondents’ relief in this *casu* was not clear and the court should not have granted an injunction more so that the respondents did not even exhibit the village register to show that they or their late father have sufficient interest in the land in dispute and the extent of the same. Counsel submitted that the Tribunal erred when it ordered for an injunction in favour of the respondents.

### **3.0 The Respondent’s Heads of Argument**

The respondents filed their supporting heads of arguments on the 25<sup>th</sup> August, 2023.

**3.1** In ground one, the respondents argued that the appellant’s argument is essentially that the Lands Tribunal should not have gone ahead to render a Ruling on an application for an injunction before dealing with the preliminary issues raised by the appellant. The respondents argued that this suggests that the Tribunal were mandated or obligated to determine the preliminary issues before determining the application of the injunction. It was the respondents’ further argument that the appellant placed reliance on *Order 20* of the *Lands Tribunal Rules, Statutory Instrument No. 90 of 1996* and *Order 14A* of the *Rules of the Supreme Court of England and Wales 1965 (White Book)* which on perusal of these two provisions shows that they both have the operative word “may” and not “shall”. In other words, *Rule 20* provides that the Chairperson “may” order for the determination of any point of law at a preliminary hearing while

*Order 14A* equally provides that the court “may” determine any question of law at any stage of the proceedings where it appears that it is suitable to do so without delving into the main matter.

**3.2** The respondents argued that the use of the word “may” confers a discretionary and not a mandatory power meaning that it was within the discretion of the Tribunal to decide whether to deal with the preliminary issues before passing a Ruling on the injunction or after that. To buttress this argument, reference was made to the cases of **The People Vs The Registrar of the University of Zambia, Ex Parte Chitalu Gozo Lumbwe<sup>6</sup>**, and **Faustine Kabwe and Another Vs Justice Ernest Sakala and 2 others<sup>7</sup>**. Reference was also made to **G. Thornton on Legislative Drafting, Fourth Edition at page 103**.

**3.3** The respondents went on to argue that after they filed their complaint and an application for an interim injunction on the 24<sup>th</sup> March, 2022 before the Lands Tribunal, an inter-parte hearing was held on the 9<sup>th</sup> September, 2002. That the appellant only filed in his affidavit in opposition on the 4<sup>th</sup> October, 2022 together with the application to raise the preliminary issues. It was the respondents’ view that it would have been prejudicial to the respondents if the Tribunal would have proceeded to consider the documents that were filed in by the appellant after the hearing of the respondents’ application. This is because the respondents would have been deprived of an opportunity to respond to whatever assertions of fact contained in that affidavit in opposition. It was argued by the respondents that they believed that the Tribunal considered this and that is why in its Ruling dated 17<sup>th</sup> May, 2023, no reference is made to the affidavit in opposition filed in by the appellant.

**3.4** The respondents went on to argue that they believed that the Tribunal applied the same line of reasoning in dealing with the preliminary issues that were raised after the parties had already appeared for the hearing of the

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interim injunction. This was their view because at the time of filing the preliminary issues, the Ruling for the injunction was reserved and if the Tribunal decided to proceed to hear the preliminary issues, then it would have created an absurd scenario where the parties would have appeared for two hearings on two different applications before a Ruling was delivered on either.

**3.5** The respondents posed a question as to whether the raising of preliminary issues, act as a stay of proceedings or does it take priority over any pending issue that is there for determination before the court. To answer this question, the court was referred to the case of **African Banking Corporation Zambia Limited Vs Copper Harvest Foods Limited and 3 others**<sup>8</sup> where the respondents took out a Notice of Motion to raise preliminary issues before the filing in of a conditional memorandum of appearance. In dismissing their application for being incompetent, the court guided that the issues of entering appearance was already pending and had to be dealt with first before the court could proceed to consider the preliminary issues raised. On this basis, the respondents in *casu* argued that the mere filing of an application to raise preliminary issues does not entail that the proceedings are stayed until that application is disposed of. It was the respondents' considered view that if there is an issue already pending before the court, the court is empowered to consider the earlier pending issue before considering the preliminary issues raised. As such, the Tribunal was on firm ground when it proceeded to pass a Ruling on the application for an interim injunction before hearing and determination of the preliminary issues by the appellant. For this reason, the first ground of appeal must fail.

**3.6** In response to ground two as to whether the Tribunal should have determined whether the respondents had *locus standi* before determining the application for an injunction, the respondents argued that at the time the appellant filed his preliminary issue, the application for an interim injunction had already been heard and a Ruling reserved. The respondents submitted that

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the only way that the Tribunal could have halted the passing of its Ruling on the application for an interim injunction and prioritize the determination of the preliminary issues is if it was mandatory for it to determine the preliminary issues before anything else regardless of the stage at which the proceedings were. The respondents argued that it has been clearly shown that the power to determine preliminary issues by the Tribunal is discretionary and not mandatory. This implies that the Tribunal has a choice to deal with the preliminary issues immediately they are raised or at any other time that the interests of justice demand at the time. As such, when the Tribunal proceeded to pass its Ruling on the interim injunction without hearing and determining the preliminary issues, it was on firm ground as it was exercising its discretionary power.

**3.7** The respondents argued in the alternative that should this court be of the view that the issue of *locus standi* was to be determined before the passing of the Ruling on the interim injunction, they were of the view that the same would have been determined in favour of the respondents. That *locus standi* as defined by the appellant refers to the right that someone has to bring a legal action or to be heard in a given forum. The respondents went on to argue that if the Tribunal were to proceed to determine the preliminary issues, it would have been faced with the question as to whether the respondents have a right to bring this action that concerns ownership of a piece of land in extent 140 hectares, situate in Chilongo Village under Chief Simamba in Siavonga District.

**3.8** The respondent argued that a perusal of the facts deposed to by the respondents in their affidavit in support of complaint shows that they deposed that their late father Misheck Malufu settled in Chilongo Village sometime in 1978 and was allocated land measuring 140 hectares by Chief Simamba and was even entered in the Village Register. Further, that they also deposed that before their late father died, he had obtained consent from Chief Simamba to convert the customary land to leasehold and although this process was not

completed, the appellant after he had been installed as Chief Simamba duly acknowledged their father as one of his subjects at the time of their father's death. The respondents were of the considered view that all these statements clearly disclose the interest that the respondents have in the land in issue which were not disputed or challenged by the appellant in his affidavit in opposition to the complaint. As such, the respondents have a clear right to bring an action in relation to the land in issue. Whether the action was brought in their own personal capacities or as Administrators or even as beneficiaries is immaterial to the question of whether they have *locus standi* or not. The respondents submitted that ground two is without merit and should be dismissed.

**3.9** With regard to ground three where the appellant argues that the matter before the Lands Tribunal was statute barred, the respondents argued that even if the Lands Tribunal were to proceed to determine the preliminary issues, it would have held in favour of the respondents herein. This is because the issue of the matter being statute barred was raised by Vanessa Chiboola, the 2<sup>nd</sup> respondent in the court below, where the Lands Tribunal guided that determination of the exact time at which the cause of action arose was a question of fact and not of law which would have been brought out in the main matter as parties led evidence. The respondents argued that they agreed with this reasoning of the Lands Tribunal as it is not apparently clear on the exact time at which the cause of action arose and it would be improper to deal with it at the preliminary stage before evidence is led in relation to the same. As such, it was the respondent's submission that the appellant's ground three should equally fail.

**3.10** In relation to ground four, the appellant argued that it was critical for the respondents to exhibit documentation of ownership of the land in dispute before the Tribunal could proceed to make a determination on the application for an interim injunction. In response, the respondents contended that all they

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needed to show was that they have an interest in the land in issue and consequently their right to relief. Further, that the respondents needed to show that an order of damages could not adequately compensate for the loss of an interest in land. It was the respondents considered view that these considerations and not the production of documentary evidence to support a claim of ownership are what inform the grant of an interim injunction. To buttress this argument, reference was made to the case of **Shell and BP Zambia Limited Vs Conidaris & Others**.

**3.11** The respondents argued further that the Lands Tribunal was on firm ground when it determined that the respondents have a clear right to relief and that they could suffer irreparable injury if an order was not granted as the Tribunal was guided by the facts that were before it which were not disputed by the appellant. For this argument the court was referred to the case of **Derrick Chitala (as Secretary of the Zambia Development Congress) Vs The Attorney General**<sup>9</sup> where the Supreme Court held that:

*“.....the Judge below cannot be validly criticized for forming an opinion on the papers before him. Whether he was correct or not in his conclusion is a different question which we are capable of addressing since an appeal operates as a rehearing on the record.”*

**3.12** The respondents concluded by arguing that the preliminary issues raised by the appellant are yet to be determined. Further, that at the stage of the interim injunction there was no need to delve into the merits of the main matter provided that the tribunal was satisfied on the right to relief and the need to protect the respondents against irreparable harm. That accordingly ground four should also fail.

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#### **4.0 The Hearing**

**4.1** At the hearing of the matter on the 22<sup>nd</sup> November, 2023, counsel for the appellant indicated that she would be relying on the heads of argument and the Record of Appeal which they filed on the 27<sup>th</sup> July, 2023.

**4.2** The respondents indicated that they would also rely on their heads of argument which they filed on the 25<sup>th</sup> August, 2023.

#### **5.0 The Decision of the Court**

**5.1.** Before determining the application before this Court, it must be noted from the onset that the appellant herein did not file an affidavit in opposition to the application for an injunction before the Lands Tribunal, but instead chose to raise the preliminary issues. The respondents herein also did not file an affidavit in opposition to the said preliminary issues and in essence the preliminary issues were not determined by the Lands Tribunal. Additionally, although the Court had initially ordered that this cause of action be consolidated with the one in which the 2<sup>nd</sup> Appellant Vanessa Chiboola Hope Lewis sued under Cause No. 2023/HP/A034, the same turned out not to be practicable as the 1<sup>st</sup> Appellant Emmy Moonga's appeal is based on the Land's Tribunal not attending to his Preliminary Issue, whereas the 2<sup>nd</sup> Appellants appeal was based on the grant of the injunction. As such both appeals were dealt with separately.

**5.2** Turning now to the appeal before this Court, the crux of this matter is whether the Lands Tribunal should have determined the preliminary issues raised by the appellant in the application before the Lands Tribunal before proceeding to determine the injunction as it did.

**5.3** In grounds one and two, counsel's main contention is that issues *in limine* have to be determined before the substance of the matter is determined and further that any party presenting a matter before court must have *locus standi*.

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In their heads of argument before this court, reference was made to *Rule 20* of the *Lands (The Lands Tribunal) Rules Statutory Instrument No. 90 of 1996* which provides as follows:

*“(1) The Chairperson may, on the application of any party to the proceedings, order any point of law, which appears to be in issue in the proceedings to be disposed of at a preliminary hearing of the Tribunal.*

*(2) If, in the opinion of the Tribunal, the decision on the point of law substantially disposed of the proceedings, the Tribunal may order that the proceedings be treated as the hearing of the case or make such other order as may be just.”*

**5.4** The court was also referred to *Order 14A* of the *Rules of the Supreme Court of England, 1965* which provides that:

*“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 question 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 or 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.*

*(3) The Court shall not determine any question under this Order unless the parties have either-*

*(a) had an opportunity of being heard on the question, or*

*(b) consented to an order or judgment on such determination.”*

**5.5** From the foregoing provisions, it can be gleaned that the decision to make a determination of a preliminary question of law is discretionary as the word “may” is used in both of the said provisions. This is because it has to appear to the Court that such question is suitable for determination without a full trial and that such determination will determine the entire cause or matter therein. Therefore such discretion must be exercised judiciously. A perusal of the questions of law posed by the appellant in his application before the Lands Tribunal reveal that they primarily center on whether the respondents had *locus standi* to commence the cause of action before the Lands Tribunal. *Locus standi* is an issue of both law and fact and depending on which area of the law a matter is commenced under, such law will prescribe the rules as to who has a right to bring the action to court.

**5.6** In the preliminary issues raised, the questions that were posed were cast as follows:

*1) Whether the complainants who are beneficiaries to the deceased estate can sue in their own capacity?*

*2) Whether the complaint is supposed to demonstrate administrators suing on behalf of beneficiaries?*

*3) Whether the local court can appoint administrators for an estate involving land whose value is more than K50.00?*

*4) Whether this Honourable court should dismiss the complaint and supporting affidavit for irregularity?*

**5.7** The learned author of **Zambian Civil Procedure Commentary and Cases, Volume 1, Patrick Matibini, LexisNexis, 2017** at page 56 states as follows:

*“Generally, causes of action other than for defamation survive a claimant’s death and vest in the deceased personal representatives, who should be named as parties in any litigation. The administrator of an estate of a deceased person is appointed by grant of letters of administration, while the executor named in a will is appointed by a court through grant of probate. Therefore, where the estate of a deceased person is suing or being sued, the full names of the deceased personal representative (either executor or administrator) should be given, followed by the words as the representative of X deceased. Thus, where a grant of probate or administration has been made, any claim against the defendant’s estate must be brought against the defendant’s personal representative. It was however laid down in the case of **Upton v Walker**, that where a suit is instituted by a purported representative, where there is no such a representative, such suit is a nullity. Thus the law is that if a plaintiff brings an action in a representative capacity as administrator or executor, that action is a nullity if the plaintiff was not at that date administrator or executor by law with a proper grant.”*

*Underlining mine for emphasis*

**5.8** From the foregoing text and particularly the authority of **Upton Vs Walker**, it is evident that in applying the principle of *locus standi*, the respondents herein must not only to show that they have sufficient interest in the matter that they commenced in the Lands Tribunal, but also that, they sued in the correct capacity. Paragraphs 4, 5, 6, 7, 50 and 51 of the affidavit in support of the Complaint filed before the Lands Tribunal reads as follows:

- “4. That we are the Administrators of the late Misheck Malufu’s estate.*
- 5. That in unknown year but before 1978, our father Misheck Malufu was allowed to settle in Chilongo Village by Timothy Hahundu Chief Simamba.*
- 6. That Misheck Malufu had 24 children. Now produced and shown to me marked MM1 is a copy of the list of children.*
- 7. That in 1978 Misheck Malufu was offered 140 hectares of land by Chief Simamba (Timothy Hahundu).*
- 50. That in 2018, the 2<sup>nd</sup> complainant herein was appointed as Administrator for the estate of the late Misheck Malufu.*
- 51. That on 11 March 2022 the 1<sup>st</sup> and 2<sup>nd</sup> complainants herein were appointed as Administrators for the estate of the late Misheck Malufu. Now produced and shown to me marked MM6 is a copy to that effect.”*

**5.9** A perusal of the documentation issued before the Lands Tribunal reveals that words “representative of the estate of Misheck Malafu” do not appear after the names of each of the respondents contrary to the requirements of the law. On this score alone the Lands Tribunal should have in exercising its discretion judiciously, addressed the preliminary issue before deliberating on the injunction application as the lack of *locus standi* results in a nullity of the said cause of action. Additionally, a perusal of the order of appointment exhibited as “MM6” reveals that the same was issued out of the Local Court, which as counsel for the appellant has argued is irregular as the Local Court can only appoint administrators for an estate involving land whose value is more than K50.00. The correct court to issue documents of administration in this case would be the High Court for Zambia where letters of Probate would be issued to the respondents herein.

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**5.10** In view of the aforesaid analysis, it was imperative for the Lands Tribunal to address its mind to this issue as it pertains to whether the order of appointment of the administrators was valid, as an invalid order of appointment would mean a nullity of the same as already alluded to in the authorities above. These are serious questions which the Lands Tribunal should have taken time to address, before attending to the injunction application, by affording the parties an opportunity to address it on the said preliminary issues. Not doing so, was a misdirection on the part of the Lands Tribunal and as such grounds one and two succeed.

**5.11** In relation to ground three, counsel for the appellant argued that the Lands Tribunal erred in determining the injunction application before determining the issue whether the cause of action was statute barred as it deals with the jurisdiction of this Tribunal to hear and issue any order. Although this issue was not raised by the appellant herein, who was the 1<sup>st</sup> respondent before the Lands Tribunal, the same was raised by the 2<sup>nd</sup> respondent being Vanessa Chiboola Hope-Lewis and was duly addressed by the Lands Tribunal. The Lands Tribunal found that the question on the matter being statute barred was an issue that fell to be determined at the hearing of the Complaint by the parties leading evidence.

**5.12** It is trite that limitation of an action is a point of law which when raised must be considered. In the case of **City Express Service Limited Vs Southern Cross Motor Limited**<sup>10</sup> it was held as follows:

*“It is clear from Zambian decided cases that the issue of the limitation period was considered in those cases as a point of law which can be raised and considered at any stage of the proceedings. In some of the cases, limitation period was not pleaded, but the*

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*courts considered the objection based on the statute of limitation as a point of law and considered it on that basis.”*

**5.13** As such, I agree with the argument raised by counsel for the appellant in this ground that once an issue in relation to a matter being statute barred is raised, it must be considered as it relates to jurisdiction as was held in the case of **Daniel Mwale Vs Njolomole Mtonga (sued as Administrator of the Estate of the late Gabriel Siwanamutenje Kapuma Mtonga), The Attorney General** where it was held by the Supreme Court that:

*“...The Statute of Limitation when raised, brings forth a serious legal question as to whether the court has jurisdiction to entertain the action before it, given that it was brought outside the limit period. It hardly bears repeating that the issue of jurisdiction is a threshold question and a lifeline for continuing any proceedings. Where a court holds the opinion that it has no jurisdiction, the very basis for continuation of the proceedings before it – it must forthwith cease to deal with that matter. In our view, the issue of statutory bar when raised is as much about the jurisdiction of the court as it is a statutory defence for a party. It is a legal point touching on both the court’s jurisdiction and a provision of a statute...”*

On this score, ground three also succeeds.

**5.14** In relation to ground four that the Lands Tribunal erred when it ordered an injunction in favour of the respondents despite them failing to exhibit any documentation of ownership of the land. This issue was not raised before the Lands Tribunal and was not addressed in their Ruling. It is trite that new matters cannot be raised on appeal as was held in the case of **Wilhelm Roman Buchman Vs The Attorney General (1993-1994) Z.R 131**<sup>11</sup> where it was held that:

*“A matter that is not raised in the court below cannot be raised before a higher court as a ground of appeal.”*

Ground four accordingly fails. The upshot of the matter is that as three of the four grounds are successful, the appeal succeeds and the injunction as against the appellant herein is discharged and the Complaint before the Lands Tribunal is dismissed for irregularity for want of *locus standi* by the Complainants therein who are the respondents before this court.

Costs are for the Appellant to be taxed in default of agreement.

Leave to appeal is hereby granted.

Dated at Lusaka this 11<sup>th</sup> day of June .....2024

REPUBLIC OF ZAMBIA  
HIGH COURT OF ZAMBIA  
11 JUN 2024  
R. CHIBBABBUKA, J  
P.O. BOX 50067, LUSAKA  
**RUTH CHIBBABBUKA**  
JUDGE