

**IN THE HIGH COURT OF ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA**  
(Civil Jurisdiction)

2024/HP/0503



BETWEEN:

**JOHN KAYONDELA****PLAINTIFF**

AND

**DAVID MUSONA****DEFENDANT**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA IN CHAMBERS THIS 6<sup>th</sup> DAY  
OF MAY, 2024**

*For the Plaintiff* : Mr Allan Samabi and Mr J. Phiri, Messrs Joseph Chirwa & Company

*For the Defendant* : Mr R. Ngulube, Messrs Tembo Ngulube & Associates

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## **R U L I N G**

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### CASES REFERRED TO:

1. *Henderson v Henderson* 1843-1860 ALC ER 378
2. *Shell and BP Zambia Limited v Conidaris and others* 1984 ZR 174
3. *American Cyanamid v Ethicon Limited* 1975 1 ALL ER 504
4. *Zimco Properties v Lapco Limited* 1988-1989 ZR 92
5. *Leisure Data v Bell* 1988 F.SR 367
6. *Nottingham Building Society v Eurodynamics Systems* 1993 F.S.R 468 at 475
7. *Bank of Zambia v Jonas Tembo and others* 2002 ZR
8. *Societe Nationale Des Chemis Pur Du Congo (SNCC) v Joseph Nonde Kakonde* SCZ Judgment No 19 of 2013
9. *Mumba v Zambia Revenue Authority* Appeal No 123 of 2013
10. *Kausa Mwachindalo and Felix Kandolo v Mathews Musona, Lingson Patama and Jackson Shakulya Nyangu* Appeal No 1 of 2021

### LEGISLATION REFERRED TO:

1. *The High Court Rules, Chapter 27 of the Laws of Zambia*
2. *The Rules of the Supreme Court of England, 1999 Edition*

OTHER WORKS REFERRED TO:

1. ***Black's Law Dictionary by Bryan A. Garner, 9<sup>th</sup> Edition, Thomas Reuters, West Publishing Co, 2009***

## **1. INTRODUCTION**

- 1.1 This Ruling is on an application, which was filed by the Plaintiff, John Kayondela on 10<sup>th</sup> April, 2024, for an Order of interim injunction, pursuant to ***Order 27 Rule 1 of the High Court Rules, Chapter 27 of the Laws of Zambia*** as read with ***Order 29 of the Rules of the Supreme Court of England, 1965, 1999 Edition***.
- 1.2 The Order of injunction is sought to restrain David Musona, the Defendant herein, whether by himself, his agents or otherwise, from being installed and carrying himself out as Chief Bundabunda of the Soli speaking people of Rufunsa.
- 1.3 The application was supported by an affidavit and a List of Authorities and Skeleton Arguments. In opposing the application, David Musona filed an affidavit in opposition and a List of Authorities and Skeleton Arguments in opposition on 26<sup>th</sup> April, 2024. An affidavit in reply, and a List of Authorities and Skeleton Arguments in reply were filed on 30<sup>th</sup> April, 2024.

## **2. BACKGROUND**

- 2.1 John Kayondela commenced this action on 10<sup>th</sup> April, 2024, by Writ of Summons which is accompanied by a statement of claim, and the other documents, in which he seeks:

- i. *A declaration that David Musona is not a descendant of the royal matrilineal lineage of the royal family and therefore, is ineligible to become Chief Bundabunda.*
- ii. *A declaration that the nomination of David Musona as Chief Bundabunda is contrary to the Soli customs and traditions.*
- iii. *A declaration that David Musona is precluded from ascending to the throne as Chief Bundabunda.*
- iv. *An injunction restraining David Musona whether by himself, his agents, servants or otherwise from being sworn in as Chief Bundabunda;*
- v. *Costs;*
- vi. *Any other relief that the Court may deem fit.*

2.2 An ex-parte application for an Order of interim injunction was filed together with the originating process. I directed that the injunction application be heard inter partes.

### **3. SUBMISSIONS AT THE HEARING**

#### **SUBMISSIONS BY COUNSEL FOR JOHN KAYONDELA**

3.1 At the hearing of the application, Counsel for John Kayondela submitted that they relied on the affidavit which was filed in support of the application together with the List of Authorities and Skeleton Arguments in support. Counsel submitted that in augmenting, he wished to state that the main issue to be resolved at trial, was the eligibility of David Musona to be installed as Chief Bundabunda of the Soli speaking people.

- 3.2 Counsel took the view that the said issue was not addressed by the Supreme Court Judgment, and therefore, it was not res judicata, in so far as it related to the eligibility of David Musona to be installed as Chief Bundabunda. It was further Counsel's submission that John Kayondela would suffer irreparable damage if the Order of injunction was not granted, as David Musona would have been installed as Chief, and damages would not atone.
- 3.3 On that basis, his prayer was that the Order of injunction be granted as prayed.

#### **RESPONSE BY COUNSEL FOR DAVID MUSONA**

- 3.4 In response, Counsel stated that they relied on the affidavit in opposition and the List of Authorities and Skeleton Arguments in opposition, in opposing the application, which documents were filed on 26<sup>th</sup> April, 2024.
- 3.5 Counsel's submission was that the crux of the opposition was that this matter is debarred, for being res judicata. In that regard, reference was made to exhibit 'DM1' the Judgment of the Supreme Court, stating that it adjudicated on the eligibility of the three royal families to ascend to the throne of Chief Bundabunda of the Soli speaking people.
- 3.6 It was added that the Supreme Court in that Judgment, found in favour of the Kashimbi family, from where David Musona hails. Thus, the Kashimbi family in whose favour the Judgment was, selected David Musona as the Chief. The further submission was that in the affidavit in reply, it had been stated that John Kayondela was from another royal

family. Therefore, he could not purport to raise issues about the selection criteria of another family.

3.7 Counsel also submitted that John Kayondela had not demonstrated that he would suffer irreparable damage or injury, and furthermore, the issue of irreparable damage or injury could not arise, as John Kayondela emanates from a different royal family altogether.

3.8 In concluding his submissions, Counsel stated that the issue to do with the Musona family coming from the Kashimbi family, and whether they are matrilineal or patrilineal arose in the High Court proceedings leading all the way up to the Supreme Court. Therefore, the right to relief was not clear.

#### **REPLY BY COUNSEL FOR JOHN KAYONDELA**

3.9 The reply was that in as much as John Kayondela belongs to the Mulonga royal family, he is under Chief Bunda Bunda. Therefore, he was interested in the subject matter. Counsel maintained that this matter is not res judicata as David Musona had simply exhibited the Judgment of the Supreme Court without pointing to specific portions of the said Judgment that addressed the issues, for them to be res judicata.

#### **4. DECISION OF THIS COURT**

4.1 I have considered the application. **Order 27 Rule 1 of the High Court Rules, Chapter 27 of the Laws of Zambia** states that:

***“1. In any suit in which it shall be shown, to the satisfaction of the Court or a Judge, that any***

*property which is in dispute in the suit is in danger of being wasted, damaged or alienated by any party to the suit, it shall be lawful for the Court or a Judge to issue an injunction to such party, commanding him to refrain from doing the particular act complained of, or to give such order, for the purpose of staying and preventing him from wasting, damaging or alienating the property, as to the Court or a Judge may seem meet, and, in all cases in which it may appear to the Court or a Judge to be necessary for the preservation or the better management or custody of any property which is in dispute in a suit, it shall be lawful for the Court or a Judge to appoint a receiver or manager of such property, and, if need be, to remove the person in whose possession or custody the property may be from the possession or custody thereof, and to commit the same to the custody of such receiver or manager, and to grant to such receiver or manager all such powers for the management or the preservation and improvement of the property, and the collection of the rents and profits thereof, and the application and disposal of such rents and profits, as to the Court or a Judge may seem proper.”*

- 4.2 **Order 29 Rule 1 of the Rules of the Supreme Court of England, 1999 Edition** on the other hand provides that:

***“(1) An application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter, whether or not a claim for the injunction was included in that party's writ, originating summons, counterclaim or third party notice, as the case may be.”***

- 4.3 The basis of the application as given in the affidavit which was filed in support of the application, which was deposed to by John Kayondela, was that in March, 2024, the Supreme Court of Zambia, under appeal No 1 of 2021 adjudged that the chieftainship of the Bundabunda chiefdom should be made on a rotational basis, among three families, being the Kalifu (Tubi) family, the Kashimbi family and the Mulonga family. He also stated that the Supreme Court directed that the next Chief should be from the Kashimbi family.
- 4.4 Therefore, following the Judgment of the Supreme Court, Chief Nkomesha held a meeting at which it was resolved that David Musona be installed as Chief Bundabunda. The minutes of that meeting were exhibited as ‘JK1’. John Kayondela averred that it is an entrenched custom and tradition, that the system of succession that is practiced by the Soli tribe, including those who hail from the Bundabunda chiefdom, is a matrilineal system of succession and not patrilineal.

- 4.5 He alleged that David Musona descends from the patrilineal lineage and not the matrilineal one. The further averment that was made, was that David Musona is scheduled to be installed as Chief on 17<sup>th</sup> May, 2024.
- 4.6 In the List of Authorities and Skeleton Arguments, John Kayondela argued that the case of ***American Cyanamid v Ethicon Limited*** <sup>(3)</sup> laid down the principles that govern the granting of Orders of injunction, as follows;
- i. Whether there is a serious question to be tried;
  - ii. Whether damages would be an adequate remedy to compensate the plaintiff;
  - iii. Whether the balance of convenience tilts in favour of the Order of injunction being granted;
  - iv. Whether the plaintiff has come to Court with clean hands.
- 4.7 The case of ***Shell and BP Zambia Limited v Conidaris and others*** <sup>(2)</sup> was cited, in support of the principle that relates to whether there is a serious question to be tried. It was stated that the Court in that matter 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; mere inconvenience is not enough. Irreparable injury means “injury which is substantial and can never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired”.*”**

- 4.8 The argument was that John Kayondela had shown that he is a member of the Royal family and therefore, he has an interest in the subject matter of the suit, by ensuring that the right person is installed as Chief Bundabunda, in order to prevent irreparable injury being caused.
- 4.9 In respect of the balance of convenience, the case of **Zimco Properties v Lapco Limited** <sup>(4)</sup> was cited as having held that:
- “The balance of convenience between the parties as to whether to grant an injunction will only arise if the harm done will be irreparable and damages will not suffice to recompense the plaintiff for any harm which may be suffered.”***
- 4.10 The cases of **Leisure Data v Bell** <sup>(5)</sup> and **Nottingham Building Society v Eurodynamics Systems** <sup>(6)</sup> were also relied on as authority in that regard.
- 4.11 David Musona in the affidavit in opposition, contended that the issue of whether or not the Kashimbi Royal family from which he hails, is patriarch or matriarch in origin arose during the High Court proceedings which gave rise to the appeal to the Supreme Court, whose Judgment was exhibited as ‘DM1’. Therefore, the question was litigated on, by a Court of competent jurisdiction. He also stated that John Kayondela’s right to relief is not clear.
- 4.12 In the List of authorities and Skeleton Arguments in opposition, the case of **Shell and BP Zambia Limited v Conidaris and others** <sup>(2)</sup> was relied on as authority, for the

principle that a Court will not grant an Order of injunction, where the right to relief is not clear.

4.13 Further reliance was placed on the case of ***Henderson v Henderson*** <sup>(1)</sup> stating that in that matter, the Court noted that once a matter becomes the subject of litigation, the parties to that litigation should bring forward the whole of their cases, and the Court will not, except in exceptional cases, permit the same parties to open the subject matter of litigation, which might have been brought forward as part of the subject contention, but which was not brought due to negligence, inadvertence or accident.

4.14 The case of ***Societe Nationale Des Chemis Pur Du Congo (SNCC) v Joseph Nonde Kakonde*** <sup>(8)</sup> was also relied on, with the argument being that the Supreme Court in that matter held that:

***“Res judicata is not only confined to the similarity or otherwise of the claims in the first and the second case. It extends to the opportunity at the time of instituting the first action and giving the Judgment.”***

4.15 Therefore, the contention was that the relief in this matter is not clear, as the issues sought to be adjudicated in this matter, were effectively and conclusively determined by the Supreme Court in its’ Judgment dated 29<sup>th</sup> March, 2024.

4.16 John Kayondela in the affidavit in reply, stated that he had contention as to whether or not the Kashimbi family is matriarch in origin, as the same is common cause. He

maintained that the issues that he has raised in these proceedings are novel, and have never been the subject of any adjudication.

4.17 His further contention was that the Judgment of the Supreme Court only addressed the following issues:

- a) Whether or not the Bundabunda chieftaincy system of succession is rotational;
- b) Whether the Kashimbi family are heirs to the Bundabunda throne;
- c) Which family lineage should ascend to the throne.

4.18 Also averred, was that John Kayondela's bone of contention is that David Musona does not descend from matrilineal lineage within the Kashimbi Royal family, and that issue was not addressed in the Supreme Court Judgment, stating the Judgment merely made a bare declaration that the chieftaincy should rotate to David Musona.

4.19 In the List of Authorities and Skeleton Arguments in reply, the definition of res judicata as given by **Black's Law Dictionary** was stated as:

***“A matter adjudicated; a thing judicially acted upon or decided, a thing or matter settled by Judgment. Rule that a final Judgment rendered by a Court of competent jurisdiction on the merits is conclusive as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand, or cause of action.”***

- 4.20 Further reliance in respect of the principle of res judicata was sought from the cases of ***Mumba v Zambia Revenue Authority*** <sup>(9)</sup> and ***Bank of Zambia v Jonas Tembo and others*** <sup>(7)</sup>. The reiteration was that the Judgment of the Supreme Court did not adjudicate on the eligibility of David Musona to ascend to the throne as Chief Bundabunda.
- 4.21 The principles that govern the granting of Orders of injunction have been well articulated above. The first question that therefore arises, is whether there is a serious question to be tried?
- 4.22 John Kayondela's contention is that the Judgment of the Supreme Court did not address the issue of eligibility of David Musona to be installed as Chief Bundabunda, from the view of patrilineal or matrilineal lineage, which is his grief in this matter. He stated that the Judgment of the Supreme Court merely directed that the Chieftaincy rotates among three royal families, and that this time, it should go to the Kashimbi family.
- 4.23 David Musona on the other hand, contended that the question of whether ascension to the Chieftaincy of Chief Bundabunda is matrilineal or patrilineal arose in the High Court proceedings and went all the way up to the Supreme Court. Therefore, the issue is res judicata.
- 4.24 *Res Judicata* is defined by ***Black's Law Dictionary by Bryan A. Garner, 9<sup>th</sup> Edition, Thomas Reuters, West Publishing Co, 2009 at page 1425*** as:

**“A thing adjudicated. 1. An issue that has definitely been settled by judicial decision. 2. An affirmative defence barring the same parties from litigating a lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions that could have been but was not raised in the first suit. The three essential elements are (1) an earlier decision on the issue (2) a final Judgment on the merits and (3) the involvement of the same parties, or parties in privity with the original parties.”**

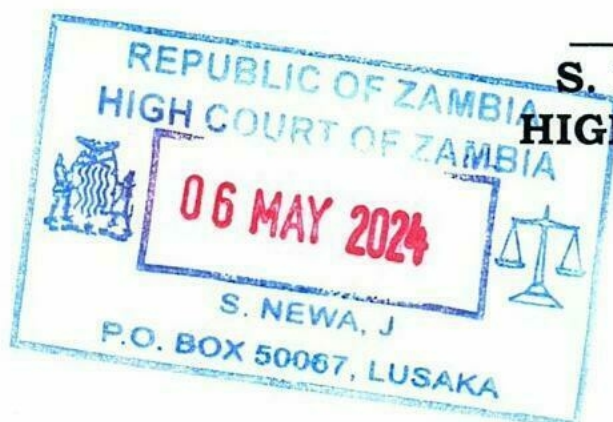
- 4.25 A perusal of the Judgment of the Supreme Court in the case, ***Kausa Mwachindalo and Felix Kandolo v Mathews Musona, Lingson Patama and Jackson Shakulya Nyangu*** <sup>(10)</sup> which was delivered on 20<sup>th</sup> March, 2024 reveals that there was a majority Judgment and a dissenting Judgment. Without going into the merits of the matter, my view is that the issue relating to ascension to the throne of Chief Bundabunda being through matrilineal or patrilineal lineage was addressed.
- 4.26 Therefore, in contrast to John Kayondela’s assertion that that the said issue, which he is raising in these proceedings, is novel, that is not the position. The issue having being determined on its’ merits, it is res judicata, as seen from the definition of res judicata and the authorities that have been cited in support of that principle.

4.27 The result consequently, is that considering the principles that govern the granting the Orders of injunction, the right to relief may not be so clear in this matter. As such, the question of whether damages would be an adequate remedy, and if not, where the balance of convenience lies, do not arise.

## 5. CONCLUSION

5.1 Having found that the right to relief may not be so clear, I decline to grant the Order of injunction, and dismiss the application. Costs shall be in the cause and leave to appeal is granted.

**DATED AT LUSAKA THE 6<sup>th</sup> DAY OF MAY, 2024**



*S. Kaunda*  
**S. KAUNDA NEWA**  
**HIGH COURT JUDGE**