

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

2022/HP/0164



IN THE MATTER OF: THE PROTECTING OF FUNDAMENTAL RIGHTS REGULATION, 1969

AND

IN THE MATTER OF: ARTICLE 28 OF THE CONSTITUTION OF ZAMBIA

AND

IN THE MATTER OF: ARTICLES 8, 12, 15, 16, 17, 21, 22, 23, 256 AND 266 OF THE CONSTITUTION OF ZAMBIA

AND

IN THE MATTER OF: THE ENVIRONMENTAL MANAGEMENT ACT NO. 12 OF 2011

AND

IN THE MATTER OF: ALL THE APPLICABLE LAWS

BETWEEN:

CHISENGA BERIAT	1 ST PETITIONER
SHEMSON BWALYA	2 ND PETITIONER
OBED MUKOSHA	3 RD PETITIONER
SHADRECK MUMBA	4 TH PETITIONER
DAVID MWAPE	5 TH PETITIONER
MARY MUKOSHA	6 TH PETITIONER
MAYBEES MISELO	7 TH PETITIONER
KALIKA PHIRI	8 TH PETITIONER
WATSON N. MAMBWE AND 46 OTHER PETITIONERS	9 TH PETITIONER

(As specified in the schedule attached hereto)

**(All the Petitioners appearing herein are suing
on their own behalf of the affected communities)**

AND

SERENJE PROPERTIES LIMITED

1ST RESPONDENT

GREGG ALEXANDER BADCOCK

2ND RESPONDENT

Before the Honourable Lady Justice C. Lombe Phiri in Chambers

RULING ON PRELIMINARY ISSUE

Cases referred to:

- 1. Matilda Mutale v Emmanuel Munaile 2007 SCZ Judgment No. 14 of 2007**
- 2. DBZ and KPMG and Others (1997) ZR 187**
- 3. Bank of Zambia and Mary Ncube (Receiver) vs Christopher Mwanza and 63 Others (SCZ/8/103/08**
- 4. ANZ Grindleys Bank (Z) Limited v Chrispin Kaona (1995) S.J SCZ Judgement No 12 of 1995**
- 5. Resident Doctors Association of Zambia and Others v The Attorney General**
- 6. Faustin Kabwe and another v Ndola Trust School Limited and another (Appeal No. 172 of 2020)**
- 7. Attorney General v Law Association of Zambia**

8. Moses Lukwanda and 9 others v Zambia Airforce Projects Limited and 7 Others (CAZ/08/323/2019)

This is a Ruling relating to a motion moved by the Respondent for determination by the Court whether or not the Court has jurisdiction to hear and determine the matter. The reasons advanced for the challenge relating to jurisdiction are that:

- i) The Environmental Management Act No12 of 2011 (EMA) provides for the remedies and reliefs sought and the procedure for seeking such reliefs, which does not include a petition to the High Court for Zambia.*
- ii) The High Court has an appellate jurisdiction under Section 116 of the EMA with regard the cause of action and remedies and reliefs sought herein and the Petitions have not exhausted the said procedures provided for by the EMA.*

The other challenge raised relates to whether the matter is res judicata and an abuse of Court process, seeing that the Petitioners have already moved the Zambia Environmental Agency (ZEMA) pursuant to the EMA regarding the cause of action herein especially that they have already obtained some of the reliefs they are seeking in this action.

Finally whether the Petition is incurably defective, given that the address of the Petitioners have not been endorsed in the Petition in contravention of the mandatory provisions of Section 2 and 3 of the Protection of Fundamental Rights Rules, 1969.

It has been stated that if any of the foregoing issues are found in the affirmative then the Petition ought to be dismissed.

In the skeleton arguments it was firstly submitted that the Petitioners had pursued the claim before the Court by a wrong mode. It was stated that the Petitioners should have moved the Court by Writ of Summons and Statement

of claim. The case of Matilda Mutale v Emmanuel Munaile 2007 SCZ Judgment No. 14 of 2007⁽¹⁾ was authoritatively cited. It was submitted that in that case the Supreme Court held, *inter alia* that:

“A petition is a rare form of bringing proceedings and is used in cases where it is required by statute or rule. A petition is not a pleading.”

It was further submitted that the High Court is part of the appellate process where a complaint has been filed with ZEMA under the EMA. It was stated that the Petitioners had already commenced the procedures of seeking relief from ZEMA and had even been gifted some of the reliefs sought. It was submitted that under s116 of the EMA the procedure for grievances is well catered for.

It was stated that where legislation has been enacted to enforce Constitutional rights it is not proper to simply ignore the legislation and attempt to enforce the rights directly under the Constitution as this may give rise to an absurd outcome. It was prayed that on this basis the Petition be dismissed.

Additionally, in relation to *res judicata* it was submitted that the Petitioners had been granted some of the reliefs they are seeking in this matter under a compliance Order No. ZEMA/LSK/CO/31/2021, issued to the 1st Respondent by ZEMA, pursuant to Section 106 of the EMA. It was submitted that the Petitioners commenced this Petition before the period of compliance under the order stated herein. It was submitted that the Courts frown upon parties that commence a multiplicity of procedures and proceedings over the same subject matter. It was submitted that the Courts have found that there ought to be a finality to litigation. The cases of DBZ and KPMG and Others (1997) ZR 187⁽²⁾, Bank of Zambia and Mary Ncube (Receiver) vs Christopher Mwanza

and 63 Others (SCZ/8/103/08⁽³⁾ and ANZ Grindleys Bank (Z) Limited v Chrispin Kaona (1995) S.J SCZ Judgement No 12 of 1995⁽⁴⁾ were cited to demonstrate the principle against multiplicity of actions and procedures. It was submitted that in view of the foregoing authorities the action is an abuse of the Court process.

Regarding the defect in relation to the omission by the Petitioners to include their address it was submitted that the same was fatal to the Petitioners case. Reliance was placed on the case of Matilda Mutale v Emmanuel Munaile (2007) SCZ Judgment No. 14 of 2007⁽¹⁾.

It was finally submitted that pursuant to the Court's jurisdiction under Order 14A as read with Order 33 rule 7 of the Rules of the Supreme Court the matter ought to be dismissed on a point of law. It was stated that the Respondents had satisfied the pre-requisite of filing a notice of intention to defend as provided for under Order 12 Rule 3(3) of the Rules of Supreme Court (1999 edition).

It was prayed the matter be dismissed on the grounds set out in the skeleton arguments and in affidavit in support of the application.

In opposition, the Petitioners jointly deposed to an affidavit. In the said affidavit it was averred that it was not in contention that the 1st Respondent is a registered owner of Farm No. 5171 Serenje. However, to the extent that he is a licensee of Farm No. 9916 is to the peculiar knowledge of the Respondents. It was further averred that contrary to the 1st Respondent's averment the Environment Social Impact Assessment submitted to ZEMA clearly states that Farm No. 9916 Central Province has no persons or settlement on it, that no household was going to be affected by the dam. It was also averred that Serenje District Council only learnt about the dam when some Petitioners complained after the dam

construction commenced. It was averred that the Respondents do not fully appreciate the extent of the dams impact on Munte River on the communities residing both upstream and downstream. It was also averred that there was no valid agreement signed by the local Chief. It was also averred that the compensation was paid while the Respondents were aware of the Petitioners' complaints. It was stated that the data stated in the affidavit in support was false because the inspection and data relate to a different place and not Farm No. 9916 Serenje. It was further averred that it was untrue that the 5th Petitioner received compensation. Also it was averred that the 3rd and 4th Petitioners refused to receive the said compensation after realizing that they were not occupying Farm No. 9916 where the project was supposed to be carried out. It was also stated that they had no authority, as subjects of Senior Chief Muchida to consent to the construction of the dam on the customary land they occupied without the approval of Senior Chief Muchinda. It was further deposed to that the persons who would be affected were listed. It was alleged that those that received compensation agreed due to threats and misrepresentation about the dam's location, which is indicated as Farm 9916, Serenje and not at the current site, which ZEMA has halted. It was admitted that the Petitioners had written letters of complaint to ZEMA. It was stated that the Petitioners had challenged the violation of their human rights and it is on that basis that requests were made to the regulator to stop the Respondents from further violating their human rights. It was further averred that on 24th September, 2021, the Petitioners did not know that ZEMA had issued a Decision letter.

It was averred that the Petitioners believed they were not precluded from taking action against the Respondents to have their human rights protected which rights are still being violated by the Respondents. It was further averred that the

compliance order issued by ZEMA does not encompass the reliefs sought in the Petitioner relating to violation of guaranteed constitutional rights and right to property and compensations of damages for the destruction of their land and blocking water for the communities residing downstream. It was also averred that the Petitioners had all accordingly provided their addresses.

In the arguments in opposition it was submitted on the question of the Court's jurisdiction that Section 110(2) of EMA recognises that parties may have other legal rights or remedies available to them and does not proscribe pursuing matters using other remedies that may be available to a party. It was stated that the section is actually clearly instructive to the effect that an action under section 110(1) is available as an additional recourse to any other remedies that may be open to a party to pursue.

Reliance was placed on the case of **Resident Doctors Association of Zambia and Others v The Attorney General**⁽⁵⁾ to show that a Petitioner under Article 28 can add some claims that appear tortious in nature.

It was submitted that Article 28 clearly stipulates that the mode of making a claim under Articles 11 to 26 of the Constitution is by way of an action to the High Court. That further Section 2 of the Protection of Fundamental Rights Rules, 1969 guides that the manner by which application under section 28 of the Constitution should be made to the Court by Petition. Further the cases of **Faustin Kabwe and another v Ndola Trust School Limited and another (Appeal No. 172 of 2020)**⁽⁶⁾ and **Attorney General v Law Association of Zambia**⁽⁷⁾ were relied upon to drive the point home. It was further submitted that Section 3 and 4 of the EMA, 2011 take cognizance of the supremacy of the

Constitution. Several authorities discussing the supremacy of the Constitution were cited but are not relevant to the issue before Court.

Further reliance was placed on the case of Moses Lukwanda and 9 others v Zambia Airforce Projects Limited and 7 Others (CAZ/08/323/2019)⁽⁸⁾ where the Court of Appeal pronounced itself on the impact of Section 106 of the EMA.

It was submitted that in view of the submissions this Court, had the jurisdiction to commence the action by Petition.

With regard the appellate jurisdiction of the Court, particularly in Section 112 of the EMA, it was submitted that the arguments in relation to Section 4 and 106 apply here. Cases were cited to discuss correct mode of commencing an action.

Regarding whether the matter is res judicata it was submitted that the letter of Demand to ZEMA did not entail invocation of procedures under the Environmental Management Act.

Further that the reliefs sought by the Petitioners under the Constitution are reliefs concerning the violation of various guaranteed constitutional rights. It was submitted that in the case before Court there was no Judgement of a Court of competent jurisdiction relating to the Petitioners claims in order for the doctrine of res judicata to be involved. That similarly there is no pending action/procedure/proceedings before another Court or tribunal relating to the same issues raised by the Petitioners under this cause to entail a multiplicity of actions or proceedings.

Regarding whether the Petition is incurably defective given that the addresses of the Petitioners have not been endorsed in the Petition it was argued that in the Petition it was agreed that in the first paragraph of the Petition the Petitioners

had each endorsed the communities to which they belong in Senior Chief Muchinda's area in Serenje District of Central Province of Zambia. The Court was invited to take judicial notice of the fact that villages do not have property numbers, therefore, the only particularity the Petitioners had was to describe their address in the manner they did under paragraph 1 of the Petition. It was submitted that by exhibit "GAB 7" it shows that the Respondents were able to locate the Petitioners within the area where they commenced their works of constructing the dam. It was stated that a perusal of exhibits "GAB6" and "GAB7" will show that there are no property numbers relating to the villages/rural settlements in question hence the lists compiled by the Respondents do not have property numbers of the interested parties who include the Petitioners herein.

It was submitted that the issues raised by the Respondents are bereft of merit and ought to be dismissed with costs

In Reply the Respondents filed an affidavit in Reply.

It was averred that the 1st Respondent is a licensee of Farm No. 9916 in Serenje as is demonstrated in Exhibit "GAB 4" which is a "Report on an EIA scoping meeting for the Development of Farm No. 9916 held on 11th July 2018 in the Council Chambers of Serenje District in Central Province. It was further averred that his adjacent farms No. 9916 and 5171 are intended to be used jointly and integrally to facilitate the construction and operation of the dam therefore the motion that a possible mistake on the positing of the actual dam entails that the 1st Respondent was undertaking a different project from the approved one is unreasonable. It was also averred that the pre and post project approval activities were carried out as evidenced by the exhibited documentation.

It was further averred that the EIA clearly and extensively addresses the project impacts and that being in the flood zone was but one of the many social impacts evaluated. It was also attested that as evidenced by the various exhibits the local traditional leaders were either involved, consulted and/or represented at all material times. It was also averred that the 5th Petitioner received compensation whose receipt was acknowledged by him.

ANALYSIS

The Preliminary issues raised before the Court seek to address 3 main issues namely:

- a) Jurisdiction of the Court:*
- b) Whether the matter is res judicata and an abuse of the Court process; and*
- c) Whether the Petition is invariably defective given that the addresses of the Petitioners have not been endorse in the Petition.*

a) Jurisdiction of the Court

It has ben argued by the Respondents that this Court lacks in jurisdiction as the remedies sought and the cause of action are adequately covered and addressed in the EMA. It has been suggested that the Petitions ought to have followed the administrative channels and if unsatisfied ought to have commenced the action by Writ of Summons and not by way of Petition.

In response to this issue the attention of the court is drawn most specifically to section 110(1) of the EMA. It is pointed out that it is recognize that a party has a right of action in addition to any other legal rights or remedies available to a Plaintiff.

A perusal of the EMA reveals that the piece of the law provides various instances under which an aggrieved party may seek redress.

Section 4(3) allows a person who is threatened or likely to be threatened as a result of an act or omission of any other person to bring an action. The instances where a person can issue an action are itemized from (a) – (f). Section 110 of the EMA provides for instances where a person can institute a civil action in pursuit of damages in respect of an act or omission that constitutes a contravention of the Act or is likely to have an adverse effect, whether or not that person or any other person has suffered or is likely to suffer any loss or harm from the act or omission. Subsection (2) states that the suit under subsection (1) is in addition to any other legal rights or remedies available to a Plaintiff or applicant.

In addition Part X of the EMA provides for a revisionary procedure of decisions of the Agency. In Section 116, specifically the right to Appeal the decision of the Minister to the High Court is provided for.

A reading of the EMA indicates that the right to sue under the Act is cumulative. Each process speaks to the other. Parties that are aggrieved may pursue various means in the resolution of a grievance whether against an individual, entity or the Zambia Environmental Management Agency in their own behalf or on behalf of others. A careful consideration of the originating process will show that the Petitioners have sought to assert their rights under various Articles of Part III of the Constitution of Zambia. They have asserted in their Petition that owing to the actions of the Respondents their various Constitutional rights have been abrogated. The Constitution provides in Article 28 that any person seeking to assert their rights under part III of the Constitution ought to bring the matter to Court by way of Petition. In view of Section 110 of the EMA and Article 28

of the Constitution it is clear that not only are the Petitioners entitled to take ought an action before the Court, they have also opted to me the correct mode of commence of the action by way of Petition. In that regard his Court is clothed with the necessary jurisdiction to consider the Petitioner before it.

The issues with regard jurisdiction of the Court therefore fail.

b) Whether the matter is res judicata

It has been argued by the Respondents that the matter before the Court is *res judicata* as some of the remedies being sought by the Petitioners have been addressed and granted in other ex curia arrangements. The Petitioners have countered this position by stating that there has been no Judgement of a Court in regard the subject matter before the Court.

Now, *res judicata* is a legal principle that refers to the concept of a matter that has been previously decided by a Court of competent jurisdiction and is therefore considered final and conclusive. The basis of the legal doctrine of *res judicata* is to prevent the same issue from being litigated again between the same parties. In this matter, as rightly pointed out by the Petitioners, there is no judgment or decision of this Court or any other Court that has been exhibited to show that the issues raised herein have been litigated and determined. It would be an unreasonable and unmerited stretch of the principle of *res judicate* to extend it to settlements, if any, that were arrived outside the Court system. The preliminary issue with regard *res judicata* fails.

c) Whether the Petitioner is incurably defective for want of proper address.

It has been posited by the Respondents that the failure by the Petitioners to endorse their full addresses on the Petition renders it fundamentally defective

and is it fatal to the Petitioners cause. The Petitioners have explained that the failure to endorse the full address is not their fault as the place they hail from does not have the conventional way of citing addresses. It has been argued that the purpose of endorsing one's address is to allow for smooth service of process.

I have carefully examined the endorsement of the Petitioners address. I have also considered the explanation rendered by them. This Court takes judicial notice that the area subject of these proceedings is in rural Zambia where conventional addresses are not issued. Instead, it is not uncommon for people to identify their places of residence by the name of their village or settlement area and Chief or Headman. In that regard I do not find that there is any defect in the manner the addresses of the Petitioners are endorsed on the Petition. And even in the case that the address is not provided in full, I would find this an appropriate cause to apply Article 118 of the Zambia Constitution in not having undue regard to technicalities to stifle the consideration on of the case on its merits.

The preliminary issue is therefore lacking in merit. Having found that all the preliminary issues fail the entire application to dismiss the matter on points of law and construction of documents is dismissed.

Costs are ordered for the Petitioner.

Leave to appeal is granted.

Dated at Lusaka this 23rd day of March, 2023



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C. LOMBE PHIRI
JUDGE

