

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



2016/HP/2083

IN THE MATTER OF:

Part XII of the Constitution
of Zambia as promulgated
under Act No. 2 of 2016

AND IN THE MATTER OF:

The Chiefs Act Cap 287 of the
Laws of Zambia

B E T W E E N:

GRIVER CHOLA SIKASOTE

PLAINTIFF

AND

COSMAS SIKAZWE TAFUNA

DEFENDANT

**Before Honorable Mrs. Justice M. Mapani-Kawimbe in Chambers on 9th
February, 2017**

For the Plaintiff : Mr. W. Mwenya, Messrs Lukona Chambers
For the Defendant : In Person

R U L I N G

Case Authorities Referred To:

1. *Walusiku Lisulo Vs Patricia Anne Lisulo (1998) ZR 75*
2. *Zambia Telecommunications Company Limited Vs Mulwanda and Ngandwe SCZ/8/63/2009*

This is the Plaintiff's application for review of the Court's ruling dated 1st December, 2016. It is filed pursuant to Order 39 of the High Court Rules and is supported by an Affidavit. By this application, the Applicant seeks to review the Court's ruling which refused to grant the Plaintiff an injunctive relief to restrain the Defendant from further acting as Deputy Senior Chief Tafuna and to relinquish all the powers vested in the Office of Chief Tafuna.

The Plaintiff **Griver Chola Sikasote** swore an Affidavit in Support where it states that the Court ruling dated 1st December, 2016, did not make any reference to his Affidavit in Reply that was filed into Court on 30th November, 2016. He states that the Affidavit in Reply contained averments which the Court should have addressed in its ruling and if it had done so, then it would have arrived at a different conclusion.

The Defendant **Cosmas Tafuna Sikazwe** filed an Affidavit in Opposition, where he deposes that the Plaintiff's proposition that the Court did not consider the Plaintiff's Affidavit in Reply does not amount to fresh evidence as contemplated by Order 39 of the High

Court Rules. The deponent contends that the Plaintiff who is not a member or spokesman of the Lungu Royal Establishment has no locus standi in this cause. The deponent further avers that the Plaintiff has not demonstrated that there is a challenge to his Chieftaincy. Further, that if at all the Plaintiff had commenced an action under cause 2012/HP/83, then the current cause might be res judicata and an abuse of the process of the Court.

At the hearing learned Counsel for the Plaintiff placed reliance on the Affidavit in Support and Skeleton Arguments. He drew my attention to a number of case authorities on review, which are on record. He contended that by pronouncing that there was no serious question to be tried, the court touched on the merits of the case, when both parties had identified that there was an issue on the Tafuna Chieftaincy. He concluded by beseeching the Court to review its ruling.

In response, the Defendant relied entirely on his Affidavit in Opposition and Skeleton Arguments.

I have seriously considered this application together with the contents of the Affidavits filed, the Skeleton Arguments and oral arguments advanced on behalf of the Plaintiff. The issue that falls for determination is, whether this is a proper case where I can exercise my discretionary power to review the ruling dated 1st December, 2016.

Order 39 of the High Court Rules states thus:-

"1. Any Judge may, upon such grounds as he shall consider sufficient, review any judgment or decision given by him (except where either party shall have obtained leave to appeal, and such appeal is not withdrawn), and, upon such review, it shall be lawful for him to open and rehear the case wholly or in part, and to take fresh evidence, and to reverse, vary or confirm his previous judgment or decision:

Provided that where the judge who was seised of the matter has since died or ceased to have jurisdiction for any reason, another judge may review the matter.

2. Any application for review of any judgment or decision must be made not later than fourteen days after such judgment or decision. After the expiration of fourteen days, an application for review shall not be admitted, except by special leave of the Judge on such terms as seem just".

In the case of **Walusiku Lisulo Vs Patricia Anne Lisulo**¹ the Supreme Court held Inter alia that:

- “1. The power to review under Order 39 Rule 1 is discretionary for the Judge and there must be sufficient grounds to exercise that discretion.**
- 3. Order 39 Rule 1 of the High Court Rules is not designed for parties to have a second bite. Litigation must come to an end and successful parties must enjoy the fruits of their judgments”.**

In the case of **Zambia Telecommunications Company Limited Vs Aaron Mweene Mulwanda and Paul Ngandwe**² the Supreme Court reiterated that:

“For review under Order 39, Rule 2 of the High Court Rules to be available, the party seeking it must show that he has discovered fresh material evidence, which would have material effect upon the decision of the Court and has been discovered since the decision but could not, with reasonable diligence, have been discovered before”.

From these authorities, a Judge can only review a decision if there is fresh evidence, which must have been in existence at the time of the decision but had not been discovered before. By implication therefore, Order 39 of the High Court Rules bears a very limited scope.

The Plaintiff's contention is that the exhibit marked "**WM/2**" which is his Affidavit in Reply contains fresh evidence, which the Court did not have at the time of its ruling. A perusal of the Affidavit in Reply reveals that it largely regurgitates what is contained in the Plaintiff's Affidavit in Support.

It makes reference to the traditions and customs of the Lungu tribe, the composition and role of the Lungu Royal Establishment on the selection and appointment of a chief, all which is contained in the Affidavit in Support and which information the Court is already aware of.

The Affidavit in Reply further repeats the history of the dispute regarding the office of Senior Chief Tafuna but quite interestingly refers to cause 2012/HP/83 and the case of Katito Farms Limited v Terry Chisha and Others - 2012/HP/115, which has just come to the attention of the court and are worthy of an inquiry.

In my considered view, the Affidavit in Reply quite clearly shows that it is devoid of any fresh evidence, which can bring this application into the realm of Order 39, so as to warrant a review of the Court's ruling dated 1st December, 2016.

For the reasons stated above, I hold that this application is misconceived. It is accordingly dismissed with costs to the Defendant to be taxed in default of agreement.

Before I conclude, I wish to point out that the Counsel's reference to the portion of the ruling on the "serious question to be tried" does not turn on the nature of this application. I need not say more.

Leave to appeal is granted.

Dated this 9th day of February, 2017.

M. Mapani-Kawimbe

M. Mapani-Kawimbe
HIGH COURT JUDGE