

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

2014/HP/1748

27 JUN 2017

BETWEEN:

JOSIAH MUBUKWANU LITIA NYUMBU

PLAINTIFF

(Suing as Chief Chiyengele)

AND

TAWILA AKAPELWA *(Induna Inete)*

1ST DEFENDANT

MWANGELWA AKAPELWA *(Induna Imandi)*

2ND DEFENDANT

STEVEN NAWA MATONGO *(Induna Namamba)*

3RD DEFENDANT

SIMAKANDO SIYUNDA *(Induna Mubonda)*

4TH DEFENDANT

LUBOSI IMWIKO II *(Litunga)*

INTENDED 5TH DEFENDANT

CORAM HONORABLE JUSTICE MR. MWILA CHITABO, SC

For the Plaintiff : *Mr. M. J. Katolo of Messrs Milner Katolo
and Associates*

For the Defendant : *Mr. C. L. Mundia of Messrs C.M. Mundia
and Company*

RULING

Legislation Referred to:

1. *The Constitution (Amendment) Act No. 2 of 2016 of the Laws of Zambia*
2. *The High Court Act Chapter 27 of the Laws of Zambia*

Cases Referred to:

1. *Secretary-General of the United National Independence Party v Elias Marko Chisha Chipimo (1983) Z.R. 125 (S.C.).*

This was an application for non-joinder of the Litunga to the proceedings brought by the Plaintiff. The application was brought pursuant to Order 14 Rule 5(1) of the High Court Rules. By consent of the parties it was agreed that the matter be heard by the High Court Judge and not the Deputy Registrar because certain constitutional issues were raised.

The application was accompanied by an affidavit deposed to by one Josiah Mubukwanu Litia Nyumbu, the Plaintiff herein. He swore that he commenced this action against the Defendants in November 2014. He averred that since the commencement of the action, it had become very clear that His Royal Highness, the Litunga Lubosi Imwiko II had a significant interest in this matter. This was because he was the one who authored a letter dated 16th October, 2014 addressed to the Permanent Secretary in the Ministry of Chiefs and Traditional Affairs advising about

his alleged dismissal as Chief Chiyengele. A copy of the said letter was produced and marked “JMLN/1”.

He deposed that he reasonably believed that in the interest of justice, it would be better if the said Litunga Lubosi Imwiko II was joined to these proceedings as 5th Defendant so that he could come to Court and explain under what authority he purported to dismiss the Plaintiff as Chief.

He prayed for the Court to grant an Order for the joinder of the Litunga Lubosi Imwiko II to this action.

The Plaintiff filed in submissions to support the application for non-joinder and in response to the Defendant’s preliminary issue raised, he submitted that Article 165 of the Constitutional (Amendment) Act No. 2 of 2016 of the Laws of Zambia provides that:

“The institution of Chieftaincy and Traditional Institutions are guaranteed and shall exist in accordance with the culture, customs and traditions of the people to whom they apply.”

He further cited Article 166 of the said Constitutional Act which provides that:

“The Institution of Chieftaincy-
(a) is a corporation sole with perpetual succession and capacity to sue and be sued;
and

(b) has capacity to hold property in trust for its subjects.”

It was Counsel’s submission that the said constitutional provision clearly bestowed corporate capacity on a chieftaincy so as to allow it not only to sue but also to be sued, therefore making any suit against the chieftaincy legally tenable.

He submitted that what was in issue was whether the application for joinder of the Litunga of the Lozi people of the Western Province invoked Articles 165 and 166 and secondly that there arose a need for the Constitutional interpretation of the two Articles of the Constitution by the Constitutional Court. He referred to Article 128 of the Constitution which provides as follows:

“(1) Subject to Article 28, the Constitutional Court has original and final jurisdiction to hear:

(a) a matter relating to the interpretation of this Constitution

(b) a matter relating to a violation or contravention of this Constitution

(2) Subject to Article 28(2), where a question relating to this Constitution arises in a Court, the person presiding in that Court shall refer the question to the Constitutional Court.”

It was Counsel's submission that Articles 165 and 166 made provision for the Plaintiff to seek legal recourse against Litunga Lubosi Imwiko II as the office he holds is a corporation sole. He argued that the application to add the Litunga to the proceedings did not violate Articles 165 and 166 as envisaged by Articles 128 above because Articles 165 and 166 merely clothed the office of chieftaincy with legal capacity and it was in that regard that the Plaintiff issued the application for joinder.

(It was his argument that the case of *Nabiwa Imikendo and 3 others v Edwin Lubosi Imwiko* (Sued in his capacity as Litunga of Western Province) cited by the Defendants as a leading case sent to the Constitutional Court as it bordered on Constitutional issues was distinguishable from the present case. He submitted that in that case the relief sought was the removal of Lubosi Imwiko from the thrown as Litunga.

(He argued that the issues in the case cited above necessitated the interpretation of Articles 165 and 166 as the Plaintiffs therein wanted to remove the Defendant from a constitutionally recognized office. According to him, the present case did not warrant the interpretation of the two articles cited above as the Plaintiff was merely using the corporate capacity of the office of the Litunga to add him to the proceedings. He submitted that the application for non-joinder commenced by the Plaintiff does not offend Article 165 and 166 of Constitution and therefore needing no interpretation by the Constitutional Court.

In opposing this Application Defence Counsel, State Counsel Mundia submitted that the application to join the Litunga of the Western Province in his personal capacity was totally misconceived as it violated the provisions of the Constitution as specified under Article 165 and 166 of the Constitutional (Amendment) Act No 2 of 2016 of the Laws of Zambia. He submitted that the office of Litunga of the Western Province was a corporation sole which could only be sued in that regard as an office and not in the name of the person holding the office at any given time.

It was his further submission that with the enactment of the Constitutional Amendment Act No. 2 of 2016 there was now created the Constitutional Court for Zambia vested with sole jurisdiction of determining matters that bordered on Constitutional issues.

He submitted that the office of the Litunga of Western Province being an office created by the said constitution, the Plaintiff's application for non-joinder of the Litunga be referred to the Constitutional Court as it was the only Court vested with the jurisdiction to determine issues bordering on the Constitution.

He submitted that in the case of *Nabiwa Imikendo and 3 others v Edwin Lubosi Imwiko* (Sued in his capacity as Litunga of Western Province) initially under cause 2017/HT/03 was referred to the Constitutional Court by the learned Judge in Charge of the High Court as the matter raised constitutional

issues. He sought the Court's indulgence to have the matter referred to the Constitutional Court for determination.

I have carefully considered the submissions before me. I will begin by stating that Article 128 of the Constitution (Amendment) Act No. 2 of 2016 is very clear on matters that can be determined by the Constitutional Court. It makes provision, in that Article, that the Constitutional Court has original and final jurisdiction in matters relating to the interpretation of the Constitution.

The main application before me is an application for non-joinder of Litunga Lubosi Imwiko II to the proceedings as the 5th Defendant. This application has been opposed in two respects. Firstly that, that the application to add the Litunga in his personal capacity is misconceived as the institution of the Litunga is a corporation sole giving it legal identity that can sue and be sued. Secondly, Defence Counsel asked this Court to refer the matter to the Constitutional Court because constitutional issues under Articles 165 and 166 of the Constitution Amendment Act were raised pertaining to the legal capacity of the Litunga, an office established by the Constitution.

Articles 165 and 166 are very clear and were referred to by the Plaintiff. Of particular importance is Article 166 which provides that:

"The Institution of Chieftaincy-

- (a) *is a corporation sole with perpetual succession and capacity to sue and be sued and*
- (b) *has capacity to hold property in trust for its subjects.”*

This provision in my view is very clear as to the legal capacity of a chief and does not require interpretation as to the meaning of a corporation sole by the Constitutional Court. The Supreme Court has pronounced itself on similar matters.

Further, article 134 of the Constitution (Amendment) Act No. 2 of 2016 provides that:

The High Court has, subject to Article 128—

(a) unlimited and original jurisdiction in civil and criminal matters.

While Article 128 stipulates which matters can only be heard by the Constitutional Court, I am of the firm view that the matter before me does not meet the matters espoused under Article 128. I therefore find that this is not a fit and proper case for the matter to be referred to the Constitutional Court for any interpretation of an express provision which is meant to provide guidance on suing of the institution of chieftaincy.

Having stated this, I will now consider the application before me. The Plaintiff's application is merely to add Lubosi Imwiko II, in his capacity as Litunga of the Western Province, to the

proceedings as the 5th Defendant. I have considered the arguments by State Counsel in opposing this application.

I have called in aid the case of ***Secretary-General of the United National Independence Party v Elias Marko Chisha Chipimo (1983) Z.R. 125 (S.C.)*** where the Supreme Court held that:

“We are satisfied that, as the Secretary - General of UNIP is neither a corporation sole nor a legal entity, he cannot sue or be sued, merely by virtue of his office.....He can, however, be sued in a representative capacity by name, not by the title of the office he holds, in which case he may be sued on his own behalf and on behalf of all the other members of UNIP”

This case, while can be distinguished from the present case, provides guidance to this Court in establishing that a corporation sole is sued by virtue of his office and not himself in a representative capacity. The Plaintiff's application in my view is to add Lubosi Imwiko II who is being sued in his capacity as the Litunga of Western Province which is in a representative capacity. The office of the Litunga is undisputedly a corporation sole which is capable of being sued and suing in its own capacity as is guided by the Article 166 of the Constitution.

In view of this, I agree with the submissions of Defence Counsel and I find that the joining of the Lubosi Imwiko II in his capacity as Litunga of Western province is procedurally incorrect as it is the office of the Litunga which should be sued.

In view of the above, I dismiss the application for non-joinder with costs.

Leave to Appeal is granted.

**Delivered under my hand and seal this 27th day of June,
2017**

A handwritten signature in black ink, appearing to be 'M. Chitabo', written over a horizontal line.

**M. CHITABO, S.C.
JUDGE**