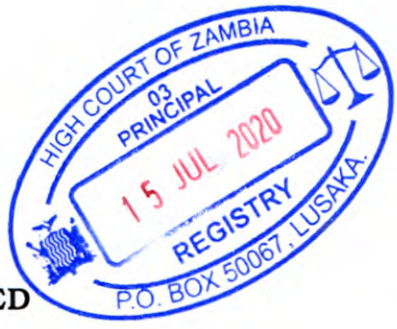
IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2018/HP/2066

BETWEEN:



FAUSTIN MWENYA KABWE — **1st PLAINTIFF**
BIMAL BHUPENDRA THAKER — **2nd PLAINTIFF**

AND

NDOLA TRUST SCHOOL LIMITED — **1st DEFENDANT**
THE ATTORNEY GENERAL — **2nd DEFENDANT**

BEFORE HON MRS JUSTICE S. KAUNDA NEWA IN CHAMBERS THIS 15thDAY OF JULY, 2020

For the Plaintiffs	:	*Mrs N.B. Chanda, AMW & Co*
For the 1st Defendant	:	*Mr C.K. Bwalya, D.H. Kemp& Co*
For the 2nd Defendant	:	*Mr J. Simachela, Chief State Advocate and Ms D. Mwewa Acting Principal State Advocate*

RULING

CASES REFERRED TO:

1. ***Hollington v F. Hewthorn & Co Limited 1943 2 ALL ER 35***
2. ***Kabwe Transport Company Ltd v Press Transport Limited 1984 ZR 43***
3. ***Chibuye v Zambia Airways Corporation Limited SCZ No 2 of 1986***
4. ***William David Carlisle Wise v E.F Hervey Limited 1985 ZR 179***
5. ***Kabanda and Kajeema Construction v Kasanga 1990-1992 ZR 145***
6. ***New Plast Industries v The Commissioner of Lands and the Attorney-General SCZ No 8 of 2001***
7. ***Mutale v Munaile 2007 ZR 118***
8. ***Attorney General v Law Association of Zambia 2008 Vol 1 ZR 21***

9. *Faustin Mwenya Kabwe and Francis Herbert Kaunda v The People HPA/33/2008*
10. *Amanda Muzyamba Chaala (Administrator of the estate of the late Florence Mwiya Siyunyi Chaala) v The Attorney General andMukelabai Muyakwa 2012 Vol 1 ZR 316*
11. *Kufamuyeke Mukelabai v Esther Nalwamba, The Commissioner of Lands and The Attorney General 2013 Vol 2 ZR 312*
12. *JCN Holdings Limited and Others v Development Bank of Zambia 2013 3 ZR 299*
13. *Corpus Legal Practitioners v Mwanandani Holdings Limited SCZ No 50 of 2014*
14. *Anti Corruption Commission v Tedworth Properties Inc 2016 Vol 3 ZR 372*
15. *African Banking Corporation Zambia v Mubende Country Lodge Appeal No 116/2016*
16. *African Banking Corporation (T/A Bank ABC) v Yangts Jiang Enterprises Limited 2017/HPC/034*
17. *Zambia National Commercial Bank PLC v Geoffrey Muyamwa and 88 others Selected Judgment No 37 of 2017*
18. *Moffit v McPeake No W2016-017-COA-R3-CV (Tenn. Ct App. Oct. 10, 2017*
19. *U-Rest Foams v Puma Botswana (PTY) Limited & Colourfast Textile Printers (PVT) Limited SCZ No 27 of 2018*
20. *Sangwa v Nkonde 2018/HP/1029*
21. *National Pensions Scheme Authority v Ndanji Fashions Limited 2019/HPC/0140*
22. *Law Association of Zambia v The President of the Republic of Zambia, the Attorney General and the National Assembly 13/CCZ/2019*

LEGISLATION REFERRED TO:

1. *The Rules of the Supreme Court of England, 1999 edition*
2. *The High Court Rules, Chapter 27 of the Laws of Zambia*
3. *Protection of Fundamental Rights and Freedoms, Statutory Instrument No 156 of 1969*
4. *Anti Corruption Commission (Disposal of Recovered Property) Regulations, 2004*
5. *English Law (Extent of Application) Act, Chapter 11 of the Laws of Zambia as amended by Act No. 6 of 2011*

OTHER WORKS REFERRED TO:

1. *Atkins Court Form Volume 29 at page 252 – 253*
2. *Phipson on Evidence (Twelfth Edition)*

3. ***Zambian Civil Procedure: Commentary and Cases Volume 1, Patrick Matibini, Lexis Nexis, 2017***

This is a ruling on two notices of motion to raise preliminary issues on points of law, the first which was filed by the 2nd defendant on 10th July, 2019, pursuant to Order 14A as read together with Order 33 Rule 3 of the Rules of the Supreme Court of England 1965, 1999 edition. The second notice was filed by the 1stdefendant on 14th February, 2020, pursuant to Order 14A of the Rules of the Supreme Court, 1965, 1999 Edition.

The notice raised by the 2nd defendant seeks the determination of the following questions;

i. *Whether property No NDO/578/C should be declared forfeited to the State following the plaintiff's failure to claim the said property within three (3) months of publication of Gazette Notice No 494 dated 24th November, 2006, issued pursuant to the Anti-Corruption Commission (Disposal of Recovered Property) Regulations, 2004, Statutory Instrument No 58.*

ii. *Whether the plaintiffs herein can rely on the outcome of the criminal judgment in the case of* ***FAUSTIN MWENYA KABWE AND FRANCIS HERBERT KAUNDA v THE PEOPLE HPA/33/2008*** *delivered on 26th May, 2016 by Justices Lengalenga, Siavwapa and Chisanga, as a fundamental basis of this matter, in light of the recent Supreme Court decision in the case of* ***U-REST FOAMS LIMITED v PUMA BOTSWANA (PTY) LIMITED & COLOURFAST TEXTILE PRINTERS (PVT) LIMITED SELECTED JUDGMENT NO 27 OF 2018?***

iii. *Whether the plaintiffs herein can rely on the said judgment in particular under paragraph 13 of the statement of claim for its effects*

to re-establish their ownership to the assets and management of the school, which is the main fact in issue in this matter?

iv. *Whether the plaintiffs herein can plead a direct violation of their legal rights as enshrined under Part III of the Constitution, Chapter 1 of the Laws of Zambia, as read with Act No 2 of 1996, in a matter commenced by way of writ of summons and statement of claim?*

In the affidavit in support of the notice, which is deposed to by Josiah Hantebe Simachela, a Chief State Advocate, it is stated that the amended writ of summons and statement of claim that were filed on 19th December, 2018 reveal that the originating process is erroneous on various aspects.

In the skeleton arguments in support of the notice, it is argued that the forfeiture of the property was done pursuant to Regulation 3 (3) of the Anti Corruption Commission (Disposal of Recovered Property) Regulations, 2004, (SI No 58). Therefore, the property belongs to the State as the plaintiffs never made a claim, and they sat on their rights. In this regard, reliance is placed on the case of ***Anti Corruption Commission v Tedworth Properties Inc*** [14].

With regard to the second and third preliminary issues, the arguments are that the pleadings reveal that the 1st plaintiff was prosecuted for various criminal offences which resulted in his conviction by the Subordinate Court. Thereafter, and appeal was launched in the High Court, and the subsequent decision of that appeal forms the foundation of the reliefs being sought before this court. Thus, the question is whether it is legally tenable for the plaintiffs herein to make a claim anchored on the outcome of a criminal judgment, more so that this has even been specifically pleaded to such a great extent.

Reference is made to paragraphs 10, 13, 17 and 18 of the statement of claim, stating that in paragraph 13, the plaintiffs claim ownership of the property, and that their belief is also premised on the criminal judgment delivered by the High Court. It is the 2nd defendant's argument that this position is not legally tenable, because the Supreme Court in the cases of ***Kabwe Transport Company Ltd v Press Transport Limited*** [2] and ***U-Rest Foams v Puma Botswana (PTY) Limited & Colourfast Textile Printers (PVT) Limited*** [19] held that the outcome of criminal proceedings cannot be tendered as evidence in civil proceedings, and that this prohibition is restricted to outcomes as opposed to the process or evidential material relating to such outcomes.

The 2nd defendant also argues that the logical reasoning for the prohibition is that it is in the interests of justice, and in this matter, the 2nd defendant is being called upon to defend the matter based upon judicial outcome to which they will, and could never be able to make any representation on, whether it is acquiesced to or not. Further, that this court is being asked to make a decision not only on the facts before it, as should be the case, but that this court should have regard to other proceedings before another court, to which the defendants were neither parties and nor was the 2nd plaintiff.

Reference is made to the Latin maxim ***res inter alios acta***, stating that it applies, because the plaintiffs want the 2nd defendant to be injured by the outcomes or pronouncements made by another court, being the decision of the High Court. It is argued in the alternative that if I do not agree with the 2nd defendant, their argument is that this action is anchored purely on the outcome of the criminal judgment, therefore, even if portions of the pleadings relating to the same are struck out,

which power the court has to order, the cause of action by the plaintiffs would be lost, and it would collapse and fail.

As regards the last preliminary issue, the 2nd defendant argues that Article 28 of the Constitution provides for how a person who alleges infringement of their rights under the Bill of Rights should proceed when commencing an action. They also argue that Rule 2 of the ***Protection of Fundamental Rights and Freedoms, Statutory Instrument No 156 of 1969*** provides that an application for the enforcement of fundamental rights and freedoms under Article 28 of the Constitution must be brought before the High Court by way of petition.

That this position was confirmed in the case of ***Attorney General v Law Association of Zambia*** [8]where it was stated that;

> ***"In dealing with the mode of commencement of the action, the trial Judge noted that the matters raised in the petition deal with more than mere interpretation; that the petition raised constitutional matters, including whether Section 25 of the Electoral Act was constitutionally valid. The Court held that the application referred to in Article 28(1), which must be made, is only by way of petition. In support of this finding, the trial Judge cited the case of Patel V. Attorney-General(7), in which it was held that by virtue of Rule 2 of the Protection of Fundamental Rights Rules, 1969, an application under Article 28(1) of the Constitution should be made by way of petition.***
>
> ***We have considered the submissions on ground two which also cover ground three. On the authority of the Patel case, the trial Judge cannot be faulted when he held that the***

matters raised in this action are constitutional or touch on the Constitution; and that the action was properly commenced by way of petition".

Further, that it was stated in the case of ***New Plast Industries v The Commissioner of Lands and the Attorney-General*** [6] that;

"We are satisfied that the practice and procedure in the High Court is laid down in the Lands and Deeds Registry Act. The English White Book could only be resorted to if the Act was silent or not fully comprehensive. We therefore hold that this matter having been brought to the High Court by way of Judicial Review, when it should have been commenced by the way of an appeal, the court had no jurisdiction to make the reliefs sought. This was the stand taken by this court in Chikuta v Chipata Rural Council (1) where we said that there is no case in the High Court where there is a choice between commencing an action by a writ of summons. We held in that case that where any matter is brought to the High Court by means of an originating summons when it should have been commenced by a writ, the court has no jurisdiction to make any declaration. The same comparison is applicable here. Thus, where any matter under the Lands and Deeds Registry Act, is brought to the High Court by means of Judicial Review when it should have been brought by way of an appeal, the court has no jurisdiction to grant the remedies sought. On this ground alone, this appeal cannot succeed. It therefore becomes unnecessary for us to consider the ground of appeal which stated that the learned judge misdirected herself in

law when she held that the procedure on appeal from the decision of the Registrar of Lands and Deeds is spelt out in section 89 of Cap 185. We uphold the learned trial judge on this issue as well".

It is argued that the record shows that this matter was commenced using a writ of summons, and therefore, the mode of commencement is wrong, and as a consequence, this court has no jurisdiction to entertain the matter at all.

The plaintiffs filed an affidavit in opposition on 16th October, 2019, which is deposed to by the 1st plaintiff. He deposes therein that sometime in 1998, the plaintiffs submitted an offer and purchased Stand No NDO/758/C comprising Ndola Trust School from Zambia Consolidated Copper Mines (ZCCM) for consideration. It is further deposed that the intention of the plaintiffs was that the property would be held in trust, styled as Ndola Trust School Trust, and a contract of sale was accordingly entered into between ZCCM and the intended trust. It is further deposed that at the date of the sale, the trust had not been formerly incorporated.

The 1st plaintiff further deposes that sometime in 2002, the Government of the Republic of Zambia commenced investigations against the plaintiffs on the basis that they had obtained the property illegally. It is stated that a joint Task Force on Corruption was set up, comprising the Zambia Police Service, the Anti Corruption Commission, the Drug Enforcement Commission and the Office of the President (Special Division).

The 1st plaintiff avers that on 25th October, 2006, he was warned and cautioned in connection with the purchase of the property, as shown on

the police report exhibited as 'FMK1' to the affidavit. It is also deposed that to the plaintiffs' surprise, and without notice, the Government sought to dispose of the property, and to that effect, it issued Gazette No 494 of 2006 under the Corrupt Practices Act No 42 of 1996, pursuant to the Anti Corruption (Disposal of Recovered Property) Regulations, 2004, which notice is dated 30th October, 2006, and is exhibited as 'FMK2' to the affidavit.

The 1st plaintiff deposes that neither himself nor the 2nd plaintiff were served the said notice, despite the 2nd defendant having been aware of the plaintiffs' addresses, and the 1st plaintiff persistently appeared before the Anti Corruption Commission, and court during the investigations and the prosecution relating to the property, and other matters unrelated to the property, which Friday Tembo and the Task Force on Corruption were handling.

It is also deposed that on 15th November, 2006, the 1st plaintiff appeared before the Task Force, and during that meeting, the ownership of the property was discussed, and he was charged with the offence of conspiracy to defraud ZCCM in his personal capacity. Further, during that meeting, Friday Tembo who was a Senior Investigations Officer at the Anti Corruption Commission was in attendance.

The averment is that on that date, the 1st plaintiff's lawyers were in attendance, and Friday Tembo also spoke with Francis Herbert Kaunda his alleged conspirator, who was the Chairperson of the ZCCM Privatisation Negotiating Team about the purchase of the property. The 1st plaintiff contends that despite the plaintiffs having made claims to ownership of the property, and without the knowledge of the plaintiffs,

the Government proceeded to seize the property, and undertook forfeiture proceedings for the said property.

It is averred that during the pendency of the investigations and prosecution before the courts of law, the plaintiffs left the management of the school to the duly appointed Board of Governors, in order not to burden the pupils and the staff at the school with those concerns. The 1st plaintiff deposes that on 26th May, 2016, following an appeal from the Subordinate Court, he was acquitted of the charge of conspiracy to defraud relating to the acquisition of the property, as shown on the judgment exhibited as 'FMK3' to the affidavit.

That following that acquittal, the plaintiffs decided to take direct management control of the school, and to this effect, on or about 7th March, 2017, the 1st plaintiff proceeded to Ndola Trust School to check on the property and assess what needed to be done following the acquittal. There, he was informed by the School Head teacher that the management of the school had changed, and a Board of Governors had been appointed and replaced.

Further, that the property comprising the school had been transferred to a company known as Ndola Trust School Limited, the 1st defendant herein, whose principal shareholder is the Government through an entity known as Pendulum Estates Limited. It is further averred that investigations established that the 1st defendant was only incorporated a few days before the judgment, that acquitted the 1st plaintiff was delivered, and the property was accordingly transferred to it, although the 1st defendant denies having anything to do with the school.

Exhibited as 'FMK4' is a print out from PACRA, indicating when the 1st defendant was incorporated. The 1st plaintiff states that following the

above discoveries, he had several meetings with the Solicitor General, Abraham Mwansa SC, who on perusal of the judgment, acknowledged that the property was wrongly seized, and that it should be returned to the plaintiffs.

The 1st plaintiff also deposes that the Solicitor General held discussions with the Director of Public Prosecutions (DPP), and the shareholders of Ndola Trust School Limited, and the Solicitor General confirmed clearance with the DPP, but not with the shareholders of Ndola Trust School Limited. Further, that the Solicitor General proposed that the Government considers compensating the plaintiffs for the property, and he asked the plaintiffs to propose a figure for negotiations in that regard, as shown on the correspondences exhibited as 'FMK5' and 'FMK6'.

With reference to exhibit 'FMK7', the letter dated 10th August, 2017, authored by the Deputy Chief State Advocate, C.L. Phiri, the 1st plaintiff deposes that even the National Prosecutions Authority (NPA) acknowledged that the property belonged to the plaintiffs. However, the Government has failed and or neglected to transfer the property into the plaintiffs' control, prompting the plaintiffs to sue by way of writ of summons accompanied with a statement of claim, claiming;

i. *Delivery of the management of Ndola Trust School.*
ii. *An account of all monies had and received from the time that the defendants wrongfully took over management of the business.*
iii. *Damages by way of compensation from the 2nd defendant for the expropriation of property legally belonging to the plaintiffs without just cause and unlawfully in violation of the plaintiffs' rights.*

It is also deposed that the plaintiffs were at all material times traceable and did not abscond or leave the country, for purposes of evading the

consequences of the investigation or prosecution, nor did they admit involvement in any corrupt act, or agree to surrender of the property. The 1st plaintiff avers that neither himself nor the 2nd plaintiff have been found guilty of an offence, or have been compensated by the Government for the said property, to which they have been denied access and control.

In the skeleton arguments and list of authorities that were filed on 14th February, 2020, the plaintiffs state that the 2nd defendant's application is incompetent and improper as the 2nd defendant has not filed a defence as required under Order 14A of the Rules of the Supreme Court, 1999 edition. That the said Order is clear, that a party seeking to rely on or invoke the order ought to have filed a notice of intention to defend.

In support of this argument, reliance is placed on the case of ***National Pensions Scheme Authority v Ndanji Fashions Limited*** *(21)*, stating that the court in that matter stated that;

> ***"The notice of intention to defend an action commenced by way of writ of summons is by filing a memorandum of appearance in the prescribed form. In addition to filing this prescribed form, a party is required to accompany a memorandum of appearance with a defence".***

The plaintiffs argue that Order 14A/2/3 which sets out the requirements for an application to be made under Order 14A, has laid down four (4) requirements, among them, the giving of notice of intention to defend. The case of ***Kufamuyeke Mukelabai v Esther Nalwamba, The Commissioner of Lands and The Attorney General*** *(11)* is also relied on in that regard. Therefore, the plaintiffs argue that the 2nd defendant has not satisfied the requirements of Order 14A of the Rules of the Supreme

Court of England, so as to entitle them to be heard on the preliminary issues raised.

It is further argued that if there exists a conditional memorandum of appearance which it is doubted, the 2nd defendant has not complied with the requirement of what is deemed to be the entering of appearance or giving notice of intention to defend. The argument is further that the plaintiffs have not waived their right to object to the 2nd defendant's irregular notice of motion to raise preliminary issues by taking fresh steps, by responding to the 2nd defendant's application.

This they argue is premised on the guidance that was given by the Constitutional Court in the case of ***Law Association of Zambia v The President of the Republic of Zambia, the Attorney General and the National Assembly*** *(22)* where it was stated that;

> ***"The court frowns upon the practice of raising preliminary issues which have the tendency of unnecessarily delaying proceedings...Litigants are therefore encouraged to incorporate their preliminary issues in their opposing affidavit and make skeleton arguments so as to minimise the possibility of multiple hearings"***.

That based on this, it was appropriate for the plaintiffs to respond to the 2nd defendant's application, albeit, it being irregular, and improperly before this court, in order to avoid a multiplicity of actions.

With regard to the reliance on the case of ***U-Rest Foams v Puma Botswana (PTY) Limited & Colourfast Textile Printers (PVT) Limited*** *(19)*, by the 2nd defendant in arguing that the plaintiffs cannot rely on the outcome of the criminal proceedings to claim ownership of the property

in dispute, it is the plaintiffs' argument that a careful reading of the record reveals that;

1. Contrary to the 2nd defendant's submissions, the case cited is not on all fours with this matter.
2. There is no blanket prohibition under the Zambian law against the reference to evidence in criminal proceedings in the context of civil proceedings.
3. Reliance on a criminal judgment is an evidential issue that cannot fully and finally determine this matter.
4. The case in casu is not caught up by the res inter alios acta principle.
5. The court may still take judicial notice of the 1stplaintiff's acquittal and or the contents of the case of ***Faustin Mwenya Kabwe and Francis Herbert Kaunda v The People HPA/33/2008***.

In arguing these issues, it is stated that in the ***U-Rest Foams*** case, the appeal arose out of a ruling made by the Judge sitting at Lusaka wherein, he refused to allow an application by the appellant, who was the defendant in that matter, to produce into evidence a court record relating to criminal proceedings which had arisen in the Subordinate Court, in the proceedings which were in progress before the Judge.

It is stated that the Supreme Court in that matter allowed the appeal, and allowed the appellants to produce in evidence, the court record of the criminal proceedings. That in this case however, sometime in 2004 and 2005, the Anti Corruption Commission instituted investigations against the 1st plaintiff, and it also investigated the purchase of Ndola Trust School. This resulted in the process surrounding the purchase of

Ndola Trust School going to court as a criminal matter. In 2016, the High Court found the 1st plaintiff not guilty of the charges.

The plaintiffs allege that the 2nd defendant illegally took compulsory possession of Ndola Trust School as a result of the said criminal proceedings and investigations, and began running the school without complying with the provisions of the Anti Corruption Commission (Disposal of Recovered Property) Regulations, 2004. The plaintiffs therefore seek delivery up of management of Ndola Trust School.

It is contended that from the above, the case of U-Rest Foam is not on all fours with this case. They further argue that they seek to recover the property that was unlawfully repossessed from them, and the claims are not anchored on the criminal judgement. It is the plaintiffs' contention that the statement of claim shows that they plead that they purchased the property for consideration. Therefore, their ownership to the property is not by virtue of the judgement, and that reference to it, is to confirm that fact, and not to establish it.

They further contend that the statement of claim is clear that the plaintiff's do not need the criminal judgment to prove their case, and that there is no blanket prohibition under Zambian law against reference to evidence in criminal proceedings in the context of civil proceedings. It is stated that what the court was precluded from doing in the ***U-rest*** case was transferring of convictions or acquittals from the realm of criminal law into the sphere of civil matters. In this regard, page J36 of the judgment in that matter is referred to, stating that the court stated that;

> ***"Thirdly, having had the benefit of mature and more complete and focused argument on the point, coupled with the additional benefit of more than superficial research around***

> ***the subject matter in question, we are satisfied that the principle which bars the reception or admission of evidence of a criminal (and even civil) character in the shape of outcomes or judgments or convictions in civil proceedings is not founded on a statute (such as the Evidence Act) but is, in fact, founded on the res inter alios acta doctrine, as earlier noted."***

The plaintiffs submit that evidence of a criminal nature may be admitted in civil proceedings, if it is not caught by the ***res inter alios acta*** doctrine. They also state that evidence of a judgment or outcome of a criminal matter is admissible in a claim for malicious prosecution.

The plaintiffs further argue that the admissibility of a criminal judgment is an evidential issue that cannot fully and finally determine this matter, and therefore, not one that can be raised under Order 14A of the White Book. Further, that it is not a matter that determines the entire action, but merely addresses one piece of evidence relevant to establish ownership. Reliance is placed on the learned authors ***Atkins Court Form Volume 29 at page 252 – 253*** where it is stated that;

> ***"The object of the order is that finality should be achieved at an interlocutory stage. It is therefore fundamental to the question of whether or not an application under Order 14 A is appropriate, that the determination of the question of law or matter of construction placed before the court should terminate the whole action or some claim or issue contained in the action. The finality of any order made is, of course, subject to appeal."***

The argument is further that in the case of ***Sangwa v Nkonde*** [20], the court noted that one of the requirements that needs to be met under

Order 14A of the Rules of the Supreme Court of England, 1999 edition, is the giving of notice of intention to defend, and that in that case, an answer would have sufficed. The court had further noted that the determination of the issues that were raised by the respondent could not dispose of the matter with finality as the issues largely related to irregularities.

It is stated that without directing how the 2nd defendant will proceed at trial, if the plaintiffs will seek to rely on the judgment to establish ownership to the property, the 2nd defendant can object to the production of the said judgment. It is argued that the issue does not determine the matter with finality, but merely addresses one piece of evidence that is relevant to establishing ownership of the property. Thus, there is still need for the parties to proceed to trial to establish ownership of the property, and whether or not process was followed in forfeiting the same, as prescribed by law.

The plaintiffs ask this court to take judicial notice of the plaintiffs' acquittal and or the contents of the case of ***Faustin Mwenya Kabwe and Francis Herbert Kaunda v The People*** [9] if it so wishes. In this regard, reliance is placed on the case of ***African Banking Corporation (T/A Bank ABC) v Yangts Jiang Enterprises Limited*** [16] where the court observed that;

> ***"A court has the power to look at records and take judicial notice of their contents, even though not formally brought before the court.***
> ***A superior court has power to call for case records of lower courts to examine them and to take judicial notice of their contents.***

A court has discretion whether or not to take judicial notice of another court's record depending on the circumstances of the particular case before it".

The plaintiffs contend that the ruling regarding the admissibility of the judgment that was delivered in the criminal matter will not fully and finally determine the matter at this stage of the proceedings. That even assuming that the judgment is inadmissible, the inadmissibility is not fatal to the plaintiffs' claims or evidence, because the plaintiffs' case is not anchored on evidence in the form of the criminal judgment.

As regards the last preliminary issue, the plaintiffs argue that Article 28 Clause 1 of the Constitution was never meant to restrict the options available to a party whose rights have been infringed, as that provision states that "*without prejudice to any other action with respect to the same matter which is lawfully available*".

An example of an individual who has been unlawfully detained is given, stating that such a person is at liberty to commence an action by writ of summons for false imprisonment, or to commence an action by way of petition, seeking a declaration that his or her right to freedom has been infringed. It is argued that the plaintiffs seek to enforce their right to property, and that it is trite law that the Constitution contains instances when one could be dispossessed of their property, through forfeiture or compulsory acquisition.

Therefore, the plaintiffs have made reference to the Constitutional provisions in establishing that there was no just cause for depriving them of their property. However, this does not entail that the action should have been commenced by way of petition. The plaintiffs further argue that ***Order VI Rule 1 of the High Court Rules Chapter 27 of the***

Laws of Zambia makes it clear that the general rule is that every action in the High Court is to be commenced by writ of summons, endorsed and accompanied by a statement of claim.

That a quick perusal of the Regulations and the Act does not reveal that an aggrieved party must bring an action by way of petition. Reference is made to the learned author ***Zambian Civil Procedure: Commentary and Cases Volume 1*** page 159 which states that a petition is another method by which proceedings may be commenced in the High Court.

That it further provides that the use of a petition may be prescribed by statute, statutory instruments or the rules, and that the most types of petitions are those related to constitutional matters, election challenges, company matters and matrimonial proceedings. Further reliance is placed on the case of ***Mutale v Munaile*** [7], stating that the Supreme Court in that matter affirmed that a petition is a rare form of bringing proceedings, and is used in cases where it is required by statute or by rule, and further, that it is not a pleading.

Also relied on is the case of ***Corpus Legal Practitioners v Mwanandani Holdings Limited*** [13], and the argument is that the Court in that matter held that where there are multiple reliefs being sought, the correct mode of commencement is by writ of summons accompanied with a statement of claim, even if some of the reliefs being sought are prescribed by law to be commenced under other modes.

It is argued that the plaintiffs claim a number of reliefs in this case, and therefore, even if the 1st defendant's assertions are true, the correct mode of commencement would still be by way of writ of summons, accompanied with a statement of claim, and not by way of petition. The plaintiffs reiterate that the questions raised cannot fully and finally

determine the matter, and consequently they are not suitable for determination under Order 14A.

The plaintiffs have also argued on the action being statute barred. It is their argument that, for the purpose of calculating the limitation period, time starts running from the date a cause of action accrues. That determining when a cause of action arises depends on the nature of the action commenced. However, generally, a cause of action will accrue when all the elements required to establish a particular action come into existence, and that they may occur once or progressively over time.

Reliance is placed on the case of ***Moffit v McPeake*** [18], stating that it was a matter involving a claim for malicious prosecution, and with regard to the period of limitation, the court held that the trial court incorrectly ruled that time starts running from the date of the unlawful arrest. That it was stated in that matter, that an action for malicious prosecution cannot be maintained until the termination of the criminal action in the plaintiff's favour, and that the cause of action does not accrue until that point. Further, that the unlawful arrest was not an event that would trigger the running of the statute of limitation.

The plaintiffs argue that in this case, the matter cannot be said to be statute barred by any measure or scale, and that time began running the date the criminal proceedings were determined with finality in favour of the 1st plaintiff, and not the date when the school was unlawfully seized and forfeited to the state. It is further argued that even assuming that the limitation period started running on the date of the unlawful forfeiture of the plaintiffs' property, the matter would still be within the limitation period prescribed for land matters.

This it is argued, is on account of the fact that the Limitation Act, 1939 prescribes the limitation period for actions involving land as twelve (12) years. It is stated that the record shows that the plaintiffs commenced this action on 29th November, 2018, eleven (11) years after the date of the unlawful forfeiture. Therefore, the assertion by the 2nd defendant that the plaintiffs have brought this action thirteen (13) years after the date of forfeiture is inaccurate and erroneous.

It is further argued that the 2nd defendant seeks to have this matter determined preliminarily as it is statute barred, on the basis of the plaintiffs not having made a claim to the property within three (3) months of the Gazette notice. However, the plaintiffs contend that the relevant provision does not create a statute bar to actions being brought, say for unlawful forfeiture. The argument is that the period is for purposes of deeming the property to have been forfeited if a claim to it is not made to the relevant authorities.

The plaintiffs also argue that the 2nd defendant has proceeded on the presumption that the plaintiffs did not make a claim to the property within the three (3) months period. It is contended that this is a fact that is in dispute, and it has to be addressed at trial. The plaintiffs further argue that had the 2nd defendant filed a defence, they would have filed a reply that in fact a claim was made to the property. Thus, this matter cannot be disposed of on preliminary issues.

The plaintiffs state that the issue in dispute is whether or not the 2nd defendant complied with the forfeiture provisions laid down by the law as it claims. It is argued that therefore, it would be absurd to determine the dispute preliminarily, as the facts need to be established in order to

apply the three (3) months period. This they state, can only be determined after a full trial.

Section 3 of the Anti Corruption Commission (Disposal of Recovered Property) Regulations, 2004 is referred to, and it is argued that the section sets out the conditions that need to be satisfied in order for seizure of property by the State to be made. The definition of recovered property under the same regulations is also referred to, and the plaintiffs argue that none of the conditions set out in Section 3 of the regulations existed at the time the forfeiture order was made.

It is further argued that the 2nd defendant wrongfully issued the Gazette notice, with the effect that the three (3) months period is inconsequential. By way of example, the plaintiffs argue that a citizen of this country cannot be deported from his own country simply because the State followed procedure for the deportation of aliens. That any time bars that may be provided under such procedure cannot validate the said deportation. Further, this court must establish whether the notice required under the Anti Corruption Commission (Disposal of Recovered Property) Regulations, 2004 was duly served on the plaintiffs, and whether or not this question is material in light of the fact that the seizure itself may have been null and void.

Coming to the notice to raise preliminary issues that was filed by the 1st defendant on 14th February, 2020, it seeks that the action be dismissed as it is incompetent, an abuse of the process of this honourable court and/or that it does not disclose any reasonable cause of action against the 1stdefendant on the grounds that;

1. *It constitutes an attempt on the part of the plaintiffs to circumvent Gazette Notice No. 494 of 2006 published on 24th November, 2006,*

and issued pursuant to the Anti-Corruption Commission (Disposal of Recovered Property) Regulations, 2004 by the Director General of the Anti-Corruption Commission dated 30th October 2006, which was addressed to the Chairman, Board of Governors of Ndola Trust School, whose particulars were, among other things, that recovered property, namely Property No. NDO/578/C, Ndola Trust School and all its Movable and Immovable Assets had been subject of and were recovered during the course of an investigation into an offence alleged or suspected to have been committed under Act No. 42 of 1996, were to be forfeited to the State, if they were not claimed within three months from the date of publication of that Notice;

2. *This action is entirely, materially and/or substantially founded on the inadmissible judgment of the High Court sitting as an appellate Court in its criminal jurisdiction dated 26th May 2016, High Court Cause Number HPA/33/2008, in which the 1st plaintiff and another person were acquitted of one count of conspiracy to defraud, contrary to Section 313 of the Penal Code, Cap. 87 of the Laws of Zambia, and to which the defendants were and are strangers; and;*
3. *This action which was commenced by writ seeks, as a central claim, to enforce the plaintiff's alleged rights under Part III of the Constitution, was instituted contrary to Article 28 of the Constitution and Rule 2 of the Protection of Fundamental Rights Rules, 1969.*

In the affidavit filed in support of the notice, which is deposed to by Lambwe Chrispin Mwanza, the Company Secretary of the 1st defendant, he states that at the centre of this action, is the property No NDO/578/C and all its movable and immovable assets. Exhibited as 'LCM1' is the Government Gazette No.494 of 2006, which is addressed to the

Chairman, the Board of Conveners and Ndola Trust School dated 30th October, 2006.

It is averred that the said notice states that the property No NDO/578/C Ndola Trust School, and all its movable and immovable assets, if not claimed within three (3) months from the date of publication of the notice, would be forfeited to the State. It is deposed that the deponent is not aware of any claim having been made by the plaintiffs or any other person to the property that was seized by the Anti Corruption Commission under the Gazette Notice No 494 of 2006 to the Anti Corruption Commission within the period of three (3) months from the date of publication of the said Gazette Notice or at all.

He avers that the plaintiffs as seen from paragraphs 10, 13, 14 and 15 of the statement of claim seek to rely on the judgment of the High Court in criminal proceedings, which was delivered on appeal on 26th May, 2016. In that judgment, the parties were Faustin Mwenya Kabwe, the 1st plaintiff herein, and Francis Herbert Kaunda as the appellants, and the State as the respondent.

The deponent states that the 1st plaintiff and the other person in that matter, were acquitted of one count of conspiracy to defraud, contrary to Section 313 of the Penal Code, Chapter 87 of the Laws of Zambia. Further, that the defendants were not party to those proceedings.

In the skeleton arguments, filed on 8th April, 2020, it is argued with respect to the first preliminary issue raised that paragraph 11 of the amended defence, and paragraphs 5,8,9 and 10 of the affidavit in support on the notice, are quite categorical on the subject matter of this action. It is argued that in the affidavit, it is deposed that the plaintiffs were aware of the existence of Gazette Notice No494 of 2006, which was

published on 24th November, 2006, and which was addressed to Chairman, and the Board of Governors of Ndola Trust School.

That the notice was to the effect that the recovered property, being No NDO/578/C Ndola Trust School and all its movable and immovable assets, had been the subject of, and were recovered during the course of an investigation into an offence, alleged to have been committed under Act No 42 of 1996, and were to be forfeited to the State, if they were not claimed within three (3) months from the date of publication of the Notice, exhibited as 'LCM1' to the affidavit in support of the notice.

The argument is that the 1st defendant is not aware of any claim having been made by the plaintiffs or either one of them, or any person to the property subject matter of the Gazette Notice No 494 of 2006. It is submitted that these depositions have not been controverted, and this is primarily because this action in its effect, whether intended or not, constitutes an attempt to circumvent the Gazette Notice.

Reliance is placed on the case of ***Anti-Corruption Commission v Tedworth Properties*** *(14)*, where the Supreme Court held that;

> ***"The question is- did the respondent make the claim for the properties? A perusal of the record of appeal establishes that the learned trial Judge held that the respondent filed an objection to the seizure of the properties late. He specifically said the following at page J9 of his judgment:***
>
> > ***'The rightful owner did not abscond the investigations officer had their Panamanian address nor did they admit to corruption. <u>They filed an objection to the seizure though late</u>.'***

"Even assuming that the Respondent had made a claim within time, we are of the considered opinion that the properties were supposed to be claimed from the appellant and not from the Court. It is clear from Regulation 3 that the intention of Parliament was that the person claiming to be the owner of a property should appear before the appellant to claim the property. The intention of enacting Regulation 3 was not to simply provide for a way of routinely handing over recovered property. The wording of Regulation 3 shows that the provision envisages that the person claiming to be the rightful owner of the property would have to appear before the appellant and make a claim. This is so because the Regulation clearly states that the recovered property would at that point have come into the possession of the appellant. Therefore, the claim can only be made to the appellant as the Institution not only conducting investigations into how the properties were acquired, but also having possession of the properties. We do not, therefore, agree with Counsel for the respondent that the Regulations do not say that the claim should be made to the appellant."

The 1st defendant argues that although the Supreme Court in the above case noted that it involved a notice under the ***Corrupt Practices (Disposal of Recovered Property) Regulations, 1986,*** it is almost word for word with ***Anti-Corruption Commission (Disposal of Recovered Property) Regulations, 2004 (Regulations)***. Therefore, the Supreme Court's decision is not only instructive, but binding on the consequences of the 2004 Regulations. Therefore, the plaintiffs are in effect circumventing or sidestepping the regulations.

As regards the second preliminary issue, it is stated that the action is entirely, materially and/or substantially founded on the inadmissible judgment of the High Court, sitting as an appellate court in its criminal jurisdiction dated 26th May, 2016, under cause number HPA/33/2008. The argument is that the 1st plaintiff and another person were acquitted of one count of conspiracy to defraud, contrary to Section 313 of the Penal Code, Chapter 87 of the Laws of Zambia.

Further, that the defendants were and are strangers to those proceedings. Thus, it is the 1st defendant's argument that it is inevitable to arrive at the conclusion that this action materially and substantially relies on the outcome of the criminal proceedings under Cause No. HPA/33/2008, when paragraphs 10, 13, 14, 15 and 17 of the statement of claim are considered.

The 1stdefendant further argues that in the affidavit in support of the notice, the deponent avers that in the lower court, the charges that were brought were brought, were one count of abuse of authority of office contrary to Section 99 of the Penal Code, Chapter 87 of the Laws of Zambia against Francis Herbert Kaunda, while in the second count, Francis Herbert Kaunda and the 1st plaintiff were charged with one count of conspiracy to defraud, contrary to Section 313 of the Penal Code.

That none of the defendants were party to those proceedings or the appeal that culminated in the judgment of 26th May, 2016, which quashed the convictions made by the lower court. The argument is that while admitting that the outcome of those proceedings are legally irrelevant, their object and purpose was not to establish or determine the ownership or interests of the plaintiffs to this action, or either of them in

the subject matter of this action, short handedly referred to as the Ndola Primary School in the pleadings.

The 1st defendant argues that the setting up of the outcome of the criminal proceedings to disclose a cause of action as the plaintiffs seek is untenable. Reference is made to Section 2 of the ***English Law (Extent of Application) Act, Chapter 11 of the Laws of Zambia as amended by Act No. 6 of 2011***, and ***Phipson on Evidence (Twelfth Edition)*** at paragraphs 1380,1381,1382 and 1383. It is stated that paragraph 1380 of the said ***Phipson on Evidence*** states that;

> ***"At common law, a judgment in personam (whether delivered in civil or criminal proceedings) is no evidence of the truth of the decisions or of its grounds, between strangers, or a party and a stranger, except upon the questions of public and general interest; in bankruptcy, administration and patent cases, to a limited extent; or so operating by contract, admission or acquiescence".***

The 1st defendant further relies on the Supreme Court case of ***U-Rest Foams Limited v Puma Botswana (PTY) Limited and Another*** [19], where it was held that;

> ***"Having regard to what we have canvassed above, we would answer the two questions which learned counsel for the appellant posed to us, as earlier noted, in the following terms:***
>
> ***(1)The evidential prohibition in Kabwe Transport against making reference to or introducing evidence of criminal***

convictions or outcomes in civil proceedings is not limited to cases of negligence but applies to all civil proceedings; and

(2) The prohibition referred to in (1) above is restricted to outcomes as opposed to the process or evidential material leading to such outcomes."

That the above decision was arrived at after the court followed its decisions in the cases of ***Kabwe Transport Company Limited v Press Transport (1975) Limited*** [2], ***Kabanda and Kajeema Construction v Kasanga*** [5] and ***Chibuye v Zambia Airways Corporation Limited*** [3]. It is thus the 1st defendant's argument that all the passages in the statement of claim that plead or refer to the outcome of the criminal proceedings ought to be struck out, and that the matter be dismissed for failure to disclose a cause of action against the defendants.

It is also stated that the other claims by the plaintiffs are also inextricably tied to, and are therefore ancillary to their alleged entitlement to the property, which is the subject matter of these proceedings, which claims substantially rest on the outcome of the criminal proceedings.

As for the third preliminary issue, the 1st defendant states that in paragraphs 11 and 12 of the statement of claim, the plaintiffs allege that the 1st defendant which is beneficially owned by the Government of the Republic of Zambia, under the guidance and express direction of the 2nd defendant took compulsory acquisition of and charge or running the school to the exclusion of the plaintiffs.

The plaintiffs further contend that the actions by the 2nd defendant were taken without legal basis, and in direct violation of the plaintiffs moral

and legal rights, as enshrined under Part III of the Constitution of Zambia. It is argued that it is important to notice that the alleged infringement of the plaintiffs' rights under Part III of the Constitution by the 2nddefendant, the 1stdefendant is, by necessary implication arising by virtue of the allegations in paragraph 11 of the statement of claim, also directed towards it.

Thus, the 1st defendant is tacitly implicated in the allegation alleging infringement of the plaintiffs' rights under Part III of the Constitution. Therefore, the alleged infringement of the plaintiff's purported rights under Part III of the Constitution against the 2nd defendant, is as much an allegation against the 1st defendant.

However, the argument is that even if the 1stdefendant were to be excluded from that allegation, the fact that it is a party to these proceedings gives it a right to be heard on the claim concerning the alleged infringement of the Part III rights. Therefore, the commencement of these proceedings by way of writ of summons, is in conflict with ***Article 28 of the Constitution*** and ***Rule 2 of the Protection of Fundamental Rights Rules, 1969,*** and therefore it is incompetent at law.

It is stated that the said Rule 2 provides that;

> ***"An application under Article 28 of the Constitution shall be made by a petition filed in the Registry of the High Court."***

Further in support of the argument, the 1stdefendant relies on the case of ***New Plast Industries v Commissioner of Lands and Attorney General*** [6], arguing that the Supreme Court in that matter laid down the legal principle that if an action is commenced in a manner contrary to

the relevant provision, the court before whom the matter is commenced, would be destitute of any jurisdiction to entertain it. The 1st defendant therefore submits that this court is only left with the option to dismiss the matter, or its decision would be a nullity.

Further in support of this argument, reference is made to the case of ***JCN Holdings Limited and Others v Development Bank of Zambia*** *(12)*. The 1st defendant also states that it is alive to the decision of the Supreme Court in the case of ***Amanda Muzyamba Chaala (Administrator of the estate of the late Florence Mwiya Siyunyi Chaala) v The Attorney General and Mukelabai Muyakwa*** *(10)*. The argument is however that at page 339 the Supreme Court stated that it was incumbent upon the High Court to consider the exercise of the public power challenged in the spirit and culture of human rights.

The 1st defendant's view is that this action whose central objective is the protection or enforcement of Part III rights under the Constitution, is quite a distinct proposition. The case of ***Zambia National Commercial Bank PLC v Geoffrey Muyamwa and 88 others*** *(17)* is referred to, stating that the soundness of this logic is reflected in that case. That by virtue of Article 128 of the Constitution, only the Constitutional Court has jurisdiction to interpret the Constitution, subject to Article 28.

It is further stated that the Supreme Court in the ***Zambia National Commercial Bank v Geoffrey Muyamwa and 88 others*** *(17)* case seen above, took the position that a court could take cognisance of a constitutional provision without necessarily offending Article 128 unless, the interpretation of the Constitution constitutes the very object or purpose of the proceedings. The 1stdefendant therefore argues that the enforcement of Part III rights forms a substantial part or central feature

of the relief sought by the plaintiffs, as is evident from the statement of claim and the reliefs sought.

It is thus the 1st defendant's argument that the commencement of this action by writ of summons robs this honourable court of the jurisdiction to entertain it.

On 26th May, 2020, the plaintiffs filed an affidavit in opposition, and a list of authorities and skeleton arguments in opposition to the 1stdefendant's Notice. In the affidavit in opposition, which is deposed to by Faustin Mwenya Kabwe, the 1st plaintiff herein, he avers that he has been advised by his advocates that the preliminary issues raised by the 1st defendant cannot be determined summarily and resolved preliminarily on points of law for the following reasons;

i. That the 1st defendant denies in its defence that the plaintiffs are the legal owners of Sub Division C of Stand No 578 Ndola, in the Copperbelt Province of the Republic of Zambia.
ii. The 1st defendant denies in its defence that the plaintiffs and Zambia Consolidated Copper Mines (ZCCM) signed a contract for the purchase of the School and property, and that ZCCM eventually handed over the management and administration of the school to the plaintiffs in May, 1998, pending changing of ownership to the property.
iii. That the 1st defendant denies in its defence that at the express direction of the 2nd defendant, the 1st defendant took compulsory possession of and charge of running the school, to the exclusion of the plaintiffs.
iv. The 1st defendant in its defence denies that the plaintiffs were not served with the Gazette Notice No 494 of 2006.

v. The parties herein dispute whether or not the State complied with the preconditions set out in the Anti Corruption Commission (Disposal of Recovered Property) Regulations 2004, which govern the seizure and forfeiture process.

vi. The plaintiffs assert that they were at all material times traceable and did not abscond, or leave the country for purposes of evading the consequences of any investigations or prosecution, and did not admit involvement in any corrupt act, or agree to surrender the property.

vii. That despite the defendants not being aware of any claim having been made on the property, within three (3) months from the date of publication of Gazette Notice No 494 of 2006, the plaintiffs will at trial aver that they in fact made a claim for their property, and this is clearly an issue in dispute.

It is the plaintiffs' argument that the 1st defendant's application is incompetent and improper because the questions raised by the 1st defendant are not suitable for determination without a full trial.

In the skeleton arguments and list of authorities filed on 5th May, 2020, the response to first preliminary issue is that it should be remembered that the defendant's claim to the property is premised on an alleged forfeiture process that was undertaken. Reference is made to Section 3 of the ***Anti Corruption Commission (Disposal of Recovered Property) Regulations, 2004*** which allows the State to commence forfeiture proceedings.

That the section provides as follows;

> ***"3. (1) Any recovered property which comes into the possession of the Ant-corruption Commission shall, subject to***

the other provisions of these Regulations, vest in the State if such recovered property cannot be returned because-

(a) the rightful owner who is the subject of an investigation in respect of an offence alleged or suspected to have been committed under the Act, has left Zambia for the purpose, or apparent purpose, of evading the consequences of such investigation or of the trial of a prosecution brought against that person;

(b) the rightful owner or the person in possession thereof absconds;

(c) the rights owner cannot be traced or ascertained; or

(d) the person in possession thereof admits involvement in the alleged corrupt act and agrees to the surrender of such recovered property to the commission because of such involvement."

It is argued that under that provision, the State may only institute forfeiture proceedings on property when the following conditions have been met;

a) The owner is subject of investigation under the Corrupt Practices Act, Chapter 91 of the Laws of Zambia.
b) The owner has left Zambia for the purpose of evading the said investigation, or
c) The owner absconds;
d) The rightful owner cannot be traced or ascertained;

e) The accused person, who is in possession of the property, admits involvement in the alleged offence, and agrees to surrender the property to the State.

It is the plaintiffs' argument that in light of this, there is need to proceed to trial in order for the court to ascertain if the preconditions existed, warranting the issuance of the gazette notice, and whether the process was complied with. The plaintiffs contend that none of the preconditions existed, and the process was not complied with, and therefore, there was no basis for the forfeiture proceedings.

It is further the plaintiffs' argument that it should be noted that the three (3) months does not relate to a statutory limitation to bring an action, but to making a claim before the relevant authority. Thus, the 1st defendant cannot seek to dismiss the action on the mere fact that a claim was not made. That more importantly however, the plaintiffs assert that they made a claim within the stipulated period, which is an issue that needs to be determined at trial, given the 1st defendant's apparent knowledge that the plaintiffs did not in fact make a claim.

The argument is also that the court has to determine whether the property in this matter constitutes *"recovered property"* as defined under the Regulations as;

> ***"recovered property" means any monies, property or thing of any description which was the subject of, and was recovered during the course of, an investigation into any offence alleged or suspected to have been committed under the Act."***

The plaintiffs argue that they do not consider the school and the property as recovered property, because the offences that the 1stplaintiff was

charged with were under the Penal Code, and not under the Anti-Corruption Commission Act. Therefore, the forfeiture proceedings ought to have been under the Penal Code, which provides for forfeiture after a person has been convicted of an offence, and not the Anti-Corruption Commission Act.

In response to the second preliminary issue, the plaintiffs re state their arguments that were made in response to the second and third preliminary issues that were raised by the 2nd defendant.

As regards the third preliminary issue, the plaintiffs also re-state their arguments in response to the last preliminary issue that was raised by the 2nd defendant.

I have considered the preliminary issues raised. They were made pursuant to Order 14A of the Rules of the Supreme Court of England, as read together with Order 33 Rule 3 of the said Rules. Order 14A provides that;

> ***"(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".***

Order 33 Rule 3 on the hand states that;

> ***"The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated".***

The plaintiffs argue that the 2nd defendant has not met the conditions stipulated in Order 14A for them to be heard on the preliminary issues raised, as they have not filed a notice of intention to defend. Order 14A/2/3 states the requirements of Order 14A as;

> ***"The requirements for employing the procedure under this Order are the following:***
> ***(a) the defendant must have given notice of intention to defend;***
> ***(b) the question of law or construction is suitable for determination without a full trial of the action;***
> ***(c) such determination will be final as to the entire cause or matter or any claim or issue therein; and***
> ***(d) the parties had an opportunity of being heard on the question of law or have consented to an order or judgment being made on such determination".***

With regard to the giving of notice of intention to defend, the record shows that the 2nd defendant entered conditional appearance on 5th April, 2019, and filed the notice of intention to raise preliminary issues, which are the subject of this ruling on 10th July, 2019.

It is the plaintiffs' argument that as the 2nd defendant has not filed a defence, in line with the holding in the case of ***National Pensions Scheme v Ndanji Fashions Limited*** *(21)*, which held that the notice to defend an action commenced by writ of summons is by filing a memorandum of appearance in the prescribed form and a defence, the 2nd defendant cannot be heard on the preliminary issues raised, as they have not satisfied the requirements of Order14A/2/3.

In the case of ***African Banking Corporation Zambia v Mubende Country Lodge*** *(15)*, the appellant issued a writ of possession under cause number 2009/HPC/0735, which was executed at the premises where the respondent conducted its business. The respondent took out a notice of claim, and during the pendency of the interpleader pleadings, the respondent took out an action against the appellant in the High Court claiming damages for wrongful execution and trespass, consequential damages, aggravated and exemplary damages, and a mandatory injunction restraining the defendants from trespassing on the property.

The appellant filed a conditional memorandum of appearance, and sought to dismiss the action on points of law, which were whether the matter was properly before the court, in light of the pending interpleader proceedings under cause number2009/HPC/0735. The trial Judge dismissed the notice of motion that was raised, on the ground that the appellant had not satisfied the conditions under Order 14A/2/3 of the Rules of the Supreme Court of England, as it had not filed a defence. On appeal, the Supreme Court referred to the requirements under the said Order 14A/2/3 of the Rules of the Supreme Court.

The Supreme Court noted that under that provision, the giving of notice of intention to defend is a requirement, and that in that matter, the defendant had not filed a defence, but had only filed a conditional memorandum of appearance. The court went on to ask the question whether a conditional appearance amounts to the giving of notice of intention to defend. It was observed that in answering that question, there was need to reconcile the provisions of the Rules of the Supreme Court of England with our High Court Rules.

The Supreme Court observed that notice of intention to defend is defined in Order 1 Rule 4 of the Rules of the Supreme Court as;

> ***"means an acknowledgment of service containing a statement to the effect that the person by whom or on whose behalf it is signed intends to contest the proceedings to which the acknowledgment relates;"***

The court further observed that notice of intention to defend does not appear in our High Court Rules, but that however, Order 11 Rule 1 of the High Court rules provides for the mode of entering appearance to a writ of summons. That going by that provision, what constitutes a notice of intention to defend is the filing of a memorandum of appearance which is accompanied by a defence. Thus, that it follows that the filing of a memorandum of appearance with a defence is a pre-requisite to launching an application under Order 14A of the Rules of the Supreme Court.

As to the appellant's argument that it had filed a notice of intention to defend by way of the conditional appearance, the Supreme Court stated that the filing of a conditional appearance without a defence is only applicable in circumstances where a defendant wishes to contest the

validity of the proceedings with a view to applying to set aside the writ, in line with Order 11 Rule 1 (4) of the High Court Rules, which provides that;

> ***"(4) Any person served with a writ under Order VI of these rules may enter conditional appearance and apply by Summons to the Court to set aside the writ on grounds that the writ is irregular or that the Court has no jurisdiction".***

That other than what is provided in the said Order, a conditional appearance can never be extended or over stretched to constitute a notice of intention to defend in the context of an application under Order 14A of the Rules of the Supreme Court, which is intended to fully determine a matter without a full trial of the action.

In this matter, the 2nd defendant as already seen, filed a conditional memorandum of appearance on 5th April, 2019, and filed the notice of intention to raise preliminary issues on points of law on 10th July, 2019. They did not file summons to set aside the writ of summons for irregularity or that the court has no jurisdiction. In line with the guidance given by the Supreme Court in the ***African Banking Corporation Zambia v Mubende Country Lodge*** *(15)* case seen above, the 2nd defendant not having filed a defence, although they filed a conditional memorandum of appearance, have not filed a notice of intention to defend.

Thus, they have not satisfied the requirements of Order 14A/2/3 of the Rules of the Supreme Court of England, in order for them to be heard under Order 14A, and the preliminary issues raised by them fail.

The 1st defendant on the other hand entered appearance on 30th January, 2019, and it filed a defence on 19th February, 2019, which was amended on 23rd January, 2020.Thus, the 1st defendant has filed a notice of intention to defend, and has satisfied the requirements of Order 14A/2/3 of the Rules of the Supreme Court.

The first preliminary issue raised in that regard is that the plaintiffs were aware of the Gazette Notice that was issued by the Anti Corruption Commission on 30th October, 2006, which was published in the Government Gazette on 24th November, 2006.However, the 1st defendant contends that it is not aware of any claim having been made by the plaintiffs to the property. Therefore, this action is just meant to circumvent the Gazette Notice.

The 1stdefendantrelies on the case of ***Anti-Corruption Commission v Tedworth Properties*** [14], stating that it is instructive, and that the plaintiffs are in effect circumventing or side stepping the Regulations by commencing this action. The plaintiffs on the other hand have argued that in order to determine the first preliminary issue, many factual disputes have to be determined, and they have pointed out seven (7) issues in their skeleton arguments that they believe relate to the factual disputes which disclose that the 1st defendant disputes the plaintiffs' claims.

The plaintiffs also argue that the term *recovered property* as defined in the Anti Corruption Commission (Disposal of Recovered Property) Regulations, 2004 does not fit with the property in question, and thus the forfeiture proceedings should have been taken under the Penal Code, being the Act under which the plaintiff was charged.

From the arguments advanced by the plaintiffs, it can be seen that their contention is that there are issues in dispute that can only be determined after trial, and not on the preliminary issues that have been raised. The contention by the plaintiffs in the main, relates to whether the plaintiffs were in fact aware of the Gazette Notice, and whether they did make a claim to the property after the Gazette Notice was issued. Further, the contention by the plaintiffs is that the 2nd defendant did not comply with the regulations in having the property forfeited.

These issues can only be determined after evidence is led, and on that basis, at this stage, it cannot be concluded that the plaintiffs are trying to circumvent the Gazette Notice that was published on 24th November, 2006. The first preliminary issue is not suitable for determination without a full trial of the action, and it fails.

As regards the second preliminary issue, the 1stdefendant argues that the plaintiffs' action is anchored on the decision in the criminal case, Cause No. HPA/33/2008, when paragraphs 10, 13, 14 ,15 and 17 of the statement of claim are considered. It also argued that all the plaintiffs' other claims are inextricably tied to, and are therefore ancillary to their alleged entitlement to the property, which is the subject matter of these proceedings.

Reliance is placed on the case of ***U-Rest Foams Limited v Puma Botswana (PTY) Limited and Colourfast Textile Printers (PVT) Limited*** [19] to argue that it is untenable for the plaintiffs to use the outcome of the criminal proceedings as a cause of action, and thus this matter must be struck out.

The plaintiffs' response to that argument is that this case is not on all fours with the ***U-rest*** case, and that they do not need the criminal

judgment to prove their case. They also state that there is no blanket prohibition under the Zambian law against the reference to evidence in criminal proceedings in the context of civil proceedings. The plaintiffs argue that evidence of a criminal nature may be admitted in civil proceedings, if it is not caught by the *res inter alios acta* doctrine.

They further argue that the outcome of the criminal matter is an evidential issue that cannot fully and finally determine the outcome of this matter. A consideration of the statement of claim shows that the plaintiffs refer to the criminal judgment, as can be seen from paragraphs 13 and 17(a) of the statement of claim, in pleading their entitlement to the property.

Paragraph 13 of the amended statement of claim dated 19th December, 2018, reads as follows;

> ***"By a judgment dated 26th May, 2016 issued out of the High Court of Zambia (Criminal Division) under cause number HPA/33/2008 the ownership of the school was confirmed to belong to the plaintiffs (hereinafter referred to as the judgment). The plaintiffs also rely on that judgmentfor its effect to re-establish their ownership to the assets and management of the school following a malicious and unwarranted challenge to their character, reputation and ownership by the Government of the Republic of Zambia through the disbanded Task Force on Corruption".***

Paragraph 17(a) of the said statement of claim on the other hand states that;

"The plaintiffs will state that:

a) The judgment as mentioned in paragraph 13 hereof clearly confirms the legal ownership of the said school and the land on which it is situated is legally owned by the plaintiffs".

In those paragraphs, the plaintiffs clearly state that they place reliance on the criminal judgment for its effect to re-establish ownership to the property. In the ***U-rest*** case, the Supreme Court in discussing the dictum in the ***Kabwe Transport Company Limited v Press Transport (1975) Limited*** [2] relating to the reference of the outcome of criminal proceedings in civil proceedings stated that;

> ***"As the narrative in Hollington v F. Hewthom & Co*** [1] ***established in its proper meaning, even an outcome or a judgment in civil proceedings cannot be used or relied upon for the purpose of establishing or proving a fact in other civil proceedings involving different parties".***

The Supreme Court went further to consider the definition of *res inter alios acta* in ***Black's Law Dictionary*** as;

> ***"A thing done between others".***

Further reference was made ***Little Text Latin for Lawyers*** with regard to the maxim, *alios acta alteri nocere non debet* as meaning;

> ***"One person ought not to be injured by the acts of others to which he is stranger. The above rule operates to exclude all the acts, declarations or conduct of others as evidence to bind a party either directly or by inference".***

The court further considered the words of Goddard L J ***Hollington v F. Hewthom & Co Limited*** [1] when he stated that;

> ***"This is true not only of convictions but also of judgments in civil actions. If given between the same parties, they are conclusive, but not against anyone who was not a party. If the judgment is not conclusive, we have already given our reasons for holding that it ought not be admitted as some evidence of a fact, which must have been found, owing mainly to the impossibility of determining what weight should be given to it, without re-trying the former case".***

That Goddard L J noted that in the opinion of the court, it was safer in the interests of justice that on a subsequent trial, the court should come to a decision on the facts placed before it, without regard to the result of other proceedings before another tribunal.

The Supreme Court concluded as follows;

> ***"Having regard to what we have canvassed above, we would answer the two questions which learned counsel for the appellant posed to us, as earlier noted, in the following terms:***
>
> ***(1)The evidential prohibition in Kabwe Transport against making reference to or introducing evidence of criminal convictions or outcomes in civil proceedings is not limited to cases of negligence but applies to all civil proceedings; and(2)The prohibition referred to in (1) above is restricted to out comes as opposed to the process or evidential material leading to such outcomes".***

The Court further stated that they accepted the arguments by Counsel for the appellant as to the correct meaning and effect of the obiter dicta remarks in the ***Kabwe Transport*** case, and they stated that;

> ***"The result therefore is that there is no provision for convictions in a criminal trial to be referred to and be taken note of in a civil trial.....Not only was the above conclusion consistent with the issue which counsel in that matter (Mr. John Jearey) had raised and which had specifically referred to "criminal convictions", it, that is, the conclusion in question did, subject to our earlier clarification, appropriately mirror the operation of the doctrine of res inter aliosacta".***

It was also stated that;

> ***"In offering this guidance, we have taken full cognisance of the fact that the appellant will not produce or endeavour to produce any judgment or certificate of conviction or, indeed, any outcome of whatsoever kind in cause SSPB/065/2016 currently pending before the subordinate court of the first class at Lusaka for the purpose of using the same (in the case of the judgment, its conclusion or outcome) in the civil proceedings which have been pending in the court below."***

The above case explained that there is no complete bar to the reference to criminal evidence in a civil matter, but that the outcome of a criminal trial cannot be used be used to establish liability in civil proceedings. In this matter, the manner in which the plaintiffs have pleaded their claim in paragraphs 13 and 17(a) of the statement of claims shows that they rely on the outcome of the criminal proceedings in establishing a cause of action in this matter.

This, as seen from the ***U-rest*** case is not tenable. Further, it will be noted that both defendants were not party to the criminal proceedings whose

outcome, the plaintiffs in paragraphs 13 and 17(a) of the statement of claim seek to rely on. The outcome of the criminal judgment is thus caught up in the *res inter alios acta* doctrine.

However, a full perusal of the statement of claim shows that apart from reliance on the outcome of the criminal judgment in pleading ownership to the property, the plaintiffs also claim ownership to the property on the basis that they entered into a contract with ZCCM for the purchase of the property, as seen in paragraphs 5 and 6 of the amended statement of claim. The 1stdefendantdisputes the transaction and the claim to ownership of the property.

The plaintiffs further argue that the inadmissibility of the criminal judgment, is an evidential issue which cannot fully and finally determine the matter. Having found that apart from the criminal judgment, the plaintiffs also rely on the assertion that they entered into a contract with ZCCM to purchase the property, the success of the preliminary issue relating to the non admissibility of the criminal judgment as the basis for the cause of action, will not fully and finally determine the matter, as an order for the amendment of the pleadings can be made. The second preliminary issue partially succeeds.

With regard to the third preliminary issue, the 1st defendant argues that the plaintiffs have commenced this action in violation of Rule 2 of the ***Protection of Fundamental Rights Rules, 1969*** which requires that an action, where the claim relates to a violation of rights under Part III of the Constitution, should be commenced by petition. Therefore, in line with the ***New Plast Industriesv The Commissioner of Lands and The Attorney General*** [6] case, this matter should be dismissed for lack of jurisdiction, as any decision made would be a nullity.

The 1st defendant also argues that this case is distinguishable from the case of ***Amanda Muzyamba Chaala (Administrator of the estate of the late Florence Mwiya Siyuni Chaala v Attorney General and Mukelabai Muyakwa*** [10] where the Supreme Court stated that the High Court should consider the exercise of the public power challenged in the spirit and culture of human rights. Further, that in line with the case of ***Zambia National Commercial Bank PLC V Geoffrey Muyamwa and 88 others*** [17], the enforcement of Part III rights forms a substantial part or central feature of the relief sought by the plaintiffs, as is evident from the statement of claim, and therefore this court lacks jurisdiction to hear this matter.

The plaintiffs on the other hand argue that Article 28 of the Constitution was never meant to restrict the options that are available to a party that alleges that his or her rights have been infringed. Thus, they have a choice to commence the matter by way of petition alleging infringement of their rights, or they can commence the action using a writ of summons accompanied with a statement of claim, claiming damages for example.

The plaintiffs have also relied on the ***Mutale v Munaile*** [7] case where it was stated that a petition is a rare form of bringing proceedings, as well as the case of ***Corpus Legal Practitioners v Mwanandani Holdings Limited*** [13] where the Supreme Court held that where there are multiple reliefs being sought, the correct mode of commencement is by writ of summons accompanied by statement of claim, even if some of the reliefs being sought are prescribed by law to be commenced under other modes.

From the arguments and submissions of both parties, it is clear that Rule 2 of the ***Protection of Fundamental Rights Rules, 1969*** requires that a matter relating to breach of the rights under Part III of the

Constitution should be commenced by petition. The 1st defendant argues that the plaintiffs' action hinges on those Articles, and therefore, the mode of commencement is wrong, and this Court lacks jurisdiction to hear the matter, in line with the ***Newplast Industries*** case.

A perusal of the statement of claim, particularly paragraphs 11 and 12 shows that the plaintiffs allege illegality, on the basis that the 2nd defendant took compulsorily possession of the school, and as a result, violated their constitutional rights as enshrined in Part III of the Constitution. The plaintiffs argue that it is trite law that the Constitution contains instances when one could be disposed of their property, through forfeiture or compulsory acquisition. That this can be seen in Article 16 of the Constitution which provides for protection from deprivation of property.

However, the plaintiffs' argument is that in pleadings their claims, they have made reference to the Constitutional provisions in establishing that there was no just cause for depriving them of their property, and that this does not entail that the action should have been commenced by petition.

The endorsement on the amended writ of summons is for;

i. *An order for the delivery up of management of Ndola Trust School.*
ii. *An order to render an account of all monies had and received from the time the defendant took over the management and administration of the plaintiff's school and business wrongfully.*
iii. *Damages by way of compensation against the 2nd defendant for the expropriation of property legally belonging to the plaintiffs without just cause and unlawfully and in violation of the rights enjoyed by the plaintiffs under the law.*

iv. Any other order that the court may deem fit.

v. Interest on the sum found due.

vi. Costs.

Rule 2 of the ***Protection of Fundamental Rights Rules, 1969*** provides as follows;

> ***"An application under Section 28 of the Constitution shall be made by petition filed in the Registry of the High Court".***

The above rule is clear that where one alleges violation of their rights under the Part III of the Constitution, the action shall be commenced by way of petition. The plaintiffs have relied on the case of ***Corpus Legal Practitioners v Mwanandani Holdings Limited*** *(13)*, arguing that there are other reliefs that they claim in this matter, and therefore, it was proper to commence the action by writ of summons.

The 1st defendant on the other hand argues that this case is distinct from the case of ***Amanda MuzyambaChaala (Administrator of the estate of the late Florence Mwiya Siyunyi Chaala) v The Attorney General and Mukelabai Muyakwa*** *(10)*, as the Supreme Court in that matter stated that was incumbent upon the High Court to consider the exercise of public power challenged in the spirit and culture of human rights.

In that case, the matter was commenced by way of judicial review of the decision of the Committee on Sale of Government Houses refusing to sell House Number 43A Independence Avenue, Mongu to the appellant. In that matter, the late Florence Mwiya Siyunyi Chaala moved the High Court, seeking among others, an order of certiorari, to move into the High Court for the purpose of being quashed, the said decision of the Committee. Other reliefs that she sought, included a declaration that the

sale by the Government of the house in question to the 2nd respondent, who had never been a sitting tenant in the house, was invalid, void and of no effect.

She had further claimed that she was entitled to purchase the said house in her own right as a civil servant, and an order for the cancellation of any certificate of title that may have been issued in favour of the 2nd respondent, and damages for mental distress, anguish and inconvenience. On 31st October, 2004, she passed away, and Ms Amanda Muzyamba Chaala was appointed as her administratix, and she was substituted as a party to the proceedings.

The Supreme Court in that matter noted as follows;

> ***"We are alive to the provisions of statutory instrument No. 156 of 1969, containing the Protection of Fundamental Rights Rules prescribing the originating process by which a citizen may seek redress for infringement or threatened infringement of their rights. Human rights issues however do arise in judicial review proceedings because by their very nature, the proceedings involve the review of public action which may impact on an individual's rights. Should such a situation arise, it is incumbent upon the Court to consider the exercise of the public power challenged in the spirit and culture of human rights. In this case, there was a human rights element. The deceased's application to buy a house was rejected on the ground that she was married to someone who had bought a house. She was being disadvantaged because of her marital status".***

In the case of ***Corpus Legal Practitioners v Mwanandani Holdings Limited*** *(13)*, the reliefs sought by the respondent were;

1. ***An Order that the Caveat entered on Lot No. 2558/M Siavonga by the 3rd Defendant Cell City Limited be vacated and the purported contract of sale dated 8th September, 2005 is null and void.***
2. ***An Order that the Certificate of Title issued in favour of the 2nd Defendant in respect of Lot. No. 2558/M Siavonga be cancelled and a Certificate of Title in favour of the plaintiff be reinstated."***

The court in that matter noted that;

> ***"From the above, it is clear that the correct mode of commencing proceedings, seeking an Order for the removal of a caveat, is by Originating Summons. However, we must hasten to mention here that the Rural Development Corporation Limited Case[1] is distinguishable from the present case in the sense that the relief sought by the Appellant, for the removal of the caveat in this case, is not the only claim which the Respondent is seeking in the Court below. In our view, the position of the law, as stated in the Rural Development Corporation Limited Case[1]envisages a situation andis only applicablewhere the sole claim in an action is for an Order for the removal of a caveat. We take the further view that, looking at the circumstances of this case, to insist that the claim for the removal of the caveat must be brought in a separate action, commenced by way of Originating Summons, would amount to asking that the different claims in this case,***

although involving the same parties and arising from the same set of facts, be severed and brought in separate actions. In turn, this would amount to multiplicity of actions, a practice which we have always frowned upon. For the reasons we have given, we find no basis to fault the decision by the Judge in the Court below to allow the amendment of these proceedings, which were commenced by way of writ of Summons, to include the relief of an order for the removal of a caveat. Ground two has no merit and we dismiss it".

Further, in the case of ***Zambia National Commercial Bank PLC V Geoffrey Muyamwa and 88 others*** *(17)*, the Supreme Court noted as follows;

"As Counsel for the appellant rightly argued, Article 128 of the Constitution of Zambia Amendment Act, vests jurisdiction in the Constitutional Court to hear matters, inter alia, relating to the interpretation of the Constitution. The Constitutional Court is in that regard, possessed with original and final jurisdiction..... On assessment, the court below was called upon to determine the amounts due to each respondent as terminal benefits. This was the main issue before the court below, and it was not a constitutional issue, but rather a labour relations issue.

Flowing from this issue arose a very minor issue of whether or not the terminal benefits to be paid to the respondents were to be subject to income tax. It is at this point, that the court below made reference to articles of the constitution. We are of the considered view that to the extent that the reference to or

interpretation of the Constitution by the court below did not relate to the main issue or subject matter of the dispute, it did not exceed its jurisdiction".

In this case, the plaintiffs allege that the defendants have taken compulsory possession of their property, and they thus seek an order for delivery up of the school, and an order to account for all the monies that they have received since taking over the management and administration of the school. The plaintiffs also claim damages for the compulsory acquisition. The defendants have denied the allegations, stating that the forfeiture of the school was done in line with the Gazette Notice that was issued by the Anti Corruption Commission.

These averments reveal that the third preliminary issue if successful would determine the action subject only to an appeal, as it relates to the jurisdiction of this court to hear the matter. This is in spite of there being issues in contention between the parties regarding ownership of the property, as can be seen from the pleadings.

The reliefs sought in this matter all centre around the alleged illegal acts by the defendants in compulsorily taking possession of the property and starting to manage it. There are no other distinct reliefs sought. Thus, this case is distinguishable from the ***Corpus Legal Practitioners*** case relied on by the plaintiffs, as in that case, the claims were for removal of a caveat and for cancellation of the certificate of title.

The court in that matter noted that the proceedings for removal of a caveat, if it had been the only relief sought, was supposed to have been commenced by originating summons. However, as there was also the claim for cancellation of the certificate of title, the matter was rightly

commenced by writ of summons, so that all the issues in controversary could be determined in one matter, to avoid a multiplicity of actions.

Further, from the guidance given in the ***Zambia National Commercial Bank PLC v Geoffrey Muyangwa and 88 others***[17], that where the main issue in dispute does not relate to breach of the Constitution, then the matter should not be commenced by way of petition, and this matter being centred around the compulsory acquisition of the property, and ultimately the deprivation of the said property, in breach of the rights under Part III of the Constitution, it should have been commenced by way of petition in line with Rule 2 of ***The Protection of Fundamental Rights Rules, 1969.***

The plaintiffs have also argued the aspect of whether the matter is statute barred. It will be noted that it was in the preliminary issues that were filed by the initial advocates for the 1st defendant that this argument was raised. The current advocates for the 1st defendant have not pursued that issue.

Suffice to state that the plaintiffs have argued that the limitation period begins to run from the time that the cause of action accrues. They argue that the limitation period in this matter began to run when the criminal proceedings were finally determined, and not on the date that the school was unlawfully seized and forfeited to the State.

Further that, even if the limitation period is said to have started running from the date of the unlawful seizure, the limitation period prescribed for land matters is twelve (12) years, in accordance with the Limitation Act, 1939. It is argued that this matter was commenced on 29th November, 2018, making it eleven (11) years from the date of the unlawful forfeiture.

The case of ***William David Carlisle Wise v E.F Hervey Limited*** [4] discussed the issue of when a cause of action can be said to have arisen. It was stated in that matter that;

> ***"A cause of action is disclosed only when a factual situation is alleged which contains facts upon which a party can attach liability to the other or upon which a party can attach liability to the other or upon which he can establish a right or entitlement to a judgment in his favour against the other."***

In this matter, the act giving rise to the cause of action was the alleged unlawful seizure of the property. It is when the cause of action arose. There is on record the Gazette Notice dated 30th October, 2006, which was published on 24th November, 2006, stating that the property had been recovered during the course of an investigation of an offence alleged to have been committed under Act No 42 of 1996. Further, that the said property would be forfeited to the State if it was not claimed within three (3) months from the date of publication of the notice.

Therefore, after the lapse of the three (3) months period stated in the notice, and the property was seized, then the plaintiffs had basis upon which they could attach liability for the seizure of the property, being after 24th February, 2007. Twelve (12) years from that date is February, 2019, and the action was commenced before then. It is not statute barred.

I agree with the argument by the plaintiffs that the three (3) months period in the Gazette Notice is for purposes of time within which to claim the property, and it is not for purposes of an action accruing in terms of limitation. However, I do not agree with the plaintiffs' contention that the cause of action arose after the determination of the criminal proceedings,

as the determination of the criminal proceedings could not be the basis upon which the cause of action in this matter could be founded, in light of my ruling on the second preliminary issues raised.

Having found that the matter should have been commenced by way of petition, in line with the case of ***Newplast Industries v The Commissioner of Lands and The Attorney General*** [6], I have no jurisdiction to hear the matter, and I accordingly dismiss the said matter. Costs go to the defendants to be taxed in default of agreement. Leave to appeal is granted.

DATED AT LUSAKA THIS 15th DAY OF JULY, 2020

Skaunds

S. KAUNDA NEWA
HIGH COURT JUDGE