

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

**2018/HPC/0198**

**BETWEEN:**

**INVESTTRUST BANK PLC**

**AND**

**LILLIAN DAKA  
RUSSELL MULELE  
ATTORNEY GENERAL**



**APPLICANT**

**1<sup>ST</sup> RESPONDENT**

**2<sup>ND</sup> RESPONDENT**

**3<sup>RD</sup> RESPONDENT**

***Before: Hon. Justice Dr. W. S. Mwenda in Chambers at Lusaka the  
28<sup>th</sup> day of January, 2020***

*For the Applicant: Mr. L. Phiri of C. Chonta Advocates*

*For the 1<sup>st</sup> Respondent: N/A*

*For the 2<sup>nd</sup> Respondent: Mr. M. Mulele of G M Legal Practitioners*

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## **RULING**

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**Cases referred to:**

- 1) *Frank Bwalya (suing on behalf of himself and in his capacity as Executive Director of Change Life Zambia Limited) v. The Attorney General, Katele Kalumba (sued in his capacity as the Secretary General of the Movement for Multiparty Democracy) and William Banda (2012) 1 ZR 354.*
- 2) *Dora Siliya, Maxwell Moses Boma Mwale and Hastings Sililo v. The Attorney General, the Electoral Commission of Zambia and Wynter Munacaambwa Kabimba (joined to the proceedings in his capacity as Secretary General of the Patriotic Front) (2013) 1 ZR 104*

**Legislation referred to:**

- 1) *Order 33, rule 3 of the Rules of the Supreme Court of England, 1999 Edition (the White Book).*

**Published work referred to:**

- 1) *Brian A. Garner (ed) Black's Law Dictionary, 8<sup>th</sup> Edition, (Thomson West, 2004), at page 960.*

This is the Applicant's application to raise a preliminary issue. The application is by way of Notice of Intention to Raise Preliminary Issues brought pursuant to Order 33, rule 3 of the Rules of the Supreme Court of England, 1999 Edition (the White Book). The said Notice was filed into court on 19<sup>th</sup> September, 2018 and is supported by an Affidavit in Support of Notice of Intention to Raise Preliminary Issues (hereinafter called "Affidavit in Support"), and Skeleton Arguments in Support of Notice of Intention to Raise Preliminary Issues, both of even date.

The issue *in limine* for determination is:

*"That Mulele Russell Mulele has no locus standi in this matter."*

Hence, the court process filed by the said Mulele Russell Mulele ought to be expunged from the court record for want of *locus standi*.

The Affidavit in Support was deposed to by one Crispin Isukanji Daka, the Head of Credit in the Applicant Bank from facts and information within his personal knowledge. It is the deponent's evidence that the Applicant commenced action against the



Respondents by way of Originating Summons and Affidavit in Support seeking the following remedies:

- i. *Payment of all monies which as at 28<sup>th</sup> February, 2018, stood at ZMW123,396 plus interest thereon at the agreed rate and other charges due and owing to the Applicant Bank by virtue of banking facilities availed to the 1<sup>st</sup> Respondent and secured by a third-party equitable mortgage over Subdivision No.16 of Farm No. 332a Kafue, property of the 2<sup>nd</sup> Respondent.*
- ii. *Foreclosure.*
- iii. *Possession.*
- iv. *Sale of the said mortgaged property.*
- v. *An order that the 2<sup>nd</sup> Respondent be held liable as guarantor of the 1<sup>st</sup> Respondent's indebtedness.*
- vi. *Any other relief the Court may deem fit.*
- vii. *Costs.*

The deponent further asserts that as the Applicant was not aware of the physical addresses of the Respondents, it did apply to Court and was granted an order to serve all court process by advertising. The originating process and date of hearing of the originating summons were duly advertised. On or about 13<sup>th</sup> August, 2018, Messrs. GM Legal Practitioners caused to be filed into Court the 2<sup>nd</sup> Respondent's Affidavit in Opposition to Originating Summons purportedly for and on behalf of the 2<sup>nd</sup> Respondent herein. Further, that as the Court record will show, the Affidavit in Opposition is deposed to by one Mulele Russell Mulele. That, in paragraphs 7 and 9 of the Affidavit in Opposition, the said Mulele Russell Mulele indicates the following:

- a) That he has never been in possession of the Certificate of Title relating to the mortgaged property that is currently in the possession of the Bank.



It is the deponent's further evidence that it must be emphasised, as per his Affidavit in Opposition to the Originating Summons, that the issue here is about the Certificate of Title which was fraudulently issued in respect of the property which he was once offered by the 3<sup>rd</sup> Respondent herein. Further, that it is also important for the Court to note that as at 24<sup>th</sup> September, 1999, when the lease in the Certificate of Title in question was purportedly being executed, he was holding the position of Permanent Secretary in the Ministry of Agriculture. That, the Court will note that the lease was purportedly witnessed by Mr. L. J. Mwale in his capacity of Assistant Director of Agriculture. That, this piece of information is also a forgery as Mr. L.J. Mwale was a personal friend of his who was holding the office of Director of Agriculture, having taken over from him when he was appointed Permanent Secretary in 1998.

The deponent avers further, that the Court should also note that the Applicant has not furnished a copy of the National Registration Card of the purported "Russell Mulele" who is a distinct person from him. That, from the foregoing, as well as a perusal of his Affidavit in Opposition to Originating Summons, it is clear that the Certificate of Title in question relates to a property he was once offered by the 3<sup>rd</sup> Respondent; that the Certificate of Title was purportedly issued to him and the lease purportedly witnessed by someone he was well acquainted with who he would ordinarily have asked to be his witness had the transaction been genuine.

That, hence he does have sufficient interest in this matter as it has to be properly determined as to who was responsible for the issuing of the subject Certificate of Title and who is ultimately responsible for paying the monies being claimed by the Applicant.

The Applicant filed an Affidavit in Reply on 2<sup>nd</sup> November, 2018 also deposed to by Crispin Isukanji Daka, the Head of Credit in the Applicant Bank, wherein he deposed that the purported 2<sup>nd</sup> Respondent, Mulele Russell Mulele, both in his Affidavit in Opposition to the application herein and Affidavit in Opposition to Originating Summons, has not afforded any evidence to establish that he was offered the mortgaged property or that he has any legal or equitable interest in it. Further, that the purported 2<sup>nd</sup> Respondent, Mulele Russell Mulele, has not provided any evidence to the Court to substantiate his claims in paragraphs 8 and 9 of the Affidavit in Opposition to the effect that as at 24<sup>th</sup> September, 1999 when the lease in the Certificate of Title was purportedly being executed, he was holding the position of Permanent Secretary in the Ministry of Agriculture and that Mr. L.J. Mwale was a personal friend of his who was holding the office of Director of Agriculture, having taken over from him when he was appointed Permanent Secretary in 1998.

In the Skeleton Arguments in Support, Counsel for the Applicant argued on behalf of the Applicant that Order 33, rule 3 of the White Book empowers this Court to hear and determine the preliminary issue raised. The said Order provides as follows:



*“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.”*

Counsel quoted the definition of ‘*locus standi*’ by Black’s Law Dictionary in Brian A. Garner (ed) Black’s Law Dictionary, 8<sup>th</sup> Edition, 2004, at page 960 as:

*“The right to bring an action or to be heard in a given forum.*

That, from the foregoing, it is clear that for one to have *locus standi*, he must have a right or must be entitled to bring the action or the right to be heard. In support of their contention that in order to have *locus standi*, an applicant must be the appropriate person to present the matter to court for adjudication by showing a sufficient personal and direct interest in a case in the sense of being personally adversely affected by the alleged wrong, Counsel cited the case of *Frank Bwalya (suing on behalf of himself and in his capacity as Executive Director of Change Life Zambia Limited) v. The Attorney General, Katele Kalumba (sued in his capacity as the Secretary General of the Movement for Multiparty Democracy) and William Banda*<sup>1</sup>. Counsel also cited the case of *Dora Siliya, Maxwell Moses Boma Mwale and Hastings Sililo v. The Attorney General, the Electoral Commission of Zambia and Wynter Munacaambwa Kabimba (joined to the proceedings in his capacity as Secretary General of the Patriotic Front*<sup>2</sup>, where the Supreme Court reportedly stated thus:

*“In order for an interested party to have locus standi or demonstrate sufficient interest, he must show that he would be affected by the Court’s decision in a concrete sense, and not an abstract one.”*

It was submitted that from the foregoing authorities, the Court is invited to note that the following questions beg consideration, namely:

- a) Is Mulele Russell Mulele the appropriate person to defend the matter herein?
- b) Does Mulele Russell Mulele have sufficient personal and direct interest in the case for him to have the right or for him to be entitled to defend the matter herein?
- c) Does Mulele Russell Mulele have an interest in the subject matter (i.e., the mortgaged property) of the litigation in order for him to claim to have the right to defend the action?
- d) Has Mulele Russell Mulele demonstrated to the Court that he would be affected by the Court’s decision in a concrete sense?

It is the Applicant’s contention that from the facts deposed in the Affidavit in Support of this application, none of the above questions can be answered in the affirmative as Mulele Russell Mulele has demonstrated to the Court that he is not the mortgagor envisaged by the action because he has never been in possession of the Certificate of Title relating to the mortgaged property that is currently in the possession of the Bank; he did not sign the Certificate of Title; he did not sign the Memorandum of Deposit of Title as the signature therein



is different from his; he does not know the 1<sup>st</sup> Respondent, Lillian Daka and has never guaranteed any loan with the Applicant and his full names are Mulele Russell Mulele and not Russell Mulele, as cited by the Applicant.

The Applicant further contends that even if the names were exactly similar, it would be unreasonable in the face of the other factors to conclude that the deponent of the Affidavit in Opposition is the mortgagor envisaged and cited as the 2<sup>nd</sup> Respondent, as such an argument would be advanced on the pretext that there is only one Russell Mulele in the entire world.

The Applicant argues in summation, that the deponent of the Affidavit in Opposition, Mulele Russell Mulele is not the mortgagor as envisaged and cited as the 2<sup>nd</sup> Respondent; that Mulele Russell Mulele does not have *locus standi* to defend this action, that is, that the deponent does not have the right or is not entitled to be heard in this matter. The Applicant therefore, prays that the preliminary issue raised be upheld and all the court documents filed by Mulele Russell Mulele purportedly on behalf of the 2<sup>nd</sup> Respondent be accordingly expunged. The Applicant also prayed for costs.

In their Skeleton Arguments, Counsel for the 2<sup>nd</sup> Respondent agreed with the holding in the *Dora Siliya and 2 others v. The Attorney General* case but argued that the fact that a Certificate of Title was fraudulently issued in the 2<sup>nd</sup> Respondent's name and subsequently pledged as security for the debt claimed herein, means that he is



likely to be affected by the Court's decision in a concrete sense. For instance, if the Applicant fails to execute any judgment in its favour, it is likely to pursue other properties belonging to the 2<sup>nd</sup> Respondent. Further, that given the commercial nature of the matter, the 2<sup>nd</sup> Respondent's creditworthiness may suffer injury as a result of the judgment declaring that he defaulted on a guarantee he purportedly made.

Counsel for the 2<sup>nd</sup> Respondent further submitted that for this Court to make a finding of fact that Mulele Russell Mulele is not the rightful 2<sup>nd</sup> Respondent herein, the Applicant should have availed the National Registration Card of the person they purport to be actually targeting. That, it cannot be a sheer coincidence that the Certificate of Title in question purports to be under a lease from 1987 when Mulele Russell Mulele was first offered a property in Kafue and that the purported witness to the lease in the Certificate of Title is a person he was acquainted with.

That, in the premises the 2<sup>nd</sup> Respondent clearly has *locus Standi* and given the fact that the 3<sup>rd</sup> Respondent has joined these proceedings by consent of the parties, it is imperative that the 3<sup>rd</sup> Respondent be allowed to give its input on the authenticity of the Certificate of Title in question as well as shed more light on who the real owner of the subject property is so that the Court can properly determine all the matters in contention. He urged the Court to dismiss the preliminary issue herein with costs.

The application came up for hearing on 7<sup>th</sup> November, 2018. Mr. Phiri, learned Counsel for the Applicant indicated that the Applicant would rely on the Affidavit in Support and Affidavit in Reply, as well as the Skeleton Arguments in Support. The gist of the Applicant's application, according to Counsel, is that the 2<sup>nd</sup> Respondent has no *locus standi* as the 2<sup>nd</sup> Respondent is named Russell Mulele. That, in the Affidavit in Support, particularly paragraph 10, the Applicant has endeavoured to establish why the named Mulele Russell Mulele is not the 2<sup>nd</sup> Respondent in this matter. That, paragraphs 5 and 6 of the Affidavit in Reply also advances the Applicant's position that the assertions made by Mulele Russell Mulele both in the Affidavit in Opposition to the Originating Summons and in the Affidavit in Opposition to the application before Court are not supported by any evidence in that Mulele Russell Mulele has not established in this Court any interest whatsoever in the mortgaged property.

Learned Counsel submitted that Mulele Russell Mulele is not an appropriate party to this matter and is not entitled to be heard as he has no personal or direct interest in this matter. That, for these reasons, it is the Applicant's prayer that the preliminary issue be upheld and all the documents filed by Mulele Russell Mulele be expunged from the record. Counsel also prayed for costs.

In response, Mr. Mulele, learned Counsel for the 2<sup>nd</sup> Respondent, submitted that the 2<sup>nd</sup> Respondent would rely on the Affidavit in Opposition and Skeleton Arguments in Opposition filed into Court.



He, however, augmented the same by *viva voce* submissions. Counsel submitted that the deponent of the Affidavit in Opposition Mr. Mulele Russell Mulele, has demonstrated sufficient interest in the matter by outlining the fact that he was once offered a farm in Kafue between the years 1986 – 1988, which correspond with the date from which the lease which is subject of these proceedings runs.

In response to the contents in paragraph 6 of the Affidavit in Reply to the effect that the deponent has not provided proof to substantiate his claims, Counsel submitted that it was impossible to expect the deponent to furnish proof of an offer letter generated 32 years ago when he has deposed on oath that he surrendered the property 27 years ago.

Counsel contended that what is important for the Court to consider is that the title deeds which are subject of these proceedings bear part of the deponent's name and the purported witness to the lease in the said title deeds is a person who is known to the deponent and did not hold the position of Assistant Director of Agriculture at the time. That, this shows that the subject title deed was fraudulently generated. Further, that if the purported individual Russell Mulele existed, the Bank would have been in possession of his National Registration Card, as it is common knowledge that a bank cannot issue a facility to an individual without retaining a copy of his National Registration Card. Counsel submitted, finally, that if the Applicant was pursuing the 2<sup>nd</sup> Respondent who truly existed, they would have effected service of the originating process at S/D No. 16

of Farm No. 332a, Kafue. That, the Applicant failed to do so because this property does not exist on account of the title being forged. That, in view of the foregoing, the preliminary issue raised should be dismissed as the Court will only get to the bottom of this matter if the 3<sup>rd</sup> Respondent, the Attorney General is allowed to give its position with regard to the authenticity of the title deed as well as the identity of the person to whom it was granted.

In reply, Mr. Phiri submitted that an issue had been raised by the Applicant as regards service of the process. Counsel submitted that their argument is that the Certificate of Title as exhibited before this Court is in the custody of the Applicant Bank and the property does exist. That, the Affidavit in Support in paragraph 5, shows that the Applicant made an application to serve the court process by way of advertising, which application was granted and it is a proper way to serve process where the parties to be served cannot be found, as was the case herein.

Responding to the argument that the title deed bears part of the deponent's names and as such suggests that it is the same person, Counsel submitted that to allow this argument would be to suggest that there is only one Russell Mulele in the whole world, which suggestion, in the 2<sup>nd</sup> Respondent's view, is impossible. That, the question before this Court is not for the Applicant to prove that the 2<sup>nd</sup> Respondent sued is different from the deponent because the Applicant, as holder of the mortgage, has commenced proceedings as it is entitled to. That, it is therefore, now for the deponent wanting



to be part of these proceedings to establish his interest, as apart from the averments in the Affidavits, nothing else has been brought to Court. Counsel reiterated his prayer that the preliminary issue be upheld with costs.

I have carefully examined the Affidavits filed by both parties and the Skeleton Arguments and considered the authorities cited. I have also deliberated on the oral submissions by Counsel on both sides. The question for determination, in my view, is whether the 2<sup>nd</sup> Respondent has demonstrated sufficient personal and direct interest in this case to have *locus standi*.

Arguments have been advanced by both parties in support of their respective positions. Black's Law Dictionary, already cited above, has defined *locus standi*, as the right to bring an action or to be heard in a given forum (emphasis supplied by the Court). The question is, has the 2<sup>nd</sup> Respondent demonstrated to the Court that he has the right to be heard in this Court? In my view, the answer to this question is in the affirmative for the reasons that follow below.

Firstly, it is Mulele Russell Mulele's testimony that the name of the person cited as the 2<sup>nd</sup> Respondent on the Originating Notice of Motion is his, save that one of his names has been omitted. That could as well be the position, but that can only be determined at trial.

Secondly, in the Affidavit in Opposition to Originating Summons and indeed, the Affidavit in Opposition to the Notice of Intention to Raise

Preliminary Issues, Mulele Russell Mulele has made allegations of fraud in the issuance of the Certificate of Title which was used as security for the facilities availed to the 1<sup>st</sup> Respondent herein. He has also made allegations of forgery of his signature on the lease attached to the Certificate of Title to the mortgaged property, which property was once offered to him but he turned the offer down in preference for another property. I am in agreement with the submission by Counsel for Mulele Russell Mulele, that with the joining of the Attorney General to the proceedings, by consent of the parties, it will be determined at trial as to who was responsible for the issuing of the subject Certificate of Title and who ultimately is responsible for payment of the monies being claimed by the Applicant. I am of the view that should it be determined at trial that the mortgaged property does in fact belong to Mulele Russell Mulele and judgment is entered in favour of the Applicant, Mulele Russell Mulele would be affected by the said judgment in a concrete sense as he would be liable as guarantor of the said loan to settle the same or risk having the mortgaged property foreclosed by the Applicant.

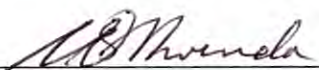
Thirdly, there is no copy of the identity card of Russell Mulele, the person that the Applicant claims is the proper 2<sup>nd</sup> Respondent herein. I am of the opinion that, contrary to the submission by Counsel for the Applicant that it is not the duty of the Applicant to prove that the 2<sup>nd</sup> Respondent sued is different from the deponent of the Affidavit in Opposition, it is the Applicant that has raised the preliminary issue which is calling upon the Court to determine that Mulele Russell



Mulele has no *locus standi* in this matter and therefore, it is incumbent on the Applicant to show that Mulele Russell Mulele is not Russell Mulele by exhibiting a copy of the National Registration Card of the latter, which the Applicant has not done. In this regard, I agree with the submission that for this Court to make a finding of fact that Mulele Russell Mulele is not the 2<sup>nd</sup> Respondent herein, the Applicant should have availed the Court with the National Registration Card of the person they purport to be targeting.

For the above reasons, I find that Mulele Russell Mulele has demonstrated sufficient interest in this matter as required by the authorities cited and therefore, has *locus standi* in the matter and is the rightful 2<sup>nd</sup> Respondent. Consequently, the preliminary issue has failed and is dismissed with costs to the 2<sup>nd</sup> Respondent. The said costs are to be agreed by the parties or taxed in default of agreement.

**Delivered at Lusaka this 28<sup>th</sup> day of January, 2020.**

  
**DR. W. S. MWENDA**  
**JUDGE**