

IN THE HIGH COURT FOR ZAMBIA  
AT THE NDOLA DISTRICT REGISTRY  
HOLDEN AT NDOLA  
(Civil Jurisdiction)

2021/HN/176

BETWEEN:

FRANCIS MUMA

AND

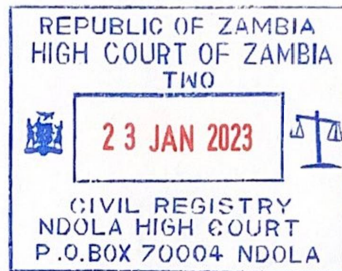
HUNDREDFOLD HARVEST FARM LTD

KAPUTA OSWARD KAUMBA

KAYULA SANKWE CHANSA

THE ATTORNEY GENERAL

MPONGWE MUNICIPAL COUNCIL



PLAINTIFF

1<sup>ST</sup> DEFENDANT

2<sup>ND</sup> DEFENDANT

3<sup>RD</sup> DEFENDANT

4<sup>TH</sup> DEFENDANT

5<sup>TH</sup> DEFENDANT

Before the Honourable Madam Justice Y. Chembe in Chambers.

For the Plaintiff:

Mr J. K. Kayuni –Messrs John  
Kayuni and Partners

For the 1<sup>st</sup> – 3<sup>rd</sup> Defendants: Mr S. Bwalya – Messrs Solly Patel,  
Hamid and Lawrence

For the 4<sup>th</sup> Defendant: No appearance

For the 5<sup>th</sup> Defendant: No appearance

**RULING**

**Cases referred to:**

1. *Wanyoike V Dyno Holdings Limited (2014) e KLR*

**Legislation referred to:**

1. *The High Court Act Chapter 87 of the Laws of Zambia*
2. *The Legal Practitioners Act Chapter 30 of the Laws of Zambia*
3. *The Legal Practitioners Practice Rules Statutory Instrument no. 51 of 2002*

By writ of summons dated 8<sup>th</sup> July, 2021, the Plaintiff commenced an action against the Defendants where he sought a declaratory order that he was the rightful owner of Farm 4795, Mpongwe, together with an order for possession of the said farm among other reliefs. The 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Defendants filed a defence. Before the scheduling conference was held, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants filed summons for an order for recusal of Advocates pursuant to order 3 rule 2 of the High Court Rules Chapter 27 of the Laws of Zambia as read together with Section 13 of the High Court Act and Section 85 of the Legal Practitioners Act Chapter 30 of the Laws of Zambia. The Defendants sought the recusal of Counsel for the Plaintiff Mr. John Kayuni.

In the accompanying affidavit which was sworn by one Muteka Muteka, it was deposed that it had been discovered that Mr J. Kayuni had signed the certificate of title for Farm 4795 when he was Registrar at the Ministry of Lands on 12<sup>th</sup> May, 2021. A copy of the certificate of tile was produced. It was deposed further that it was discovered that Mr Kayuni had also signed the certificate of title relating to Farm no. Mpong/10202602 on 21<sup>st</sup> May, 2018 way



before the Plaintiff's certificate of title was issued. A copy of the 1<sup>st</sup> Defendant's certificate of title was produced.

The deponent also deposed that the Plaintiff had alleged, in the amended statement of claim, that he discovered that the lands register had been tempered with by deleting his parent's details and replacing them with his own. It was stated that this is alleged to have occurred at a time when Mr Kayuni was the custodian of the lands register and as such was in a position to testify on the allegations of tempering with the lands register or records and the procedural impropriety relating to the issuance of the said certificates of title.

It was further deposed that the Defendants wished to subpoena Mr Kayuni as a witness and he could not therefore continue to represent the Plaintiff.

In the affidavit in opposition sworn by Mr. John Kayuni, it was deposed that at the material time, he was not employed as a legal practitioner but was an Assistant Registrar for lands and deeds. He deposed that he took oath of office as a security officer. He explained that as part of his duties, his signature was scanned and embedded in the Zambia Information Land Management System which electronically appended his signature to the documents.

It was averred that Zambia Information Land Management System electronically appended his signature without him physically inserting it or meeting the customer. He denied having ever dealt



with the two certificates of title or meeting the owners in person. He denied that the Legal Practitioners Act applied to state advocates.

Mr Kayuni also averred that as Assistant Registrar he had no powers to allocate land as his duties entailed issuing certificates of title. He denied having obtained any confidential information from the Defendants which was protected from disclosure. He maintained that electronically signing a certificate of title could not be a basis for refusal. He alleged that the Defendants' application amounted to restraint of trade and was a breach of the constitution as it infringed on the Plaintiff's right to counsel of choice.

He pointed out that he was not on the Defendant's list of witnesses and that there was no application for leave to amend the Defendant's list of witnesses. He averred that there were other registrars with Ministry of Lands who could be called as witnesses. He averred that the lands register dated 11<sup>th</sup> December, 1987 relating to F/4795 was issued by Mr. Ernest Kapenda who omitted the details of the first owner of the farm. He denied having personally entered any entries relating to the farm in issue in the actual lands register. He also denied having been the advocate for the 1st Defendant at the time the alleged registration of farm no. 4795 was done. He averred that he was never the custodian of the lands register as this fell under the Chief Registrar for Lands and Deeds, Mrs. Agatha Ntutuma.

The Defendant also deposed that it was impossible for him to testify on behalf of the 1<sup>st</sup> Defendant for things he did as a former Security



Officer as the oath of office could not permit him to. He stated that the issue before Court was whether the Plaintiff's land had been encroached upon and not whether the signature on the certificate of title was forged. He denied that he was responsible for the registration of the title deed as shown in the documents produced by the Defendants marked 'mm3' and 'mm4'. He stated that the firm John Kayuni and Partners had 6 other lawyers who had never worked for the Lands and Deeds registry.

In the skeleton arguments filed in support of the application, the Defendants submitted that Counsel for the Plaintiff, Mr. J. Kayuni was as officer of the Court as provided by section 85 of the Legal Practitioners Act. I was referred to the case of **ZCCM investment Holdings PLC V First Quantum Minerals Limited 2016/HPC/515** (for persuasive reasons only), where rule 33 (1) (d) (e) was discussed. Section 33 (1) was reproduced and provided as follows:

***"A practitioner shall not accept any brief if to do so would cause the practitioner to be professionally embarrassed under the following circumstances:***

- d) The matter is one which the practitioner has reason to believe that the practitioner is likely to be a witness or in which whether by reason of any connection of the practitioner (or any partner or other associate of the practitioner) with the client or with the Court or a member of or otherwise, it will be difficult for the practitioner to maintain***



*professional independence or the administration of justice might appear to be prejudiced.*

- e) *The practitioner has been responsible for deciding on a course of action and the legality of that action is in dispute in the proceedings."*

My attention was also drawn to a Kenyan authority of ***Murigu Wanyoike Vs Dyno Holdings Limited (2014) e KLR***, where the issue of whether or not the law firm of Messrs Mohamed Madhani and Company Advocates could continue to be on record in the proceedings. Counsel for Defendants quoted at length from that judgment where the Court held that presence of the law firm would be prejudicial to a fair trial and ordered that it ceased acting for the Defendants.

The Defendants contended that Mr. Kayuni had signed the certificates of title for the Plaintiff and the 1<sup>st</sup> Defendant whose legality both parties sought to impugn. They maintained that Mr. Kayuni was likely to be called as a witness given that the Plaintiff was alleging that lands register which was under his care had been tampered with. I was urged to order the recusal of Mr Kayuni and his law firm.

The Plaintiff filed lengthy arguments in opposition to the application for recusal. It was submitted that the Legal Practitioners Act Cap 30 and statutory instrument no. 52 of 2002 The Legal Practitioners Rules were aimed at providing for the independence and integrity of



lawyers. He submitted that a lawyer owed ethical duties to Court, the client, the legal profession and society at large. I was referred to the case of ***Exparte Bread Manufacturers, Re Truth and Sportman Limited (1937) SK (NSM) 242*** at page 249 on conflict of interest. Several cases were referred to (which I shall not reproduce here) to demonstrate that a legal practitioner has a fiduciary duty to avoid conflict of interest. He maintained that the duty was mainly owed to the client.

It was submitted that the legal practitioner's rules did not apply to a former government lawyer who is bound by the State Secrets Act Cap 111, not to disclose confidential matters to anyone. The plaintiff submitted further that it was only a client who could bring an application to restrain a lawyer from acting and to the extent that the Defendants were not Mr Kayuni's clients, the application was bad at law. He urged the Court to view the application brought by people with adverse interest with skepticism.

The Plaintiff submitted further that the application for recusal offended against the dictates of Article 18 (2) (e) of the Constitution which provided that a person charged with a criminal matter was entitled to be represented by a legal practitioner of his own choice. He contended that the provision applied to civil matters as well.

It was also submitted that the impression created by the application was that the Plaintiff's lawyer had to testify against the interests of his client which would defeat the course of justice. It was argued that before disqualifying a lawyer, the Court needed to consider



whether the continued representation would lead to loss of public confidence in the legal system. In the present cause, it was argued that there would be no such loss of public confidence.

The Plaintiff also made lengthy submissions on what constitutes conflict of interest. He referred to a number of foreign judgments which I shall not summarise here for reasons that will become apparent later. In a nutshell the argument by the Plaintiff was that recusal on the basis of conflict of interest of duty normally arose where there was a lawyer client relationship and was intended to protect privileged communications. He did however acknowledge that the Court had an inherent duty to prevent conflict of duty which may impinge upon the administration of justice.

I was referred to a book by Lewis and Kyros entitled *Handy Hints on Legal Practice* where the learned authors stated that rules of the bar often preclude an advocate from taking instructions in a matter in which the advocate is likely to be called as a witness. It was submitted that issue of a lawyer being called as a witness must be weighed against the constitutional right to choose one's lawyer of choice.

I was referred to the case of ***Kallinccos V Aunti (2005) NSW SC 1181*** for the test on whether a lawyer should be prohibited in a case where he was a potential witness. I was urged to find that the application by the Defendants was aimed at defeating the course of justice.



The Plaintiff maintained that the legal practitioner rules did not apply to Mr Kayuni because at the time the certificates of title were issued, he was a state advocate who was exempt from the Legal Practitioner's Act. He restated Rule 33 of Statutory Instrument Number 51 of 2002. It was submitted that the Defendants had failed to show that a client lawyer relationship existed or that there was any reason to believe that Mr Kayuni would be called as a witness or that it would be difficult for him to maintain his professional independence. It was also submitted that there was no evidence that continued representation of the Plaintiff by Mr Kayuni would affect the administration of justice or how the Defendants would be prejudiced.

On the case of Murigu Wanyoike, the Plaintiff submitted that case would be distinguished from the current scenario as that case involved a lawyer who had acted for both the vendor and the purchasers. He argued that in the present case Mr Kayuni did not issue the title deed to the 1<sup>st</sup> Defendant as it was the president through the commissioner of lands who gave two Leases to two persons over the same land.

He referred to the cases of ***Hotelier Limited, Odys Works Limited V Finsbury investments 2011/HP/260*** and ***Law Association of Zambia V The Attorney General*** and ***Philles Lombe Chibesakunda 2013/HP/1393, Akashambatwa Mbikusita Lewanika Vs Frederick Jacob Chiluba SCZ Judgment no. 54 of***



**1998 and *Juldan Motors Limited & Others V First National Bank Zambia Limited Appeal No. 51/2018.***

A further submission by the Plaintiff was that the Defendants had delayed in bringing their application and were therefore deemed to have waived their right to object. In support of that position the Defendant referred to the case of ***Vailatu V Kelly (1989) CLR 56.***

I was urged to dismiss application with costs.

I have carefully considered the affidavit evidence together with the skeleton arguments by both sides. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants (hereinafter referred to as the defendants) seek an order of recusal of the Plaintiff's advocates Mr John Kayuni and his firm Messrs John Kayuni and Partners pursuant to Order 3 Rule 2 of the High Court Rules Chapter 27 of the Laws of Zambia as read with Section 85 of the Legal Practitioners Act Chapter 30 of the Laws of Zambia. The Defendants also rely on Rule 33 of Statutory Instrument no. 52 of 2002. The Legal Practitioners Practice Rules.

The facts upon which the application is anchored as revealed by the affidavit in support of the application are that the Plaintiff's advocate whilst he was employed as Registrar at the Ministry of Lands signed the certificate of title relating to Farm 4795 on 12<sup>th</sup> May, 2021. Mr Kayuni also signed the certificate of title relating to the 1<sup>st</sup> Defendant's property Farm No. MPONG/10202602 on 21<sup>st</sup> May, 2018. The two properties are in contention as the Plaintiff alleges that F/Mpong/10202602 was created on top of Farm 4795.



In the statement of claim, the Plaintiff averred that someone at the Ministry of Lands had tempered with the land register to his detriment. The Defendants contended that Mr Kayuni having been the custodian of the lands register at the material time could be called to speak to the state of the lands register.

The Plaintiff has opposed the application for recusal on the ground that he had no direct dealings with the parties as the signature was electronically inserted. He also contended that Mr Kayuni did not have a client lawyer relationship with the defendants which could give rise to a conflict of interest. It was also argued that at the material time Mr Kayuni was a state advocate and therefore not subject to the Legal Practitioner's Act. The Plaintiff further argued that the Defendant had not disclosed what prejudice they were likely to suffer if the order was not granted and that the order of recusal would impinge upon the Plaintiff's constitutional right to legal counsel of his choice.

Most of the facts herein are common cause. It is not in dispute that Mr Kayuni was employed as Assistant Registrar in the Ministry of Lands. His duties included signing certificates of title and a general oversight of the lands Register. His signature appears on the certificates of title for Farm 4795 and Farm no. Mpong/10202602 belonging to the Plaintiff and the 1<sup>st</sup> Defendant respectively. It is also common cause that two certificates of title relate to more or less the same piece of land; hence the current dispute. The certificate of title for the first defendant was issued earlier having



been registered on 21<sup>st</sup> May, 2018 while that for the Plaintiff was registered on 12<sup>th</sup> May, 2021. On both dates Mr Kayuni was working as assistant registrar.

Section 85 of the Legal Practitioners Act provides that:

***“Any person duly admitted as a practitioner shall be an officer of Court and shall be subject to the jurisdiction thereof.”***

However, Section 30 (1) of the same Act provides that the Act shall not apply to the Attorney General, State Advocates and other advocates employed by the Government. The Plaintiff contends that the Act does not apply to him since he was a State Advocate at the time he signed the certificates of title.

I find this argument to be misleading and misconceived. The application for an order of recusal against Mr Kayui is not against him as a state advocate. The basis of the application is that the Mr Kayuni as a practicing Legal practitioner should not continue to act for the plaintiff because he could be called as a witness to explain issues that have been raised concerning his actions when he was Assistant Registrar. In my view, the argument of the Defendants in citing Section 85 of the Act and Rule 33 of the Legal Practitioners Practice Rules is that Mr Kayuni should not have accepted instructions in a matter in which he was likely to be called as a witness on an issue he had dealt with earlier. The argument that the Legal Practitioners Act does not apply to him would have been



valid if he was still a State Advocate. It is not in dispute that at present Mr Kayuni is a legal Practitioner and not a State Advocate. The Legal Practitioner's Act therefore, does not apply to him.

The issue that I need to determine is whether by representing the Plaintiff, Mr Kayuni has fallen foul of Rule 33 (I) (d) and (e) of the Legal Practitioners Practice Rules Statutory Instrument no. 51 of 2002 Rule 33 (I) of the Rules provides that:

***“A practitioner shall not accept any brief if to do so would cause the practitioner to be professionally embarrassed under the following circumstances.***

***a) .....***

***b) .....***

***c) .....***

***d) the matter is one in which the practitioner has reason to believe that the Practitioner is likely to be a witness or in which whether by reason of any connection of the practitioner (or of any partner or other associate of the practitioner with the client or with the Court or a member of it or otherwise, it will be difficult for the practitioner to maintain professional independence or the administration of justice might be or appear to be prejudiced;***



*e) the practitioner has been responsible on a course of action and legally of that action is in dispute in the proceedings;*

*f) .....”*

The Plaintiff has gone to great lengths to demonstrate that no conflict of interest exists as the 1<sup>st</sup> Defendant was never a client of Mr Kayuni at any stage and he did not have any personal dealings with him. Again, the Plaintiff has completely misconstrued the issue at hand. There is no suggestion in the affidavit evidence or indeed the skeleton arguments by the defendants that Mr Kayuni was ever retained by any of the Defendants or that a client/lawyer relationship existed between them whose sanctity could be jeopardised by him representing the Plaintiff herein. The argument is that having signed the 1<sup>st</sup> Defendant's certificate of title in 2018 (which the Plaintiff seeks to have cancelled) and having subsequently signed the certificate of title for the Plaintiff over the same piece of land in 2021 while the 1<sup>st</sup> Defendant's certificate of title still subsisted, it is likely that Mr Kayuni would be called as a witness.

In my view, Mr Kayuni was aware of the existence of the two certificates of title and the fact that they both have his signature from the beginning. I say so because the claims in the writ of summons sought cancellation of the Defendant's certificate of title. The averments in the accompanying statement of claim in



paragraph 14 show that Mr Kayuni was aware that there was an allegation that the 4<sup>th</sup> and 5<sup>th</sup> Defendants issued title to the defendant despite knowing that the land was held on title by the Plaintiff. I would like to believe that Mr Kayuni could not have drawn the above pleadings without having sight of the Defendant's certificate of title. He should have been aware of the likelihood of being called as a witness.

Mr Kayuni has tried to distance himself from having taken any action in relation to the issue of the certificate of title in issue by stating that the signature was an electronic one which was embedded in the Zambia Information Land Management System which could append his signature. I am unable to follow this argument or the evidence. It is not clear whether Mr Kayuni is denying that he signed the certificates of title electronically or otherwise. I find it hard to believe that his electronic signature could be appended to a document without his knowledge. In my view the registrar's signature signifies that he is satisfied that all the procedural steps have been taken. Given that a certificate of title denotes ownership of land by the person named therein, it is a document of such importance only the person occupying the office of Registrar or Assistant Registrar of Lands can sign. It cannot be therefore, that that an electronic system can append the signature without the participation of the holder of the signature.

It appears that the gist of his statement on the signature is that he did not meet the clients. However, the issue is not whether he met



the clients or not but whether he registered two certificates over the same piece of land to two separate entities. In my view the duty of the Registrar or Assistant Registrar of lands is to ensure the propriety of all process surrounding the issuance of the certificate of title and not to append a signature with aloofness.

I found the case of ***Wanyoike V Dyno Holdings Limited (2014) e KLR*** cited by the Defendants to be instructive on the issue of when an order for recusal of counsel should be made. It was held in that case that the facts of each case should be evaluated to determine whether it would be prejudicial for a particular advocate to appear in the matter. Each case must turn on its own facts. Granted that in that case the facts involved an advocate who had acted for both the Plaintiff and the Defendant in drawing up the contract which was disputed and the conflict of interest was apparent when he chose to act for the Defendant, in the present case Mr Kayuni can be said to have 'acted' for both the Plaintiff and the 1<sup>st</sup> Defendant when his signature was appended to both their certificates of title.

Further Rule 33 (I) (d) is couched in very clear terms and prohibits legal practitioners from accepting any brief which would result in professional embarrassment to him. One of the situations referred to in (d) is where he has reason to believe that he is likely to be a witness. As stated above, the very fact that the existence of two certificates of title over the same property is being questioned should have put him on alert that he could be called as a witness.



The Plaintiff's argument that there are other officers in the Ministry of Lands who can be called as witnesses in my view is neither here nor there as it is Mr. Kayuni whose signature appears. Further, it is my considered view that under Rule 33 (I) (d) of the Legal Practitioners Practice rules, there is no requirement to prove that one party will be prejudiced. The basis for declining a brief is the fear that Counsel may be professionally embarrassed if he was called as a witness in a case in which he was representing one of the parties.

Although I accept that there are other lawyers within the firm of Messrs. John Kayuni and Partners who did not work for the Ministry of Lands, I do not believe it would be proper for any other advocate from the firm to represent the Plaintiff as it would be awkward to cross examine their principal should he be called. The argument that the order of recusal would impinge upon the Plaintiff's constitutional right to counsel of their choice is flawed as the right is not absolute and may be tempered by other considerations.

The Plaintiff cited a plethora of cases on what constitutes conflict of interest which in my view were not useful to his case or the issue at hand.

On the totality of the evidence before me, I find that the Defendants have established that it would be prejudicial to the administration of justice if Mr Kayuni were to be allowed to continue representing the Plaintiff in this matter. I accordingly order that Mr J. Kayuni is



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recused from representing the Plaintiff and that the firm of Messrs John Kayuni and Partners should not continue to act in this matter. The Plaintiff is granted 60 days to look for alternative counsel.

I make no order for costs.

**DATED THIS 23<sup>TH</sup> DAY OF JANUARY, 2023.**

.....*Chembe*  
**Y. CHEMBE**  
**HIGH COURT JUDGE**

