

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

**2023/HP/0505**

BETWEEN:

**KILLIAN MWIINGA**

*(Suing as attorney for Gregory Mainza)*

AND

**EMMANUEL CHAMA**

**MAZUBA WILSON KACHALI**

**COMMISSIONER OF LANDS**

**APPLICANT**

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

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

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



**Before:**

***The Hon. Mr. Justice Charles Zulu***

The Applicant (*Killian Mwiinga*): In Person.

For the 1<sup>st</sup> Respondent:

Mr. V.K. Luswili & Ms. L. Nakamba-Kaluba of Messrs Iven Levi Legal Practitioners.

The 2<sup>nd</sup> Respondent:

No Appearance

For the 3<sup>rd</sup> Respondents:

Mr. M. Chinyonga, State Advocate,  
Attorney General's Chambers.

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## **R U L I N G**

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Cases referred to:

- 1. *Gregory v Turner* [2003] 1WLR 1149.**
- 2. *Ashmore v British Coal Corporation* [1990] 2 ALL E.R. 990.**
- 3. *Swallow and Pearson (a firm) v Middlesex County Council* [1953] 1 ALL E.R. 580.**
- 4. *Finance Bank Zambia Limited v Monokandilos and Another* [2012] Z.R. Vol. 484.**

Legislation and other works referred to:

- 1. *The High Court Rules Chapter 27 of the Laws of Zambia.***

2. ***The Legal Practitioners Act, Chapter 30 of the Laws of Zambia.***
3. ***The Rules of the Supreme Court of England and Wales 1965 (White Book 1999 Edition Vol. 1).***
4. ***Black's Law Dictionary, Tenth Edition, page 1084).***
5. ***Halsbury's Law of England, 4<sup>th</sup> Edition Vol. 1, para 730, 739, 744, pages 438, 444, 447.)***

## **1.0 INTRODUCTION**

- 1.1 This ruling is in respect of an application by the first Respondent, Emmanuel Chama. The application was made pursuant to Order III rule 2, and Order XIV rule 1, of the ***High Court Rules (HCR) Chapter 27 of the Laws of Zambia***, and section 42 of the ***Legal Practitioners Act, Chapter 30 of the Laws of Zambia***; to ascertain the validity of this action. That is to say, determine whether the Applicant had the capacity to sue.

## **2.0 BACKGROUND**

- 2.1 A brief background to this application is that, the Applicant, Mr. Killian Mwiinga took out an originating summons against the Respondents, dated March 22, 2023. Mr. Killian Mwiinga purported to sue under the power of attorney on behalf of Gregory Mainza; claiming for an order that Gregory Mainza be declared the legal owner of Plot No. 36838 SOS Lusaka.
- 2.2 An affidavit in support to the originating summons was deposed to by Mr. Killian Mwiinga, in which he *inter alia* stated: "That I am the applicant suing in my capacity as attorney for Gregory

Mainza now produced and marked “KM1’ is the Power of Attorney”. The alleged power of attorney is dated March 7, 2023, wherein the donor, Mr. Gregory Mainza, appointed Mr. Killian Mwiinga to be his attorney (agent), to *inter alia*: (i) represent him in all matters, and (ii) to represent him in all legal issues and transactions.

2.3 The first Respondent, Emmanuel Chama filed an affidavit in opposition to the originating summons.

### **3.0 HEARING**

3.1 The hearing of the main matter was slated for October 8, 2023. The Applicant, Mr. Killian Mwiinga, appeared together with his donor, Mr. Gregory Mainza, in a manner a legal practitioner/advocate would ordinarily appear before court with his instructing client.

3.2 The matter did not proceed, because Counsel for the first Respondent, informed the Court that, the client intended to raise an objection regarding the *locus standi* of the Applicant in issuing court process on behalf of his donor, and prosecuting the matter as if he was of counsel, when in fact not.

### **4.0 THE PRESENT APPLICATION/ARGUMENTS**

4.1 The issues raised by the first Respondent in this application were couched as follows:

- (i) ***whether or not the Plaintiff, Killian Mwiinga who is suing as an attorney for Gregory Mainza has the legal capacity to represent the named Gregory Mainza through the Power of Attorney when he is not a qualified person; and***

**(ii) whether or not the named Gregory Mainza should be made a party as a Plaintiff in lieu of the appointed attorney.**

4.2 The backdrop to these issues is section 42 (1) of the ***Legal Practitioners Act***, which provides:

**42 (1) No unqualified person shall act or practice, directly or indirectly, as an advocate or as such sue out any summons or other process, or commence, carry on or defend any action, suit or other proceeding in the name of any other person in any court of civil or criminal jurisdiction, or act as an advocate in any cause or matter, civil or criminal, or act as a Notary Public.**

4.3 As regards the first limb of the objection, Counsel for the first Respondent, Ms. Nakamba Kaluba sparked her arguments by stating that every adult individual may sue, or be sued in his or her name, except in cases where the person is mentally incapacitated, an alien or insolvent. That by virtue of section 42 (1) of the ***Legal Practitioners Act***, and the case of ***Gregory v Turner<sup>(1)</sup>***, a person cannot delegate the right to conduct litigation by a power of attorney.

4.4 Ms. Nakamba Kaluba also cited section 3(3)(a) of the Act, which provides:

**3(3) Nothing in this Act contained shall be construed or deemed to prevent:**

**(a) an unqualified person from appearing for and representing in court any party to any civil cause or matter, if duly authorised thereto by any rule of the Court or of subordinate courts;**

- 4.5 And as to the meaning of unqualified person, regard was had to section 2 of the **Legal Practitioners Act**, which provides:

***"unqualified person" means a person who is not a practitioner and includes a practitioner who has not in force a practicing certificate.***

- 4.6 It was concluded that the exception stated in section 3(3)(a) of the Act, did not apply to the Applicant because, employing the purposive interpretation, in relation to section 42 (1) of Act, it was not the intention of the law maker to allow an unqualified person take out court process in his or her name and represent a litigant through a power of attorney. He added that there is no rule that that permits the conduct of litigation through a power of attorney. It was thus argued that the Applicant had no capacity to represent the said Gregory Mainza.

- 4.7 The second limb of the objection is seemingly an attempt by the first Respondent to cure the alleged irregularity pointed above. Therefore, Order XIV rule 1 of the HCR was vouched, which provides:

***If any Plaintiff sues, or any defendant is sued, in any representative capacity, it shall be expressed on the writ. The court or a judge may order any of the person represented to be made parties either in lieu of, or in addition to the previous existing parties.***

- 4.8 Reading the above in conjunction with Order III rule 2, of the HCR, which confers on this Court inherent jurisdiction, I was urged to substitute Mr. Killian Mwiinga with Mr. Gregory Mainza, the rightful Plaintiff/Applicant.



4.9 Ms. Chinyonga representing the State did not object to the application.

5.10 The Applicant, Mr. Killian Mwiinga, filed his list of authorities. In opposing the application, he cited Order 5 rule 6 (2). I assume this was in reference to the ***Rules of the Supreme Court (RSC) of England and Wales 1965 (White Book 1999 Edition Vol. 1)***, which he erroneously referred to as: *the rules of the annual practice volume 1 of the supreme court 1965 Edition*. Order 5 rule 6, of the RSC, under the heading: *Right to Sue in Person* provides:

***6(1) Subject to paragraph (2) and to Order 80, rule 2, any person (whether or not he sues as a trustee or personal representative capacity) may begin and carry on proceedings in the High Court by a solicitor or in person.***

***(2) Except as expressly provided by or under any enactment, a body corporate may not begin or carry on any proceedings otherwise than by a solicitor.***

5.11 And in his *viva voce* submissions, Mr. Killian Mwiinga admitted that he was not an advocate, but as an ‘attorney’, i.e. an agent empowered by the power of attorney. He argued that, if Mr. Gregory Mainza was denied representation through him, it was synonymous to saying: *He should perish because he was staying very far.*

5.12 Mr. Killian Mwiinga made reference to a ruling delivered by Newa J., involving Killian Mwiinga (himself) suing as ‘attorney’ for Anthony Mutika, against Muhamed Mulenga under Cause No. 2020/HP/1181. I wish to interpose here and state that, the legal issues raised here were not the subject of determination in

that case. Perhaps, Mr. Killian Mwiinga cited the ruling to show that his *locus standi* in that matter was not objected to, and should not be an issue here.

## **5.0 DETERMINATION**

5.1 I have carefully considered the facts in issue and the arguments thereof. Firstly, I take judicial notice that, there is a growing reproachable conduct by unqualified persons abusing court processes, and making a living out of the abuses of court processes. This calls for the Court to sensitively demonstrate its vigilance, not only by censuring such conduct, but also interdicting such persons. The practise in issue is executed by misguided busy bodies that are not advocates/legal practitioners, but purport to have some knowledge of the law. These busy bodies frequently trek to our Registries to issue out court process in their personal names on behalf of aggrieved persons, or purport to defend litigants under the guise of a power of attorney.

5.2 According to ***Black's Law Dictionary***, an instrument titled: a "power of attorney" is defined to mean:

***1. An instrument granting someone authourity to act as an agent or attorney-in-fact for the grantor. 2. The authourity so granted; specif., the legal ability to produce a change in legal relations by doing whatever acts are authorized.***

5.3 In other words, a power of attorney is an instrument conferring authourity by deed. The person conferring the authourity is termed the donor of the power, and the recipient of the

authourity, the donee (see ***Halsbury's Law of England, 4<sup>th</sup> Edition Vol. 1, para 730, page 438.***) ,

- 5.4 Similarly, in this matter, Mr. Killian Mwiinga is said to have been favoured with the power of attorney from Mr. Gregory Mainza to issue out court process in his name on behalf of the latter. And all the court documents were drafted, issued and signed by Mr. Killian Mwiinga in his own name on behalf of Gregory Mainza.
- 5.5 On the return date, thus the date of hearing, Mr. Killian Mwiinga appeared in court with his donor of the power of attorney, Mr. Gregory Mainza, in a manner an advocate would stylishly appear with his or her instructing client. Apart from this case, Mr. Killian Mwiinga has taken out other actions in similar fashion as demonstrated by Cause No. 2020/HP/1181. In this cause, Mr. Killian Mwiinga sued under a power of attorney executed by Anthony Mutika against Muhamed Mulenga, seeking an order, to compel the Defendant, Muhamed Mulenga to pay his donor the sum of K118,500.00, for unpaid work done by his donor.
- 5.6 It is also of interest to note that, in the course of drafting this ruling, it came to my attention that Mr. Killian Mwiinga, using the power of attorney supposedly penned by Precious Bubala, took out an action in his name on behalf of Precious Bubala, against Renox Chitimpa and two others, claiming damages for loss of life of Juliet Matimba, under Cause No. 2023/HP/2013.



- 5.7 The first issue as I understand it is whether, Mr. Killian Mwiinga has *locus standi*, to sue or commence an action, in his name on behalf of Gregory Mainza under the power of attorney. The term *locus standi* simply means: the capacity or the right to bring an action or to be heard in a given forum (see ***Black's Law Dictionary, Tenth Edition***, page 1084).
- 5.8 Mr. Killian Mwiinga is not an advocate of the High Court of Zambia, neither is he personally aggrieved by the alleged infringement perpetuated by the Respondents. Needless to say, Mr. Gregory Mainza as a natural person, enjoys the right to sue in his name, or sue through representation, provided the law permits. The right to sue, either in person or through representation is not absolute, but has limitations. This was ably demonstrated in the case of ***Ashmore v British Coal Corporation***<sup>(2)</sup>, wherein it was held:

***A litigant's right to have his claim litigated was subject to that claim not being frivolous, vexatious or an abuse of process. What constitute such conduct depended on all circumstances of the case. In particular abuse of process was not limited to sham claims and those that were not honest or bona fide: instead to public policy and interest of justice.***

- 5.9 The Court cannot *play possum* to impostors preying on unsuspecting litigants or colluding with potential litigants to circumvent the prohibition and restrictions spelt out under section 42(1) of the ***Legal Practitioners Act***, under the façade of a power of attorney. No agreement whatsoever via a power of attorney can waive public law. In ***Swallow and Pearson (a firm) v Middlesex County Council***<sup>(3)</sup>, Parker J, had this to say:

***There is no doubt that a man is entitled to waive or to agree to waive the advantage of a law or rule made solely for his benefit and protection. It is equally clear that no person can waive a provision or a requirement of the law which is not solely for his benefit, but is for the public benefit.***

- 5.10 The practice of the law is strictly reserved to qualified professionals who successfully spent ages in law schools and at the law practice institute. This reservation is necessary for the public good, to protect the nobility and purity of the legal system, by ensuring that members of the public seeking legal services are sincerely and competently served by qualified professionals, rather than by charlatans.
- 5.11 The language employed in section 42 (1) of the Act is plain and unambiguous; that a person not qualified or who is not an advocate cannot act, or practise law either directly or indirectly, or sue in his name on behalf of an aggrieved person. I am not aware of any rule that exempts the prohibition in section 42 (1) of the Act, via a power of attorney, unless through an advocate. Likewise, Matibini J., in the case of ***Finance Bank Zambia Limited v Monokandilos and Another***<sup>(4)</sup>, in his dictum, made the same observation that, he was not aware of any rule of procedure that permits the conduct of litigation through a power of attorney.
- 5.12 For the avoidance of doubt, it should be recorded that taking out of a representative action is permissible provided the rules of procedure so permit. For example, under Order 80 RSC, a person under disability can sue through a proxy, otherwise by *next friend or guardian ad litem*. In the present case, as earlier

noted, no such enactment exists, empowering an agent the right to sue in his or her name on behalf of his or her principal. In fact, the Applicant's conduct is criminalized and punishable as contempt of court under section 42(2) of the ***Legal Practitioners Act***.

5.13 Mr. Killian Mwiinga advanced a moral philanthropic argument, that if he does not assist his donor, the donor will perish for lack of access to justice. This argument is out-rightly moribund, because it is trite law that no authority can be given to do an illegal act. The issuance of an action in the present manner is illegal; by the fact that the Applicant issued process in his own name on behalf of his donor.

5.14 However, it should be made clearer that, a donor can generally empower a donee with the authority to sue on behalf of the donor. The caveat to this authority is that, the action should be brought in the principal's name (see ***Halsbury's Law of England, 4<sup>th</sup> Edition Vol. 1, para 739, 744, pages 444, 447.***) And allied to the circumstances of this case, this power and the permissible acts thereof must be construed in line with section 44 of the ***Legal Practitioners Act***. The section does not permit an unqualified person to prepare or draw any written document relating to proceedings in law or equity at a fee or for a reward, or in expectation of any fee, gain or reward.

5.15 Reverting to the present case, it is plain and ubiquitous that Mr. Killian Mwiinga is one of the busy bodies abusing our court processes for a living, through the illegal use of the power of attorney to sue in his name on behalf of 'absentee litigants',

contrary to section 42(1) of the ***Legal Practitioners Act***. Given the volume of legal drafting, the attendant work, and the multiplicity of actions taken out in his name on behalf of others, he is not a gratuitous agent. He does it for a reward. It is worth noting that the nature of litigation herein, is not one inspired by public interest litigation, but one that is private in nature.

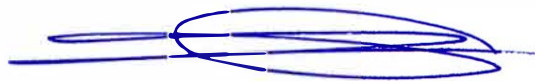
- 5.16 If the courts were to allow the *status quo* to prevail, the results would be similar to the disorder and anarchy of allowing unqualified persons or misguided busy bodies to carry out clinical operations and procedures in hospitals and clinics, based on some rudimentary knowledge. Whereas, the disorder in hospitals would lead to untold mortalities of unimaginable scale, in the courts of law, it would lead to countless cases of abject irreparable injustice.
- 5.17 It was suggested in the second limb of the argument that the irregularity be cured by substitution of the Applicant with the rightful aggrieved party. Regrettably, the irregularity is terminally incurable, because it represents a concerning reality of how the courts and the legal system can be hijacked, and abused by unqualified persons. The appropriate and commensurate sanction lies in dismissing this action for abuse of court process. And to strongly admonish the perpetrator to immediately shut down his illegal 'chambers'.
- 5.18 There is no room for compromise, especially where there is conscious abuse of court process by unqualified persons pretending to be advocates, or indirectly practising law.

## **6.0 CONCLUSION**

6.1 In the light of the foregoing, the application is allowed to the extent that, this action is dismissed for want of *locus standi*, on the part of the Applicant, Mr. Killian Mwiinga, and for abuse of court process. The costs of this dismissal to be borne by the Applicant and Gregory Mainza, to be taxed in default of agreement. The dismissal does not take away Mr. Gregory Mainza's right to freshly sue in his name.

6.2 Leave to appeal granted.

**DATED THIS 20<sup>TH</sup> DAY OF NOVEMBER, 2023.**



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**THE HON. MR. JUSTICE CHARLES ZULU**