

REMMY KABANDA KAINDU MUSHOTA v THE LAW ASSOCIATION OF  
ZAMBIA (1985) Z.R. 146 (S.C.)

SUPREME COURT  
SILUNGWE, C.J., NGULUBE, D.C.J., AND GARDNER, J.S.  
4TH APRIL, 1985.  
(S.C.Z. JUDGMENT NO. 11 OF 1985)

**Flynote**

Civil Procedure - Law Association Act - Originating Summons signed by unqualified person employed by legal practitioners - whether valid.

Civil Procedure - Law Association of Zambia - Originating summons in the name of the Association - Whether the legal practitioners committee is proper party to institute proceedings on behalf of the Association.

Legal Practitioners - Law Association Act - Originating summons signed by unqualified person employed by legal practitioners whether valid.

**Headnote**

The Law Association of Zambia issued a writ of summons against the defendant, a legal practitioner, applying for an order that he should deliver to a firm of accountants his books of accounts and other documents and for an order restraining him from paying out any money lying in his firms bank accounts. The injunction was granted and the defendant appealed. The defendant argued that the originating summons was bad because it was signed by an unqualified person in the employment of a firm of qualified legal practitioners. The Association argued that s.54 of the Legal Practitioners Act allowed an unqualified person to issue such process in the name of a qualified practitioner. The defendant also argued that the proceedings should have been instituted by the Legal Practitioners' Committee of the Law Association because s.13 (7) (c) of the Law Association Act provides that the function of the practitioners' Committee was to exercise on behalf of and in the name of the Association, the powers conferred upon the Association by s.69 of the Legal Practitioners' Act.

**Held:**

- (i) It is a clear intention of s.54 of the Legal Practitioners' Act to provide an exception to the prohibition in s.42 by permitting the issue of writs by clerks or unqualified employees of practitioners subject to the safeguards as set out in s.54 which makes it clear that the clerk or the employee is acting on behalf of the qualified principal.
- (ii) The Legal Practitioners' Committee is expressly empowered to take action under s.69 of the Legal Practitioners' Act and any such action instituted by the Council is so instituted by the wrong organ of the Association.
- (iii) In this case no injustice would occur to the defendant by allowing the Law Association of Zambia to take the appropriate action through the appropriate committee to ratify what had already been done in the name of the Association.

**Case referred to:**

(1) Bellamano v Lombarda Ltd. (1976) Z.R. 267.

**Legislation referred to:**

Law Association Act, Cap. 47, ss.11, 13..

Legal Practitioners' Act, Cap. 48 ss. 42, 44, 54,69.

For the appellant: In person.

For the respondent: M.M. Lwatula, of Ellis and Company.

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**Judgment**

**GARDNER, J.S.:** delivered the judgment of the court.

This is an appeal against a ruling by judge in chambers refusing to set aside and discharge an order and an injunction. The matter arises out of an originating summons issued by the Law Association of Zambia to whom we shall refer in this judgment as the Association, against Remmy Kabanda Kaindu Mushota, to whom we shall refer as the defendant.

The Association applied for an order that the defendant should deliver to Messrs Price Waterhouse and Company, a firm of accountants, his books of account and other documents and an order restraining the defendants firm of legal practitioners from paying out any money lying in the banks in the accounts of that firm. The original interlocutory injunction was granted ex parte, but the hearing resulting in the ruling which is now appealed against was inter partes.

In his appeal to this court, the defendant has argued that the originating summons was signed and issued by Mr DM Fluck, who, although employed its clerk in the firm of Ellis and Company, Legal Practitioners, is an unqualified person. He argued that section 42 of the Legal Practitioners' Act (Cap.48) provides, inter alia, that no unqualified person shall issue out any writ of summons, or similar process, and that, although section 54 of the Act provides that nothing in the Act shall be deemed to prevent any practitioner from employing an unqualified person to do any work on his behalf, such as is ordinarily done by clerks or employees the issuing of legal process is not work which can be done by an ordinary clerk and is specifically forbidden by section 42. Section 54 provides that the work which may be done by unqualified clerks or employees which must be done in the name of the practitioner and all fees must be paid directly to the practitioner; that in all cases where an unqualified person signs written document he shall, in addition, sign his own name after the name of the practitioner, and that the practitioner shall send to the court and the magistrate of the district wherein he practices, the names of unqualified persons who are authorised to do any such work on his behalf. There was evidence that Mr Fluck's name had been sent to the court as required by that section, and it was argued in the court below on behalf of the Association that Mr Fluck, by signing over the name of Ellis and Company, a firm of practitioners whose partners are legally qualified, was doing none other than the work usually done by a clerk in such circumstances.

In considering what documents could be envisaged as being within the permitted scope of unqualified persons, our attention was drawn to section 44 of the Act which provides that it shall be an offence for an unqualified person to, inter alia, directly or indirectly draw or prepare any written document relating to real or personal state or to any proceeding in law or equity, unless he proves that the act was not done for, or in expectation of, any fee, gain or reward. It was argued by the defendant that this specifically prevented Mr Fluck from drawing and signing the originating summons herein.

On behalf of the Association, it was argued that this section also was covered by the saving as to the employment of unqualified persons set out in section 54.

In our view, the purpose of section 44 is to prevent unqualified persons, acting on their own, from drawing legal documents for gain or reward, and section 54 makes special provision for such work to be done by legal practitioners' clerks or employees, subject to the important condition under paragraph (a) that all fees or other reward in respect of such work shall be paid to, and received directly by, the practitioner. In the same way, we do not consider that section 42, which is a prohibition on any unqualified person issuing out any summons or process, is intended to be a prohibition on the clerks or employees referred to in section 54. The section is obviously designed to prevent an unqualified person from holding himself out as a qualified legal practitioner and issuing process in his own name. It is the clear intention of section 54 to provide an exception to the prohibition in section 42 by permitting the issue of writs by clerks or employees of practitioners, subject to the safeguard set out in section 54 which make it clear that the clerk or the employee is acting on behalf of the qualified principal. In this case, we are satisfied that the qualification of the practitioner covered the work done by Mr Fluck in his capacity as clerk of that practitioner. This ground of appeal, therefore, must fail.

The defendant indicated that he was abandoning grounds two and five, and his grounds three and four were the only ones which remained to be argued. As they were the subject of the same argument, they were argued together for convenience. The ground of appeal was that, although the originating summons was properly in the name of the Law Association of Zambia, the wrong organ of that Association had been responsible for giving instructions for its issue. The originating summons claiming handing over of books of account was issued under the provisions of section 69 of the Legal Practitioners' Act, which refers to proceedings taken under the third schedule to the Act. Under this schedule, the Association may require the production or delivery, inter alia, of books of account to anyone nominated by it, it is further provided that, in the event of the person having those books of accounts failing to hand them over, application may be made to the High Court or a judge for an order for that person to comply with the requirements of the Association. The defendant pointed out that the Law Association Act (Cap. 47) provided for the establishment of a Council of the Association and that section 11

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of the Act provides that, except as otherwise expressly provided by the Act, the council may exercise all the powers of the Association. Section 13 of that Act provides for the election of a Practitioner's Committee, and section 13 (7) (c) provides that the functions of the Practitioners' Committee shall be to exercise, on behalf of, and in the name of the Association, the powers

conferred upon the Association by section 69 of the Legal Practitioners' Act. The defendant argued that this is an express provision and that only the Legal Practitioners' Committee can issue legal process under subsection (c). He maintained that, because it is an express provision it is excluded from the general powers given to the council by section 11.

We agree with this argument and are satisfied that, because that Legal Practitioners' Committee is expressly empowered to take action under section 69 of the Legal Practitioners' Act, any such action instituted by the Council, is so instituted by the wrong organ of the Association. The defendant argued that, this being the case, it was impossible for the Association, through the Legal Practitioners' Committee, to ratify something which had been done by an organ which was completely ultra vires the power of that organ. He argued that the situation was different from that pertaining to a company which had instructed solicitors to issue a writ without valid resolution by the directors of the company authorising the solicitors to do so. We cannot agree that the situation is any different. In any case in which legal action is taken by, or in the name of, a party when such party has not properly given authority because of a technical defect, such defect may always be remedied, unless, of course, injustice would result from allowing such a remedy. In this case, no Injustice would occur to the defendant by allowing the Law Association of Zambia to take the appropriate action, through its appropriate committee, to ratify what has already been done in the name of the Association. The situation which arose in the case of *Bellamano v Lombarda Limited* (1976) Z.R.267 (1), is pertinent to the facts of this case. In that case, company issued a writ but there was no company resolution for the appointment of the plaintiff's solicitors and the issue of the writ. An application was made to set aside that writ on the grounds that it was issued without authority, and this Court, on appeal ordered that the issue of the writ was irregular and that, therefore, the action should be stayed until such time as the irregularity was cured. We propose to realm such an order in this case. The action will be stayed on condition that it be properly ratified within fourteen days from today, failing which the action will stand dismissed. The injunction will continue in force for fourteen days at the end of which period it will be discharged unless the notion will have been properly ratified within that time.

Appeal allowed in part

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