



**BETWEEN:**

**EDWARD MBOMBOLA MOYO**

*(suing as Chief Mutondo)*

**APPELLANT**

**AND**

**PRINCE MAKWETI ISITEKETO**

*(sued as Senior Chief Amukena)*

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

**ATTORNEY GENERAL**

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

**Coram: Chisanga JP, Kondolo and Makungu JJA**

On 23/05/18, 23/01/19, 28/01/19, 22 /05/19, 11/11/19 and 30/01/2020

*For the Appellant: Mr. M. Chitundu of Barnaby and Chitundu Advocates*

*For the 1<sup>st</sup> Respondent: Mr C.L Mundia of C.L Mundia and Company*

*For the 2<sup>nd</sup> Respondent: Miss D.M Mwewa Acting Senior State Advocate-  
Attorney General's Chambers*

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## **JUDGMENT**

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**Makungu, J.A** delivered the judgment of the court.

**Cases referred to:**

- 1. Ludwig Sondashi v Godfrey Miyanda (sued as National Secretary of the Movement for Multi-party Democracy) (1995) S.J 1.*
- 2. Wilson Masauso Zulu v Avondale Housing Project Limited (1982) Z.R 172*

**Legislation referred to:**

- 1. The Constitution of Zambia, Cap 1 of the Laws of Zambia.*
- 2. The Constitution (Amendment) Act, No.2 of 2016.*
- 3. The Chiefs Act, Cap 287 of the laws of Zambia. Ss. 3(2)(a)(b)*

## **INTRODUCTION**

1. This is an appeal against the judgment dated 31<sup>st</sup> August, 2017, delivered by Mrs Justice Betty Majula- Mung'omba as she then was. This case started on 16<sup>th</sup> March, 2000 and took seventeen years from the date of commencement to the date of judgment. The lower court cited several factors contributing to the delay: Many interlocutory applications, the changing of advocates by the parties and lastly the matter passed through five other judges before it was heard and concluded by the trial judge.

## **APPELLANT'S CASE**

2. The action was commenced by way of writ of summons accompanied by a statement of claim. The appellant was cited as plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> respondents as 1<sup>st</sup> and 2<sup>nd</sup> defendants respectively. The process was initially amended and later re-amended by court order dated 8<sup>th</sup> September, 2008. According to the re-amended writ, the plaintiff's claims were;

*1. A declaration that the 1<sup>st</sup> defendant was and has always been the administrator of the Naliele Native Authority since its*

*inception in or about 1937 by virtue of which the 1<sup>st</sup> defendant was later erroneously appointed a chief by the Litunga thereby creating the present dispute.*

- 2. A declaration that upon establishment of Kaoma District council, the 1<sup>st</sup> defendant who was the holder of the post of administrator of Naliele Native Authority ought to have ceased to perform such duties instead of continuing as chief of the Lozi people in the area of jurisdiction of the plaintiff.*
- 3. A declaration that the purported appointment of the 1<sup>st</sup> defendant by the Barotse Royal Establishment (BRE) as Senior Chief in the plaintiff's area of jurisdiction and control at Naliele village and his subsequent recognition as such by the government is wrongful null and void and contrary to the provisions of the Chief's Act, and Articles 11, 127(1) and 128 of the Constitution of Zambia (Amendment) Act of 1996.*
- 4. A declaration that the 1<sup>st</sup> defendant's area of jurisdiction Naliele village is in chief Mutondo's area and under Chief Mutondo's control and jurisdiction.*

5. A declaration that the 1<sup>st</sup> defendant being Senior Chief Amukena of the Lozi people at Naliele village has no area of jurisdiction in Kaoma District as there are already Nkoya Chiefs.

6. An order that section 3(2)(b) of the Chief's Act (cap.287 of the Laws of Zambia) is contrary to Articles 11,127(1) and 128 of the Constitution of Zambia and therefore wrongful, null and void.

7. An order restraining the 1<sup>st</sup> defendant or successors in title from performing the functions of a Chief in Mutondo's area of jurisdiction.

3. The plaintiff's case rested on the evidence of three witnesses. The first witness was Derrick Moyo, the Prime Minister (Ngambela) of Lukena palace of Chief Mutondo in Kaoma District of Western Province. The second witness was Joseph Minango, the Acting Surveyor General and the third witness was Mwabula Edward Shamanga, an Induna at Lukena palace. In brief their evidence was as follows:

4. The plaintiff was recognized by the President of the Republic of Zambia on 8<sup>th</sup> April, 1993 through Statutory Instrument No.56 of 1993 as Chief Mutondo of the Nkoya people of Kaoma District Western Province of Zambia. The statutory instrument specifies Chief Mutondo's areas of jurisdiction as Lukena, Shibombwe, Luambuwa and Lalafuta. Whereas the 1<sup>st</sup> defendant was recognized as Senior Chief Amukena, of the Lozi people of Kaoma District in the Western Province of Zambia, by the President of the Republic of Zambia pursuant to Statutory Instrument No. 95 of 2004 dated 19<sup>th</sup> November, 2004. His area of jurisdiction is stipulated as Naliele.

5. Naliele is state land. It became state land in 1965. Before that, it was under Chief Mutongo. The statutory instrument recognizing Chief Amukena gives him control only over Naliele village which is 100 metres in radius. The plaintiff has no complaint about that. However, the plaintiff is aggrieved that Chief Amukena has been wrongly extending his authority to Chief Mutondo's area. Chief Mutondo is not claiming more than what is gazetted owing to a judgment from the Lands Tribunal to

the effect that Naliele is state land. The plaintiff withdrew its claim for Naliele.

6. Upon establishment of the Mankonya Native Authority in 1937, Chief Mutondo requested the Litunga to send someone to administer the Native Authority. The Litunga first appointed Mwanawina as an administrator. Eventually Mwanawina was recalled to Mongu to inherit the paramount Chieftaincy. He was succeeded by Isiteketo the father to the 1<sup>st</sup> defendant who was succeeded by Mwendaweli Litia. In 1965 councils were established and native Authorities abolished. Then the native courts were surrendered to the Ministry of Justice. In 1974 Litia Mbikusita was the first Chief of the Lozis to be recognized by the President for Naliele. After Mbikusita the next chief was the 1<sup>st</sup> defendant. This brought about serious disputes between the Nkoyas and the Lozis.

7. The plaintiff's further evidence was that the Barotse Royal Establishment (herein after referred to as the BRE) has no authority to appoint Nkoya Chiefs because of the differences in customs and traditions.

8. The provisions of Section 3(2)(b) of the Chiefs Act, Cap 287 of the Laws of Zambia are oppressive and biased because it bestows power upon the Litunga to recognize all chiefs traditionally by various tribes in Western Province before they can be recommended for recognition by the president. Such a law is at variance with Article 127(1) of the Constitution of the Republic of Zambia which allows ethnic groupings with their own cultural norms to select their own chiefs. The issue raised by the plaintiff is that the 1<sup>st</sup> defendant is operating within the jurisdiction of the plaintiff.

### **THE 1<sup>ST</sup> DEFENDANT'S CASE**

9. In brief, the 1<sup>st</sup> defendant's amended defence was that the plaintiff has been one of the sub chiefs in Kaoma District and his recognition as a chief by the late President Chiluba was ultra vires the provisions of Section 3 (2) (b) of the Chiefs Act. Consequently, the recognition was null and void.

10. The 1<sup>st</sup> defendant has been at all material times Senior Chief Makweti Isiteko Amukena for the entire Kaoma District irrespective of the tribes living there as the representative of

the Litunga of Western Province has no chiefdom boundaries but a unitary kingdom with Senior Chiefs and sub chiefs as representatives of the Litunga of Western Province.

11. The Nkoya tribe migrated to Barotseland from Congo. The plaintiff has no chiefdom and could only hold the position of sub chief with the approval of the Litunga and his council in accordance with the Chiefs Act.
12. The recognition of Chief Mutondo in 1981 by President Kaunda was in violation of the Chiefs Act as it was without the approval of the Litunga.
13. The 1<sup>st</sup> defendant further averred that His Majesty the Litunga has always been and will continue to be the supreme ruler of the entire Western province as there are no such demarcations as chiefdoms. The sub districts called Lilalo for plural and Silalo-singular have been administrative arrangement of the Litunga and his council in the running of Barotseland. Naliele has always been the royal seat of authority for the entire Kaoma District.



14. Senior Chief Mwanawina who became His Majesty the Litunga was not sent to Kaoma to run a Native Treasury and court but as a representative of His Majesty the Litunga whose royal seat of administration was Naliele and as such he was recognized as a senior chief.
15. Naliele as a royal traditional village has been the seat of all senior chiefs appointed by the Litunga and his council as traditional heads in Kaoma District and two Nkoya Chiefs have always been subordinate chiefs as Kaoma comprises other tribes such as the Mbunda, Luvala and Chokwes who had sub chiefs too in addition to the Lozis and Nkoya. Senior chief Isiteketo Makweti Amukena's jurisdiction is Naliele.
16. The 1<sup>st</sup> defendant further pleaded that the Barotse Royal Establishment has never attempted to dethrone Chief Kahale and Mutondo but it has been Chief Mutondo who has orchestrated hate campaign against the Lozi people who had generously through the Litunga and his council welcomed his ancestors when they arrived in Barotseland kingdom from Congo. All the plaintiffs' claims were denied and the 1<sup>st</sup> defendant's prayer was that the plaintiff's case be dismissed.

17. The 1<sup>st</sup> defendant called six witnesses. DW1 was Nyambe Namushi who is an Induna and acting Imangambwa under the Barotse Royal Establishment at Naliele Royal village. DW2 was Kenny Mwalitekana Libinga, the Local Courts Magistrate at Lonatila local court in Kaoma District who is also area Chief Libinga for Mulamatila appointed by the Litunga. DW3 was Dennis Kabinda Akandelwa who had been an Induna of Silalo Mbua of Luambuwa-Kabila-Mwandi for ten years. DW4 was Felix Mumbali Mufaya an Induna for Muyukwayukwa also appointed by the Litunga. DW5 was Richard Munalula Nyambe an Induna at Lealui of Mongu District and second in command of the BRE whose duty is to administer the affairs of the Litunga's palace. Dw6 was Mwangelwa Akapelwa Silumbu an Induna in charge of education and culture at the BRE.

18. In brief, their evidence was as follows: In Western Province, the supreme ruler is his majesty the Litunga. The Litunga is an institutionalized symbol of unity of all the thirty-eight (38) ethnic groups in Western province. He is the medium of harmonizing culture, tradition and customs of all people in Western Province. He decentralizes his authority and power to

a prime minister known as Ngambela, who runs the day to day administration of the Kingdom. The Litunga's power and authority is decentralized further to senior chiefs in charge of Districts. Each senior chief is the head of the Kuta council in charge of the day to day administration of the District. These heads of the Kuta are answerable to the Ngambela who is assisted by the council of Indunas. Below the District Chiefs are the Silalos that are equivalent to county Indunas. Each silalo Induna has an area of jurisdiction and has also a kuta and council of Indunas. Under the silalo Induna comes the Indunas for silalanda, a sub county at the level of village Headman. Village headmen are in charge of the day to day administration of the villages assisted by elders. The installation of senior chiefs is the prerogative of his majesty the Litunga. The Litunga appoints senior chiefs from among the members of the Litunga's Royal family.

19. On the other hand area chiefs are appointed according to the traditions and customs of where they come from. In Kaoma, there are 15 chiefs among them Chief Mutondo and Chief Kahare. The area chiefs are elected by the electoral college of

the ruling family. These may not necessarily be members of the royal family. As far as the Lozis are concerned the plaintiff hails from a family of commoners. His position can be equated to that of an Induna whose sub district (silalo) is Shikombwa. Any chief in Western Province who has not been recognized by the Litunga and his council is not a chief by tradition. All legitimate Nkoya Chiefs have passed through the same selection process and have been recognized by the Litunga and subsequently given the instruments of power.

20. It was further averred that the plaintiff is not a chief but an ordinary person because he has not been recognized by his majesty the Litunga. The area of jurisdiction for a legitimate Chief Mutondo is Shikombwe. The Litunga determines the areas of jurisdiction for the respective chiefs. Therefore, to ask the 1<sup>st</sup> defendant to vacate Naliele is blasphemy by the plaintiff because the 1<sup>st</sup> defendant's jurisdiction spans over the whole Kaoma District.

21. The 1<sup>st</sup> defendant asserts that Naliele is the headquarters and seat or administrative center of the Senior Chief Amukena in

Kaoma District. That the term Lozi refers to all people of Western Province including Nkoyas.

## **THE 2<sup>ND</sup> DEFENDANT'S CASE**

21. The 2<sup>nd</sup> defendants defence as pleaded was that the 2<sup>nd</sup> defendant admitted that the holder of the office of Chief Mutondo was Mr. Edward Mbombola Moyo and his area of jurisdiction within Zambia is Lukena, Shikombwe, Luambua in Western Province.
22. The 2<sup>nd</sup> defendant denied that it only recognized Nkoya chiefs in Kaoma district of Western Province. It stated that the 1<sup>st</sup> Defendant was installed as chief by the Litunga in 1996 and his area of jurisdiction is Naliele in Kaoma District and from time immemorial, Naliele has been under the control and jurisdiction of the Litunga and not the plaintiff.
23. The recognition of the 1<sup>st</sup> defendant via Statutory Instrument No. 95 of 2004 was proper as it did not contravene Articles 127 (1) and 128 of the Constitution of Zambia and the Lozi customs and traditions.

24. It was denied that the plaintiff was entitled to any relief.
25. The 2<sup>nd</sup> defendant's sole witness was James Chileshe (DW7) an Assistant Director in Charge of Chiefs Affairs at the Ministry of Chiefs and Traditional Affairs. He explained to the court the normal procedure for recognizing chiefs in this country. That when a vacancy occurs in a given chiefdom, the traditionalists sit to select a successor to the throne in accordance with their established traditions and customs. Thereafter, a meeting is convened where government officials are invited to record the minutes which are sent to the provincial permanent secretary to be forwarded to the permanent secretary at the Ministry of Chiefs and Traditional Affairs. When the minutes are received by the permanent secretary, a draft statutory instrument is prepared indicating the name of the person selected to ascend to the throne, the tribe, district and local area. Upon approval, the statutory instrument is taken back to the Ministry of Chiefs. The Ministry of Chiefs in turn submits the Statutory Instrument to the President of the Republic of Zambia who signs it only if he is satisfied that the selection was properly done and that the selected person is entitled to the chiefly

office. Thereafter, the statutory instrument is referred to the Government printing department to be published in the Gazette. He pointed out that in Western Province the procedure is the same except that the selected chief has to be recognized by the Litunga and his council before he is recognized by the President. The 1<sup>st</sup> defendant was recognized in accordance with the laid down procedure. Additionally, a chief cannot exercise his powers outside his area of jurisdiction. Naliele is traditional land.

## **THE LOWER COURT'S DECISION**

26. Upon considering the evidence before her, the learned trial judge identified the following as primary issues;
1. *Whether section 3(2)(b) of the Chiefs Act, is contrary to Articles 11,127(1) and 128 of the Constitution of Zambia (amendment) Act 1996 of the Laws of Zambia vis-à-vis selection, installation and recognition of a Chief, thereby rendering the provisions oppressive.*

2. *Whether the 1<sup>st</sup> defendant was erroneously recognized as Chief by both the Litunga and the government of the Republic of Zambia.*

3. *Other cross-cutting issues raised in the matter generally bordering on jurisdiction of a chief, proper parties to the action and the mode of commencement of the action.*

27. The learned trial judge found that the citation of the plaintiff as Edward Mbombola Moyo and the 1<sup>st</sup> defendant as Prince Makweti Isiteketo was contrary to Article 128 of the Constitution which provides as follows;

*“128. The following concepts and principles shall apply to Chiefs:*

*(a) the Institution of Chief shall be a corporation sole with perpetual succession and with capacity to sue and be sued and to hold assets or properties in trust for itself and the people concerned;*

*( b) .....*



*(c) a traditional leader or cultural leader shall enjoy such privileges and benefits as may be conferred by the Government and the local government or as that leader may be entitled to under culture, custom and tradition.*

28. The lower court found that, since the institution of Chief has legal capacity to sue and be sued, the plaintiff and 1<sup>st</sup> defendant ought to have been cited through their respective chiefly offices and not in their personal names. However, considering the fact that the action was commenced 17 years earlier, she invoked her inherent jurisdiction not to dismiss it on account of wrong parties.

29. Judge Mung'omba held that matters alleging violation of Article 11 of the Constitution, which forms part of the Bill of Rights, must be commenced by petition pursuant to Regulation 2 of the Protection of Fundamental Rights as enacted by Statutory Instrument No. 156 of 1969 based on the principle espoused in the case of **Ludwig Sondashi v Godfrey Miyanda (sued as National Secretary of the Movement for Multi-party Democracy)**<sup>1</sup>. She exercised her discretion to treat the matter as though it was properly commenced.

30. As regards the issue of whether section 3(2)(b) of the Chief's Act is contrary to Articles 11,127(1) and 128 of the Constitution of Zambia (amendment )Act 1996 vis-à-vis selection, installation and recognition of a Chief, the trial judge cited a lot of authorities on interpretation of statutes and found that section 3(2)(b) of the Chief's Act does not violate Article 127 of the Constitution.
31. The trial judge further found the 1<sup>st</sup> defendant was not erroneously recognized as chief by the Litunga and the President, as the documentary evidence dispels that.
32. The trial judge further found that the plaintiff had abandoned the claim that the 1<sup>st</sup> defendant's jurisdiction fell within his area of jurisdiction as no evidence was advanced to prove it.
33. For the foregoing reasons, the plaintiff's action was dismissed and the defendants were awarded costs.

## **THE APPEAL**

34. This appeal is based on three grounds framed as follows;

1. *The court below erred in both law and fact by failing to recognize that Naliele area wherein the 1<sup>st</sup> Respondent claims to be chief falls within Chief Mutondo's chiefdom and as such the 1<sup>st</sup> Respondent should not have been firstly appointed as a Chief over the said area and secondly recognized as such by the Government.*
2. *In the alternative, the trial judge misdirected herself in both law and fact when after finding that the 1<sup>st</sup> respondent's jurisdiction is within Naliele area, failed to order the 1<sup>st</sup> respondent to exercise his powers within Naliele area and not the entire Kaoma District of Western province as is the case.*
3. *The trial court misdirected itself in law and fact when it failed to appreciate that the appointment and or recognition of the 1<sup>st</sup> respondent as Senior Chief was irregular and erroneous as he had taken up the position of ordinary chief and not senior chief and as such could not be appointed and or recognized as senior chief.*

## APPELLANT'S ARGUMENTS

35. Counsel for the appellant Mr. Chitundu relied on the heads of argument.
36. In support of ground one, he submitted that in order to properly administer their chiefdoms, Chiefs appoint Indunas (Headmen) over portions of the chiefdom known as villages. Similarly Chief Mutondo appointed various Indunas to preside over villages within his chiefdom which is even recognized by the Government. Among the Indunas appointed by Chief Mutondo was Induna Libinga who presides over Mulamatila Silalo in Naliele village. Naliele falls under Chief Mutondo's Chiefdom as confirmed by the Register of Western Province of 1985 printed by the Government Printers whose extract appears on page 134 of the record of appeal and the village is indicated as village No. 110.
37. Counsel further submitted that, the 1<sup>st</sup> respondent's predecessors initially came as administrators of the treasury and the court system but they were later imposed as chiefs by the Litunga. This was on account that government had formed

councils and courts rendering the said office of administrator irrelevant.

38. It was also submitted that the 1<sup>st</sup> respondent's predecessor Mbikusita was gazetted as ordinary chief as per Statutory Instrument No.26 of 1974 and not as Senior Chief which is the case with the 1<sup>st</sup> respondent. It was therefore, wrong for the President to recognize the 1<sup>st</sup> respondent as Senior Chief of Naliele in 2004 as it falls under Chief Mutondo.

39. Naliele is actually state land and therefore it is the Government of the Republic of Zambia that has authority to administer the said land and not the 1<sup>st</sup> respondent, as there can be no Chieftom on state land. This goes to show that the 1<sup>st</sup> respondent has no land to administer. As a result, he has strayed into the appellant's land and has started administering it contrary to the statutory instruments that recognize both chiefs and specifies their areas of jurisdiction. This is an illegality that the court should correct.

40. To demonstrate the confusion caused by appointing the 1<sup>st</sup> respondent in the appellant's Chieftom, reference was made to DW3's evidence which discloses that Induna Kabilamwandi is

in the appellant's area and yet he reports to the 1<sup>st</sup> respondent who appointed him.

41. We were therefore urged to hold the appointment and recognition of the 1<sup>st</sup> respondent as Chief within Naliele, wrongful and void.
42. On ground two, Mr. Chitundu submitted that, after holding that the 1<sup>st</sup> respondent's area of jurisdiction is within Naliele, the court should have held that the 1<sup>st</sup> respondent should exercise his jurisdiction within that area. The court failed to stop the illegality.
43. He also argued that the contention by the 1<sup>st</sup> respondent that by virtue of him being Senior Chief in Kaoma he has authority over the entire Kaoma District and that all the Chiefs therein including Chief Mutondo and Chief Kahare of the Nkoya people, fall under his authority is untenable. Further that a chief cannot rule two different tribes at a time. Being a Lozi senior chief, the 1<sup>st</sup> respondent cannot be chief of the Nkoya people.

44. Even the Litunga is not king of the entire Western Province but specific areas of Western Province and the people he presides over are the Lozi speaking people. The Litunga does not preside over the Nkoya people of Kaoma or the areas over which the appellant has jurisdiction which areas include Lukena, Shibombwe, Luambuwa and Lalafuta.
45. There is no evidence to show that the Lozis settled in Kaoma first and gave shelter to the Nkoyas. Neither is there proof that the Litunga created the Mutondo Chieftainship for the Lozis to reign over the Nkoyas.
46. The 1<sup>st</sup> respondent's claim that all Chiefs in Western Province have to be recognized and recommended by the Litunga before Government can recognize them was refuted by the 2<sup>nd</sup> respondent who stated through his witness that the appellant is not Lozi and as such need not be recognized by the Litunga.
47. The Nkoyas together with their leaders such as the appellant believe they need to live freely and govern themselves as they were the first to settle in Kaoma District. It is no doubt that the presence of the 1<sup>st</sup> respondent at Naliele and his attempt to

exercise authority over the appellant's land is the source of conflict and violence in Kaoma.

48. We have been urged to condemn the 1<sup>st</sup> respondent's action and order him to exercise his authority within his legally recognized areas of jurisdiction.
49. As regards ground three, it was submitted that the court below should have appreciated evidence from both parties that the appointment of the 1<sup>st</sup> respondent as Senior Chief was wrong at law on the premise that his palace was within the appellant's area of jurisdiction. The 1<sup>st</sup> respondent as Senior Chief does appoint chiefs but they are not recognized by the government. These chiefs hold themselves equal to the appellant who is recognized by the President and do not recognize the appellant's chieftainship. Only when the recognition of the 1<sup>st</sup> respondent as Senior Chief is withdrawn or he restricts his area to Naliele will there be peace and harmony between the Nkoyas and Lozis. Counsel therefore prayed that the appeal be upheld.



## **FIRST RESPONDENT'S ARGUMENTS**

50. The 1<sup>st</sup> respondent only filed submissions in relation to the cross appeal but withdrew the cross appeal due to the death of the Edward Mbobola Moyo (Chief Mutondo) who died before the appeal could be heard.

## **THE SECOND RESPONDENT'S ARGUMENTS**

51. The 2<sup>nd</sup> Respondent's counsel, Mrs. Mwewa relied on the heads of argument. Ground one, two and three were argued collectively since they raise the same issue against the 2<sup>nd</sup> respondent.

52. She stated as follows: An examination of the provisions of Article 127 of the Constitution, reveals that it recognizes the existence of Chiefdoms in this country and Article 128 provides that the institution of a chief is a corporation sole which is essentially a legal person who has capacity to sue and be sued. Counsel went on to examine the process of recognition of a chief by the authorities. In this respect she relied on the testimony of DW7 (David Chileshe) an Assistant Director of the Chief's Affairs who outlined the process.

53. We were referred to section 3 of the Chief's Act, which provides as follows:

*3.(1) Subject to the provisions of this section, the President may, by statutory order, recognize any person as being, within the area in Zambia specified in the order, the holder of-*

*(a)The office of Litunga of the Western Province or of any other chiefly office in the Western Province specified in the order;*

*(b) The office of Paramount Chief, Senior Chief, Chief or Sub-Chief.*

*(2)No person shall be recognized under this section as the holder of an office unless-*

*(a)The President is satisfied that such person is entitled to hold the office under African customary law; and*

*(b)In the case of a chiefly office in the Western Province, other than the office of Litunga, the person to whom recognition is accorded is recognized by the Litunga and traditional council to be a member of a ruling family in Western Province.*

54. Counsel submitted that when recognizing the 1<sup>st</sup> respondent as Chief, section 3(2) of the Chief's Act and all the necessary procedures were followed by the 2<sup>nd</sup> respondent. The 2<sup>nd</sup> respondent should not be involved in the internal wrangles between the appellant and the 1<sup>st</sup> respondent as the 2<sup>nd</sup> respondent merely recognized the person presented to them by the members of the royal families in Kaoma district. Moreover, the recommendation to the 2<sup>nd</sup> respondent to recognize the 1<sup>st</sup> respondent came from the appellant as well.
55. Counsel therefore urged the court to dismiss the appeal with costs.
56. Miss Mwelwa augmented the written arguments by stating that the 2<sup>nd</sup> respondent plays no role in the selection or installation of chiefs. She claimed that there was a misjoinder of the 2<sup>nd</sup> respondent because that office merely places on pay roll whoever is chosen as chief. She went on to state that since the commencement of the action, the law on chiefs has been amended. To fortify this argument, she referred to Article 165(1) of the **Constitution (Amendment) Act, No.2 of 2016** which provides:

*165(1) The institution of chieftaincy and traditional institutions are guaranteed and shall exist in accordance with the culture, customs and traditions of the people to whom they apply.*

*(2) Parliament shall not enact legislation which—*

*(a) confers on a person or authority the right to recognize or withdraw the recognition of a chief; or*

*(b) derogates from the honour and dignity of the institution of chieftaincy.*

57. In light of the foregoing, she stated that the installation of a chief cannot be nullified. She contended further that section 3 of the Chief's Act which provides for the recognition of a Chief is bad law.

## **ARGUMENTS IN REPLY**

58. In reply Mr. Chitundu reiterated that the evidence on record clearly shows that the 1<sup>st</sup> respondent's area of jurisdiction is Naliele only and not the whole of Kaoma. The 1<sup>st</sup> respondent cannot be chief over the Nkoyas because his appointment was chief Amukena of the Lozis and not the Nkoyas. The 1<sup>st</sup>

respondent should not allocate land outside Naliele in the manner that he has been doing. He urged us to hold that his jurisdiction is limited to Naliele.

59. He clarified that the Attorney General was sued because Chief Amukena was recognized by the President. He conceded that the Government no longer plays that role in light of the new Constitution.

### **DECISION OF THIS COURT**

60. Having considered the record of appeal and counsels' written and oral submissions, we shall deal with ground one then grounds three and two separately.

61. The appellant through PW1 informed the court that he no longer had an issue with the 1<sup>st</sup> respondent's jurisdiction in Naliele, see page 681 of the record of appeal. Even the "final submissions" to the lower court by the plaintiff's counsel at page 645 of the record of appeal confirm this position.

62. Since the appellant abandoned his claim for Naliele, the lower court cannot be faulted for not determining that issue. The

first ground of appeal is therefore misconceived and accordingly dismissed.

63. Coming to the third ground of appeal, according to Statutory Instrument No. 95 of 2004, Prince Makweti Isiteketo was recognized as the holder of the office of Senior Chief Amukena of the Lozi people of Kaoma District on 19<sup>th</sup> November, 2004. His area of jurisdiction is clearly indicated as Naliele. According to the evidence of DW7 which was unchallenged, the 1<sup>st</sup> respondent's appointment and recognition was in accordance with the customs and traditions of the Lozi people, section 3 of the Chiefs Act and Article 127(1) of the Constitution. It is also clear from his evidence that the President's role was merely to recognize the person chosen as chief in accordance with the customs and traditions of the pertinent area as by law provided.

65. It follows that the 1<sup>st</sup> respondent is the "senior chief" of the Lozi people in Naliele and not in chief Mutondo's defined area of jurisdiction. We note that "senior chief" is not defined under the Chiefs Act and the Constitution. For the avoidance of doubt, the 1<sup>st</sup> respondent is not chief over the whole of Kaoma

District as alleged in his evidence. The appellant failed to prove that the 1<sup>st</sup> respondent's appointment was wrongful. Under the circumstances, we find no merit in the third ground of appeal and dismiss it.

66. As regards the second ground of appeal, it is trite law that a trial judge has the duty to resolve all matters in dispute in any particular case. The case of **Wilson Masauso Zulu v Avondale Housing Project Limited**<sup>2</sup> refers. In this case, the appellant had claimed that the 1<sup>st</sup> respondent or his successors in title should be restrained from performing their functions in Chief Mutondo's area of jurisdiction. The appellant also adduced ample evidence to the effect that the 1<sup>st</sup> respondent was wrongfully operating in his jurisdiction. The 1<sup>st</sup> respondent and his witnesses' adduced evidence that the 1<sup>st</sup> respondent is the overall chief in Kaoma District and alleged that the appellant is not a chief but an *Induna*. There was also clear evidence that the 1<sup>st</sup> respondent was interfering with the administration of the Mutondo Chieftainship in the designated areas. It was therefore incumbent upon the trial judge to determine that crucial question but she glossed over it.

67. Our determination of this issue is as follows: According to Statutory Instrument No.56 of 1993 Chief Mutondo Edward Mbobola Moyo was recognized as chief of the Nkoya people on 8<sup>th</sup> April, 1993 and his areas of jurisdiction were indicated as Lukena, Shibumbwe, Luambua and Lalafuta. His position is not equivalent to that of an induna but chief as defined under the Constitution of Zambia Amendment Act No. 2 of 2016:

*“A person bestowed as chief and who derives allegiance from the fact of birth or descent, in accordance with the customs, traditions, usage or consent of the people in a chiefdom”*

Or as defined under the Chiefs Act as

*“A person recognized under this Act as the holder of an office specified by or under section three.”*

68. We have already determined that the 1<sup>st</sup> respondent's jurisdiction is only in Naliele according to Statutory instrument no. 95 of 2004 and not in chief Mutondo's area of jurisdiction as stipulated in Statutory instrument no. 56 of 1993 recognising Edward Mbombola as Chief Mutondo.



69. With regard to the question of the lawful authority of a Chief, we hold that everyone living in a particular area within which recognition is accorded to the chief under the Chiefs Act, or visiting that area, is required to pay allegiance to the chief, regardless of his or her tribe and standing in society. There are penalties prescribed under section 12 of the Chiefs Act for interfering with a chief's rule.
70. Accordingly, the 1<sup>st</sup> respondent is ordered not to interfere with the appellant's functions and authority in Lukena, Shimumbwe, Luambua and Lalafuta.
71. The submissions by the respondent's advocate on Article 165 (1) of the amended Constitution as read with Section 3 of the Chief's Act are misconceived because the issue of misjoinder was not raised in the court below and no cross appeal was filed against the lower court's interpretation of Section 3 of the Chief's Act. Furthermore, this cause of action arose long before the said amendment of the Constitution.

## CONCLUSION

72. In closing, grounds one and three fail. Ground two succeeds. Since this matter is of public interest, we order that each party bears his own costs in this court and the court below.



.....  
F.M. Chisanga  
**JUDGE PRESIDENT**



.....  
M.M. Kondolo, SC  
**COURT OF APPEAL JUDGE**



.....  
C.K. Makungu  
**COURT OF APPEAL JUDGE**