

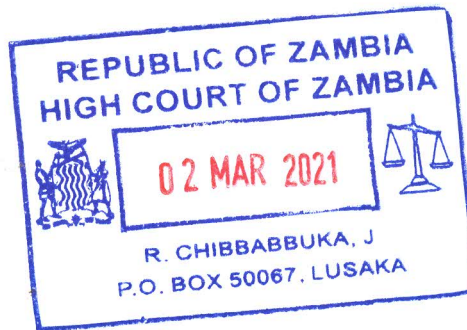
IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)



2020/HP/0191

BETWEEN:

MWEENE PHIGEN MWIINGA



PLAINTIFF

AND

MWENYI MUNGANDI

1ST DEFENDANT

CHINGOLA MUNICIPAL COUNCIL

2ND DEFENDANT

ATTORNEY GENERAL

3RD DEFENDANT

Before the Honourable Mrs Justice Ruth Chibbabbuka on the 2nd day of March, 2021

For the Plaintiff:	Mr M. Mweene, Messrs Ferd Jere & Company
For the 1 st Defendant:	Mr G.M Kanja, Messrs George & Bwalya Advocates
For the 2 nd Defendant:	Mr D.S Phiri, In-house Counsel
For the 3 rd Defendant:	Mr E. Kwesa, Counsel, Attorney Generals Chambers

RULING

Cases referred to:

1. *The People vs Mutembo Nchito S.C HPA/08/2015*
2. *Mutembo Nchito S.C vs The Attorney General 2016/HP/365*
3. *John Sangwa vs Sunday Bwalya Nkonde S.C CAZ Appeal No. 60/2019*
4. *Akashambatwa Mbikusita Lewanika & others vs Fredrick Jacob Chiluba SCZ Judgment No. 14 of 1998*

Legislation referred to:

Legal Practitioners Rules 2002, Statutory Instrument No. 51 of 2002

The 1st defendant in this matter pursuant to *Rule 33 (1) (d)* of the *Legal Practitioners Rules, Statutory Instrument No. 51 of 2002*, issued a Notice of Motion to a Raise Preliminary Issue on a point of law on the 24th February, 2021 to be determined by this court which issue is outlined below as follows:

1. Whether or not Counsel for the plaintiff on record could properly represent the plaintiff owing to the fact that the plaintiff is the father to Counsel on record.

Counsel for the 1st defendant in the said Notice has indicated that 1st defendant shall apply that the Court directs and/or Orders that counsel record for the plaintiff recuses himself from the matter.

The respondent filed skeleton arguments in support of the Notice of Motion and in so doing submitted as follows: The provisions of *Rule 3* and *Rule 33* of the *Legal Practitioners Rules* provide guidance to Counsel on the basic principles of practice including when counsel should or should not take instructions. Counsel referred this court to *Rule 3 sub-rule (2) paragraph (a)* of the said *Rules* which provides that:

“3 (2) A practitioner shall not do anything in the course of practice or permit another person to do anything on the practitioners behalf, which compromises or impairs or is likely to compromise or impair any of the following:

- (a) the legal practitioners independence or integrity;”*

This court was also referred to *Rule 33 sub-rule 1* of the *Legal Practitioners Rules* which provides that:

“33 (1) 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 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 on the administration of justice might appear to be prejudiced;”

It was counsel’s considered view that based on the above provisions of the law in the *Legal Practitioners Rules*, Counsel for the plaintiff on record Mr Mweene, should recuse himself in this matter as his being the son of the plaintiff, there is reason to believe that he is likely to be a witness more so that the cause of action involves a land dispute. Counsel argued that it was not uncommon to call your children or spouse to be a witness in land dispute as usually these are the people that get to use that land or are beneficiaries of the same. Counsel also argued that by reason of this connection between counsel for the plaintiff and the plaintiff himself, it is highly likely that it will be difficult for the practitioner to maintain professional independence in the prosecution of this matter on behalf of his father. Counsel prayed that this Court guides or orders that Counsel Mweene recuses himself from representing his father in this matter.

Counsel for the plaintiff filed in skeleton arguments in opposition on the 1st March, 2021. Counsel argued that the preliminary issue raised appears to be speculative and purports to set a generic rule on relationships. Counsel argued further that the 1st defendant had failed to demonstrate in any law how conflict can arise save for a speculative statement that the lawyer maybe called upon to testify. It was counsel’s considered view that what the 1st defendant ought to have demonstrated was the link between the case and the lawyer for conflict of interest to arise. Counsel contended that there is no presumption or law that speaks to the effect that a lawyer cannot represent a party he or she is related to. To buttress this argument this court was referred to the cases of **The People vs Mutembo Nchito S.C**¹ and **Mutembo Nchito S.C vs The Attorney General**² where in both these cases Mr Mutembo Nchito S.C was represented by Mr. Nchima Nchito his brother from Nchito and Nchito

Advocates. Counsel also referred this court to the case of **John Sangwa vs Sunday Bwalya Nkonde S.C CAZ³** where Mr John Sangwa was represented by Mr R.M Simeza S.C a partner in the firm of Simeza Sangwa and Associates. Counsel argued that based on these authorities there is nothing that stops a lawyer from representing a party he or she is related to as is the case in *casu*. In summing up his argument on this point counsel contended with force that what the 1st defendant ought to have shown is whether or not counsel seized with conduct of the matter on behalf of the plaintiff will prejudice the 1st defendant's case. Counsel asserted that he is not included on the list of witnesses that the plaintiff intends to call and further that if the 1st defendant intends to call him as a witness the 1st defendant should have demonstrated the same and shown why it is important for counsel to testify for the 1st defendant.

On the issue that counsel for the plaintiff may not be able to maintain professional independence in the prosecution of this matter, counsel for the plaintiff argued that this reasoning lacked merit as there are lawyers who fail to maintain their professional independence in prosecuting a matter even though they have no blood relations with a client. Counsel contended that under *Article 18 of the Constitution of Zambia, Chapter 1 of the Laws of Zambia*, the right to a fair trial also requires that the plaintiff has the right to be represented by a lawyer or firm of his choice. It was counsel's considered view that if the plaintiff is "ok" with counsel on record, they saw no reason as to why and how this could prejudice the 1st defendant. Counsel summed up his arguments by stating that this application is merely meant to delay the hearing of the matter more so that this information relating to the relationship between the plaintiff and counsel on record was made known to counsel for the 1st defendant a month ago and they had enough time to raise the same. Counsel prayed that the application be dismissed.

I am indebted to counsel for their arguments and submissions.

At the last hearing on the 17th February, 2021 where this preliminary issue was raised viva voce it was agreed that a formal application would be made and responded to whereupon the court would then make its Ruling. This is the court's Ruling. The Preliminary Issue raised revolves around the two following questions:

1. Can a legal practitioner represent a relative in a cause of action?; and
2. Should a legal practitioner represent a relative in a cause of action?

The answer to the first question in my considered view is that though not ideal a legal practitioner can represent a relative in a cause of action as there is no specific law that bars a legal practitioner from doing so which resonates with counsel for the plaintiff's argument. Be that as it may however, the answer to the second question which is the more pertinent question in matters of the lawyer and client relationship is what is of critical significance to the preliminary issue that has been raised by counsel for the 1st defendant.

The simple answer to the second question is neatly summarized in the case of **Akashambatwa Mbikusita Lewanika & others vs Fredrick Jacob Chiluba**⁴ where the Supreme Court held that:

“An Advocate should decline to accept instructions when there are circumstances which would render it difficult for him to maintain the requisite independence or which would in some way impair or undermine his ability to promote the best interest of the administration of justice.

Ideally an advocate should not appear as such in his own cause as in any other situation of possible want of independence or conflict of interest or embarrassment.”

It is clear from the **Lewanika** case that it is not ideal for an advocate to represent a relative I say so because the underlying element that the Supreme Court was highlighting in the **Lewanika** case is the requirement for objectivity

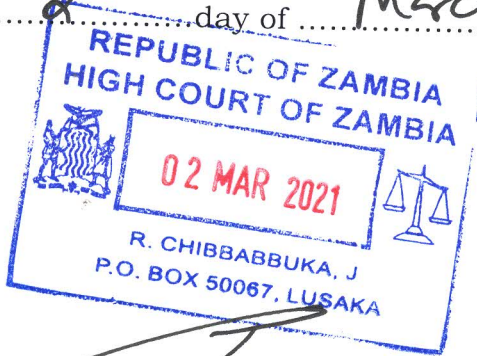
in the administration of justice a duty which not only rests on the court but the legal practitioners themselves. It is also apparent that there are certain circumstances in cases brought before the courts of law that would undoubtedly mar the process of being objective in the administration of justice and hence the critical need for legal practitioners to introspect when called upon to take instructions from a client as to whether they are the rightful person to prosecute the matter.

Rule 3 and 33 of the *Legal Practitioners Rules* speak to the requirement of legal practitioners introspecting when called upon to take instructions from a client as to whether they are the rightful person to prosecute a given matter bearing in mind the need to be objective in the administration of justice. Counsel for the 1st defendant has brought this very introspection to light by this preliminary issue and has argued that the subject matter being land, counsel for the plaintiff inevitably has an interest in the same as he is the son of the plaintiff. I agree with this argument as indeed there are many matters before our courts both past and present over land, which are highly contentious involving parties that are related to each other.

Consequently I do not agree with counsel for the plaintiff's view that if the plaintiff is "ok" with counsel on record then he sees no reason as to why and how this could prejudice the 1st defendant's case. It is my view that this is a rather flippant and casual approach to the office of counsel which requires that even at the level of taking instructions great introspection must be undertaken to ensure that an advocate gives the best representation possible to a client without being compromised. For avoidance of doubt the onus is on the legal practitioner and not on a client to ensure that this objectivity is attained in a lawyer client relationship. In fact by raising this preliminary issue counsel for the 1st defendant has done that which ought to have been done by counsel for the plaintiff himself. Without belabouring this point any further I agree with the simple but succinct arguments raised by counsel for the 1st defendant and accordingly counsel on record for the plaintiff is hereby ordered to recuse

himself from this matter from this matter and either transfer the case to another advocate in his law firm or advise the plaintiff to retain other counsel.

Dated the.....^{2nd}..... day of ^{March}.....2021



[Handwritten signature]

Ruth Chibbabbuka

JUDGE