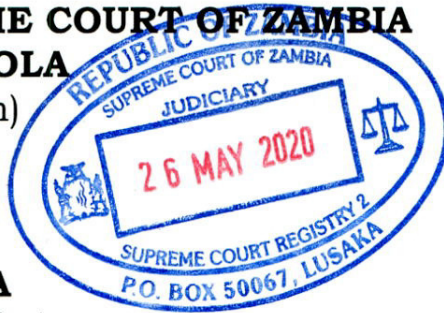


**Appeal No. 169/2010**

**IN THE SUPREME COURT OF ZAMBIA  
HOLDEN AT NDOLA**  
(Civil Jurisdiction)



BETWEEN:

**KAUMBA LEMBA**  
(Alias Chief Kasaka)

**1<sup>ST</sup> APPELLANT**

**GODFREY SONGE NDUNGU**  
(Senior Chief Ndungu)

**2<sup>ND</sup> APPELLANT**

**AND**

**SENIOR CHIEF ISHINDI**  
(Suing as the Lunda Royal  
Establishment)

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

**THE ATTORNEY GENERAL**

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

**Coram : Phiri, Musonda and Hamaundu, JJS**

On the 4<sup>th</sup> December, 2012 and ..... May, 2020

**For the 1<sup>st</sup> Appellant: Mr. Haimbe of Messrs. Sinkamba Legal Practitioners**

**For the 2<sup>nd</sup> Appellant: Mr. Chitabo, SC of Chitabo Chiinga Associates**

**For the Respondent: Mr. D. Mulenga of Messrs Derrick Mulenga and Company.**

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## **JUDGMENT**

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**PHIRI, JS, delivered the Judgment of the Court.**

**CASES REFERRED TO:**

1. **Anderson Kambela Mazoka and two Others v levy Patrick Mwanawasa (2005) ZR 138,**
2. **Mundia v Sentor Motors Ltd (1982) ZR 66**
3. **Wilson Masauso Zulu vs Avondale Housing Project (1982) ZR 172.**
4. **Nkongolo Farms Limited v Zambia National Commercial Bank Limited (2007) ZR 149**

**LEGISLATION REFERRED TO**

1. **Chief's Act, Chapter 287 of the Laws of Zambia**

The delay in rendering this judgment is deeply regretted. When we sat to hear this appeal, we were with Hon. Mr. Justice P. Musonda who has since left the bench. This is therefore the majority judgment.

This appeal and cross-appeal arise from the judgment of the Hon. Mr. Justice L. V. Siame dated 30<sup>th</sup> April, 2010 in a consolidated action between the parties. By that judgment, the Appellant's claims were substantially dismissed.

In the consolidated cause, the 1<sup>st</sup> Respondent was the 1<sup>st</sup> Plaintiff in the court below while the 2<sup>nd</sup> Appellant was 2<sup>nd</sup> Defendant. The 1<sup>st</sup> Appellant was the 1<sup>st</sup> Defendant, while the second Respondent (the Attorney-General) was the 2<sup>nd</sup> Plaintiff at the trial.

In the court below, the Plaintiffs pleaded the following reliefs:

- (i) An order that in declaring himself as Chief the said Kaumba Lemba violated the Lunda tradition and custom.
- (ii) An Order declaring that the said Kaumba Lemba is not a Chief or that there exists no Chief Kasaka in the Lunda Royal Establishment.
- (iii) An order restraining Godfrey Songe Ndungu (Senior Chief Ndungu) the 2<sup>nd</sup> Appellant herein, from interfering and/ or installing any person as Chief in the Lunda Royal Establishment

The background of this case has a very long history and there has been previous litigation on some aspects of the dispute. The background stretches from pre-colonial migration and settlement of the Luvale, Lunda and the Luchazi ethnic groups of people along the Zambezi valley of the Zambezi River in the Northwestern Province of the present day Republic of Zambia. The other affected ethnic groups include the Chokwes, Mbundas and others who settled in and around the contested areas. The disputes among these ethnic groups range from the boundaries of their chiefdoms and jurisdiction, the language spoken in particular areas, the traditional ceremonies, the appointment of Chiefs and sub-chiefs etc.

A study of the record of appeal shows evidence based on oral and written history from both sides that the Luvale, the Lunda and the Luchazi and indeed a number of other ethnic groups share their historical origins. They all migrated from Angola in tranches. The first tranche were the Luvale under Senior Chief Ndungu who migrated from Angola in and around 1820. The second tranche consisted of the Lunda under Senior Chief Ishindi in or around 1895. The third were the Luchazi.

The migrations originated from paramount Chief Mwatiamvwa's kingdom in Angola. The Luvale under Senior Chief Ndungu predominantly settled on the West bank of the Zambezi river, while the Lunda under Chief Ishindi and Chief Ishima predominantly settled on the East bank.

There are government approved maps of the territories prepared by the Surveyor General and the Physical Planning Department of the Ministry of Local Government and Housing. These maps show grid references, geographical references, land features such as roads, footpaths, villages, forests and the Zambezi river. More importantly, the approved maps show distinct boundaries between traditional land and

state land with public facilities such as schools, clinics, the District Council offices and the graveyard.

Each ethnic grouping is allowed by the District Council to perform its own traditional ceremonies within state land after obtaining the necessary permits while access to public utilities such as schools and the graveyard is not restricted to any particular ethnic group.

There is evidence that in 2002 there was an agreement executed by Senior Chief Ishindi and Senior Chief Ndungu which was witnessed by the Permanent Secretary, the Police and the Indunas from both sides. One of the key aspects of that agreement was that the Makishi will rise from Zambezi township Council graveyard in the east bank of the Zambezi river during the Likumbi Lyamize traditional ceremony. The graveyard is located on state land, while the Makishi is a tradition of the Luvales who are predominantly settled in the West bank. The Lunda have their Lunda Lubanza traditional ceremony.

The two predominant ethnic groups treaded allegations and counter-allegations concerning the extent of their boundaries and jurisdictions of their chiefdoms along the Zambezi river, appointment of subordinate Chiefs and headmen and the performance of cultural

practices and traditional ceremonies and customs in their respective areas.

At the trial the court received and analysed evidence from 25 witnesses including three witnesses who were called at the court's instance after the close of the defendant's case. the learned trial Judge identified the following issues for determination:

- 1. Whether the 1<sup>st</sup> Defendant (now 1<sup>st</sup> Appellant) declared himself Chief and, if he did, whether he violated the Lunda tradition and customs and to order or declare that he is not a Chief or that there is no Chief Kasaka in the Lunda Royal Establishment.**
- 2. Whether to order the 2<sup>nd</sup> Appellant not to interfere and/ or to restrain him from interfering with, and/or installing any person as Chief in the Lunda Royal Establishment.**

Regarding the first issue, the specific allegation was that Josias Chiteta refused to go to Chief Ishima to do some work, which he used to do, allegedly because he had also become a Chief. The learned trial Judge considered the evidence from PW1, PW2, PW3, PW5 and PW10 and concluded that none of these witnesses were able to explain how

the 1<sup>st</sup> Appellant declared himself as Chief Kasaka. The trial court observed that although Josias Chiteta was once arrested and prosecuted in the Subordinate Court which found him guilty of the charge of declaring himself Chief contrary to **Section 12 (a) (b) and (c) of the Chiefs Act Cap 287**, and sentenced to 12 months imprisonment, he was acquitted by the High Court on appeal. The trial court found as a fact that under **Section 3 (1) (2) (a) and (b) of the Chiefs Act Cap 287**, the 1<sup>st</sup> Appellant did not qualify as a Chief or sub Chief; that the colonial government abolished some chiefdoms including that of Chief Kasaka whose village was now under Chief Ishima's authority; that the 1<sup>st</sup> Appellant could have been installed by the Luchazi traditional council as Chief Kasaka, but he was not recognized by the government. The trial court concluded, therefore, that the 1<sup>st</sup> Appellant did not declare himself as Chief Kasaka and did not violate the Lunda tradition and customs.

Regarding the second issue, the learned trial Judge assessed the evidence and concluded that there is no Chief Kasaka in the Lunda Royal Establishment. The trial court did observe that Kasaka village is not a Lunda village but a Luchazi village whose separate chiefdom was abolished by the colonial government and was not recognized by the

Zambian government; that Kasaka village is under Chief Ishima and that the 1<sup>st</sup> Appellant falls in the category of a village headman.

In considering whether there was interference by the 2<sup>nd</sup> Appellant in the installation of any Chief in the Lunda Royal Establishment, the court examined the evidence given by both sides and delved into the aspect of territorial boundaries between Senior Chief Ishindi and Senior Chief Ndungu. The court concluded that there was overwhelming evidence from both sides that the Luvale people under Senior Chief Ndungu were predominantly settled on the West bank although some were also found on the East bank, and that the Lunda people were predominantly found on the East bank under Senior Chief Ishindi; and that there is no Lunda Chief on the West bank as well as there is no Luvale Chief on the East bank, although a few Luvale villages and a few Lunda villages are found on either side of the Zambezi river. The trial court therefore concluded that the boundary between the two chiefdoms is the Zambezi river. The court took into account the migration patterns and the history of the two ethnic groups and the approved government maps as well as the conclusion of a government inquiry headed by President Levy Patrick Mwanawasa in 2008. The court therefore declined to restrain Senior Chief Ndungu on the ground that there was



no interference from him. The court dismissed the evidence of PW3 who claimed that he witnessed the installation of Chief Kasaka because PW3 did not see Senior Chief Ndungu perform any role or function in the claimed installation of Chief Kasaka.

Regarding the Makishi ceremony of the Luvale people, the learned trial Judge assessed the evidence and found as a fact that the Makishi emerge from the East bank and move on to the West bank where the Likumbi Lyamize ceremony takes place. According to the evidence, the Makishi traditionally arise from the ancestral graveyard, but because there was no such graveyard in the east bank, by agreement of the two senior chiefs the emerging of the Makishi from the Zambezi township graveyard in the East bank was accepted and adopted. The court observed that the council graveyard is not located on the Lunda traditional land, but was on state land.

The summary of the court's findings were as follows:

- i) That the 1<sup>st</sup> Defendant (1<sup>st</sup> Appellant herein) or indeed his predecessor Josias Chiteta, did not declare himself Chief Kasaka and this claim is dismissed.

- ii) That the 1<sup>st</sup> Defendant (1<sup>st</sup> Appellant herein) is not a Chief and Chief Kasaka does not exist in the Lunda Royal Establishment, and this claim succeeds.
- iii) The court finds that the boundary between the Luvale chiefdom on the West bank and the Lunda on the East bank is the Zambezi river and the two Senior Chiefs should confine their powers and jurisdictions in their areas. The court further finds that there has been some amount of interference in Senior Chief Ishindi's chiefdom by senior Chief Ndungu but finds no evidence that Senior Chief Ndungu installed the 1<sup>st</sup> Defendant or any other person as Chief Kasaka. This claim partly succeeds and partly fails.
- iv) To promote harmonious neighbourliness between the two chiefdoms the court orders that each party will pay their own costs of these proceedings.

The Appellants who abandoned one ground of appeal, canvassed four (4) grounds as follows:

**1. The learned trial Judge erred in fact and law by Ruling that Chief Kasaka was not a Chief under the Lunda Royal Establishment as**

**Chief Kasaka is Luchazi and did not claim chieftainship under Lunda custom but under Luchazi custom.**

- 2. The trial Judge misdirected himself by finding that the boundaries between the two chiefdoms was the Zambezi river with chief Ndungu on the West bank and Chief Ishindi on the East bank as he ruled on the matter that was not pleaded.**
- 3. The learned trial Judge misdirected himself in Ruling that the Zambezi river was the boundary between the two chiefdoms as that in effect expanded Senior Chief Ishindi's territory beyond Mukanda Kunda and extended it to Chavuma, Kabompo and Angola.**
- 4. The learned trial Judge misdirected himself by ignoring evidence to the effect that Chavuma had no Lunda Chief and that the settlers were Luvala, Chokwes, Luchazis and Vimbunda with the majority being Luvala and further that Zambezi, Kabompo and Chavuma are fully fledged Districts falling under state land and hence the jurisdiction of the President of the Republic of Zambia.**

In support of ground one of the appeal it was submitted that the evidence adduced in the trial court established that the Luchazi people

were distinct from the Lunda, with their own traditions, customs and culture and settled in parts of Zambezi East bank where they established a village and that some of the Lunda people also settled in parts of Zambezi West bank after being allowed to settle there by Chief Ndungu and were allowed to develop and flourish under their own Senior Chief Ishindi and that the area the Luchazi were allowed to settle on should be subject to Luchazi customary law and traditions in the same way the land occupied by the Lunda is subject to their customary laws. It was argued that the finding by the court below was a suppression of the rights of the Luchazi people who equally settled in the area after inheriting it from the original settlers.

In response to ground one, it was submitted that the 1<sup>st</sup> Appellant was clearly intent on misleading this court as the evidence on record established that there was no Chief Kasaka in the Lunda Royal Establishment and therefore the establishment and installation of the 1<sup>st</sup> Appellant as Chief Kasaka in the customary land of Chief Ishima was irregular and unlawful, and, therefore, the lower court was on firm ground to hold that Kasaka was not a Chief.

In support of ground two, it was submitted that the issue of the boundary between the two chiefdoms was never raised in the pleadings

and, therefore, the lower court misdirected itself at law when it declared the Zambezi river as the boundary.

In response, it was submitted that the lower court made a determination of the boundary in order to resolve whether there was some interference in Senior Chief Ishindi's chiefdom by Senior Chief Ndungu as pleaded by head (c) of the amended statement of claim which sought a restraining order against interference. Our attention was drawn to the case of **Anderson Kambela Mazoka and two Others v Levy Patrick Mwanawasa<sup>(1)</sup>**, and the case of **Mundia v Sentor Motors Ltd<sup>(2)</sup>**, in which the function of pleadings was pronounced. It was further pointed out that the 2<sup>nd</sup> Appellant admitted in his evidence that the Zambezi river is the boundary between the Lunda and Luvale chiefdoms.

In support of the third and fourth ground of appeal which were argued together, it was submitted that the evidence before the court did not suggest that the two Senior Chiefs did not know their respective boundaries. It was argued that the dispute which gave rise to the action in the court below was limited only to the Zambezi District with regard to the Makishi arising from the grave yards in the district and to the alleged installation of Chief Kasaka at Mize in the West bank. According

to the learned counsel for the Appellants, the issue of the Makishi rising from the Zambezi did not require a declaration of boundaries since the boundaries were a non issue as both Senior Chiefs had signed an agreement on the 15<sup>th</sup> June, 2002 allowing the Makishi to emerge from Zambezi township. It was argued that the trial court's conclusion has the effect of extending the 1<sup>st</sup> Respondent's territories beyond Mukanda Kunda to include Kabompo and Chavuma which have never been under the jurisdiction of the 1<sup>st</sup> Respondent or his ancestors; that the declaration was misleading and contrary to the evidence on record which did not suggest an extended jurisdiction for the 1<sup>st</sup> Respondent.

In response to the third and fourth grounds of appeal, learned counsel for the 1<sup>st</sup> Respondent submitted that the declaration made by the trial court was based on the findings of fact on the evidence before the court and there was no direct or indirect order made to expand the 1<sup>st</sup> Respondent's chieftom which recognized the distinction between state land and customary land.

In support of the fifth ground of appeal which alleged that the production of evidence from the Surveyor General was suppressed, the learned counsel for the Appellants argued that there was uncertainty as to the boundaries depicted on the maps produced before the trial court

which should have been resolved by the production of evidence by the Surveyor General before the trial court concluded that the Zambezi river was the boundary between the two chiefdoms, which conclusion was baseless.

In response to the fifth ground, the learned counsel for the 1<sup>st</sup> Respondent submitted that there was no time during trial when the learned trial Judge ruled against the production of evidence from the office of the Surveyor General; and, therefore, the allegation that material evidence was suppressed was baseless.

In support of the sixth and last ground of appeal, the Appellant's argument was that the finding by the trial court that there had been some amount of interference in Senior Chief Ishindi's chiefdom by Senior Chief Ndungu was ambiguous and contradictory because the court found no evidence that Senior Chief Ndungu installed the 1<sup>st</sup> Appellant or any other person as Chief Kasaka.

In response to the sixth ground of appeal, the 1<sup>st</sup> Respondent's contention was that Senior Chief Ndungu has attempted to install chiefs in Lunda chiefdom in the past as was the case in 1971 when he installed Chief Chisumpu Nyaulembe in Chavuma in the area under Senior Chief Ishindi. It was also submitted that the Likumbi Lyamize traditional

ceremony was moved to Lunda area since 1996 when the Makishi who are supposed to emerge from the 1<sup>st</sup> Respondent's ancestral grave yards, started to emerge from Zambezi township. It was also alleged that the 1<sup>st</sup> Respondent had been agitating to have Luvale language taught and used in schools in Lunda chiefdom and in public gatherings. It was further alleged that the instructions were issued to the 1<sup>st</sup> Respondent's Luvale speaking people living in Lunda chiefdom not to pay any allegiance and/or homage to Lunda Chiefs.

In the cross- appeal, the 1<sup>st</sup> Respondent raised two grounds. These were; first that the lower court fell in error in fact and law when it made a finding that the 1<sup>st</sup> Appellant or indeed his predecessor Josias Chiteta did not declare himself as Chief Kasaka and dismissed the 1<sup>st</sup> Respondent's claim when the evidence established that the 1<sup>st</sup> Appellant considered himself as a Chief who was installed by the Luchazi Traditional Council. The second ground was that having found that there was some interference by the 1<sup>st</sup> respondent, the lower court should have made appropriate and specific orders against that interference with specific reference to the evidence before the trial court.

We have considered all the grounds of appeal, the judgment of the lower court, the submissions made by both sides and the record of



appeal. To begin with, we do not appreciate that there are any new and substantial issues raised in the two grounds of the cross-appeal that require separate determination. These two grounds relate to and are consequential to the grounds in the main appeal and were inclusively argued. In any case we remain curious that a party who was successful in the court below should appeal against the judgment.

Secondly, a study of the grounds of the appeal and their supporting arguments, reveals that apart from grounds two and five, they all assail findings of fact made by the lower court. On many occasions we have pronounced that the appellate court will only reverse findings of fact made by a trial court if it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts or that they were findings which on a proper view of the evidence, no trial court acting correctly could reasonably make. One of our prominent cases where we pronounced this position clearly is the case of **Wilson Masauso Zulu vs Avondale Housing Project**<sup>(3)</sup>.

In the present case, the trial court heard and gave a balanced evaluation of the evidence received from numerous witnesses from both sides including the 1<sup>st</sup> and 2<sup>nd</sup> Appellants. As our narration of the

background of this appeal reveals, the evidence included admissions made by the Appellants themselves. For instance, the 1<sup>st</sup> Appellant admitted that he was never installed as Chief Kasaka and the 2<sup>nd</sup> Appellant admitted that he never installed him as such. Both Appellants also admitted that the 1<sup>st</sup> Appellant has never been recognized by the Government as Chief Kasaka. Both Appellants admitted that the 1<sup>st</sup> Appellant was a Luchazi from Kasaka village which is located in the Lunda chiefdom as shown on the particulars on his National Registration Card. More importantly, none of the Appellants alleged that the lower court gave an unbalanced evaluation of the evidence received; and none of them challenged the factual evidence received. Therefore, in accordance with our precedents, we are satisfied that the findings of fact which the lower court settled were neither perverse nor made in the absence of any relevant evidence or upon a misapprehension of the facts. We therefore find no merit in grounds one, three, four and six of the appeal.

Coming to ground two of the appeal, the allegation was that the issue of the boundaries between the Luvale chiefdom and the Lunda chiefdom was never pleaded and that the lower court should not have made the pronouncement it made that the Zambezi river was the

boundary. A quick review of the evidence before the court, shows that the majority of the witnesses from both sides gave evidence on the areas of jurisdiction between the two contending senior chiefs. They all testified that although both ethnic groups are found on either side of the Zambezi river, their predominance is clearly divided by the Zambezi river. As we have said, this evidence was adduced by witnesses from both sides to the dispute and there was no objection recorded on the record of the appeal. Our position is that when evidence is adduced before a trial court, which evidence was not objected to, the trial court has an obligation to consider and weigh that evidence so far as it is relevant in determining the issues raised [**see Nkongolo Farms Limited v Zambia National Commercial Bank Limited**]<sup>(4)</sup>. In our view, this is exactly what the lower court did in declaring the Zambezi river as the boundary between the two chiefdoms in order to decide whether there was interference or not. We find no merit in ground two of the appeal.

In ground five, the Appellants alleged that there was suppression of evidence from the Surveyor General. We have not seen any evidence on record supporting this allegation. The Appellants did not even attempt to point to us any part of the record of proceedings which

suggested such suppression of evidence. We equally find no merit in ground five of the appeal.

Before we end, we note that although the trial court rightly found that there was no evidence that the 2<sup>nd</sup> Appellant installed the 1<sup>st</sup> Appellant as Chief Kasaka, the trial court did state that there was “some” interference by Senior Chief Ndungu. In our considered view, this conclusion was a misdirection as it was unsupported by the evidence. This conclusion was out of place in the evidence that was before the trial court and we quash it. This however, is without any consequences to the outcome of this appeal. The net result is that we find no merit in this appeal and we dismiss it. Each party will bear their own costs.



.....  
G. S. Phiri  
**SUPREME COURT JUDGE**



.....  
E. M. Hamaundu  
**SUPREME COURT JUDGE**