



THE ADVOCATUS NEWSLETTER

ISSUE 4 - Aug 21, 23

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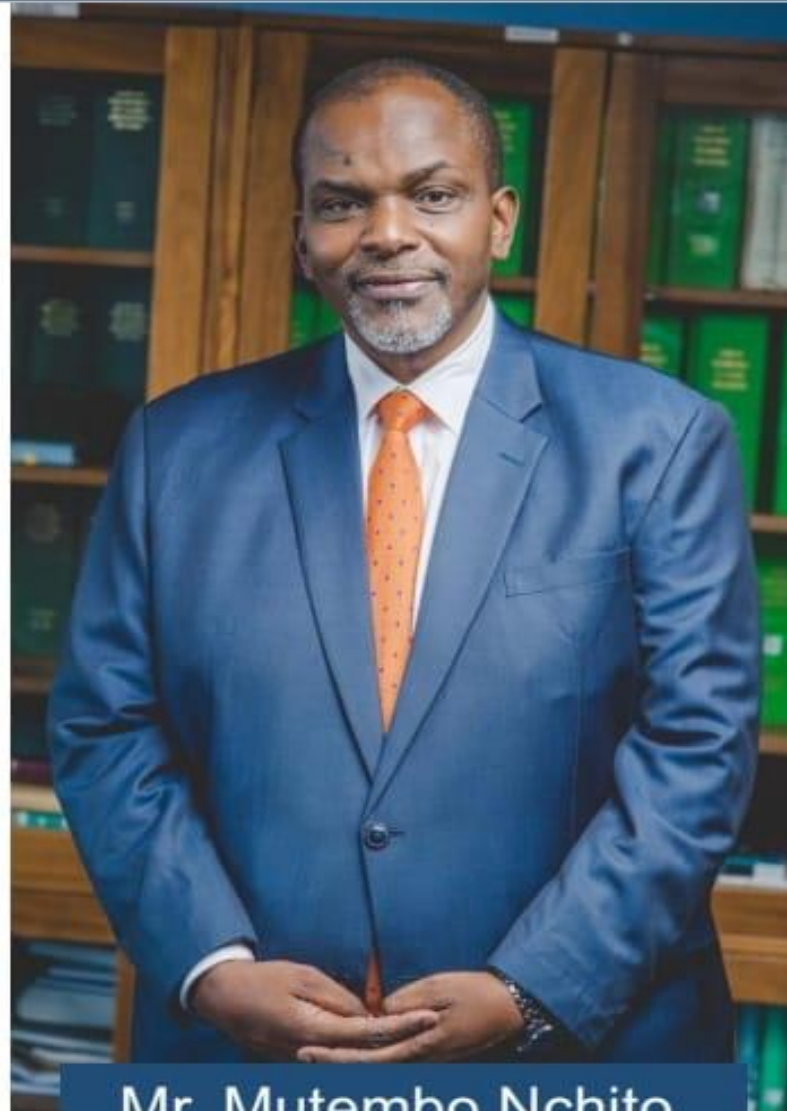
50th Anniversary of the Supreme Court of Zambia

Deputy Chief Justice will be visiting the University for The Celebration

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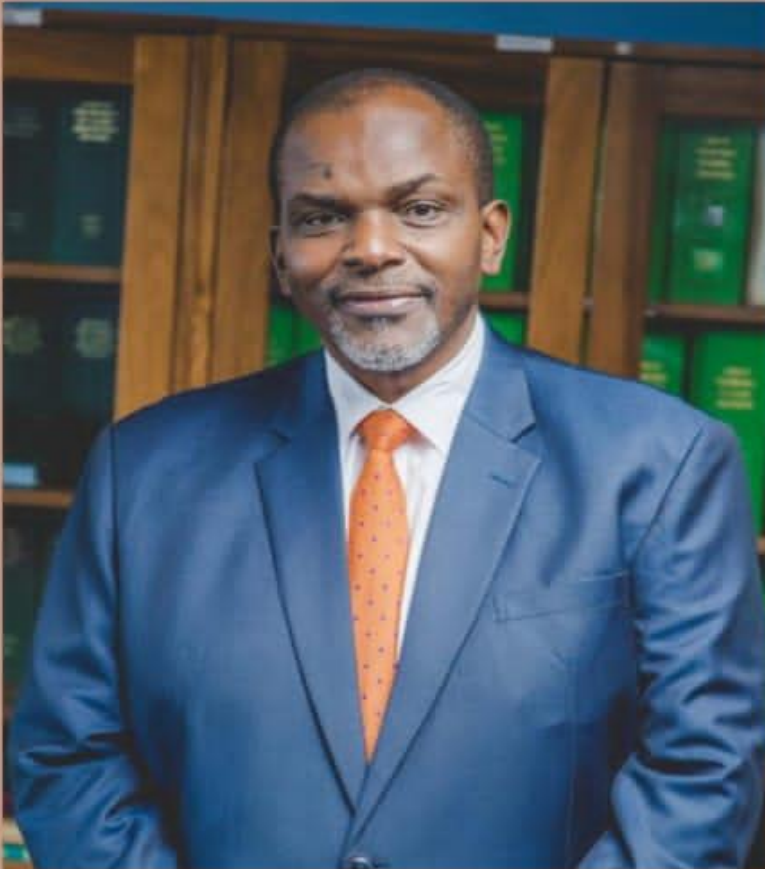
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Mr. Mutembo Nchito

Mr Mutembo Nchito is a prominent Lawyer in the legal space and is a current Partner at the Law firm Nchito and Nchito, starting off as an Associate at Shamwana and company he rose through the ranks and founded a law firm at a young age. Mr Nchito was one of Zambias former Director of Public Prosecutions, and has since continued as a legal practitioner.

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EDITOR'S NOTE



The Advocatus is the official newsletter of the school of law under the University of Lusaka. It is a student led initiative that was founded to be an informative medium between law students, students around the country and the public at large.

This newsletter consists of an interview with one of the former Director of Public Prosecutions (DPP) of Zambia, Mr. Mutembo Nchito, he gave encouraging insight on how he grew through this profession, where he started and how he got to be the great Lawyer he is today.

I would like to thank the entire editorial board for the immense effort they put into the creation of this newsletter, and all the students and lecturers who took time to make this newsletter informative and special. I would also love to extend my gratitude to the Management of the School of Law under the University of Lusaka, your cooperation and guidance has been a driving force to the production of this piece.

Yours truly,

Taonga Phiri

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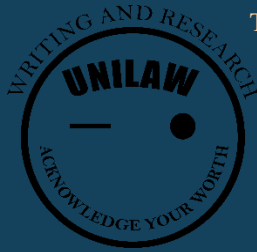
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What is the Correct Interpretation and Application of Section 13 (3) of Lands Act-is the Polythene Products



Right of Re-entry refers to the repossession of real property by a previous landholder with a future interest in the property in the event that the current landholder breaches a condition of the grant through which they held the property.

In our Jurisdiction, the state reserves the right of re-entry as envisaged in Section 13(1) of the Lands Act^[1] which gives the President the power to cause a certificate of re-entry to be entered in the registry where a lessee breaches a term or a condition of a covenant under the Lands Act.

Section 13(3) of the Lands Act allows a lessee whose land is subject of a re-entry and aggrieved by the same to challenge the decision by the President by bringing the matter before the Lands Tribunal. The said Section 13(3) reads;

“A lessee aggrieved with the decision of the President to cause a certificate of re-entry to be entered in the register may within thirty days appeal to the Lands Tribunal for an order that the register be rectified.”

Although the above provision expressly stipulates that an appeal against the re-entry lies with the Lands Tribunal, the section uses the permissive word ‘may’ and not the mandatory word 'shall'. The question which then arises is whether the High Court by virtual of its unlimited jurisdiction to determine upon land matters by virtual of Article 134(a) of the Constitution^[2] has jurisdiction to

entertain an appeal against the re-entry.

This question was addressed and settled in the case of **Polythene Products Zambia Limited v Cyclone Hardware and Construction Limited, and the Attorney General**^[3] where the Supreme Court held that;

“The 1st defendant being aggrieved by the certificate of re-entry on Stand 12094 had no option but to appeal to the Lands Tribunal in its challenge of the certificate of re-entry; and that on the facts of that case, the learned trial judge had no jurisdiction to entertain the counterclaim on fraud and negligence, which was commenced by writ of summons.”

It followed from this decision that an appeal against a re-entry lies with the Lands Tribunal and the lessee does not have a choice to take his appeal before the High Court as it does not have the jurisdiction.

However, the Supreme Court had the occasion again, seven years later in the case of **Attorney General and Others v Ambex Clothing Manufacturing Ltd**^[4], to consider the question of whether Section 13 (3) of the Lands Act has served to oust the jurisdiction of the High Court in land matters. And in its judgment delivered on 15th November 2017, it held, applying its decision in the case of **Union Gold (Zambia) Limited v The Attorney General**^[5], that the High Court's jurisdiction is not ousted by the Lands Tribunal in land matters and that an aggrieved party can choose between initiating proceedings in the High Court or the Lands Tribunal to have his grievances redressed. This position was reiterated in the case of **Faramco v Camel Freight Limited and four others**^[6] where the Supreme Court held the view that there was no basis for faulting the learned High Court judge's conclusion that the respondent's counterclaims, both challenging the re-entry and the cancellation of the certificate of re-entry where legitimately before the court and that it has jurisdiction to hear the matter.

The question to be then asked is whether by virtual of the above decisions the Supreme Court has by implication overruled the Polythene Products case.

In its recent judgment in the case of **Chungu v Chanda and Others**^[7], the Court of last resort was called upon to determine this very question.

in the court's view, the case of Attorney General and others v Ambex Clothing Manufacturing Ltd as well as the case of Faramco Ltd v Camel Freight Ltd and others, discussed in general terms whether the Lands Act ousts the jurisdiction of the High Court in land matters which as was stated in those cases it does not. The fact that the Supreme Court have stated so in general terms, does not mean that the unlimited jurisdiction of the High Court goes to the extent of dealing with claims relating to re-entry under section 13 (3), because that is the preserve of the Lands Tribunal.

The Faramco Case which in the Author's view dealt with issues touching on Re-entry was held in the Chungu's case to have dealt with the question of a declaration as to the main relief sought, hence, not overturning the decision in the Polythene Products case.

The Supreme Court has taken the view that the unlimited jurisdiction which the High Court enjoys is subject to section 13 (3) of the Lands Act when it comes to claims involving re-entry. The use of the word 'may' in section 13 (3) does not refer to the choice of forum but rather to the decision to be taken by an aggrieved party. This is so, because an aggrieved party has a choice whether or not to accept a decision which is not in his favor.

In a nutshell, the court's decision in the case of **Chungu v Chanda and Others** is to the effect that where a provision in the lands Act and/or the Lands Tribunal Act has specifically provided for a forum upon which a particular case lies, that is the mode of commencement of a particular action, the said provision is to be followed. For example, where a matter specifically deals with re-entry, pursuant to S13(3) of the lands Act, the High Court has no jurisdiction and the lessee has no choice but to bring the case before the Lands Tribunal.

The correct position therefore as per **Chungu v Chanda and Others** therefore is that, while the High Court has unlimited jurisdiction in land matters, its jurisdiction is limited as in this case by section 13 (3) of the Lands Act. It follows therefore that Polythene Products case is still good law provided that the matter deals specifically with s13(3) of the Lands Act.

MEET THE TEAM



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[1] Chapter 184 of the Laws of Zambia

[2] Act No. 2 of 2016

[3] Z.R (2012) Volume 3, 396

[4] ZMSC 607 (7 May 2018)

[5] SCZ Judgment No. 141/2016

[6] SCZ/8/341/2015

[7] [2023] ZMSC 13

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. EXPLORING THE KENNETH KAUNDA STATUE AND THE IMPORTANCE OF RECOGNISING THE FREEDOM OF PANORAMA AS AN EXCEPTION TO COPYRIGHT



CHISANGA
MUTALE &
MARLO
KALILAMOJO
JUMA

Abstract

Freedom of panorama is a copyright exception that allows the public use of copyrighted works in a way that does not infringe the rights of the copyright owner. It is particularly relevant in the context of public spaces, where individuals may take photographs or make videos of public buildings, and statues like the one of Kenneth Kaunda located at the Longacres mall in Lusaka Zambia for non-commercial or even for commercial usages. However, this is not attainable in Zambia because the panorama exception is not recognised under the Zambian Copyright Act. As a result, there is a great deal of copyright infringement that goes on as the public take videos and pictures of the iconic Kaunda statue. It is argued in this article that recognising the freedom of panorama under the Zambian Copyright Act would allow people to freely take and share photos of public buildings and statues like the one of Kenneth Kaunda without the threat of a potential lawsuit for copyright infringement. It is further contended that taking photos of historical monuments is a great way to share, appreciate art, preserve our cultural heritage, boost tourism and promote the freedom of expression.

Keywords: Freedom of Panorama, Copyright, Free Use, Freedom of Expression.

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1.0 Introduction

It helps to start by highlighting that images of works that are permanently positioned in public places like the Kenneth Kaunda statue can be used without their author's permission under the freedom of panorama which is an exception to copyright law. This however, is not possible in Zambia because this exception is not recognised under the Zambian Copyright Act. It is in light of the foregoing that this article aims at exploring the Kenneth Kaunda Statue and the importance of recognising the freedom of panorama as an exception to Copyright protection in Zambia. To realise this goal, the first part of the article will give a brief background of this copyright exception while the second will scrutinize the effect of not recognising this exception in the Zambian Copyright Act. In the third and the final part, the article will conclude by discussing the benefits of recognising the freedom of panorama as an exception to copyright protection in Zambia.

1.1 Background

The term, 'Freedom of Panorama' emanates from the German word "Panoramafreiheit".^[1] Freedom of panorama is the legal right to publish pictures of artworks, sculptures, paintings, buildings or monuments that are in public spaces, even when they are still under copyright protection. This can be with regards to publication for commercial and non-commercial use.^[2] This right is an exception under the infringements of copyright. The reason of this rule is to ensure that the diverse interests of society are accommodated.^[3] Furthermore, the rationale for this exception is aptly given by Barron Oda who is of the view that "if a work is put forth to the public for the public's aesthetic enjoyment, education, or enrichment, then the public should be able to make reasonable reproductions of such work in furtherance of that purpose."^[4] Zambia however, does not recognise this exception under the Copyright Act chapter 406 of the Laws of Zambia (hereinafter referred to as the Copyright Act). Section 17 of the Copyright Act gives authors exclusive rights to authorise or not to authorise another individual to use their work (which right the author of the Kaunda statue enjoys). A careful review of the Copyright Act indicates that there is no exception of the freedom of panorama. Resembling the freedom of panorama is the exception provided for in section 21(h) of the Copyright Act which provides for "incidental inclusion of a work in an artistic work, audio-visual work, broadcast or cable program." This has been used to control the use of public artworks outside of the narrow scope of the exception of panorama. This however is not and cannot be

This however is not and cannot be substituted for the legal right that the freedom of panorama gives to its users to publish pictures of artworks which are in the public space, without asking for the permission of right holders or paying royalties.^[5]

Different countries have used different methods to regulate public artwork. For example, Italy enforces a charging policy for the reproduction of antique public domain works, Egypt had a similar bill for the pyramids, while Sydney Opera House is relying on trademark law to reach a similar effect.^[6] All such mechanism which try to balance the interests of copyright holders and society where public works are concerned are not present in Zambia.

1.2 The Effect of Non-Recognition of the Freedom of Panorama as an Exception to Copyright Protection in Zambia

Andrew Inesi argues that public photographs have a copyright issue because they are both unavoidable for photographers depicting public places and facial violations of copyright.^[7] Measures such as the freedom of panorama exception in copyright law if not implemented create a burden for members of the public. This is because to properly enjoy the right to take photographs of artistic works in public spaces members of the public will have to carry out inquiries and carry out searches of the Copyright authors of these artistic works to seek consent to use the photographs of their artistic works. Alternatively, members of the public should wait until the work goes into the public domain. In Zambia, copyright protection starts as soon as a work is created and it is protected for the life of the author plus 50 years after death. Once the period of 50 years after the demise of the author, the work falls into public domain and anyone can use it without requirement for remuneration to or authorisation from the author.^[8]

The above is burdensome to members of the public as the authorship details of such a work as a building or an outdoor monument like the Kenneth Kaunda is not documented next to it. This makes the likelihood of copyright infringement very high and this is retrogressive as public photography has become such an omnipresent aspect of our digital society. Therefore, it is essential that a more expansive and specific view of freedom of panorama is given by the Zambian Copyright Act. Statutory exception must be given for both non-commercial and commercial usages of public artwork.^[9] Certain provisions of the Zambian Copyright Act require reviewing and updating, as it is necessary to bring the legal rules in line with the needs of society, to take into account the legislative challenges related to the development of digital technologies and react to problems which are already identified.^[10]

As a result of the non-recognition of the freedom of panorama exception and generally a lack of knowledge by members of the public, there is a great deal of copyright infringement that goes on in Zambia of copyrighted public works such as the Kenneth Kaunda statue. Many members of the public have little to no knowledge of copyright and copyright infringement. However, ignorance of the law is no defence and despite one not knowing that they are infringing copyright, they will still be found liable for copyright infringement. The Zambian case of *Performing Rights Society Ltd v Francis Anthony Hickey*^[11] illustrates this fact. In this case three musical albums were played in public by the defendant without a plaintiff-issued permission. On the other hand, the defendant said that he had no intention of continuing to violate the copyright. Prior to it, he claimed, he had gotten multiple letters from the plaintiffs' attorneys urging him to cease performing songs protected by copyright, but he had no idea why they were doing so. He continued by saying that he had never before in his life heard of music copyright. The defendant violated copyright, according to the court, and the plaintiff was only entitled to a portion of the profits made as a result of the violation rather than damages because the defendant was not aware and had no grounds to suspect that copyright existed in the work. This case shows that despite the leniency of the learned trial judge the defendant was still held liable for copyright infringement despite having no idea that he was infringing copyright.

On the strength of the case above, it is strongly recommended that the freedom of panorama exception should be recognised and more knowledge should be given out to the public with regards to copyright and copyright infringement because the likelihood of such cases occurring is quite high. As already alluded to, the recent installation of the Kenneth Kaunda statue at the Longacres shopping mall for example is one that might attract copyright infringement to be on the rise. The shopping mall has various numbers of locals and tourists visiting it weekly to take photographs. While others may only be taking photographs of the statute for memories and personal use, others might be taking these photographs for commercial purposes without knowing that permission is required from the author of the statute. Others that may want to take photographs of the statue for memories and personal use may also be of the view that they are prohibited completely from taking photographs of the artistic work. Recognition of the freedom of panorama for both non-commercial and commercial purposes in the copyright legislation would erase the ambiguity surrounding this and individuals can avoid being sued for copyright infringement with a clear guideline on how to conduct oneself with regards to artistic works in public spaces.

1.3 The Benefits of Recognising the Freedom of Panorama as an Exception to Copyright Protection in Zambia

The benefits of recognising the freedom of panorama as an exception to copyright protection are numerous save to highlight the following. Firstly, this exception would allow people to take and share photos of public buildings and statues like the one of

Kenneth Kaunda without the threat of a potential lawsuit for copyright infringement. Taking photos of historical monuments is a great way to share and appreciate art and thereby preserving our cultural heritage. To that effect, Bertoni & Montagnani argues that “public art works may express the identity of a community, a state, a nation; they can embody cultural, economic, social, environmental interests, and have civic, commercial, and touristic value. As such, they are more than just simple works under copyright.”^[12]

Secondly, this exception to copyright would promote tourism and encourage people to visit public spaces and heritage sites. This can be seen from the number of people flocking to Longacres mall to see the iconic Kenneth Kaunda statue. The third benefit of recognising the freedom of panorama as an exception to copyright law in Zambia is that it will encourage creativity and artistic expression among artists in Zambia as they can take photos of public spaces and use them in their own creative projects, such as making collages or creating digital artwork.^[13]

The fourth benefit is that this exception would allow for the preservation of our cultural heritage. Cultural heritage encompasses “tangible and intangible, natural and cultural, movable and immovable and documentary assets inherited from the past and transmitted to future generations by virtue of their irreplaceable value.”^[14] People can take photos and videos of the Kenneth Kaunda statue that may not be around forever, and share them with future generations so that even them may appreciate and learn from this iconic statue about one of the greatest leaders Zambia has had.

Lastly, another benefit of recognising this copyright exception is that it promotes freedom of expression. The right to freedom of expression is an essential human right that allows us to express our opinions, ideas, and beliefs without fear of government or other people's censorship this provided by **Article 20 of the Constitution**.^[15] This right plays a vital role in a democratic society by helping to ensure that the government remains accountable and that the public can engage in meaningful dialogue and debates. Freedom of expression is also linked to other fundamental rights such as the right to access information and to access the media.

Freedom of panorama is an extension of the right to freedom of expression. This right allows people to take photographs and video recordings in public places without needing to obtain permission from the owners of the property or any other person or entity. People can take and share photos of public spaces and art without fear of legal repercussions, allowing for a more open and democratic society.

1.4 Conclusion

The article has shown that the Zambian Copyright Act does not recognise the freedom of panorama as an exception to copyright protection. This essentially means that there is a great deal of copyright infringement that goes on in Zambia of copyrighted public works such as the Kenneth Kaunda statue. This problem is further compounded by the fact that many members of the public have little to no knowledge of copyright law and its niceties. Unequivocally, it has been argued that recognising the freedom of panorama under the Zambian Copyright Act would allow people to freely take and share photos of public buildings and statues like that of Kenneth Kaunda without the threat of a potential lawsuit for copyright infringement. This could certainly be a great way to share, appreciate art, preserve our cultural heritage, boost tourism and promote the freedom of expression.

^[12] SS Rana & Company, Freedom of Panorama, available at www.lexology.com/library/detail.aspx?g=3df8e059-79e6-4d33-bcfe-ba1e4a67de29 visited 05/07/2023

^[13] Mélanie Dulong de Rosnay, Pierre-Carl Langlais. Public artworks and the freedom of panorama Controversy: a case of Wikimedia influence. Internet Policy Review, Alexander von Humboldt Institute For Internet and Society, 2017, 6 (1), ff10.14763/2017.1.447ff. fhalshs-01472414ff

^[14] Anna Shtefan, Freedom of Panorama: The EU Experience, 2 EUR. J.LEGAL STUD., no. 2, 2019.

^[15] Barron Oda, 'Mobile Devices, Public Spaces, and Freedom of Panorama. Reconciling the Copyright Act with Technological Advances and Social Norms Regarding Content Creation and Online Sharing' (2018) 14(2) cited by Anna Shtefan, Freedom of Panorama: The EU Experience, 2 EUR. J.LEGAL STUD., no. 2, 2019.

^[16] Mélanie Dulong de Rosnay, Pierre-Carl Langlais. Public artworks and the freedom of panorama Controversy: a case of Wikimedia influence. Internet Policy Review, Alexander von Humboldt Institute For Internet and Society, 2017, 6 (1), ff10.14763/2017.1.447ff. fhalshs-01472414ff.

^[17] *ibid*

^[18] Andrew Inesi, Images of Public Places: Extending the Copyright Exemption for pictorial Representations of Architectural Works to Other Copyrighted Works, 13 J. INTELL. PROP. L. 61, 63 (2005).

^[19] Section 21(1) of the Copyright and Performance Rights Act

^[20] Bryce Clayton Newell, Freedom of Panorama: A Comparative Look at International Restrictions on Public Photography, 44 CREIGHTON L. REV. 405,406, 413-14 (2011).

^[21] Anna Shtefan, Freedom of Panorama: The EU Experience, 2 EUR. J.LEGAL STUD., no. 2, 2019.

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Trademark opposition



VANESSA
NDHLOVU

Opposition is the legal procedure that allows a third party to try and stop a published mark from being registered this simply means that a third party, has found the mark objectionable. A party can oppose the entire application, or only some of the goods or services it covers. To further understand this procedure its important to know what exactly amounts to a trademark, according to the learned author Mr. George M. Kanja; *“a trademark is any sign that is capable of distinguishing the goods or services produced or provided by one enterprise from those of other enterprises.”*^[1]

Trademarks gain their commercial origin from the merchants and traders in the late 19th century, where individuals were seen to mark their goods since the early days of agriculture. Evidence does indeed suggest that the first piece of legislation to deal with trademarks was passed in England in 1266 under the reign of king Henry. Under the Zambian jurisdiction the principal piece of legislation that sets the standard and deals with trademarks is the **Trademarks Act Chapter 401 Of The Laws of Zambia**.

Following the growth and importance of marking goods in modern day society, a need arose for individuals or corporate entities to maintain their distinctive identity and to protect themselves against parties that seek to thrive on the commercial popularity associated with their marks in order to make profits.

To further delve more into this legal topic our Zambian laws in the case of **Trade Kings Limited And Unilever Plc, Cheesebrough Ponds (Zambia) Limited, Lever Brothers (Private) Limited**^[2] the supreme court provided that under Section 9 of the Act, the registration of a mark creates a statutory monopoly protecting the use of the mark in the course of trade for the goods or service for which the mark is registered.

The section inures for the benefit of both registered proprietors and any resulting conflict appears to have been anticipated by the legislature.

Following this need that arose for protection; a procedure was developed for a party seeking to register a trademark. The steps a party is considered to follow are clearly outlined under the Trademarks Regulations. The first step is that an application must be made at the Patents and Companies Registration Agency (PACRA) upon which the suggested name, logo or mark will be published in the Industrial Property Journal. A third party seeking to oppose must file a notice of opposition with PACRA within two months of the date of publication of the application this is in line with **regulation 46**. In addition to this point, it was stated in the case of **Olympic Milling Limited vs Comite International Olympique**^[3] that; *“a trade mark may be opposed by any person with an interest in or who may be affected by the registration of the trade mark. ”*

Following the aforementioned procedural step, the notice must be accompanied by a statement of the grounds of opposition which include reasons such as confusion with a senior mark, descriptiveness and genericness of the mark.

Following this step, **regulation 48** provides that the registrar will then serve the notice on the applicant, who must then file a counter-statement within two months of receipt of the opposition. The parties must then file evidence in the form of affidavits or solemn declarations as provided under **regulation 49** thereafter, the registrar will set a date to hear the arguments of both parties. After this hearing, the registrar will determine whether the registration of the trademark should proceed. If the aggrieved party is dissatisfied with the registrar's decision, it may appeal to the High Court. It is also imperative to note the fact that it is of utmost importance that where one is dealing with an opponent not within the Zambian jurisdiction security for costs is a requirement, this is pursuant to the power exercised by the registrar of an amount they may deem fit to cover legal costs this is in accordance with regulation 56 of the Trademarks Regulations. The case of **Keen Exchange (Holding) Company v Ingrid Andrea Loiten Investment Bank Plc**^[4] shades more light on this point, where Imasiku J, held inter alia: *“A Plaintiff who is abroad is prima facie bound to give Security for costs. If a Plaintiff desires to escape from doing so he is bound to show that he has substantial property in the Country not of a floating but of a fixed and permanent nature, which would be available in the event, the Defendant being entitled to costs of the action. Another fact taken into consideration is exercising the discretion*

Order is security for costs is the Plaintiff's respect of success in an action. If the Plaintiff has prospects of success, it is the Plaintiff and not the Defendant who would be entitled to costs."

In line with the main essence of this legal piece of writing, legal issues have arisen on matters dealing with opposition by third parties, one notable issue has been that of unregistered trademark proprietors seeking protection. Inasmuch as the Trademarks Act gives no protection to unregistered trademarks in relation to either infringement or opposition proceedings, the protection of unregistered trademarks is provided for under the tort of passing off. However, in seeking to address this substantive principle of law could there be circumstances which would allow a third party who had been in prior use of the unregistered trademark to challenge a registered proprietor?

To address the astute but not questionable uncertainty the Supreme court in the case of **Dh Brothers Industries (Pty) Limited V Olivine Industries (Pty) Limited**^[51] the supreme court stated that; *"for one to have protection of the Act to oppose or prevent the registration of another mark, one must have a mark capable of being registered within the meaning of Section 16 and the mark must actually be registered on the Register of Trade Marks; and that Sections 7 and 8 of the Act make it clear that only a proprietor of a registered trade mark can oppose the registration of a similar mark."* **Section 7 of the Trademarks Act**^[52] clearly provides that; *"No person shall be entitled to institute any proceedings to prevent or recover damages for the infringement of an unregistered trade mark, but nothing in this Act shall be deemed to affect rights of action of any person for passing off goods as the goods of another person or the remedies in respect thereof."* Therefore, the Act clearly provides that only a registered proprietor can challenge an action for registration of a mark. Therefore, to supplement this discussion trade mark opposition a recent decision on this position of the law was reiterated in the judgment of **Swiss Bake Limited v Monster Energy Company**, in January 2023 which dealt with well-known marks. "A Zambian company, Swiss Bake Limited, applied to register the trademark 'Amazon Monsta Creams' in Class 30 for biscuits. A US company, Monster Energy Company (Monster Energy), opposed the application. The opposition was based on earlier Zambian registrations for marks incorporating the word "Monster" (such as 'Monster Rehab') in classes 5, 30 and 32. It was also based on the claim that the mark 'Monster' is a well-known mark under Article 6 bis of the Paris Convention for the Protection of Industrial Property. Monster Energy relied on significant worldwide use of its marks over a period of some 20 years."^[53] Monster Energy claimed that there would be consumer confusion and that the application for 'Amazon Monsta Creams' had been filed in bad faith. The hearing officer found for Swiss Bake, saying that there was no likelihood of confusion. One consideration was that **Article 6 bis of the Paris Convention** has not been adopted in Zambian law.

In light of the judgment given in the preceding case when it comes to an action for opposition the mere fact that Zambia is a signatory to the Paris Convention does not mean that it applies bindingly in Zambia. Regardless of whether prior registration has been affected in a member state, there is need for review in line with the domestic laws and may be rejected on reasonable grounds pursuant to those laws. The case of **The Attorney General v Roy Clark**^[54] the supreme court states that the binding applicability of international instruments is only that of a persuasive nature unless domesticated in line with the laws of the state.

In light of the aforementioned, it will not be a sustainable ground in a trademarks opposition proceeding for a party to try and establish that they have gained a right over the mark owing to usage over a period of time and in support of this principle the case of **Nicholson Vs Bass**^[55] which is an English decision cited in Zambian case law provides that; it was not necessary to prove the length of use of the trademark or the extent of the trademark. Therefore, to raise such an argument would be a flagrant disregard to the precedent so eminently developed and scrutinized under our jurisdiction.

In essence, the prevailing law on trade mark opposition adequately provides an avenue for the protection of the usage of a trade mark this is emanating through the Act as provided under its regulations as well as evidenced through court decisions as demonstrated in the preceding case of **Swiss Bake Limited v Monster Energy Company**, in which the courts stated that merely being signatory to international treaties does not render a party the requisite protection to pursue a trademark opposition if it has not followed the required steps and actually registered its mark in line with the provisions of the law. Lending more credence to this hypothesis is the fact that even unregistered trademarks can be protected albeit via the law of tort as opposed to Intellectual Property law. However, having accented to this regulatory provision it can otherwise be noted that this may operate to the disadvantage of unregistered users as it encourages parties lack of originality in brand names and ideas as they will rely on the blanket protection of the law to actualize their goods with no creative initiative.

^[1] M.G Kanja "Intellectual Property Law" (UNZA Press, 2006) pg. 327.

^[2] (S.C.Z. JUDGMENT NO. 2 OF 2000).

^[3] (appeal no. of 2019)

^[4] (2009) ZR 343

^[5] Scz Judgment No. 10/2012

^[6] n1

^[7] D.Maguire (Zambian update: trademark law modernisation and Monster Energy's case falls flat, 20th March, 2023.) <https://www.managingip.com/article/2bfcdg18w16mupowr2hlc/sponsored-content/zambian-update-trademark-law-modernisation-and-monster-energys-case-falls-flat>

^[8] SCZ Appeal No.96A/2004

^[9] (1931) 2 CH1

THE ADVOCATUS

A CRITICAL ANALYSIS OF THE CASE KONKOLA COPPER MINES V HENDRIX MULENGA



PRISCILLA
 NYIRENDA

INTRODUCTION

The following commentary is based on the critical analysis of the case of Konkola Copper Mines v Hendrix Mulenga Chileshe which is a case based on the court's decision on wrongful dismissal.

'Wrongful dismissal' occurs when an employer dismisses an employee without giving notice of termination or, that the employee has acted in violation of the contractual provision or has breached the contract of employment. Under common law, there is a need to note that the remedies available to an Employee who has been wrongfully dismissed by an Employer are Damages. Therefore, determining whether a dismissal is wrongful relies on whether the contract of employment has been terminated, with or without notice, or the employee has acted in violation of some contractual provisions or has breached the disciplinary or grievance procedure code.

SUMMARY OF THE CASE

The brief facts of the case were that the Respondent had been employed by the Appellant as a Project Engineer who was also a team leader for the project team which was assigned by the Appellant for the supervision of the construction of phase II works at Nampudwe high school.

The Respondent was under a duty to frequently visit the construction site to ensure that there were no sloppy works. However, this was not the case as the Respondent was several times denied transport by his superior to visit

the site. Later, the Chief Executive Officer (CEO) of the Appellant, the Manager of Corporate Social Responsibility and the Head engineer visited the site, and upon their visit were informed by the area councillor about the poor workmanship on the works of the project. An audit was conducted which confirmed the sloppy work, and as a result, the Appellant charged the Respondent with the offence of 'negligence of duty'. The Respondent exculpated himself and a disciplinary committee was heard. However, the committee was unsatisfied and informed the respondent which resulted in the committee summarily dismissing the Respondent.

In its decision, the court held that in dealing with wrongful dismissal, the question is not 'why', but 'how' the dismissal came into effect, considering whether or not the employer had the necessary power to dismiss the employee and adhered to the prescribed procedure when dismissing the employee.

Moreover, the court also stated that where the correct procedure has been followed, the only question which can arise could be whether there were established facts to support the disciplinary measures since any exercise of power will be regarded as bad if there is no foundation of fact to support the same. According to the case at hand, the court found that the Respondent had been wrongfully dismissed as he was not given an opportunity to exculpate himself and to prepare a defence on the issue concerning his difficulties in getting his superior to sanction trips to the construction site.

The court further stated that the court could not be required to sit as an Appellate court to review the decisions of a disciplinary committee, institution or commission or to inquire whether its decision was fair or reasonable but that the court will only have regard to whether the disciplinary committee, institution or commission did have valid disciplinary power and if so whether such powers were validly used.

COMMENTARY

It can be observed from the above case that, when it comes to termination of an employment contract with regards to 'Wrongful dismissal', the law requires that the employer informs the employee of the offence which he or she has been charged with, in which the offence must be clearly stated before dismissing the employee.

The law further requires that the employee be accorded the opportunity to exculpate himself which can either be done in person or through an exculpatory letter before the disciplinary committee and that a hearing should be conducted. Without which, any exercise of power by the employer will be deemed to be bad, null and void.

CONCLUSION

In summary, the only way to ensure that employees are protected from being wrongfully dismissed is to ensure that Employers clearly state what would constitute an offence and what procedures are to be followed before dismissing an employee.

MEET THE TEAM



Emmanuel Mubanga-Senior Associate Editor



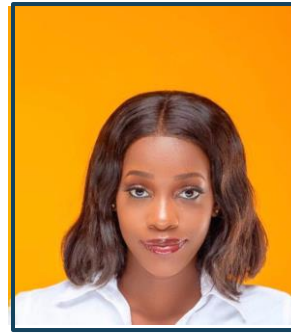
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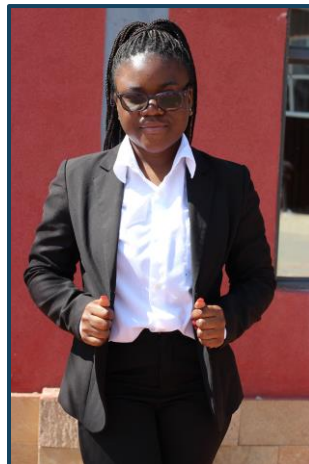
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THE ADVOCATUS

The landmark decision of George Mwanza and Melvin Beene v The Attorney General and what it really meant for Zambia.



TAONGA

The case of *George Mwanza and Melvin Beene v The Attorney General*^[1] is a 2019 Supreme Court decision that opened up a window of opportunity for Zambian citizens to sue for their second-generation rights in the High Court.

The events that led to the birth of the case were that the appellants, George Mwanza and Melvin Beene, were prisoners who unfortunately suffered from Human Immunodeficiency Syndrome (HIV). Before their conviction, both prisoners were treating their condition with Anti-Retroviral Treatment (ART). The correctional facility they were placed in did not cater to their need for the mentioned medication. Further, their dietary needs were equally left unconsidered. Essentially, their complaint was oriented around the fact that the prisoners felt that the state was not providing them with food of nutritional value which constituted a balanced diet, which would consequently mitigate the effects of having HIV; their stance was that the lack of a nutrition filled diet would negatively affect their battle with HIV posing a threat to their right to health, thus eventually affecting their right to life.

When the case was presented to the Supreme Court, the court posed the following question:

"It raises the question of whether there is any role for the courts in Zambia to play in the full realization of economic, social and cultural rights in the broader context of the justiciability of fundamental rights, that is to say, the giving of a voice to rights - holders and offering them forms of

reparations in case of a violation."^[2] In drafting this profound question, my view is that the courts simply projected unto its judgement an inquiry made informally by the appellants and, to a greater extent, even members of the public.

In order to dissect the importance of the question, it is paramount to look at the definition of justiciability and its significance as it relates to the discussion of Human Rights. In the case at hand, Justiciability was defined to mean "the ability to claim a remedy before an independent and impartial body when a violation of a right has occurred or is likely to occur. It implies access to a mechanism that redresses violations of recognized rights. Accordingly, justiciable rights grant right holders a legal recourse to enforce them whenever the duty bearer fails to live by its duty to honour those rights."^[3] In a more simplified form, Justiciability concerns itself with whether or not an independent court can make decisions on a particular right. On the flip side, the importance of justiciability is that it ensures the protection of a specific group of rights^[4], and the effectiveness of their protection. It introduces and makes available a wider range of justice for those who fall into the category of victimisation of unprecedented violations. The courts are the last resort for human rights violations and cornerstone of the victims who face such violations as clearly demonstrated by the supreme court in the case of *Resident Doctors Association v The Attorney General*^[5] "Courts, as final arbiters, when interpreting the constitution and the laws made thereunder which confer the freedoms, determine the content and parameters of these rights." It is for the court to lay out the manner in which these rights are to be handled and whether or not a remedy for violations of a particular group of rights hold any form of existence or gravity in our jurisdiction.

Having unpacked the doctrine of justiciability, it follows that the court's stance prior to this judgement is briefly discussed. In light of the aforementioned, the jurisdiction of Zambia previously saw only first-generation rights to be justiciable; first-generation rights are those that are generally about the person against political power and typically maintain the originality of the human^[6]. First-generation rights include rights such as the right to life, freedom of movement, freedom of assembly, right to vote and so on. Second-generation rights, however, are rights which require positive action by states; they are famously known as 'expensive rights' because they bare a financial responsibility on a state to ensure their enjoyment; they include rights such as Right to health, right to education, right to social security, right to food etcetera.^[7]

The previous stance made it incredibly difficult, and quite honestly, virtually impossible to sue on violations of rights that fell under second-generation rights, that was until this very judgement was made. It introduced a window of opportunity, a slight opening of an otherwise shut door. The judgement of the court and the reasoning thereof was that where a violation of a second-generation right will inevitably lead to a violation of a first-generation right, there is cause for a case to be heard and remedied by the court.

The judgement of this case is important to this country for various reasons. It is no secret that Zambia is a third-world nation doing its best to make available every resource to its population; despite the immense efforts put forth to initialise full realization of second-generation rights, it is more often than not a sad reality for many citizens in this country that resources of essentialities are scarce, the rumble and rave to hold on to what is actually available will inevitably lead to the horrors of violations of human rights.

This judgement has pivoted the manner in which remedies for second-generation rights violations are handled. The core essence of the establishment of human rights was not to place them in a hierarchical structure, belittling one group of rights and insinuating that one was more precious than the other; the establishment of rights was founded on the premise that each human being must have some form of protection, from captivity, deprivation and harm, no matter what shape or form they present themselves in. In a country such as Zambia, a paramount objection must always be to make not only full realization of such rights but to equally ensure they are protected and benefit every citizen within these borders. The courts quite clearly made this very observation that it is ill thinking to treat such rights as though they were below the other because they are interdependent and interrelated, they work with each other.

In conclusion, this judgement made an important realisation and deconstructed false pretences that suggested that First generation rights were the only rights justiciable in Zambia; it reinforced the principle that no right is above another, as rights are interrelated and interconnected, and most importantly, it awarded an opportunity for Zambians to sue on their second-generation rights.

[1] Selected Judgment No. 33 of 2019

[2] Ibid

[3] ibid

[4] SA Yeshanew, 'The justiciability of human rights in the Federal Democratic Republic of Ethiopia' (LLD thesis, Åbo Akademi University, 2008)

[5] (SCZ Judgment No. 12 of 2003)

[6] MR Sarani, 'The Concept of Right and its Three Generations' July 2017, Vol 5, International Journal of Scientific Study, 38

[7] L Reid 'The Generations of Human Rights,' (2019), available on: <https://sites.uab.edu/humanrights/2019/01/14/the-generations-of-human-rights/> (accessed on 25 July 2023).

MEET THE TEAM



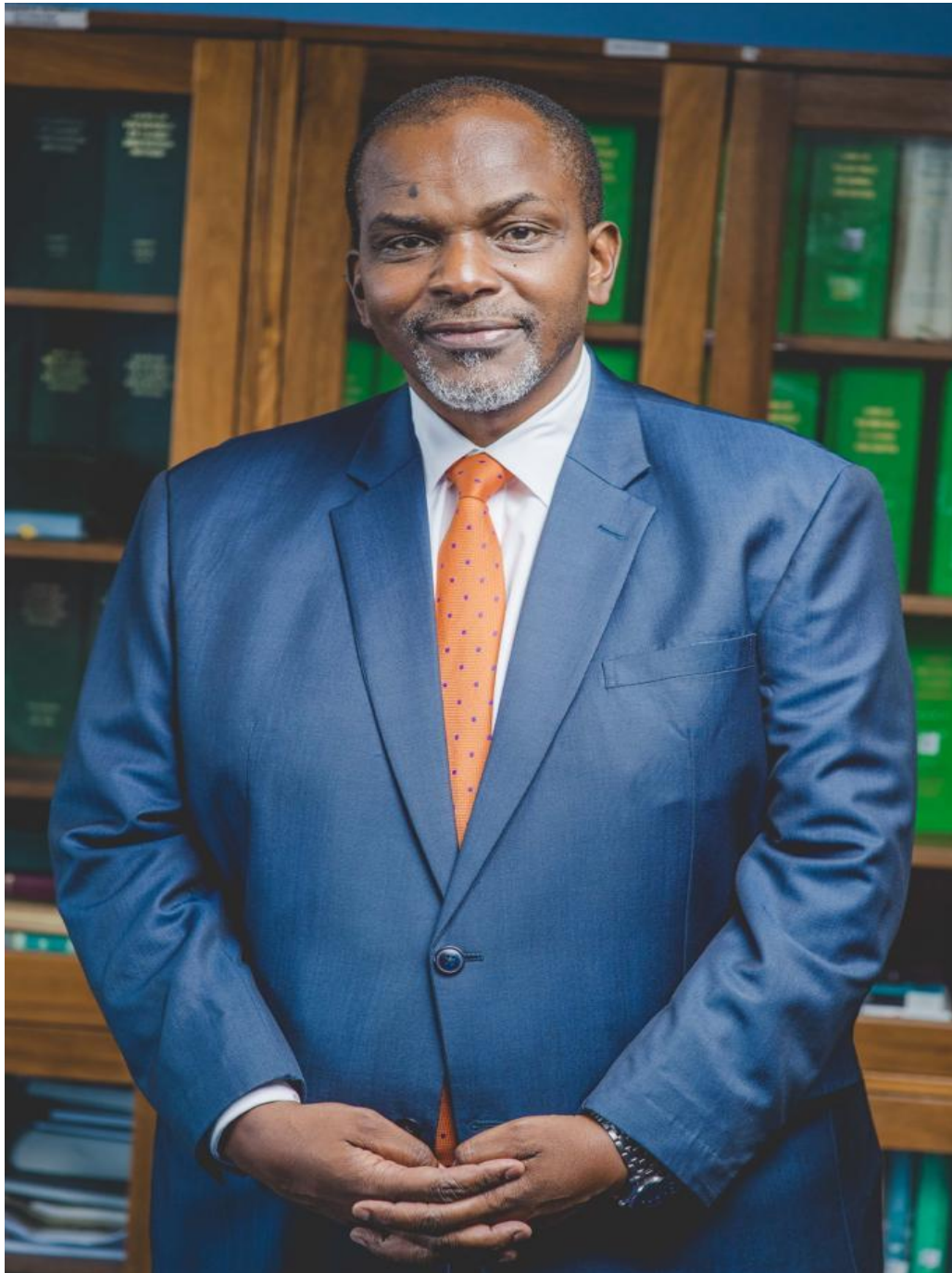
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**AN EXCLUSIVE INTERVIEW WITH FORMER DIRECTOR
OF PUBLIC PROSECUTIONS, MR. MUTEMBO NCHITO**

**INTERVIEWED BY: PEMBA MANENGU AND TAONGA
PHIRI**



The UNILAW team had the opportunity to sit and briefly chat with the renowned Mutembo Nchito SC. Mr. Nchito, who once served as the country's Director of Public Prosecutions, is a prominent name in legal circles. During the interview, Mr. Nchito shared some valuable nuggets about what he has picked up in his practice as a lawyer, what he thinks are the necessary attributes for one to have a successful legal career and what he thinks the future of the profession is.

When asked about his educational background, Mr. Nchito was quick to point out that he was not the strongest student in his formative education years. "I'm not like most parents who will lie to you that I used to pass number 1," he said jokingly. He stated that the method that was used to teach at the time, placed emphasis on memory and made it extremely difficult for him to learn how to read. His mother who could only read in a local language (Bemba) took it upon herself to ensure that he learnt how to read. "The mode of learning at the time was about memorizing and I wanted to know why 'the' was 'the' and when my mother discovered that I could not read, she decided to teach me through vowels...."

Although State Counsel Mutembo Nchito still was not the strongest student, in the eleventh grade, he decided to study hard and this sudden change in his school ethic earned him good marks, which in turn secured him a place at the University of Zambia. Mr. Nchito says he was extremely fortunate to have been clear about what he wanted to do very early in life. He pursued a Law degree and after graduating, he went on to clear his Bar exams on his first attempt. Having practiced law for a few years, he felt the need to obtain a postgraduate qualification in corporate law at Kings College in the United Kingdom.

Having shared his background, Mr. Mutembo Nchito, shared his experience as a lawyer and what he thought prevents some lawyers from progressing in their careers. He talked about the need for lawyers to be humble. "In as much as we are a learned profession, we also ought to be a humble profession." SC Nchito also emphasized the critical role that mentorship plays in the development of one's legal career. He shared a personal experience about how upon graduation, he was offered a job at a law firm, with good conditions of service but he opted to go and work for the renowned Edward Jack Shamwana SC, who was just restarting his firm and was going to pay him less. Mr. Nchito reasoned that he was going to learn more from Mr. Shamwana than he was going to learn from the other firm and this proved right. "Mr. Shamwana taught me many things, and practices that we still use in my

firm today,” he stated. “You have to make sure that the place where you spend your formative years is one where you can learn from, the size of the firm doesn’t really matter because you can be in a large firm and the only thing you are allowed to do is staple documents. If your goal is to be a litigator for example, your first job should never be as in-house counsel because you won’t learn as much in such an environment.”

Mr. Nchito also emphasized not only the unique ability to play to one’s strengths, but also to have the discipline to do what has to be done. He recognized the fact that everyone is wired differently and while we must use that to our advantage, we must also ensure that we step out of our comfort zone to do even the work that we find unpleasant, because it must be done. To sum it all up, Mr. Nchito stated that provided one is hardworking, humble and honest, they will make it in the legal profession. *“I always say that there is a shortage of honest people. If you’re honest, your clients will stick with you and you will be successful in your practice.”*

When asked about the future of the profession, and whether there is still a high chance for young lawyers to make a living through practicing, Mr. Nchito quickly stated that there will always be jobs for lawyers and provided one is diligent and honest in their practice, they will be able to make a decent living. He stated that there are a lot of areas of the law that have not yet been explored and those areas will probably be explored by the new lawyers. Mr. Nchito also spoke of how the law is cross cutting and makes lawyers extremely versatile, which enables them to do so many things. *“Lawyers make good investors and entrepreneurs. I have done many things in my life.”* There will always be jobs for lawyers!

A photograph of a desk setup. A silver laptop is open on a white desk. To the left of the laptop is a black pen and a small orange object. To the right is a black pen and a notebook. The background is a brick wall.

CALL FOR LEGAL ARTICLES

The University of Lusaka Academia and Legal Writing Society (UNILAW) is calling upon all interested law students to submit articles to its editorial board for inclusion in its 2nd newsletter issue.

- 1-Applicants must be law students at the University of Lusaka in the school of law(full-time/part-time/distance)
- 2-Write on any legal topic of interest
- 3-Font 12 Times New Roman
- 4-1.5 Line spacing
- 5-Pages must be numbered
- 6-Submission open till further notice
- 7- It **MUST** be accompanied by at least a minimum of 8 **LEGAL AUTHORITIES**
- 8-Use OSCOLA referencing style (only)
- 9-2 minimum pages and 5 maximum pages.
- 10-Query and submission should be made to writingresearch99@gmail.com