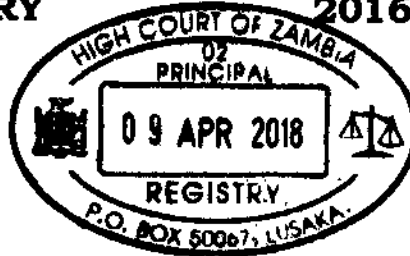


**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

**2016/HP/0416
2016/HP/0959**



BETWEEN :

MOSHEN ZABAD HAIDER

1ST PLAINTIFF

YOTA INTERNATIONAL LIMITED

2ND PLAINTIFF

AND

IRFAN SULEMAN NARBHANDH

1ST INTERESTED PARTY

LACKSON NGOMA

**2ND INTENDED INTERESTED
PARTY**

*(suing on his behalf and on behalf of the
Beneficiaries of the Estate of the late
MachwelloMfungwe)*

LINDON MFUNGWE

**3RD INTENDED INTERESTED
PARTY**

*(suing on his behalf and on behalf of the
beneficiaries of the Estate of the late
LindonMfungwe)*

AND

BURDEN MFUNGWE

DEFENDANT

**Before Honourable Mrs. Justice M. Mapani-Kawimbe on 9th day of April,
2018**

For the 1st Plaintiff : *Mr. K.M. Simbao & Ms. N. Simbao, Messrs
Mulungushi Chambers and Mr. T. Ngulube,
Messrs Tutwa S. Ngulube & Company*
For the 2nd Plaintiff: *Mrs. K.M. Chileshe, Messrs Mweemba Chashi
& Partners*
Interested Party : *Mr. C.M. Sianondo, Messrs Malambo & Company*

For the 2nd & 3rd

Intended Interested Party: Mr. M. Kennedy, Messrs Fred Jere & Company

For the Defendant : Mr. L.E. Eyaa, Messrs KBF Partners & Mr. S. Mbewe, Messrs Keith Mweemba Advocates

R U L I N G

Cases Referred To:

1. *Daniel Mwale v Njolomole Mtonga (sued as Administrator of the estate of the late Gabriel Siwonamutenge Kapuma Mtonga) SCZ Judgment No. 25 of 2015*
2. *Abel Mulenga and Others v Mabvuto Adam Avuta Chikumbi and Others & The Attorney General (2006) Z.R. 33*
3. *Eureka Construction Limited v Attorney General, Consolidated Lighting Zambia Limited (Proposed Intervening Party) (2008) Z.R. 64 Vol. 2 (S.C.)*
4. *Sachar Narendra Kumar v Joseph Brown Mutale SCZ Judgment No. 8 of 2013*

Legislation Referred To:

1. *High Court Act, Chapter 27*
2. *Law Reform Miscellaneous Act UK 1939*
3. *Law Reform (Limitation of Action etc) Chapter 72*
4. *Lands and Deeds Registry Act, Chapter 185*

This is the intended 2nd and 3rd Interested Parties application for an order of non-joinder pursuant to Order 14 Rule 5 of the High Court Rules. It is supported by Affidavit.

The Affidavit was sworn by **Lackson Ngoma** who deposes that the intended 2nd and 3rd Interested Parties wish to join this action as representatives of the beneficiaries of the estates of Mackwello Mfungwe and Lindon Mfungwe. That the beneficiaries include Tambara Mfungwe, Joseph Mfungwe, Fukwe Mfungwe and Phineas Mfungwe. Further, that between 2016 and 2018, the Plaintiffs and the 1st Interested Party commenced an action against the Defendant on Stand no. 33323, Lusaka, which belongs to the estates of Mackwello Mfungwe and Lindon Mfungwe and not the Defendant who was just an administrator.

The deponent avers that sometime in 2005, Mackwello Mfungwe obtained a Certificate of Title for Stand no. 33323, Lusaka as shown in exhibit "**LN1**." That sometime in 2005, Mackwello Mfungwe and Lindon Mfungwe agreed to build a hotel for their benefit which was later known as Capital Hotel. It is deposed that when Lindon Mfungwe died on 25th March, 2005, the Defendant and Mazuba Mfungwe were appointed joint administrators of his estate. That the administrators mismanaged Lindon Mfungwe's estate and the beneficiaries issued Court process against them

under Cause no. 2005/HP/0864. That the administrators were restrained from dealing with the estate as shown in the exhibit marked **"LN2."**

The deponent states that on 11th February, 2006, Mackwello Mfungwe passed away. That the families of Mackwello Mfungwe and Lindon Mfungwe decided to appoint one administrator, (the Defendant) for the estates as shown in the exhibits marked **"LN3"** and **"LN4."** That the beneficiaries of the estates authorized the Defendant to lease part of their property and manage Capital Hotel for their benefit.

The deponent avows that unknown to the beneficiaries and without their consent, the Defendant as administrator vested Stand no. 33323 into his names as shown in the exhibit marked **"LN5"**. That from 2005, the Defendant has been selling portions of the land forming part of the estates, without their consent or order of Court. Further, that the Defendant has not advanced the proceeds of the sales to any beneficiaries of the family. The deponent prays for the joinder of the intended 2nd and 3rd Interested Parties so that they

can assert their rights in Court and to compel the Defendant to account for the distribution of the estates.

At the hearing, Learned Counsel for the Intended 2nd and 3rd Interested Parties relied on the Affidavit in Support and reiterated its contents. He prayed to Court to join the intended Interested Parties in the interest of justice. The Plaintiffs and Defendant did not file Affidavits in Opposition. However, their Learned Counsel opposed the application on points of law.

Learned Counsel for the 1st Plaintiff submitted that the intended 2nd and 3rd Interested Parties intentions were not well founded. They did not disclose their interest apart from claiming to be beneficiaries of the estates. They also did not exhibit probate or letters of administration and it was difficult to ascertain their capacity. Their claim was on the remaining extent of Stand no. 33323, which is not in contention in *casu*.

Counsel went on to submit that the intended Interested Parties did not register their interest at the Lands and Deeds

Registry within (12) months according to their exhibits "LN3" and "LN4". Counsel referred me to sections 4 and 6 of the Lands and Deeds Registry Act, on the need to register documents and the effect of non registration. He contended that the documents that the intended Interested Parties sought to rely on were not registered. They were void and of no use to Court. Counsel went on to state that twelve (12) years had lapsed from the date of Mackwello Mfungwe's death in 2006 and the intended Interested Parties had done nothing to assert their rights in Court. Hence, their claims were statute barred.

As regards the probate of Lindon Mfungwe, Counsel submitted that he died more than thirteen (13) years ago. He called in aid section 4 of the Law Reform Miscellaneous Act UK 1939 and the Law Reform (Limitation of Action etc), where he asserted that the claims of the intended Interested Parties were equally statute barred. Counsel stated that his perusal of the Affidavit in Support revealed that the deponents were aware that the Defendant had been selling land since 2005, but did nothing to hold him accountable. Counsel wondered why the intended Interested

Parties were challenging the Defendant when their exhibit "**LN5**" showed that he owned the property in his own right and not as administrator. Counsel added that the lease agreement between Mackwello Mfungwe and Lindon Mfungwe was not exhibited and there was no proof that it was registered at the Ministry of Lands to confirm its existence.

It was Counsel's argument that there was nothing in the Affidavit in Support to prove that the deponent claims were valid and cited the case of **Daniel Mwale v Njolomole Mtonga**¹ to fortify his arguments on statute barred claims. He submitted that the intended 2nd and 3rd Interested Parties had come very late to Court and should not be entertained. He prayed to Court to dismiss the application.

Learned Counsel for the 2nd Plaintiff opposed the application by adopting the arguments canvassed by Counsel for the 1st Plaintiff. Learned Counsel for the Interested Party equally opposed the application and submitted that the intended 2nd and 3rd Interested Parties exhibit "**LN2**" did not disclose their representative

capacity. Further, section 2 of the Law Reform (Limitation of Actions etc) Act limits the accounting period of an administrator to six (6) years. This made the issues raised by the deponent statute barred. Further, citing section 4 of the Limitation Act, Counsel stated that the intended 2nd and 3rd Interested Parties' period of recovery was limited to twelve (12) years, which had elapsed. He prayed to Court to dismiss the application.

In response, Counsel for the intended 2nd and 3rd Interested Parties stated that a beneficiary is not required to obtain a Court order to assert his/her rights. A beneficiary has a statutory right to compel an administrator to account for an estate. He also stated that the intended Interested Parties were suing in their own right and on behalf of the other beneficiaries. They were entitled to do so according to the law.

On the action being statute barred, Counsel submitted that the other parties had misapprehended the statute of limitation. He argued that the beneficiaries cause of action against the Defendant only arose after he breached his fiduciary duty and not at the

demise of Lindon Mfungwe and Mackwello Mfungwe. The lease agreement between Mackwello Mfungwe and Lindon Mfungwe was personal and only to develop their property. Thus, it was not envisaged within the context of section 4 of the Lands and Deeds Registry Act. He prayed to Court to grant the application because the intended Interested Parties had shown sufficient interest.

I have seriously considered the application together with the Affidavit filed in Support and the oral arguments of Learned Counsel. Order 14 Rule 5 of the High Court Rules says that:

".....(5) If it shall appear to the Court or a Judge, at or before the hearing of a suit, that all the persons who may be entitled to, or claim some share or interest in, the subject-matter of the suit, or who may be likely to be affected by the result, have not been made parties, the Court or a Judge may adjourn the hearing of the suit to a future day, to be fixed by the Court or a Judge, and direct that such persons shall be made either plaintiffs or defendants in the suit, as the case may be....."

From this provision, a party who seeks to be joined to proceedings must demonstrate that he/she has sufficient interest in the subject-matter of the suit, or is likely to be affected by the result of the suit. In the case of **Abel Mulenga and Others v Mabvuto Adan Avuta Chikumbi and Others &The Attorney²**, the Supreme Court held *inter alia* that:

"..... In order for the appellants to be joined as parties in the action, the appellants ought to have shown that they have an interest in the subject matter of the action. The mere fact that the appellants may have been affected by the decision of the court below does not clothe them with sufficient interest or locus standi entitling them to be joined in the dispute....."

Similarly, in the case of **Sachar Narendra Kumar v Joseph Brown Mutale**³ where the Supreme Court stated thus:

".....the Court has inherent jurisdiction to order joinder of a party even after Judgment has been delivered. From an analysis of these cases, it is clear that the Court does not simply grant or deny a joinder, but takes into consideration all circumstances of the case.....We would be failing in our duty as the Court, if we allowed all kinds of applications simply because a party is within his rights to do so. We say so as we are not persuaded that it would be in the interest of justice to order the joinder of AT computers Limited as the interest of justice also demands that cases must come to finality."

In **Eureka Construction Limited v Attorney General, Consolidated Lighting Zambia Limited (Proposed Intervening Party)**⁴ the Supreme Court also held that:

"..... In a proper case, a court can join a party to the proceedings when both the plaintiff and defendant have closed their cases and before judgment has been delivered by invoking Order 14 Rule 5....."

I am therefore, bound to consider whether the intended 2nd and 3rd Interested Parties have disclosed sufficient interest to be joined to these proceedings. I was invited by Learned Counsels for

the opposing parties to consider that the intended 2nd and 3rd Interested Parties' claims are statute barred. The point is very valid granted that in the case of **Daniel Mwale v Njolomole Mtonga**¹ the Supreme Court stated that:

The statute of limitation when raised, brings forth a serious legal question as to whether the Court has jurisdiction to entertain the action before it, given that it was brought outside the limitation period. It hardly bears repeating that the issue of jurisdiction is a threshold question and a lifeline for continuing any proceedings. Where a Court holds the opinion that it has no jurisdiction - the very basis for continuation of the proceedings before it - it must forthwith cease to deal with that matter. In our view, the issue of statutory bar when raised, is as much about the jurisdiction of the Court as it is a statutory defence for a party. It is a legal point touching on both the Court's jurisdiction and a provision of a statute.

The effect of the **Daniel Mwale**¹ case is that when a defence of statute bar is raised, a Court must immediately deal with the question of jurisdiction. In the present case, the defence of statute bar was raised by Counsel at the Bar and without Affidavit evidence to fortify their arguments. I am therefore constrained to deal with the issue and will limit myself to the ambit of Order 14 Rule 5 of the High Court Rules.

It is universally accepted in our court system that "a trial court has a duty to adjudicate upon every aspect of the suit between the parties so that every matter in controversy is determined in finality." It was brought to my attention by intended 2nd and 3rd Interested Parties in their Affidavit that some of the beneficiaries of Lindon Mfungwe's estate commenced an action under Cause no. 2005/HP/0864 challenging the administrators on the distribution of the estate. The Originating Summons are reproduced herebelow:

*"RINNES CHEELO
EVELYN MUDENDA
MARY NACHIVULA*

**1ST APPLICANT
2ND APPLICANT
3RD APPLICANT**

AND

*BURDEN MFUNGWE
MAZUBA MFUNGWE
(sued as joint administrators
of the estate of the late Lindon
Mfungwe)*

**1ST RESPONDENT
2ND RESPONDENT**

In that cause, the Applicants seek the following reliefs:

- i. *That the Respondents herein give a full and satisfactory account of how they have managed the estate of the late Lindon Mfungwe.*
- ii. *That the Respondents distribute the said estate to the beneficiaries of the estate.*
- iii. *That the Respondents bear the costs of this application.*
- iv. *Any other relief as this Honourable Court may deem fit."*

The Affidavit in Support is reads in part as follows:

"That the 1st Applicant was married to the late Lindon Mfungwe under customary law from 1994 to 1996 and they had one child together, namely Martha Mfungwe born on 8th November, 1995. That Martha lived with the deceased and his wife until his demise and that she now resides with the 1st Applicant. That the deceased was financially responsible for Martha. That the 3rd Applicant was married to the late Lindon Mfungwe under customary law from 1996 to 1998 and they had one child together namely, Phineas Mfungwe aged 9 years. Phineas lived with the deceased and his wife until his demise and the deceased was financially responsible for him. That the 2nd Applicant was married to the late Lindon Mfungwe from August 1998 to August 2000 and that they had one child together namely, Joseph Nebert Mfungwe. The deponents state that the late Lindon Mfungwe was married to the 2nd Respondent at the time of his death and they had two children. They state that the late Lindon Mfungwe had one child, Lindon Mfungwe Junior aged about 10 years with another lady who has since died. That Martha, Phineas, Joseph Nebert, Lindon junior, Emmanuel and the 2nd Applicant have shares in Capital Milling. That despite constant reminders there has been no feedback from the 1st Respondent and the inventory will not be tabled as agreed. The Respondent from his actions does not want them to know the value of the estate or for them to know what their children are entitled to."

Before this Court the Affidavit in Support reveals that the intended 2nd and 3rd Interested Parties claims largely border on the Defendant's distribution of Lindon Mfungwe and Mackwello Mfungwe's estates including the remaining extent of the Stand no. 33323 Lusaka. Exhibit "**LN5**" in the Affidavit in Support of this application shows that the Defendant is the registered property holder of Stand no. 33323.

The intended 2nd and 3rd Interested Parties claim that the Defendant vested their property in his names. It is also alleged that from 2005 the Defendant started selling portions of their property without their consent. The Affidavit in Support does not hint that the Defendant fraudulently obtained title. Thus, the Defendant according to the exhibit "**LN5**" is the registered title holder. Under section 33 of the Lands and Deeds Registry Act a certificate of title is conclusive proof of land ownership. As such, I find that the intended 2nd and 3rd Interested Parties are strangers to this action and with no locus standi.

The mere fact that the intended 2nd and 3rd Interested Parties may be affected by the decision of the Court does not clothe them with sufficient interest to be joined to the dispute. If they have any issue with the distribution of Lindon Mfungwe and Mackwello Mfungwe's estates, they must seek to join the proceedings in Cause no. 2005/HP/0864.

Accordingly, this application is dismissed for lack of merit. I award costs to the Plaintiffs and Interested Party to be taxed in default of agreement.

Dated this 9th day of April, 2018.

M. Mapani
M. Mapani-Kawimbe
HIGH COURT JUDGE