

IN THE HIGH COURT FOR ZAMBIA

2014/HP/1977

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)



B E T W E E N :

HARRISON MOONGA

1ST PLAINTIFF

ESSIAH KALONGA MOONGA

2ND PLAINTIFF

AND

PETER CHISI

DEFENDANT

WINSTONE CHISI

INTENDED THIRD PARTY

Before Honorable Mrs. Justice M. Mapani-Kawimbe in Chambers on 5th September, 2016

For the Plaintiff : *Mr. L. Mwanabo, Messrs L.M. Chambers*
For the Defendant : *No Appearance*
For the Intended Third Party : *No Appearance*

R U L I N G

Case Authorities Referred To:

1. *Attorney General Vs Aboubacar Tall and Zambia Airways Corporation Limited (1995-1997) Z.R. 54*
2. *Eureka Construction Limited Vs Attorney General, Consolidated Lighting Zambia Limited (Proposed Intervening Party) (2008) Z.R. 64 Vol. 2 (S.C.)*
3. *Abel Mulenga and Others Vs Mabvuto Adam Avuta Chikumbi and Others The Attonery General (2006) Z.R. 33*
4. *Sachar Narendra Kumar Vs Joseph Brown Mutale SCZ Judgment No. 8 of 2013*

5. *Wilson Masauso Zulu Vs Avondale Housing Project Limited (1982) Z.R. 172 (S.C.)*

Legislation And Other Works Referred To:

1. *High Court Act, Chapter 27 of the Laws of Zambia*
2. *Rules of the Supreme Court (1999) Edition*

Counsel for the Plaintiff by notice dated 12th August, 2016, raised the following preliminary issue with two limbs:

1. *That the High Court has no jurisdiction to hear the application in issue as it is functus officio since final judgment was already rendered by Justice Mulenga after a hearing of the matter.*
2. *That the application for non joinder is incompetent as the Order under which it is applied does not include JOINDER after judgment thereby making the applications anchored on its strength i.e. for a stay and review without basis on which they can be granted.*

In support of the preliminary issue, Counsel filed a list of authorities and skeleton arguments, where he drew the Court's attention to Order 14, Rule 5 of the High Court Act on joinder of parties. He then adverted to the cases of **Attorney General Vs Aboubacar Tall and Zambia Airways Corporation Limited (1185-1997) Z.R. 54** and **Eureka Construction Limited Vs Attorney General, Consolidated Lighting Zambia Limited (Proposed Intervening Party) (2008) Z.R. 64 Vol. 2 (S.C)** equally state the law on joinder of parties.

It was contended in the skeleton arguments that the Court had become *functus officio* when it delivered its Judgment, on the basis of the cited provision of law and case authorities. It was also contended that Order 14 Rule 5 envisaged a situation, where a party could only be joined before delivery of Judgment. Thus, the intending third party's application for joinder was misconceived in law. The skeleton arguments concluded with a prayer to the Court to dismiss the application for joinder and for review, which was anchored on the application for joinder.

The hearing of the preliminary issue was fixed on 26th August, 2016. Only Counsel for the Plaintiff was in attendance. The intended third party did not attend Court. At the hearing, Learned Counsel submitted that the preliminary issue was raised pursuant to Order 14 A of the Rules of the Supreme Court. He placed reliance on the list of authorities and skeleton arguments that were filed into Court on 12th August, 2016.

Counsel went on to state that the Judgment of the Court was delivered on 24th March, 2016. On that basis he argued that the intended third party's application for joinder, which was made under the provision of Order 14, Rule 5 of the High Court Rules was not supported by the law. It was his contention that joinder of a party under that Order could only be made before the delivery of Judgment. He asserted that after delivery of Judgment, the Court had become *functus officio*. He concluded with a prayer to the Court

to dismiss the intended third party's application for joinder and review.

I have seriously considered the preliminary issue, the skeleton arguments, authorities cited and the oral submissions of Counsel.

Order 14A Rule 1 of the White Book provides *inter alia* as follows:

"(1) The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that -

(a) such question is suitable for determination without a full trial of the action, and

(b) such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein.

(2) Upon such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just....."

This Order confirms a party's entitlement to a raise preliminary issue before the Court at any stage of proceedings, thus the application before Court.

Order 14 Rule 5 of the High Court Rules states in part as follows:

".....(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....."

What I understand the said Order to mean is that in an application for joinder, a party is required to demonstrate the interest it possesses in the subject-matter of a suit or how it is likely to be affected by the result.

In the case of ***Abel Mulenga and Others Vs Mabvuto Adan Avuta Chikumbi and Others The Attorney General (2006) Z.R. 33 (1)***, 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 ***Eureka Construction Limited Vs Attorney General, Consolidated Lighting Zambia Limited (Proposed Intervening Party) (2)*** also cited by the Counsel for the Plaintiff, the Supreme Court held *inter alia* 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 nonetheless guided by the case of **Sachar Narendra Kumar Vs Joseph Brown Mutale SCZ Judgment No. 8 of 2013** ⁽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".

On the strength of the authorities cited and which I am bound by, it is my considered view that the intending third party can be joined as a party to these proceedings. The intending third party is not limited by the requirements of Order 14, Rule 5 of the High Court Rules. I take solace in the fact that **Sachar Narendra Kumar** modifies the case of **Attorney General Vs Aboubacar Tall and Zambia Airways Corporation Limited** and **Eureka Construction Limited Vs Attorney General and Others**. I say so because where there is ostensible conflict in the decisions of the Supreme Court, a lower Court is compelled to follow the most recent decision of that Court.

I am therefore convinced that by joining the intending third party, the parties will be able to reach the aspired conclusion of this matter. This in my considered view resonates with the Supreme Court's holding in the case of **Wilson Masauso Zulu** where it held 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."

Having made that point, I do not agree with Counsel's contention that Order 14 Rule 5 stifle the Court into a *functus officio* status. In my considered view, I find that the Court still remains within its boundaries to adjudicate the outstanding disputes in this cause. Thus I find it otiose to consider the second limb of the preliminary issue.

I accordingly dismiss the preliminary issue and make no order on costs.

Leave to appeal is granted.

Dated the 5th day of September, 2016

.....*M. Kapani*.....
Hon. Mrs. Justice M. Mapani-Kawimbe
HIGH COURT JUDGE

