

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

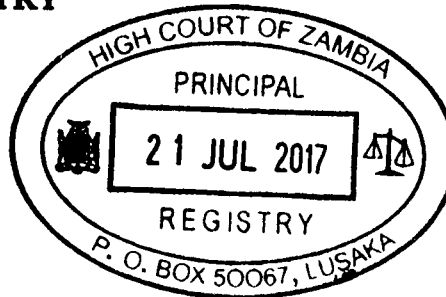
2017/HP/0689

BETWEEN:

MARGRET KATUBILA

AND

**AINESS SHIFWANKULA
SAMSON KACHEPA
McBRIDE BRIAN KAITE**

**PLAINTIFF**

**1st DEFENDANT
2nd DEFENDANT
INTENDED PARTY**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 21st DAY OF JULY,
2017**

For the Plaintiff

: *Ms M.M.Siansima, TMN Legal
Practitioners*

For the Defendants and intended party : *Mr H. Mulenga, Philsong and
Partners*

R U L I N G

CASES REFERRED TO:

1. **LAFARGE CEMENT PLC V PETER SINKAMBA** (*suing for and on behalf of Citizens for a Better Environment*) **SCZ Appeal No 169 of 2009**

LEGISLATION REFERRED TO

1. **The High Court Rules, Chapter 27 of the Laws of Zambia**
2. **The Rules of the Supreme Court, 1999 edition**

This is a ruling on preliminary issues raised by the Defendant, as well as for an order for joinder and non-joinder made pursuant to Order 3 Rule 2 of the Subordinate Court Rules, Chapter 28 of the Laws of Zambia, and Order XIV Rule 5 (1) and (2) of the High Court Rules, Chapter 27 of the Laws of Zambia.

Counsel stated that the first question raised in the preliminary issue is whether or not the Plaintiff is properly before court, given that the site plan for the property in question shows that the property is in the name of Emma Chibamba. That the gist of the application was that the Plaintiff commenced this action in the lower court on 22nd December, 2016 in her names Margret Katubila, and the Defendant had filed an application for misjoinder before that court on 4th January, 2017.

It was submitted that among the issues alleged in the application was that the Plaintiff is not the owner of the land in issue, and the Plaintiff had in the affidavit in opposition dated 1st February, 2017 exhibited 'MK3', an order of appointment as administrator, which was only granted on 10th January, 2017, long after the proceedings had been commenced.

Therefore it was the Defendant's contention that the Plaintiff has no locus standi to commence these proceedings in the manner that she has done, as the proceedings do not reflect that she has sued in a representative capacity. Reliance was placed on the case of **LAFARGE CEMENT PLC V PETER SINKAMBA** (*suing for and on behalf of Citizens for a Better Environment*) **SCZ Appeal No 169 of 2009**, where it was held that where a party has no locus standi to commence an action, the entire action should be dismissed with costs. Counsel accordingly prayed that the action be dismissed with costs, as the lack of locus standi was an incurable defect, as the letters of administration were obtained, long after the proceedings had been commenced.

With regard to the application for misjoinder and non-joinder, Counsel stated that they relied on the affidavit filed in support of the application, adding that Order XIV Rules 5 (1) and (2) empower the court to make both orders sought. He prayed that the 2nd Defendant be misjoined from the proceedings, and that the intended party be joined to the proceedings.

In response Counsel for the Plaintiff opposed the application, and relied on the affidavit in opposition filed in the lower court on 1st February, 2017, especially paragraphs 8 and 9 of the said affidavit. The court was urged to take into account the peculiar circumstances under which the Plaintiff commenced this action, and Counsel also submitted that the Defendants would not be prejudiced if the record was amended, as it is in the interests of the justice that the matter should be heard on its merits, and not on mere technicalities.

It was stated that it was their view that the defect is curable, as it is not in dispute that the Plaintiff was the daughter of the late Emma Chibamba, the owner of the property in dispute.

Counsel in response to the application for misjoinder and non-joinder did not object to the application, stating that the Plaintiff was not privy to the developments that had taken place between the Defendants.

In reply Counsel stated that the fact that the Plaintiff was the daughter of the person appearing on the site plan did not entitle her to commence the proceedings. He further submitted that the **LAFARGE** case is binding on this court, and that the rules of court are there to allow smooth conduct of proceedings. That there would be no justice if any person could commence an action against another in a manner that they wished, and not according to the law. Counsel reiterated that the defect was not curable, and the matter should be dismissed with costs.

I have considered the application. I will begin with the preliminary issues raised. I do note that the notice filed on 26th June, 2017 before this court was filed pursuant to Order III Rule 2 of the Subordinate Court Rules, Chapter 28 of the Laws of Zambia. This is the same notice that was filed before the Subordinate Court, when the matter was before court, before transfer to myself. I will still consider the notice on account of the matter

having been transferred from the Subordinate Court, as the record of proceedings was transferred to this court.

The issues raised in the notice are;

- 1. Whether or not the Plaintiff is properly before this honourable court given the fact that the site plans exhibited show that the owner of the properties in question is Emma Chibamba.*
- 2. That if the Plaintiff will be found not to be the owner of the property in question 1 above, and as alleged in the site plan marked MK1 and MK2, produced before this honourable court, the Plaintiff be struck out from these proceedings, and that the matter be dismissed with costs.*

In the affidavit in opposition to the notice filed on 2nd February, 2017 the Plaintiff in paragraph 8 avers that she has sufficient interest in the matter being the daughter as well as administrator of the estate of the late Emma Chibamba, who owned the property in dispute. Exhibited as 'MK3' is an order of appointment of administrator for the estate of the late Emma Chibamba in favour of the Plaintiff dated 10th January, 2017. Indeed as rightly argued by Counsel for the Defendants and intended party, the order of appointment as administrator was obtained after these proceedings had been commenced on 15th December, 2016, in the Subordinate Court.

The order of appointment of administrator shows that Emma Chibamba died on 10th December, 2016, before the proceedings were commenced. It is trite that a personal representative steps into the shoes of a deceased person, being an executor where the deceased left a will disposing of their property, and an administrator where they did not leave a will, or where there is partial intestacy. In this case the Plaintiff obtained letters of administration entailing that the deceased died intestate, or without leaving a will.

That being the position, any proceedings relating to the property that the deceased owned can only be properly instituted and defended by the administrator of the deceased's estate. Counsel for the Defendants and intended party argued citing the case of **LAFARGE CEMENT PLC V PETER SINKAMBA** (*suing for and on behalf of Citizens for a Better Environment*) **SCZ Appeal No 169 of 2009**, that the Plaintiff has no locus standi in this matter as she has not sued in a representative capacity, and the defect is incurable, and the matter should be dismissed with costs.

In that matter the Supreme Court dismissed the action on account of the Plaintiff not having locus standi to commence the action under the Mines and Minerals Act, and since his claim related to the Environmental Protection Fund (EPF). The Supreme Court in that case noted that; ***"it is manifestly clear that he had no locus standi to commence this action. Section 123 has not clothed the respondent with authority to 'recover money or demand from the appellant payment or deposit into the (EPF)'. The best the respondent could have done was to co-operate with the Ministry of Mines to register his grievances with regard to the operations of the appellant, and to establish whether the appellant was paying into the EPF or not. It is up to the government to use its powers under the Act as far as the EPF is concerned"***.

I agree that the Plaintiff in her personal capacity has no locus standi to commence this suit, as the property does not belong to her, even though she was the late Emma Chibamba's daughter. She has however shown that she is the administrator of the estate of the late Emma Chibamba, her mother, who owned the property. Thus the question that arises is whether the failure to cite the capacity in which the Plaintiff commenced this action is fatal, and the matter should accordingly be dismissed?

Order XIV Rule 1 of the High Court Rules provides that;

“1. If any plaintiff sues, or any defendant is sued, in any representative capacity, it shall be expressed on the writ. The Court or a Judge may order any of the persons represented to be made parties either in lieu of, or in addition to, the previously existing parties”.

Order 20 Rule 5 (4) of the Rules of the Supreme Court, 1999 edition allows for the alteration of parties to a suit. It states that;

“(4) An amendment to alter the capacity in which a party sues may be allowed under paragraph (2) if the new capacity is one which that party had at the date of the commencement of the proceedings or has since acquired”.

Order 20/8/18 of the said Rules of the Supreme Court states that the effect of Order 20 Rule 5 (4) is to allow a party to amend the capacity in which he or she sues as executor or executrix after the grant of probate, since this would relate back to the date of death, but it will also allow a party to amend the capacity in which he or she sues as administrator or administratrix, after the grant of administration even though this may take place after the issue of the writ.

Therefore while the **LAFARGE** case relied on by Counsel for the Defendants and intended joinder, dismissed the matter for want of locus standi, my view is that the case is distinguishable from this case, as in that matter the Plaintiff had no capacity at law to commence the proceedings independently of the Attorney General. In this matter however the Plaintiff acquired the capacity to sue as administrator of her late mother's estate, after she had commenced the action, and under the provisions of Order 20 Rule 5 (4) of the Rules of the Supreme Court, she has locus standi, provided the writ is amended to reflect that capacity.

I accordingly find that the failure to cite the Plaintiff as suing in the capacity of administrator is not fatal, but curable by way of amendment, and the preliminary issue fails. I therefore order that the Plaintiff shall within fourteen days from today amend the writ to show that she is suing in her capacity as administrator of the estate of the late Emma Chibamba. Failure to do so will result in the writ being set aside for irregularity.

As regards to the application for misjoinder and non-joinder, this was not objected to, and I accordingly grant the prayer that Samson Kachepa, the 2nd Defendant herein, be misjoined from the proceedings, and the intended party, Mcbride Brian Kaite, is hereby joined to the proceedings as 2nd Defendant. Costs shall be in the cause. Leave to appeal is granted.

DATED THE 21st DAY OF JULY, 2017.

S. Kaunda
S. KAUNDA NEWA
HIGH COURT JUDGE