

**IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**

(Civil Jurisdiction)

2008/HP/A040

BETWEEN:

FEBBY CHRISTINE KABWE

AND

**PENGUIN INVESTMENTS LIMITED
NATIONAL HOUSING AUTHORITY
LAWRENCE NKOSI**

(Trustee of Nkosinathi Nkosi)



APPELLANT

1st RESPONDENT

2nd RESPONDENT

3rd RESPONDENT

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 4th DAY OF
OCTOBER, 2017**

For the Appellant : Messrs H.H. Ndhlovu and Company

For the 1st Respondent : No appearance

For the 2nd Respondent : No appearance

For the 3rd Respondent : Mrs K. M. Chileshe, Mweemba Chashi and Partners

R U L I N G

CASES REFERRED TO:

- 1. Isaac Tantameni Chali (Executor of the will of the late Mwala Mwala) V Liseli Mwala (Single woman) 1997 SJ 22*
- 2. Investrust Bank PLC V Chick Masters Limited, Dr Mwilola Imakando 2009/HPC/0013*
- 3. Enala Chirwa V Kachena Financial Limited, Annie Zulu and Noah Mwansa SCZ/8/180/2011*

LEGISLATION REFERRED TO:

- 1. The High Court Rules, Chapter 27 of the Laws of Zambia*

This is a ruling on two notices of intention to raise preliminary issues, filed by the Appellant, the first one dated 25th August, 2017 and the second one dated 11th September, 2017. When the matter came up for the hearing of the two notices, only Counsel for the 3rd Respondent was before court, and she informed the court that she relied on the affidavit filed in opposition to the two notices dated 13th September, 2017.

I have considered the applications. The first notice dated 25th August, 2017 asks the court to determine the following questions;

- 1. Whether the 3rd Respondent should not be misjoined from the case for having been improperly joined*
- 2. Whether an executed judgment can be reviewed and or stayed?*

The notice dated 11th September, 2017 asks the court to determine two questions of law namely;

- 1. Whether a party can re-apply to the same High Court for review of a judgment after having been refused*
- 2. Whether a party can apply to review a judgment he/she was not a party to during the trial?*

The affidavit in support of the notice dated 25th August, 2017, states that the court delivered its judgment on 13th September, 2013, and that the 3rd Defendant was joined as a party to the proceedings on 23rd October, 2013. It is averred in paragraph 6 of the said affidavit that the Plaintiff executed the judgment on 27th April, 2017 by paying the purchase price for the house into court on 27th April, 2017.

The skeleton arguments in support of the notice filed on 28th August, 2017 refer to Order 14 Rule 5 of the High Court Rules, Chapter 27 of the Laws of Zambia, which provides for the joinder of parties, and it was

argued therein that based on that provision of the law, joinder of a party can only be done before judgment is delivered in a matter and not thereafter. The case of **ISAAC TANTAMENI CHALI (Executor of the will of the late Mwala Mwala) V LISELI MWALA (Single woman) 1997 SJ 22** was also relied on, arguing that it was held in that case that joinder can only be done before judgment.

The provisions of Order 15 Rule 6 of the Rules of the Supreme Court, 1999 edition were also relied upon in support of the argument, as well as the case of **INVESTRUST BANK PLC V CHICK MASTERS LIMITED, Dr MWILOLA IMAKANDO 2009/HPC/0013**. Therefore, the joinder of the 3rd Respondent in this matter was irregular.

The affidavit dated 11th September, 2017 on the other hand in paragraph 4 states that the 3rd Respondent on 19th May, 2016 informed the Supreme Court that the High Court had refused its application for review as shown on the transcript of the proceedings exhibited as 'TC1'. That the 3rd Respondent has again applied for review before the same court that declined to review the judgment.

In the affidavit in opposition dated 13th September, 2017, it is deposed in paragraph 6 that the statement regarding the High Court having declined to review the judgment was made in error, as Counsel who had appeared before the Supreme Court was not Counsel who had initially handled the matter, and that upon being queried further by the Supreme Court Counsel, had clarified that it was not the review that had been appealed against but the judgment of the court below. Further that the record will show that no notice of hearing was issued for the hearing of the review, and neither was there an order on the record declining to review the matter, as the Judge who handled the matter retired after delivering the judgment.

I will start with the issue of whether the 3rd Respondent should be misjoined from the proceedings, having been improperly joined. Counsel for the Appellant relied on Order 14 Rule 5 of the High Court Rules and Order 15 Rule 6 of the Rules of the Supreme Court, as well as the cases of **ISAAC TANTAMENI CHALI (Executor of the will of the late Mwala Mwala) V LISELI MWALA (Single woman) 1997 SJ 22** and **INVESTRUST BANK PLC V CHICK MASTERS LIMITED, Dr MWILOLA IMAKANDO 2009/HPC/0013** to argue that the 3rd Respondent could only be properly joined to the proceedings before judgment had been delivered in the matter. That as he was joined after the judgment, the said joinder was irregular, and he should accordingly be misjoined from the proceedings.

The order for joinder was granted by the court that handled the matter and there was no appeal against the said order of joinder. The issue therefore cannot be raised as a preliminary matter. Suffice to state that the case of **ENALA CHIRWA V KACHENA FINANCIAL LIMITED, ANNIE ZULU AND NOAH MWANSA SCZ/8/180/2011** considered the issue of joinder of a party to the proceedings after judgment. In that appeal, the Supreme Court noted that the court has inherent jurisdiction to order the joinder of a party to the proceedings after judgment where exceptional circumstances are disclosed. That by allowing the joinder, the court will adjudicate all the matters in dispute in one action, and avoid a multiplicity of actions.

This brings me to the question whether I have jurisdiction to review the matter after an application to review the said judgment was declined by a High Court Judge, and whether review is tenable when the party so applying was not a party to the proceedings?

In the ***ENALA CHIRWA V KACHENA FINANCIAL LIMITED, ANNIE ZULU AND NOAH MWANSA SCZ/8/180/2011*** case, it was stated that joinder of an applicant to the proceedings would allow that applicant to be heard. As to how that Applicant would be heard is dependent on how the court is moved after the joinder. In this case the 3rd Respondent has applied for review of the judgment. Counsel for the Appellant argued that the 3rd Respondent's application for review was declined by the court that delivered the judgment, and he then appealed, and he therefore cannot apply for review once again before the High Court.

In response to that argument, the 3rd Respondent stated that the said review was not heard and that is why he appealed. A perusal of the record shows that it is incomplete, and there is no way of verifying what happened after the judgment was delivered, suffice to note that the application for joinder is on the court record, as well as an application for special leave to appeal. In the affidavit in support of the application for special leave to appeal, the 3rd Respondent deposed that he was only made aware of the judgment of the court dated 13th September, 2013 on 18th October, 2013, by which date the time within which to appeal had elapsed.

The record of proceedings before the Supreme Court on 19th May, 2016 which are exhibited as 'TC1' to the affidavit dated 11th September 2016, shows that the record of appeal did not contain any application to review the judgment of the court. Counsel for the 3rd Respondent withdrew the appeal after the Supreme Court noted that they had made an application for the 3rd Respondent to give evidence before the court as he was not party to the proceedings in the High Court before the delivery of the judgment.

The Supreme Court had asked why that application had not been made before the High Court, and the response was that Counsel did not have conduct of the matter then. Going by what is on record, it is clear that no application for review was ever made before the High Court, and the preliminary issue based on the application for review after the High Court declined to review the matter cannot stand, and it will fail.

As to whether a person who was not party to the proceedings before the delivery of the judgment can move the court to review the judgment, Order 39 of the High Court Rules provides that;

“1. Any Judge may, upon such grounds as he shall consider sufficient, review any judgment or decision given by him (except where either party shall have obtained leave to appeal, and such appeal is not withdrawn), and, upon such review, it shall be lawful for him to open and rehear the case wholly or in part, and to take fresh evidence, and to reverse, vary or confirm his previous judgment or decision:

Provided that where the judge who was ceased of the matter has since died or ceased to have jurisdiction for any reason, another judge may review the matter.”

The Appellant raised similar arguments in the affidavit in opposition to the application for special leave to review the judgment and I delivered a ruling on 19th July, 2017 granting leave to review the judgment. As I granted leave to review, whether the 3rd Respondent can successfully have the judgment reviewed is a matter that can only be determined after the review is heard on its merits, and not as a preliminary issue.

With regard to the preliminary issue on whether the judgment can be reviewed after the judgment has been executed in light of the fact that

the Appellant has paid the purchase price into court, it cannot be said that the judgment has been executed as no order of possession has been granted, and any money paid into court can be paid out. On that basis the preliminary issue fails and the matter shall come up for review on Monday 13th November, 2017 at 09:00 hours. Costs shall be in the cause, and leave to appeal is granted.

DATED THE 4th DAY OF OCTOBER, 2017

S. Kaunda
S. KAUNDA NEWA
HIGH COURT JUDGE