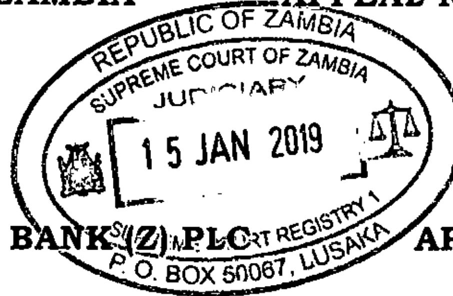
IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 051/2016**
HOLDEN AT KABWE
(CIVIL JURISDICTION)



BETWEEN:

STANDARD CHARTERED BANK (Z) PLC **APPELLANT**

AND

WILLARD SOLOMON NTHANGA & OTHERS **RESPONDENTS**

CORAM: WOOD, KAOMA AND MUSONDA, JJS

On 6th November, 2018 and 15th January, 2019.

For the Appellant : Mr. E. Silwamba SC of Messrs. Eric Silwamba Jalasi & Linyama Legal Practitioners with Mr. C. Chula of Messrs. Chibesakunda & Company

For the Respondents : Mr. M. L. Mukande SC of Messrs. M. L. Mukande & Company

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JUDGMENT

WOOD JS, delivered the Judgment of the Court.

CASES REFERRED TO:

1. **Eureka Construction Limited v Attorney General, Consolidated Lighting Zambia Limited (Proposed Intervening Party) (2008) 2 ZR 64**
2. **London Ngoma, Joseph Biyela, Richard Ng'ombe and Friday Simwanza v LCM Company Limited and United Bus Company of Zambia Limited (Liquidator) (1999) ZR 75**
3. **Howard and Company (Africa) Limited v Behrens (1972) ZR 224**
4. **Bellamano v Ligure Lombarda Limited (1976) ZR 328**
5. **Mususu Kalenga Building Limited and Another v Richman's Money Lenders Enterprises (1999) ZR 27**

6. **NFC Africa Mining Plc v Techro Zambia Limited (2009) ZR 236**

LEGISLATION REFERRED TO:

(1) **Order 3(2) and Order 14(5) of the High Court Rules, Chapter 27 of the Laws of Zambia**
(2) **Article 118 (2)(e) of the Constitution of Zambia (Amendment) Act No. 2 of 2016**

WORK REFERRED TO:

(a) **Order 2(2) and Order 15(6)(8) of the Rules of the Supreme Court of England, (White Book) 1999 Edition**

This appeal is from a Judgment of the High Court dated 30th October, 2015, in which the learned Judge ordered the joinder of 68 individuals to this action as plaintiffs.

Brief facts leading to this appeal are that Willard Solomon Nthanga and 52 others commenced an action against the respondent in the High Court on 28th November, 2000. The learned Deputy Registrar then ordered the joinder of 201 more plaintiffs and the number of plaintiffs increased from 53 to 254. On 8th September, 2003, the learned Judge also granted an application allowing the plaintiffs to amend the writ of summons to add 81 more individuals as plaintiffs, which further increased the number of plaintiffs to 334.

The events that followed are at the centre of the dispute in this appeal. It is not clear whether the plaintiffs made a subsequent application to join 68 more individuals as plaintiffs. However, the record shows that on 10th February, 2005, Counsel for the plaintiffs filed an application to amend the writ of summons to add 68 more plaintiffs. The application was supported by an affidavit in which Mr. Mukande SC deposed that he had received further instructions that a number of former employees were not included on the amended writ of summons which the plaintiffs had filed earlier.

It should be noted that there is nothing on record to show that this application was heard or that it was granted by the Court. The matter proceeded to trial and the 68 individuals participated in the proceedings as if they had been formally joined. The number of plaintiffs on record also increased from 334 to 402.

After trial, the High Court found in favour of the plaintiffs. The plaintiffs were again successful when the matter went on appeal to the Supreme Court and it was referred to the learned Deputy Registrar for assessment. At assessment, a preliminary issue was raised by State Counsel Silwamba on behalf of the appellant that

the 68 individuals were wrongly before Court because there was no Court order joining them to the proceedings as plaintiffs.

The learned Deputy Registrar heard the preliminary objection and dismissed it. He found that the plaintiffs filed an application for leave to amend the writ of summons, which was intended to achieve the joinder of the 68 individuals to the proceedings. He noted that although the application was filed, there was no order granting the application but the 68 individuals were subsequently treated as part of the proceedings.

The learned Deputy Registrar found that the erroneous joinder of the 68 individuals was a pure procedural failure, which could not be wholly blamed on them. He took the view that striking out the 68 individuals as plaintiffs would entail a total failure or defeat of the suit, which would be at odds with **Order 14 rule 5(3) of the High Court Rules** which provides that no suit shall be defeated by reason of non-joinder or misjoinder of parties. The learned Deputy Registrar noted that the Supreme Court directed him to assess the entitlement of each of the plaintiffs, who included the 68 persons,

and as such it would be inappropriate and unjust to strike them out at that stage of the proceedings.

The appellants appealed to a Judge of the High Court against the decision of the Deputy Registrar. The learned Judge found that while the application to join the 68 individuals was made, there was no Court order granting the application. He took the view that the learned Deputy Registrar's decision which was based on **Order 14 rule 5(3) of the High Court Rules** was invalid in that striking out the 68 individuals would not have resulted in the defeat of the suit as assessment would still have proceeded with the valid parties to the suit. In his view, the fact that the 68 individuals took part in the prosecution of their claim both in the High Court and the Supreme Court was sufficient proof that their application was made before Judgment.

The learned Judge took the view that it was not the fault of the 68 individuals that a formal order was not made by the Court to join them and could not be made to suffer for an omission that was not attributable to them. He was satisfied that this was a proper case in which to exercise his inherent jurisdiction to formalize the

addition of the 68 persons as Plaintiffs. He therefore dismissed the appellant's appeal and ordered that the 68 individuals be formally deemed to have been added to the suit with effect from a date which was 21 days after they filed their application to amend the writ of summons.

It is against the decision by the learned Judge that the appellant appealed to this Court advancing two grounds of appeal. In the first ground of appeal, it is contended that the learned Judge erred in law when he refused to strike out the 68 applicants having held that the learned Deputy Registrar's decision based on that provision of the law is invalid in the sense that striking out 68 persons would not have resulted in the defeat of the suit as assessment would still proceed with the persons that were valid parties to the suit. In the second ground of appeal, the Appellant argued that the learned Judge erred in law when he purported to order the joinder of the 68 applicants as he was wanting in jurisdiction since the High Court had concluded the proceedings and delivered its judgment and was therefore *functus officio*.

In support of these grounds of appeal, State Counsel Silwamba submitted on behalf of the appellant that the learned Judge made two correct and critical findings, namely, that there was no order to join the 68 proposed plaintiffs by the Court that determined liability; and that the rule which the learned Deputy Registrar relied upon to join the 68 proposed plaintiffs was wrong. State Counsel contended that having made a finding that there was no proof of the order to join the 68 proposed plaintiffs, the learned Judge should have proceeded to hold that the 68 were not parties to the proceedings.

Mr. Silwamba SC argued that the 68 individuals should not have been joined to the proceedings in view of the principle in **Eureka Construction Limited v Attorney General, Consolidated Lighting Zambia Limited (Proposed Intervening Party)**[1], where we held that a party cannot join proceedings after judgment. He argued that the 68 individuals came too late in the day to be joined as plaintiffs. State Counsel further submitted that the case of **London Ngoma, Joseph Biyela, Richard Ng'ombe and Friday Simwanza v LCM Company Limited and United Bus Company of**

Zambia Ltd (Liquidator)[2], in which it was held that the Court has inherent power to join a party after judgment has been entered is distinguishable from this case. He submitted that in that case, the applicants applied to join an appeal in the Supreme Court because they were not aware of the proceedings in the High Court. He argued that in this case, the 68 individuals did not indicate that they were not aware of the proceedings in the High Court.

Mr. Silwamba SC went on to submit that the learned Judge did not properly exercise his inherent jurisdiction. He argued that both the learned Deputy Registrar and the learned Judge were *functus officio* after the matter was decided upon by the High Court after a trial, and by the Supreme Court on appeal. Mr. Silwamba SC submitted that the learned Judge improperly invoked his inherent jurisdiction in a matter which he had become *functus officio* and parties could not be joined.

State Counsel Silwamba also argued that the claims for the 68 individuals were statute barred. In support of this argument, we were referred to several authorities including the case of **Howard**

and Company (Africa) Limited v Behrens[3]. State Counsel urged us to allow this appeal.

This appeal was opposed by the respondents. On their behalf, State Counsel Mukande contended that both the learned Deputy Registrar and the learned Judge acknowledged that much as there were procedural lapses in this matter, the lapses could not be blamed entirely on the 68 individuals who were desirous of joining the action.

He argued that the irregularity which the learned Judge found was not fatal but curable. He submitted that **Order 3 Rule 2 of the High Court Rules** allows the court to make any interlocutory order which it considers necessary for doing justice, whether such order has been expressly asked for by the person entitled to the benefit of the order or not.

State Counsel Mukande contended that the learned Judge used his inherent jurisdiction to formalize the joinder of the 68 individuals, which inherent jurisdiction allows the court to determine matters or disputes between parties with finality. In

buttressing his argument, State Counsel referred us to **Article 118 (2)(e) of the Constitution of Zambia (Amendment) Act** which provides that in exercising judicial authority, the Courts shall be guided by the principle that justice shall be administered without undue regard to procedural technicalities. He argued that procedural technicalities cannot defeat the dictates of justice, particularly in this case where the learned Judge found compelling reasons to do justice.

State Counsel Mukande went on to argue that the appellant slept on its rights which it could not resurrect to prejudice the 68 individuals. To support this argument, he referred us to **Order 2 Rule 2 of the Rules of the Supreme Court of England** which provides that in an application to set aside for irregularity, any step taken in any proceedings or order shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity. He further referred us to the case of **Bellamano v Ligure Lombarda Limited**[(4)] where it was held that in the face of an irregularity in the pleading, the affected party must, within reasonable time, take

steps to challenge the same before taking further steps. State Counsel argued that the appellants knew from the time trial commenced in the High Court that the 68 individuals were part of the 402 plaintiffs but took no step to dispute that fact.

Mr. Mukande SC further argued that the case of **Eureka Construction Limited v The Attorney General and Another**[1] which the appellant relied on is distinguishable from this case in that the proposed intervening party in that case wanted to join the case after judgment was delivered by the Supreme Court. He submitted that in this case the 68 individuals became part of the proceedings way before trial started in the High Court. Mr. Mukande SC argued that the appellant deliberately ignored that the 68 individuals joined the proceedings before trial commenced and litigated both in the High Court and the Supreme Court, and that they were part of the successful plaintiffs. State Counsel submitted that the argument by the appellant that the learned Judge was *functus officio* is irrelevant because all the learned Judge did was to formalize and give effect to what had already happened.

Mr. Mukande SC further contended that, the appellant's argument that the 68 individuals' claims were statute barred could not be raised on appeal, because it was not raised in the Court below. In support of this argument, he referred us to the case of **Mususu Kalenga Building Limited and Another v Richman's Money Lenders Enterprises**[5] in which we held that where an issue was not raised in the court below it is not competent for any party to raise it in this court. He submitted that the decision by the learned Judge to join the 68 individuals was a mere formality because they were already part of the 402 Plaintiffs. He argued that this appeal lacks merit and it should accordingly be dismissed.

We have carefully considered the evidence on the record, the Judgment appealed against and the submissions of Counsel. Although Counsel for the parties have raised several issues in this appeal, the central issue is whether the learned Judge in the Court below properly exercised his inherent jurisdiction to join the 68 individuals to the action as plaintiffs. **Order 14 rule 5 (1) of the High Court Rules** gives power to the Court to add a person to proceedings as plaintiff or defendant. It provides that:

"5. (1) 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. In such case, the Court shall issue a notice to such persons, which shall be served in the manner provided by the rules for the service of a writ of summons, or in such other manner as the Court or a Judge thinks fit to direct; and, on proof of the due service of such notice, the person so served, whether he shall have appeared or not, shall be bound by all proceedings in the cause:..."

In terms of **Order 15 rule 6 (17) of the Rules of the Supreme Court of England**, an application to add, substitute or strike out a party should be made by summons. Further, **Order 15 rule 6 (3) of the Rules of the Supreme Court of England** requires that an application for an order adding a party must, except with the leave of the Court, be supported by an affidavit showing the proposed party's interest in the matters in dispute in the cause or matter or the question or issue to be determined as between him and any party to the cause or matter.

In this case, there is no evidence on record to show that a summons for joinder to add the 68 individuals as plaintiffs was filed in accordance with the rules. There is also no evidence that the

Court granted any application to join the 68 individuals to the action. The only application that is on record was to amend the writ of summons. The rules require that an application to amend the writ of summons should be made after an application to add a party has been made and granted by the Court. In particular, **Order 15 rule 8(4) (a) of the Rules of the Supreme Court of England** provides that where a person is added as a party, he will not become a party until the writ has been amended in relation to him and (if he is a defendant) has been served on him.

However, there is no evidence in this case to show that the application to amend the writ was preceded by summons for non-joinder and an order granting the application to join the 68 individuals to the proceedings. But State Counsel Mukande insisted when we heard this appeal that an application for non-joinder was filed and heard by the Court, except that the proceedings went missing because this matter had taken long. He told us that Mr. Wataya, who was Counsel representing the appellant at the time, did not object to the application being granted and the learned Judge directed that an order be filed. State Counsel Mukande said

that he sent a draft order to Mr. Wataya for approval but he was indisposed for almost two years and the draft order could not be uplifted because the case record went missing in the High Court.

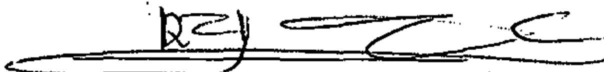
While we sympathise with Mr. Mukande SC and his clients, there are no proceedings or indeed any evidence on record to substantiate his submissions. In the absence of an application for joinder and an affidavit in support setting out the interests of the 68 proposed plaintiffs, we do not think there was sufficient material on which the learned Judge purportedly exercised his inherent jurisdiction to deem the 68 individuals to have been formally joined to the proceedings.

Further, the fact that the matter came on appeal to the Supreme Court indicating the respondents as *Willard Solomon Nthanga and 402 Others* does not mean that this court recognized the joinder of the 68 plaintiffs if they were not formally and or properly joined to the proceedings in the court below. The rules should have been strictly followed. In **NFC Africa Mining Plc v Techro Zambia Limited**[6], we held that:

"...Rules of Court are intended to assist in the proper and orderly administration of justice. And as such, they must be strictly followed."

In view of the glaring irregularities that we have highlighted in this matter, it is our considered view that the learned Judge in the Court below did not properly exercise his inherent jurisdiction. We shall therefore allow this appeal and set aside the decision of the learned Judge and that of the learned Deputy Registrar. We make no order as to costs.

A.M. WOOD
SUPREME COURT JUDGE



R.M.C. KAOMA
SUPREME COURT JUDGE

M.MUSONDA,SC
SUPREME COURT JUDGE