

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

CAZ/08/014/2019

BETWEEN:

MAXWELL BANDA

APPELLANT

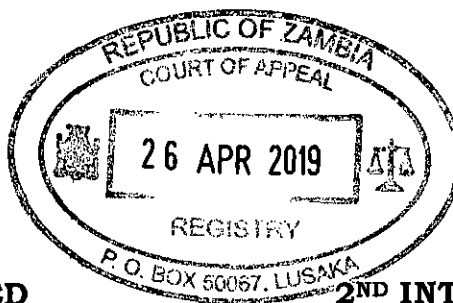
AND

ANDREW HOWARD

RESPONDENT

LOURIE ESTATES LIMITED

2ND INTENDED RESPONDENT



***Before Hon. Mr. Justice D.L.Y. Sichinga in Chambers
On the 26th day of April, 2019***

For the Appellant: Mr. C. Simukonda of Messrs Reagan Blankfein Gates Legal Practitioners

For the Respondent: Mr. P.G. Katupisha of Messrs Milner and Paul Legal Practitioners

RULING

Cases referred to:

1. *Abel Mulenga and Others v. Mabvuto Adam Chikumbi and Others* (2006) ZR 33
2. *Sachar Narendra Kumar v. Joseph Brown Mutale* SCZ No. 8 of 2013
3. *Mpongwe Farms Ltd v. Dar Farms Ltd* SCZ No. 38 of 2016
4. *ANZ Grindlays Bank (Zambia) Ltd v. Chrispin Kaona* (1995) ZR 85
5. *Bank of Zambia v. Jamas Tembo and Others* SCZ No. 24 of 2002

Legislation referred to:

1. *Rules of the Supreme Court of England* 1999 Edition

This is an application by the appellant for leave to join the 2nd intended respondent, Lourie Estates limited, to the proceedings pursuant to **Order 15 Rule 4 of the Rules of the Supreme Court of England 1999 Edition**. The summons are supported by an affidavit filed on 15th February, 2019 and deposed to by one Maxwell Banda. In the affidavit, the appellant laments that he was gifted 230 hectares of a portion of Farm No. 313a, Chalimbana, Lusaka by his late employer which farm was assigned by the respondent to the 2nd intended respondent. It is further averred that the 2nd intended respondent has an interest in this matter as it is the current title holder of Farm No. 313a Chalimbana. At the hearing of the application, Mr. Simukonda, learned counsel for the appellant relied on the affidavit in support, skeleton arguments and list of authorities. Counsel submitted that the 2nd intended respondent has interest in the subject matter. He referred the Court to the case of **Abel Mulenga and Others v. Mabvuto Adam Chikumbi and Others**¹ which enunciated the principle that for a party to be joined, they must have interest. Counsel referred to exhibits '**MB3**' in the affidavit in support, the same being a contract

of sale and lands register showing that the 2nd intended respondent bought the land in dispute. I was also referred to exhibit '**MB6**' a certificate of title of the appellant's late employer and the 2nd intended respondent. He submitted that the exhibits demonstrate that the 2nd intended respondent has sufficient interest.

Secondly, Mr. Simukonda submitted the 2nd intended respondent would be affected by the outcome of the Court's decision. He referred to the case of **Sachar Narendra Kumar v. Joseph Brown Mutale²** to illustrate that an appellant must show that the person to be joined will be affected by the outcome. Mr. Simukonda submitted that the 2nd intended respondent is the current title holder of the disputed land. Therefore, he would be affected by the outcome of the appeal. Counsel prayed that the 2nd intended respondent is joined to this cause in the interest of justice.

The respondent opposed the application and relied on an affidavit in opposition filed on 15th April, 2019 and deposed to by one Guy David Zingalume Phiri, a director of the 2nd intended respondent. The respondent further relies on submissions by counsel. At the

hearing of this application, Mr. Katupisha, learned counsel for the respondent submitted that there was no law that prohibits joinder after judgment. He submitted that the authorities cited by Mr. Simukonda were sound even after judgement. That the Court has power to join a party after judgment. However, it is contended that the circumstances of this case do not merit the 2nd intended respondent to be joined. Counsel submitted that the application ought to have been made to the Court below. That indeed it was made to the Court below. However, it was not heard on account of the fact that the whole matter was dismissed on a point of law pursuant to **Order 14A Rules of the Supreme Court of England, 1999 Edition**. It is submitted that the appeal is not to the merit of the main cause but against the decision to dismiss the whole matter on a point of law. Therefore, it would be premature to join the 2nd intended respondent.

The second limb of counsel's submission relied on the affidavit in opposition. That the 2nd intended respondent has demonstrated that the matter as it relates to Farm No. 313a was determined by a Court of competent jurisdiction and judgement was rendered in its

favour. Exhibit "**GP3**" in the affidavit in opposition refers, the same being a judgement of the Court below. That following the said judgment of the Court below, the appellant was cited for contempt of defying the judgement. Exhibit "**GP4**" being notice of motion for committal proceedings refers. That the appellant was duly served by '**GP5**', being an affidavit of service and he was moved by merit of restitution per "**GP2(a)**".

It is submitted that in another action brought by a squatter, Agness Nyendwa against the executor of the estate of the late Fenella Mary Wright Pestel, the 2nd intended respondent was included in that action as the 2nd defendant over the same subject matter. Counsel also referred to exhibit "**GP8(b)**" a Ruling made by the lower Court dismissing the action where the said Agness Nyendwa sought review. It is submitted that joining the 2nd intended respondent to this action would be indirectly appealing previous Rulings which were not appealed against as the same are *res judicata*. Counsel referred to the case of ***Mpongwe Farms Limited v. Dar Farms Limited*³; ANZ Grindlays Bank (Zambia)**

Limited v. Chrispin Kaona⁴; and **Bank of Zambia v. Jonas Tembo and Others⁵**, regarding *res judicata*.

Mr. Katupisha submitted that the 2nd intended respondent cannot be joined to the proceedings as the matter has been settled. That the appellant was a party in previous actions with other unknown persons. He prayed that the application be dismissed with costs.

In reply, Mr. Simukonda submitted that the arguments presented are attacking the main appeal and not the application before that Court. He submitted that the judgements of the lower Court brought to the attention of the Court were not binding on this Court. That it was in the interest of justice to join the 2nd intended respondent to these proceedings, and that it would be prejudicial not to add the 2nd intended respondent to the proceedings as it would be affected. Counsel further contended that there are exceptions to statutes of limitation and that the appellant fell within those exceptions.

I have carefully considered the appellant's application for leave to join the 2nd intended respondent together with the record and

submissions by counsel. **Order 15 Rule 3 of the Rules of the Supreme Court 1999 Edition** provides that:

"(1) Without prejudice to rule 1 the Court may at any stage of the proceedings in an action for the recovery of land order any person who is in possession of the land (whether in actual possession or by a tenant) and is not a party to the action to be added as a defendant".

The appellant's contention is that he was given 230 hectares of Farm No. 313a and commenced an action in the High Court in 2018 against the respondent for demolishing his houses, destroying his properties, burning his documents and grabbing his 230 hectares of land. According to the writ of summons, his claim was for *inter alia* an Order of declaration that he was the lawful and rightful beneficiary of a portion of Farm No. 313a measuring 230 hectares. According to his affidavit, he did not know at the time of commencing the action that the respondent had assigned the entire Farm No. 313a including his 230 hectares to the 2nd intended respondent. The appellant applied to the Court below for an Order of non-joinder of the 2nd intended defendant (2nd intended

respondent), however, the application was not heard as the appellant's entire action against the respondent was dismissed on a point of law on 11th January, 2019. The appellant then lodged an appeal against the lower Court's judgment to dismiss the appellant's action under cause **No. 2018/HP/0479**.

My understanding is that a successful outcome of the appeal would effectively reverse the lower Court's decision to dismiss the matter or restore to the active cause list for determination at trial. Given this state of facts, I have no difficulty agreeing with the respondent's submissions that it would be premature to join the 2nd intended respondent at this stage of proceedings because the matter was dismissed and is yet to be restored should the Court uphold the appeal. At that point the appellant's application filed in the lower Court on 9th May, 2018 would have an opportunity to be heard.

The second limb of the respondent's argument refers to the appellant's claim being *res judicata*, and or statute barred. The view that I have taken is that these submissions are full of red hearings or distracting from the application at hand. It would, for

instance, be impossible for me to reach a conclusion on whether the appellant's claim against the 2nd intended respondent is statute barred since there is no revelation in the affidavit in support to show when the land in dispute was actually given to the appellant. The respondent's efforts to show that the appellant's claim is statute barred or *res judicata* were rather *otiose* to this application.

For the reasons I have given, I decline the application to join the 2nd intended respondent with costs to the respondent to be taxed in default of agreement.

Delivered at Lusaka in Chambers on the 26th day of April, 2019.



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D.L.Y. Sichinga
COURT OF APPEAL JUDGE