

IN THE HIGH COURT FOR ZAMBIA

2016/HP/1076

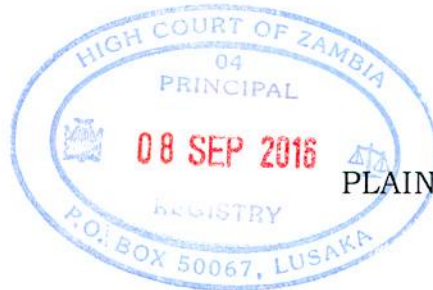
AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

KELVIN CHISEMBELE



PLAINTIFF

AND

JOHN MWANSA CHISEMBELE

DEFENDANT

Before The Honourable Mrs Justice P.C.M. Ngulube in Chambers.

For the Plaintiff:

No appearance.

For the Defendant:

Mr M. Mulele Messrs G.M. Legal Practitioners

For the Intended

Intervener:

Mr C.L. Mundia, Messrs C.L. Mundia and
Company

R U L I N G

Cases referred to:

- 1. Development Bank of Zambia vs. Sunvest Limited (1995) ZR 187.***
- 2. Zambia Seed Company Limited vs Chartered International Limited, Supreme Court of Zambia Judgment Number 20 of 1999.***
- 3. The Attorney General vs. Tall and Zambia Airways Corporation Limited (1995-1997) ZR 54***
- 4. Miles Emmanuel Sampa and Two Others vs. Inonge Wina and Another Appeal Number 195/2014***

This is the Advocates for the Defendant's preliminary application to raise a preliminary issue. They filed a Notice of Intention to Raise Preliminary issues on the 13th of July, 2016 whether –

1. The Intended Intervenor's application to join these proceedings amounts to multiplicity of actions in view of the action commenced against the Defendant under Cause Number 2016/HP/1263 seeking to set aside the Consent Judgment.
2. Whether it is proper to allow the Intended Intervenor to join these proceedings when Judgment sought to be stayed has already been executed.
3. Where it is proper to join the Intended Intervenor to these proceedings when all the issues in dispute between the Plaintiff and the Defendant have been settled in finality.

At the hearing of the matter, Mr Mulele, on behalf of the Defendant submitted that the Intended Intervenor has a running action against the Plaintiff and the Defendant under Cause Number 2016/HP/1263, which was filed on the 23rd of June, 2016. He submitted that the main relief sought is a declaration and order that the Consent Order executed by the parties on this action be set aside. He further stated that the other matter is based on the same facts as the one before this court, with the same reliefs. Mr Mulele contended that this conduct amounts to abuse of court process and creates a multiplicity of actions and referred to the case of ***Development Bank of Zambia vs. Sunvest Limited***¹ where the court held that –

“the court disapproves of the commencement of a multiplicity of actions over the same subject matter, as well as the pursuit of other steps during the action.”

Mr Mulele submitted that the Intended Intervenor could have sought the reliefs that he seeks herein under Cause Number 2016/HP/1263. He stated that if the court allows the Intended Intervenor to join these proceedings, there may be two conflicting judgments between the two courts and prayed that the court dismisses the Intended Intervenor’s application for the aforementioned reasons.

The Learned Counsel for the Intended Intervenor, Mr Mundia submitted that he agreed that the Supreme Court provided guidance on more than one occasion emphasizing the need for parties to resolve matters in one cause. He submitted that the guidance of the Supreme Court is not without exceptions and that the only way a Consent Judgment can be challenged or set aside is by commencing a fresh action, by way of Writ of Summons and Statement of Claim. Mr Mundia referred to the case of ***Zambia Seed Company Limited vs. Chartered International Limited***² where the Supreme Court held that –

“by law, the only way to challenge a Judgment by Consent would be to start an action to challenge the Consent Judgment.”

Mr Mundia submitted that this court does not have authority to set aside a Consent Judgment but has the authority to join the Intended Intervenor to this Cause and equally has the authority to stay the Consent Judgment as it is a Judgment

like any other passed by this Court and can accordingly be stayed. In reply, Mr. Mulele submitted that it would be an abuse of court process to seek an order to join proceedings and stay a Consent Judgment without the Intended Intervenor or any parties taking further steps in prosecuting the matter. He maintained that the Intended Intervenor could have obtained similar relief in the other court. He urged the court to dismiss the Intended Intervenor's application.

I have considered the submissions by both Counsel as well as the issues raised in the Notice to Raise Preliminary Issue in this matter. Order 15, Rule 6, subrule 2((b) and (3) of the White Book states that –

“subject to the provisions of this rule, at any stage of the proceedings in any cause or matter, the Court may on such terms as it thinks just and either on its own motion or application.....

(b) order any of the following persons to be added as a party, namely:

(i) Any person who ought to have been joined as a party, whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon.

(3) An application by any person for an order under paragraph (2) adding him as a party must, except with leave of court be supported by an affidavit showing his

interest in the matter in dispute in the cause or matter as the case may be, the question or issue to be determined as between him and any party to the cause or matter.”

The Learned Advocates for the Intended Intervenor filed an affidavit in support of Summons for an Order to join a party to proceedings and stay Consent Judgment on the 24th of June, 2016. The affidavit was sworn by one Mukela Mutukwa who averred that he is the Intended Intervenor in this matter as it affects his legal rights to subdivision A of Farm Number 2563 in the Central Province of the Republic of Zambia. He averred that he has a substantial legal and equitable interest in the subject matter as he recently acquired the land through the administrator of the estate of the Late Sylvester Mwimba Chisembele.

The said administrator is the Defendant herein. He averred that subdivision A of Farm Number 2563 was sold to him by agreement on the 1st day of October, 2015 and that the Defendant was represented by Messrs M.L .Mukande and Company throughout the course of the said transaction. Mr Mutukwa averred that he paid the sum of ZMW 900,000, save for the sum of ZMW 100,000 which is in his Advocates' custody as the Defendant remains under an obligation to remove all squatters on the subject land as well as provide an access road.

Mr Mutukwa averred that he is the holder of Certificate of Title Number 21408 in respect of the said subdivision. He averred that the Consent Judgment that was entered on the

15th of June, 2016 cancels the registration of any assignment or subdivisions emanating from the sale of any part of Subdivision of Farm 2563. He averred that this adversely affects his legal rights as a statutory lessee of the said subdivision and that it was entered with the Defendant's knowledge that the Intended Intervenor is legally entitled to the said subdivision A of Farm 2563.

Mr Mutukwa averred that he has since commenced an action challenging the Consent Judgment under Cause Number 2016/HP/1263 and that he has demonstrated to the court that he possesses sufficient interest to be joined to this matter. He craved the indulgence of this court that he be so joined to these proceedings because he has commenced an action to challenge the Consent Judgment under Cause Number 2016/HP/1263.

In the case of ***The Attorney-General vs. Tall And Zambia Airways Corporation Limited***³ the Supreme Court stated that –

“...the joining of the Attorney-General in these proceedings would be necessary to ensure that the matters in this cause may be effectually and completely determined and adjudicated upon to put an end to any further litigation.”

In the case of ***Miles Emmanuel Sampa and Two others vs. Inonge Wina and Another***⁴, the Supreme Court held that –



“A person can be joined to the proceedings notwithstanding that there is a Consent Judgment provided that he satisfies the conditions which were set out in the London Ngoma case, namely that he must have locus standi, sufficient interest and must not have been aware of the proceedings.”

From the affidavit evidence before this court, I find that the Intended Intervenor had interest in the matter and should have been notified of the action concerning the said land in issue as he had paid a substantial part of the purchase price and had commenced the process of obtaining a Certificate of Title. I am therefore convinced that the Intended Intervenor should be party to these proceedings to protect his interests in spite of the fact that the consent judgment has already been executed.

The Intended Intervenor has locus standi and a direct interest in this matter. I also form the view that the Intended Intervenor was not aware of these proceedings because as late as the 14th of June, 2016, there was correspondence from the Advocates for the Defendant, Messrs Mukande and Company on the removal of squatters from the land without any indication that there would be a consent judgment executed with between the parties. Further, the said consent Judgment seeks to cancel the Intended Intervenor's legal rights to subdivision S/DA of Farm 2653.

This court must order a stay of Execution of the Consent Judgment herein in the interests of justice pending the



determination of Cause Number 2016./HP/1263 as the said Consent Judgment does affect the rights of the Intended Intervenor. On the issue of whether there is a multiplicity of actions by allowing the Intended Intervenor to be joined to these proceedings, I do not agree with the Defendant's Advocates that joining the Intended Intervenor to these proceedings amounts to a multiplicity of actions. This is because the Intended Intervenor has sufficient interest in the matter as the holder of Title S/DA of Farm 2563, Central Province.

I accordingly dismiss the preliminary issues raised for lack of merit. I further join Mukela Mutukwa as an Intervenor and stay the Consent Judgment pursuant to Order XXXIV Rule 10 of the High Court Rules. Costs are awarded to the Intervenor. Leave to appeal is granted.

Delivered this 8th day of September, 2016.



**HONOURABLE MRS JUSTICE P.C.M. NGULUBE
HIGH COURT JUDGE**

