

IN THE COURT OF APPEAL FOR ZAMBIA APPEAL NO.26/2017
HOLDEN AT KABWE

(Civil Jurisdiction)

ZAMBIA OPEN DOOR MISSION
REGISTERED TRUSTEES
AND

KAFUE DISTRICT COUNCIL



APPELLANT

RESPONDENT

Coram: **Mchenga DJP, Chashi and Mulongoti, JJA**
 On 4th May, 2017 and 7th September, 2017

For the Appellant: Mr. M. Khunga of Barnaby and Chitundu Advocates
For the Respondent: N/A

J U D G M E N T

MULONGOTI, JA, delivered the Judgment of the Court.

Cases referred to:

1. *Daniel Mwale v. Njolomole Mtonga and others* (SCZ 8/312/2014)
2. *R.B. Policies At Lloyd's v. Butler* (1962) 1 ALL ER 226, 229, 230
3. *Board of Trade v. Cayzer, Irvine and Co. Limited* (1927) AC 610, 628
4. *Zambia Consolidated Copper Mines v. Joseph David Mutale* (SCZ NO. 21 of 2002)

Legislation and Works referred to:

1. *The Limitation Act, 1939*
2. *Halsbury's Laws of England Vol. 14, 4th edition, p.845*
3. *The High Court Act, Chapter 27 of the Laws of Zambia Order III Rule*

This is an appeal against the entire ruling of the High Court dated 16th January, 2017, dismissing the preliminary issues raised by the appellant challenging the propriety or legality of the defendant (respondent's) action, of the filing of an amended defence and counter claim after the close of pleadings, without leave of court, and endorsing claims which are statute barred.

At this stage, it is necessary to say a little about the background of the appeal. The plaintiff (now appellant) sued the defendant (now respondent) in the High Court on 15th December, 2006, seeking a declaration that it is the sole and lawful owner of subdivision no. 625 of Lot no. 1052/M Lusaka. It also sought damages for inconvenience, an injunction, interest on any sums found due and costs.

For its part, the respondent filed a memorandum of appeal and defence on 27th February, 2007, denying the appellant's claims. On 2nd March, 2007, the appellant filed its bundle of documents. This was followed by a notice of intention to proceed which was only filed on 5th November, 2013, by the respondent's advocates. On 28th March, 2014, the appellant filed a supplementary bundle of documents. The High Court then proceeded to issue an Order for Directions dated 7th May, 2014. In pursuance of the said Order, the appellant filed a reply to defence on 14th May, 2014. The respondent also filed in its bundle of documents on 2nd December, 2015.

On 16th August, 2016, the respondent, without leave of court, filed in an amended defence and counter-claim. The counter-claim was for an order for cancellation of the appellant's certificate of title alleging that it was procured through fraud. This prompted the appellant to

raise preliminary issues before the High Court as to whether the newly introduced counter-claim was statute barred and whether the amendments introducing new matters filed after the close of pleadings and made without leave of court could stand.

The High Court held that the respondent was required to seek leave to amend, which it never applied for. The High Court further held that Order XVIII rule 1 of the High Court Rules gave the court discretion to allow for an amendment of pleadings at any stage even by an indolent party on such terms as it deems fit. Furthermore, that although the counter claim is statute barred, the case before it was exceptional to warrant the court to allow an amendment despite the expiry of the limitation period. The Judge accordingly invoked the provisions of Order III rule 2 of the High Court Rules and ordered that the defence and counter-claim filed without leave, be deemed to have been duly filed.

Being dissatisfied with the ruling of the High Court, the appellant lodged an appeal in this Court and has raised three grounds couched as follows:

1. The honourable court below erred in both law and fact when it held that the respondent's counter-claim be deemed to have been duly filed into court notwithstanding it being statute barred.
2. The honourable Judge below misdirected himself in both law and fact when he allowed the respondent's amended defence which was filed into court without prior leave of court and when pleadings had closed and the matter had been set down for trial.

3. The honourable court below erred in both law and fact by allowing the amended defence which introduced in the action facts that arose in 1998 hence being statute barred without prior leave and these are the same facts on which the counter-claim is premised thereby re-casting the entire defence.

At the hearing of the appeal, Mr. Khunga who appeared for the appellant placed reliance on the heads of argument in their entirety. In arguing ground one, counsel submitted that the respondent's counter-claim cannot be sustained because it is statute barred. The certificate of title which the respondent seeks to revoke was issued in 1999, 17 years after the cause of action arose. Counsel also relied on section 4(3) of the Limitation Act 1939 which limits the period for commencing actions for recovery of land to 12 years from the date the cause of action arose. Counsel amplified this argument by placing reliance on the case of **Daniel Mwale v. Njolomole Mtonga and others**¹, and submitted that time began to run when the certificate of title was issued, that is, on 2nd February, 1999.

It is learned counsel's contention that the learned trial judge had no jurisdiction to entertain the respondent's counter claim as the respondent sat on its rights and that doing so was contrary to the principles of statutes of limitations. The cases of **R.B. Policies At Lloyd's v. Butler**² and **Board of Trade v. Cayzer, Irvine and Co. Limited**³ were cited in aid of this argument.

Regarding grounds two and three, which were argued together, learned counsel argued that the amended defence dated 16th August, 2016, was irregularly filed for want of leave as it was filed after the close of pleadings. Counsel also made reference to Order 18(1) of the

High Court Rules and Order 20/5/2 of the Rules of the Supreme Court which allows the court to amend proceedings at any stage.

The court's attention was drawn to the case of **Zambia Consolidated Copper Mines v. Joseph David Mutale**⁴ wherein the Supreme Court cited the case of Weldon v. Neal [1887] 19QBD 394 in which Lord Esher M.R. in his dictum at P. 395 formulated the rule that:

“amendments should not be allowed if they would prejudice the rights of the opposite party as existing at the time of amendment.”

The Supreme Court also noted that the dictum of Lord Esher was considered in Pontin v. Wood [1961] ALL E.R. 992 where it was held, *inter alia*, that:

“where an action is statute barred at the time of amendment of the statement of claim, the amendment can only be made if there are peculiar circumstances justifying amendment despite the expiry of the limitation period.”

Counsel also made reference to the Halsbury's Laws of England Vol. 14, 4th edition at page 845 that:

“the High Court has no jurisdiction to allow an amendment after the time prescribed by statute by the introduction of a fresh substantive charge.”

It is counsel's submission that the respondent's amended defence has included a counter claim in which it is challenging the authenticity of the certificate of title issued on 2nd February, 1999 on grounds of fraud or mistake, which would prejudice the interest of the appellant on account of the fact that the claim is statute barred. Counsel further contends that it was a misdirection for the court below to allow the filing of the respondent's amended defence and counter claim without

leave of court when pleadings had closed and the matter had been set down for trial.

Mr. Khunga prayed that the appeal be allowed with costs.

There was no appearance for the respondent. Neither did they file in any heads of argument.

The central issue in this appeal is whether the amended defence and counter-claim are statute barred. Key to this issue, is whether the amended defence and the counter-claim were properly filed after close of pleadings and without leave of court.

It is undisputed that the plaintiff commenced this action on 15th December 2006, by writ of summons and statement of claim, for a declaration that it is the sole and lawful owner of subdivision No. 625 of Lot No. 1052/M, Lusaka. It is also a fact that on 27th February, 2007, the respondent filed a defence denying the appellant's claim. The respondent averred *inter alia*, that the defence will put the plaintiff to strict proof as to the approval of its application. And ***“that Minute No. KDC/PWD/37/08/98 is fake and non-existent”***.

In paragraph 4 of its statement of claim, the plaintiff alleges that:

“...on or about 18th June, 1998 its application for the said piece of land was approved by the defendant during a full Council Meeting No. KDC/PWD/37/08/98”.

It is also common cause that many years later precisely on 16th August, 2016, the respondent filed an amended defence and counter-claim for an order for cancellation of the plaintiff's (appellant's) certificate of title alleging that it was procured by fraud.

The crucial amendment is in paragraph 3 of the amended defence in which the defendant state; in response to paragraph 4 of the statement of claim aforesaid that: ***“.....the defendant will aver at trial that Minute No. KDC/PWD/37/08/98 is a fraud and forgery.”*** The particulars of fraud and forgery are stated in clause 3(i) to (vii) of the amended defence. Of importance to this appeal is clause 3(i) where it is alleged that:

“the said Minute No. KDC/PWD/37/08/98 is fake and non-existent as the meeting held on the 18th June, 1998 did not table and/or discuss any purported application by the plaintiff to acquire a small holding otherwise known as subdivision No. 625 of Lot No. 1052/M, as such a fraud and forgery ”.

Essentially, the defendant added the words ‘*fraud*’ and ‘*forgery*’ to its earlier averment that the Minute No. KDC/PWD/37/08/98 is ‘*fake*’ and ‘*non-existent*’. In our view a fake document may well be a fraud and forgery. However, at this stage we cannot go in detail on these issues as the matter is still pending hearing and determination by the High Court, suffice to state that we find that no new claim was introduced by the amendments. The amendments clearly stem from the original defence which was filed in February, 2007, that the Minute was fake and non-existent. The counter-claim was also filed on the basis of the amendments alleging fraud. It will be for the High Court to determine whether the Minute No. KDC/PWD/37/08/98 is fake and non-existent and or fraud and forgery based on the evidence that will be adduced.

We are therefore of the considered view that the amended defence and counter-claim did not raise a new claim and thus not statute barred as the counter-claim arose from the original defence which was filed within time back in February, 2007. The High Court therefore misdirected itself to the extent where it held that the counter claim was statute barred.

We now turn to the question whether the High Court erred in law by invoking the provisions of Order III Rule 2 of the High Court Act, by which it ordered that the defence and counter-claim filed without leave of the court be deemed to have been duly filed. In order to put matters in proper context, we reproduce the provisions of Order 3 Rule 2:

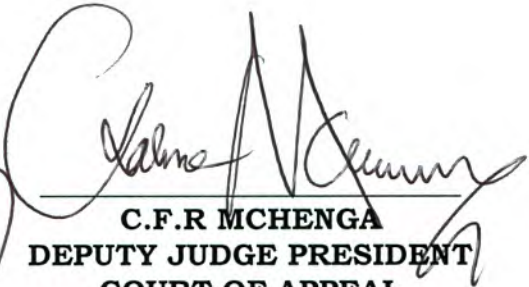
“2. Subject to any particular rules, the Court or a Judge may, in all causes and matters, make any interlocutory order which it or he considers necessary for doing justice, by the person entitled to the benefit of the order or not.”

Having perused Order III Rule 2 of the High Court Rules, its import is quite clear and fairly straight forward. It simply entails that the High Court can make any interlocutory Order, for the ends of justice, even when the parties have not requested for it. Thus, we find that the High Court was on firm ground to have allowed the amendments and counter-claim which were filed without leave of court and after the close of pleadings in accordance with Order III Rule 2.

For the foregoing, we find no merit in the appeal and it is accordingly dismissed.

We make no orders as to costs.


Delivered at Lusaka on 7th September, 2017.



C.F.R MCHENGA
DEPUTY JUDGE PRESIDENT
COURT OF APPEAL



J. CHASHI
COURT OF APPEAL JUDGE



J.Z. MULONGOTI
COURT OF APPEAL JUDGE