

IN THE COURT OF APPEAL OF ZAMBIA

CAZ APP/213/2021

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

BRUNO MUBANGA

MARRIEN MULENGA MUBANGA

CHRISPIN PHIRI + 3 UNKNOWN OTHERS

IN OCCUPATION OF PLOT NO. F842/Y/2081

PRESIDENTIAL AREA

AND

LIA MPONGO (Suing as beneficial owner

of plot No. F842 Presidential Area

Ndeke Kitwe)

KITWE CITY COUNCIL

THE ATTORNEY GENERAL



1ST APPELLANT

2ND APPELLANT

3RD APPELLANT

1ST RESPONDENT

2ND RESPONDENT

3RD RESPONDENT

Coram: Mchenga DJP, Banda-Bobo, Sharpe-Phiri, JJA

On: 20th September 2023 and 19th March 2024

For the Appellants: M. Nkhoma, Messrs Robert and
Partners

For the 1st Respondent: K. Botha with S.M. Kalikeka,
William Nyirenda & Company

For the 2nd Respondent: J.N.M. Luwawa with S. Lubinda,
Kitwe City Council

For the 3rd Respondent: S.K. Mofya, Assistant Senior
State Advocate, Attorney Generals
Chambers

J U D G M E N T

Mchenga DJP, delivered the judgment of the Court

Cases referred to:

1. Zambia Seed Company Limited v. West Co-op Haulage Limited and Western Province Co-operative Union SCZ/8/114/2013
2. Zambia Consolidated Copper Mine v. Chileshe (2002) Z.R. 86
3. Western Province Co-operative Union, Zambia Textiles Limited (in Liquidation) v. Progress Kalemba and 29 Others SCZ/8/233/2014

Legislation referred to:

1. The Rules of the Supreme Court of England (White Book) 1999 Edition
2. The High Court Rules Chapter 27 of the Laws of Zambia

Other works referred to:

1. The Halsbury's Laws of England 3rd Edition Volume 30 (London) Lexis Nexis

INTRODUCTION

[1] This appeal is against the ruling of the High Court (C. Chanda, J.), dated 9th April 2021, in which the 1st,

2nd and 3rd appellants' application to amend their defence was dismissed.

BACKGROUND

[2] On 14th May 2020, by writ of summons, the 1st respondent commenced proceedings against the appellants seeking the following reliefs:

1. A declaration order that plot No. F842/Y/2081 Kitwe belongs to Lia Mpongo as per the certificate of Title No. 1004077 issued by Ministry of Lands;
2. An order for damages for trespass, invasion, subdividing of the said plot;
3. An order for interim injunction restraining the defendants herein from occupying, constructing on the said plot or subdividing and subletting the said piece of land being plot No. F842/Y/2081 Kitwe and further from interfering, trespassing on the said piece of land and or interfering with the quiet occupation and possession of the said plot by the plaintiffs herein either by themselves, their agents, servants and or any other persons unknown;
4. An order for the costs and interest on the amount found due; and

5. Any other relief the court may deem fit.

- [3] On 22nd May 2020, the appellants entered appearance; they also filed their defences and a counter claim.
- [4] The 2nd and 3rd respondents were joined to the case at the instance of the appellants.
- [5] The 2nd respondent entered appearance and filed their defence on 15th September 2020.
- [6] The trial commenced on 22nd February 2021, and the 1st respondent and her witness gave evidence and she closed her case.
- [7] On 26th February 2021, the appellants launched the application which is now the subject of this appeal.
- [8] The application was for leave to amend their defence pursuant to **Order 20 Rule 8 of The Rules Supreme Court (RSC)**.
- [9] In the affidavit in support of the application, it was deposed that the purpose of the application was for them to place the issues in their defence into perspective. That would ensure that the issues in dispute were fully resolved.

[110] In addition, it was submitted that the amendment was sought to respond to specific claims in the statement of claim.

[111] The 1st respondent opposed the application. Her objection was anchored on **Order 20 Rule 11 of the RSC**.

[112] In addition, she contended that allowing the application would prejudice her because it would then compel her to re-open her case and give further evidence.

[113] It was also pointed out that since the action was filed in May 2020, the appellants had sufficient time prior to May 2021, to make the subject application.

[114] The 3rd and 4th respondents equally opposed the application. They were of the view that this was not a fit and proper case in which the trial court could exercise its discretion in favour of the appellants.

[115] In reply, it was submitted on behalf of the appellants that it was important that they are allowed to amend their defence because the issues they sought to include were critical to the case.

DECISION OF THE TRIAL COURT

[16] The trial Judge opined that the main issue for his determination was whether the prejudicial effect associated with the granting of leave to amend at that stage of the proceedings, outweighed the justice it sought to attain.

[17] He concluded that allowing the application would place the 1st respondent in a position where she would have to re-open her case and give fresh evidence because the amendment would introduce a new cause of action.

[18] The trial Judge was also of the view that the proposed amendments were not necessary because the issues in controversy were already clearly set out. The appellants would not suffer any prejudice if the application was not allowed as the proposed amendments had no bearing on their counterclaim.

[19] He concluded that this was not a proper case in which he could exercise his discretion to allow late amendments, particularly that the appellants did not

give any reasons why the amendments were not sought earlier.

GROUNDS OF APPEAL

{20} The appellants, dissatisfied with the decision of the trial Judge have appealed to this court and advanced three grounds of appeal.

{21} The grounds of appeal are couched as follows:

1. The court below erred in law and fact in not giving credence to the fact that under Order 20 Rule 8 of the Rules of the Supreme Court, amendments can be made at any stage of the proceedings.
2. The court below erred in law and fact in arriving at a decision that even without the proposed amendments the court was in a place to decide on real issues in controversy on, inter alia, the reasoning that the proposed amendments were being sought to be made in the defence and as such had no bearing on the 1st, 2nd and 3rd appellants' counterclaim totally ignoring the fact that the 1st, 2nd and 3rd appellants' prayer for cancellation of

the plaintiff's certificate of title was to be ground in the proposed amendments.

3. The court below erred in law and fact in declining to grant the 1st, 2nd and 3rd appellants' application to amend defence and counterclaim on the ground that the application was made after the 1st respondent had testified and laid out her case while acknowledging that the 1st respondent had not been cross-examined.

ARGUMENTS IN SUPPORT OF THE GROUNDS OF APPEAL

[22] In support of the 1st and 2nd grounds of appeal, the appellants submitted that it was important for them to amend their defence and counterclaim, so that they could include particulars of the fraud they had pleaded.

[23] Such an amendment would assist the court to resolve the issues in dispute because even though they had pleaded fraud, they had not provided the particulars of the fraud.

[24] On the basis of Order 18 Rule 8 sub rule 8 of the RSC, Order 20 Rule 8 of the RSC, Order XVIII of the High

Court Rules and the case of **Zambia Seed Company Limited v. West Co-op Haulage Limited & Western Province Co-operative Union**¹, it was submitted the defence could still be amended even though the 1st respondent had already testified. This is because an amendment can be effected at any stage of the proceedings.

[25] Relying on the case of **Zambia Consolidated Copper Mines Limited v. Joseph David Chileshe**², it was submitted that since the amendment was not introducing a new defence, it was difficult to appreciate the prejudice which could have been suffered by other litigants if the amendments had been allowed.

[26] As regards the 3rd ground of appeal, it was submitted that it was erroneous for the trial Judge to hold that it was not necessary when the appellant was seeking to introduce the particulars of the fraud that he had pleaded.

[27] **Halsbury's Laws of England, 3rd Edition Volume 3 paragraph 51** was referred to in aid of the proposition

that once fraud is plead, the particulars of the fraud must be set out.

[28] They contended that their application for an amendment should not have been found to be late merely because the 1st respondent had already testified. The application was in good faith and intended to outline the issues for determination.

RESPONDENTS ARGUMENTS

[29] Although the three respondents each filed separate responses to the appellant's arguments, they took a common position on the three grounds of appeal.

[30] In response to the 1st and 2nd grounds of appeal, they argued that the appellants cannot rely on **Order 20 Rule 8 of the RSC** or **Order XVIII of the High Court Rules** because the amendment they were seeking to effect was in fact introducing a new defence.

[31] The defence as is currently set out, is misrepresentation while the intended amendments seeks to introduce a new defence of fraud.

[132] As regards the 3rd ground of appeal, they acknowledged that an amendment can be effected at any time but that it is dependent on the circumstances of the case.

[133] They referred to cases including **Zambia Seed Company Limited v. West Co-OP Haulage Limited and Western Province Co-operative Union¹**, **Zambia Consolidated Copper Mine v. Chileshe²** and **Western Province Co-operative Union and Zambia Textiles Limited (in Liquidation) v. Progress Kalemba and 29 Others³** and submitted that the trial judge rightly rejected the application to amend because it was made late in the day.

[134] The respondent had already testified and closed her case and there was nothing to suggest that even with the exercise of due diligence, the deficiency would not have been noticed.

CONSIDERATIONS AND DECISION OF THIS COURT

[135] Although the appellants filed arguments in reply to the respondents' submissions, we do not find it necessary to reproduce them because they basically

emphasise the issues already raised in their arguments in support of the appeal.

[36] Since the three grounds of appeal are interrelated, we will deal with all of them at the same time.

[37] In the case of **Zambia Consolidated Copper Mine v. Chileshe**², Chitengi JA., delivering the Judgment of the Supreme Court, pointed out as follows:

"On the totality of the authorities we have considered, we are of the firm view that although Order 20 rule 5 gives the court power to allow the plaintiff to amend his writ or any party to amend his pleadings, it does not provide a wide discretion and does not allow a general relaxation of the governing principle that any amendment after the expiry of the limitation period will not be allowed unless it is just to do so and it will be just to do so if there are peculiar circumstances which make the case an exceptional one".

[38] Further, in the case of **Zambia Seed Company Limited v. West Co-op Haulage Limited and Western Province Co-operative Union**¹, Malia, JS. (as he then was), delivering the judgment of the Supreme Court, said the following:

"Although the pendulum weighs or tilts in favour of granting amendments, courts of law are entitled to refuse amendments in deserving cases. Trial courts must

examine the application for amendment very carefully in the light of affidavit evidence. In the process, the courts should consider the peculiar facts of each case. In doing so the court is enjoined to take into account a number of principles or factors including: (a) the attitude of the parties in relation to the amendment; (b) the nature of the amendment sought in relation to the suit; (c) the question in controversy; (d) the time the amendment is sought"

[39] He went on to point out that;

"If the application for amendment was delayed, the court should be interested to know what caused the delay. If the reason for seeking the amendment is as a result of an important issue relating to the applicant's case coming to the applicants notice late, that should be a consideration in his favour. But the court should take into consideration also whether the applicant, as a person of due diligence and business acumen, ought to have procured the information earlier than the time he obtained it"

[40] The thrust of the appellants' case is that the proposed amendment is intended to provide particulars for the defence of fraud that the appellants have already pleaded.

[41] Our examination of the defence filed on 22nd May 2020, does not point at any defence of fraud being pleaded by the appellants.

[42] In their counterclaim, the appellants pleaded that title to the plot which is the subject of this appeal was obtained through misrepresentation.

[43] This being the case, the proposed amendment, which seeks to introduce fraud and particulars of that fraud, is an amendment that will introduce a new cause of action.

[44] The appellant has provided no justification whatsoever, for the late application. We say late because it was made after the 1st respondent had closed her case.

[45] All they have done is to strangely claim that they seek to provide particulars for the fraud that was pleaded, when no fraud was pleaded at all.

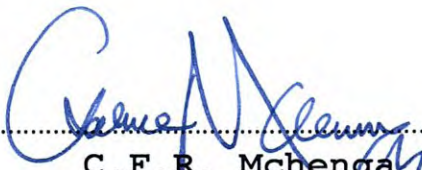
[46] One of the considerations for the exercise of discretion to amend, postulated in **Zambia Seed Company Limited v. West Co-op Haulage Limited and Western Province Co-operative Union¹**, was the stage in the proceedings, at which the application to amend is sought.

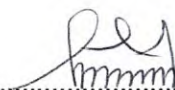
[47] In this case, even though the trial was still in progress, the respondent had closed her case. If the trial Judge had allowed the amendment, the 1st respondent would have required to reopen her case and probably amend her pleadings too. That would have been prejudicial to the other parties.


[48] In the absence of a valid reason for seeking the amendment and the respondent having closed her case, we are satisfied that the trial Judge properly exercised his discretion when he declined to allow the amendment.


[49] Consequently, we find that this appeal is devoid of any merits and we dismiss it.

[50] We award the respondents costs and in default to be taxed.


.....
C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT


.....
A.M. Banda-Bobo
COURT OF APPEAL JUDGE




.....
N.A. Sharpe-Phiri
COURT OF APPEAL JUDGE