

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

Appeal No. 166/2023

BETWEEN:

KAPESIKA ENTERPRISES

1ST APPELLANT

KATE MUTALE SIKAZWE

2ND APPELLANT

KAPEMBWA SIKAZWE

3RD APPELLANT

AND

CAVMONT BANK ZAMBIA LIMITED

RESPONDENT

CORAM: Mchenga, DJP, Muzenga and Chembe, JJA
On 30th April 2024 and 22nd July 2024

For the Appellants: No appearance

For the Respondent: Mrs. M. Phiri-Nkunika, Messrs Milner & Paul Legal Practitioners

J U D G M E N T

MUZENGA JA, delivered the Judgment of the Court.

Cases referred to:

- 1. Ayub Farms Limited v. African Banking Corporation – 2018/HP/1938**
- 2. Savenda Management Services Limited v. Stanbic Bank Zambia Limited – Selected Judgment No. 10 of 2018**
- 3. Zambia Telecommunications Company Limited v. Aaron Mweenga Mulwanda and Another – SCZ Appeal No. 63 of 2009**
- 4. The Attorney General v. Tall and Another – SCZ Appeal No. 77 of 1994**
- 5. Hakainde Hichilema and Others v. The Government of the Republic of Zambia – SCZ Appeal No. 28 of 2018**
- 6. Shamwana and Others v. The People (1985) ZR 41**

Legislation referred to:

- 1. The High Court Act, Chapter 27 of the Laws of Zambia.**
- 2. The Rules of the Supreme Court of England (White Book) 1999 Edition (RSC).**
- 3. The High Court Rules, Chapter 27 of the Laws of Zambia.**

1.0 INTRODUCTION

1.1 This is an appeal against a Ruling by Zeko-Mbewe, J dated 22nd March 2023 declining to dismiss the cause following a preliminary issue raised by the respondents.

2.0 BACKGROUND

2.1 The background to this appeal is that the respondent commenced a mortgage action against the respondents in the court below by way of

originating summons pursuant to **Order 30 Rule 14 of the High Court Rules**, on 30th November 2016 claiming the following reliefs:

- (i) **Payment of all monies plus interest thereon due to the applicant from the respondents and such costs as would be payable by the respondents if this were the only relief granted;**
- (ii) **Alternatively, delivery by the respondents to the applicant of possession of the mortgaged properties or the relief of foreclosure and further an Order for the power of sale by the applicant of the properties, subject to Barclays Bank Zambia Plc's Legal Mortgage registered on subdivision B of Plot 2983/M Lusaka;**
- (iii) **Further or other relief;**
- (iv) **Cost of this action.**

2.2 Subsequent to the above cause being commenced, the respondent was acquired or taken over by Access Bank (Z) Ltd and as such it ceased to exist.

2.3 The appellants then raised a preliminary issue on points of law pursuant to **Order 14A and Order 33 Rule 3 of the Rules of the Supreme Court of England (RSC)** for determination of the following issues:

- 1. Whether in light of the cessation to exist as a legal entity with *locus standi* of the applicant in this matter, this court can proceed to determine this matter.**

- 2. In the alternative to preliminary issue 1 above:**
 - (1) Whether or not the purported guarantees for 2nd and 3rd respondents exhibited in the applicant's affidavit in support of originating summons valid on the basis that the said guarantees are not dated nor do they refer to any particular borrowing said to have been subject of guarantee.**

 - (2) Whether or not the overdraft advanced to the 1st respondent subsequent to the loan facility of 12th September 2014 without the consent of the 2nd and 3rd respondents did not have the effect of discharging the guarantees of the 2nd and 3rd respondents respectively.**

 - (3) In the further alternative to the first i.e. preliminary issue 1 above:**
 - (1) Whether the affidavit in support of originating summons as one purporting to be an affidavit in support to a mortgage action by which the applicant as mortgage claims delivery of possession and payment of money secured by a mortgage complies with Order 88 Rule 5(1) and 5(2) of the Rules of the Supreme Court of England.**

 - (2) Whether the affidavit in support of originating summons as one purporting to be an affidavit in support of an application to a mortgage action by which the applicant as mortgagee claims delivery of possession and payment of money secured by a mortgage complies with Order 88 Rule 5(1) and**

5(3)(a) of the Rules of the Supreme Court of England.

- (3) Whether the affidavit in support of originating summons as one purporting to be an affidavit in support of an application to a mortgage action by which the applicant as mortgagee claims delivery of possession and payment of money secured by a mortgage complies with Order 88 Rule 5(1) and 5(3)(b) of the Rules of the Supreme Court of England.**
- (4) Whether the affidavit in support of originating summons as one purporting to be an affidavit in support of an application to a mortgage action by which the applicant as mortgagee claims delivery of possession and payment of money secured by a mortgage complies with Order 88 Rule 5(1) and 5(3)(c) of the Rules of the Supreme Court of England.**
- (5) Whether the affidavit in support of originating summons as one purporting to be an affidavit in support of an application to a mortgage action by which the applicant as mortgagee claims delivery of possession and payment of money secured by a mortgage complies with Order 88 Rule 5(1) and 5(3)(d) of the Rules of the Supreme Court of England.**
- (6) Whether the affidavit in support of originating summons as one purporting to be an affidavit in support of an application to a mortgage action by which the applicant as mortgagee claims delivery of possession and payment of money secured by a mortgage complies with Order 88 Rule 5(1) and 5(4)(a) of the Rules of the Supreme Court of England.**

(7) Whether the affidavit in support of originating summons as one purporting to be an affidavit in support of an application to a mortgage action by which the 1st respondent as mortgagee claims delivery of possession and payment of money secured by a mortgage complies with Order 88 Rule 5(1) and 5(7) of the Rules of the Supreme Court of England.

2.4 The respondent opposed the preliminary objection raised by the appellants.

3.0 DECISION OF THE COURT BELOW

3.1 After hearing the parties on the preliminary objection, the trial court agreed with the first issue that following the acquisition of the respondent, it ceased to exist. However, the trial court went further to hold that the assets and liabilities are now vested in Access Bank and granted leave to substitute the party pursuant to **Order 3 Rule 2 and Order 18 of the High Court Rules.**

3.2 The court below equally allowed the respondent to amend its affidavit instead of dismissing the matter as doing so would defeat the interest of justice. The trial court ordered the amendments to be effected within 14 days.

4.0 GROUNDS OF APPEAL

4.1 Unsettled with particularly the decision of the court below to order substitution of the party and holding that all assets and liabilities of the respondent vested in Access Bank, appeals to this court fronting two grounds couched as follows:

- 1. The court below erred in law and in fact in the absence of evidence, *inter alia*, as regards the acquisition and its in outs of the respondent by Access Bank (Z) Limited to have decided that all assets and liabilities of the respondent vested in Access Bank (Z) Ltd.**
- 2. The court below erred in law and fact in the absence of any evidence or application by the respondent with regard to which party was to be substituted in place of Cavmont Bank (Z) Limited other than submission at the bar from the respondent's advocates to have decided the respondent should substitute Cavmont Bank (Z) Ltd to reflect the correct party.**

5.0 APPELLANT'S ARGUMENTS

5.1 Both grounds of appeal were argued together. The kernel of the appellant's argument is that, there having been no application by the respondent to substitute a party or evidence supporting the substitution of a party, the lower court should not have made the order. Learned counsel contended that the only application by way of preliminary issue, relevant to this appeal, that the court below was

saddled with, was whether Cavmont Bank Zambia Limited had *locus standi*, having ceased to exist. It was learned counsel's submission that having succeeded on the preliminary issue, the court below should have left whichever party claiming to have *locus standi* to apply to join the case in place of Cavmont Bank Zambia Limited by establishing a connection to Cavmont Bank Zambia Limited and the reliefs sought in the court below.

5.2 Learned counsel then drew our attention to the case of **Ayub Farms Limited v. African Banking Corporation**¹ in which the High Court discussed the concept of *locus standi*. Thereafter counsel drew our attention to the reasoning of the court below in making the Ruling which is the subject of this appeal and thereafter gave us what transpired in the court below, prior to them raising the preliminary issue. It was learned counsel's contention that the lower court placed reliance on *viva voce* submissions by counsel for the respondent from the bar, which submissions cannot amount to evidence.

5.3 It was submitted that under the circumstances the court below was wrong to have *suo moto* concluded on a matter that begged for an application based on evidence which was to reveal the interest of the

party to be substituted, that the takeover of the respondent was “a **corporate restructuring**” and that the assets and liabilities of the respondent were to vest in Access Bank Zambia Limited.

- 5.4 Counsel argued that the trial court should not have made the order substituting a party in the absence of an application or evidence. We were referred to the Supreme Court decision in the case of **Savenda Management Services Limited v. Stanbic Bank Zambia Limited**², where the Apex Court expressed misgivings about the manner in which the High Court Judge awarded a sum of K192,500.00 in the absence of evidence to support it or pleadings particularising the claim. We were also referred to the case of **Zambia Telecommunications Company Limited v. Aaron Mweenga Mulwanda and Another**³, in which an application to interpret a judgment was before the High Court Judge, which application the judge dismissed but proceeded on her own motion, to review her judgment without giving the appellant a chance to be heard on review.
- 5.5 We were urged to allow the appeal.

6.0 RESPONDENT'S ARGUMENTS

- 6.1 It was learned counsel's submission in opposing the appeal that a court has inherent power to amend proceedings even in the absence of any application before it. It was contended that a court could do so even on its own motion. Reliance for the argument was placed on **Order 18 of the High Court Rules** and **Order 20 Rule 8 of the Rules of the Supreme Court of England, 1999 Edition**.
- 6.2 In placing reliance on the case of **The Attorney General v. Tall and Another**⁴, learned counsel argued that in order to ensure that issues in controversy between the parties to the cause are determined, the lower court equally and rightly ordered the amendment of the originating process by substitution to reflect the correct party to the action.
- 6.3 We were also referred to the case **Hakaide Hichilema and Others v. The Government of the Republic of Zambia**⁵ in which the Supreme Court stated that:
- ".....Order 3 Rule 2 of the High Court Rules gives wide discretionary power to a court to make any interlocutory orders even if the said orders are not expressly asked for in order to meet the ends of justice..."**

- 6.4 Learned counsel contended that the learned court below was entitled to take judicial notice of the facts brought before him. We were referred to a lot of authorities on the subject including the case of **Shamwana and Others v. The People**⁶. Regarding the issue of the lower court having relied on submissions by counsel at the Bar which did not amount to evidence, learned counsel submitted that this was a fact deposed to in the appellant's affidavit in opposition to the Originating Summons and in support of Notice to raise points of law.
- 6.5 We were urged to dismiss the appeal with costs.

7.0 THE HEARING

- 7.1 At the hearing of the appeal, learned counsel for the appellant was not before court. Learned counsel for the respondent briefly augmented their written submissions.

8.0 DECISION OF THE COURT

- 8.1 We have carefully considered the record and the arguments by the parties. The issue in this appeal is whether the lower court was on firm ground in substituting a party to the proceedings in the circumstances.

- 8.2 At the heart of the appellant's argument is that the trial court erred in substituting a party in the absence of evidence supporting the takeover of the respondent company by Access Bank Zambia Limited and also in the light of the absence of an application to substitute a party.
- 8.3 The preliminary issue which gave rise to the Ruling which is the subject of this appeal was raised by the appellant. In their first issue as noted above, they contended that the respondent lacked *locus standi* to prosecute the matter on account that it ceased to exist following its takeover by Access Bank Limited. This information was deposed to in the affidavit sworn by Kapembwa Sikazwe and Kate Mutale Sikazwe dated the 9th December 2022. Particularly in paragraph 4 of the said affidavit, which reads:

"That before deposing to the facts against the applicant's affidavit in support we wish to bring to the fore the factual issue brought out at the hearing of the respondent's application to set aside judgment where this court was by counsel representing the applicant Mrs. Chasaya, told that Cavmont Zambia Limited having been taken over by Access Bank Zambia Limited was no longer in existence."

- 8.4 The lower court then proceeded to accept and uphold the first preliminary issue raised by the appellant. It is surprising that the appellant after raising the issue of the respondent not having *locus*

standi could again argue that there was no evidence that the respondent was taken over and ceased to exist. The trial court was entitled to accept that as a fact and did in fact additionally take judicial notice of the takeover. We therefore find no merit in this argument.

- 8.2 Having accepted that the respondent no longer exist, the trial court had a choice to either dismiss the matter or order an amendment of proceedings to reflect the correct party following the takeover. In placing reliance on **Order 3 Rule 2** and **Order 18** of the **High Court Rules**, the lower court considered that it is in the interest of justice to order the alteration of the parties. We note further that the High Court is clothed with power to order the alteration of parties pursuant to **Order 16 Rule 1** of the **High Court Rules**, where after the institution of a suit, any change or transmission of interest or liability occurs in relation to any party to the suit, on application by any person or on the court's own motion, for the proper carrying on of proceedings. We therefore see nothing wrong with the order the trial court made. On the contrary, it would have been an affront to justice if the lower court dismissed the cause instead, especially that the appellant suffered no prejudice by the order the court made. This is because the cause will


be determined on its merits and the respondent will have a chance to be heard and defend itself. We therefore find the grievance taken by the appellant to be without merit. The learned court below cannot, thus, be faulted.


8.3 All in all, the appeal is devoid of merit.

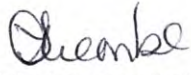
9.0 CONCLUSION

9.1 Having found the appeal to be without merit, we dismiss it.

9.2 We award costs to the respondent, payable forthwith and to be taxed in default of agreement.


.....
C. F. R. MCHENGA
DEPUTY JUDGE PRESIDENT


.....
K. MUZENGA
COURT OF APPEAL JUDGE


.....
Y. CHEMBE
COURT OF APPEAL JUDGE