

**IN THE COURT OF APPEAL OF ZAMBIA APPEAL No. 002/2020
HOLDEN AT LUSAKA
(Civil Jurisdiction)**

BETWEEN:

MPANDE LIMESTONE LIMITED

AND

WADI FARIDA POULTRY LIMITED

IDRIS MOTALA



APPELLANT

1ST RESPONDENT

2ND RESPONDENT

CORAM :Mchenga, DJP, Chishimba and Sichinga JJA

On the 17th February, 2020 and 25th February, 2020.

For the Appellant : Mr. L. Chanda and Mr. K. Chulu – Messrs P.H. Yangailo & Co.

For the Respondents : Dr. O. M. M. Banda and Mr. N. Mwandila – Messrs O. M. M. Banda & Co.

J U D G M E N T

CHISHIMBA, JA, delivered the Judgment of the Court.

CASES REFERRED TO:

1. Wilson Masauso Zulu v Avondale Housing Project Limited (1982) Z.R. 172
2. Simbeye Enterprises Limited and Investrust Merchant Bank (Z) Limited v Ibrahim Yousuf (2000) ZR 159
3. Kariba North Bank Company Limited v Zambia State Insurance Corporation Limited (1980) ZR 94
4. Weldon v Neal (1887) 19 QBD 394

5. London Ngoma and Others v LCM Company Limited, and another (1999)
ZR 75

LEGISLATION REFERRED TO:

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

1.0 INTRODUCTION

1.1 This is an interlocutory appeal arising from the ruling of the Hon. Mrs. Justice S. K. Newa dated 29th October, 2019 in which she granted an application joining the 2nd Respondent to the proceedings in the court below as the 2nd Plaintiff.

2.0 FACTS OF THE CASE

2.1 The facts underlying the appeal are that the 1st Respondent commenced an action against the Appellant in the High Court by way of Writ of Summons seeking several reliefs connected to a piece of land measuring 243 hectares on which the Appellant sought to conduct mining activities. The 1st Respondent was carrying out farming activities on approximately 29 hectares of the affected land which was acquired by one Idris Motala. The said Motala was also the proprietor of the 1st Respondent.

2.2 The record shows that on 8th August, 2019, trial commenced with Idris Motala testifying as PW1 and three other witnesses.

PW1 was recalled to the stand on 9th August, 2019 for a scene visit and cross-examination. Later, on 17th October, 2019, Idris Motala (PW1) made an application by way of summons for leave to add a party to the proceedings pursuant to Order 14 Rule 5 (1) of the High Court Rules Chapter 27 of the Laws of Zambia, as read with Order 15 Rule 6 (1), (2) and (3) of the Rules of the Supreme Court of England, 1999.

3.0 AFFIDAVIT EVIDENCE BEFORE THE COURT BELOW

- 3.1 In his affidavit in support of the application for joinder, Idris Motala, deposed that he is the co-owner of the land in issue which was given to him in 1993 by Senior Chieftainess Nkomeshya Mukamambo II of Chongwe District. In 2006, he registered the 1st Respondent and operated the same as Managing Director. He stated that the 1st Respondent commenced an action against the Appellant but that he is a person who ought to have been joined in the proceedings as his presence is necessary to ensure that all matters in dispute in the cause are completely determined. He also stated that he believes that the decision of the court below would seriously affect his interest in the land and other interests where the dispute lies.

- 3.2 The Appellant opposed the application through affidavit deposed by Chanda Katema, its legal officer. It was deposed that Idris Motala is not a co-owner of any land belonging to the Appellant. The Appellant denied carrying out any mining activities or construction works on the 1st Respondent's neighboring farm as the Respondents do not own any land. The Appellant further stated that the 1st Respondent could still pursue the matter without joining the siad Motala to the proceedings as the 1st Respondent is an artificial person capable of pursuing its own interests distinct from those of Motala.
- 3.3 An affidavit in reply was filed by Idris Motala in which he exhibited several letters and minutes of meetings of the Busoli Royal Establishment showing that he owned the customary land.

4.0 DECISION BY THE COURT BELOW

- 4.1 The learned Judge in the court below considered the application before her and the applicable law. She found that Order 14 Rule 5 (1) of the High Court Rules, Chapter 27 of the Laws of Zambia, and Order 15 Rule 6 (1), (2) and (3) of the Rules of the Supreme Court of England, 1999 Edition provide that for a person to be joined to the proceedings, they must demonstrate that they

have some interest in the subject matter of the suit, or that they are likely to be affected by the outcome of the suit. In this case, the subject matter is compensation on the basis of the mining activities being conducted by the Appellant affecting the 1st Respondent.

- 4.2 The court below found that the letter from the Zambia Environmental Management Agency and evaluation report addressed to both the 1st and Idris Motala demonstrated that Motala has an interest in the subject matter of the suit. On the argument that only a certificate of title is conclusive evidence of ownership, the learned Judge took the view that courts administer law and equity concurrently, and that issues of land held under customary tenure are covered under principles of equity, where one is yet to convert land held under customary tenure to statutory tenure.
- 4.3 The court below further found that the Idris Motala, having applied on his own to be joined to the proceedings, Order 15 Rule 6 (4) of the Rules of the Supreme Court of England did not apply to him. Consequently, the court below found that Motala had demonstrated that he has sufficient interest in the subject

matter of the proceedings, and that he is likely to be affected by the outcome of the proceedings.

- 4.4 The court below then ordered that Idris Motala be joined to the proceedings as 2nd Plaintiff, and then adjourned the matter to a later date for a scheduling conference in view of the addition of the 2nd Respondent as a Plaintiff to the proceedings.

5.0 **THE APPEAL**

- 5.1 Being dissatisfied with the ruling of the court below, the Appellant has appealed to this Court and has advanced five grounds of appeal as follows:

- 1) That the court below erred in law and fact when it failed to adjudicate on the Appellant's submission that the 2nd Respondent's application for joinder was merely an afterthought that arose after cross-examining him and before he was re-examined (2nd Respondent);***
- 2) That the court below erred in law and fact by not correctly interpreting and applying both statute and case law relating to consent for a party to be joined to proceedings as a Plaintiff;***
- 3) That the court below erred in law and fact by not properly evaluating the evidence before it in determining the 2nd Respondent's interest in the subject matter when it held that the Zambia Environmental Management Agency (ZEMA) decision letter and valuation report were addressed to both the 1st and 2nd Respondent when clearly, the same were only addressed to the 2nd Respondent;***

- 4) The court erred in both law and fact by failing to distinguish the interest of the company and the 2nd Respondent; and**
- 5) The court erred in both law and fact by ordering a scheduling conference and re-opening the whole pleadings of the matter disregarding the fact that trial has already commenced and reached an advanced stage.**

5.2 However, the Appellant indicated that they had abandoned grounds three and four of the appeal.

6.0 THE APPELLANT'S ARGUMENTS

6.1 The Appellant filed into Court heads of argument dated 10th January, 2020 in support of its appeal. With respect to ground one, the Appellant's argument was that the 2nd Respondent's application for joinder was an afterthought that arose after he had been cross-examined in that the 2nd Respondent had told the court below in cross-examination that his not being a party to the proceedings was technical. The 2nd Respondent was also of the view that he and the 1st Respondent are one and the same person.

6.2 The argument advanced was that the question of the locus standi of the 2nd Respondent was brought to the attention of the court below during the application for joinder, but that the court did not address the issue. Therefore, it was submitted that on

the authority of the case of **Wilson Masauso Zulu v. Avondale Housing Project Limited**⁽¹⁾, the court below fell into grave error as it did not completely and finally determine all matters in controversy between the parties.

- 6.3 The gist of ground two is that the court below did not correctly interpret and apply statute and case law in relation to the requirement of a written consent by a party to be joined to the proceedings as Plaintiff. The submission was that the learned Judge misapplied Order 15 Rule 6 (4) of the Rules of the Supreme Court, 1999 Edition when she stated that:

“... in this case, neither the Plaintiff nor any other person has applied to join Idris Motala to the proceedings. Idris Motala has applied on his own behalf to be joined to the proceedings. Therefore, Order 15 Rule 6 (4) does not apply.”

The submission was that this flew into the teeth of paragraph 2 of the Affidavit and Further Affidavit in Support of Summons to join a party to the proceedings at page 62 of the record of appeal which shows that the deponent, Idris Motala indicated that he was depositing the affidavits in a representative capacity of the 1st Respondent.

6.4 Reliance was placed on the case of **Simbeye Enterprises Limited And Investrust Merchant Bank (Z) Limited v. Ibrahim Yousuf**⁽²⁾ where it was held that:

- (i) **No person shall be added as a plaintiff without his consent signified in writing or in such other manner as may be authorised.**
- (ii) **The rule applies only where the application is made either by a plaintiff to join another person as a co-plaintiff or by another person to join the other as a plaintiff.**

Therefore, it was submitted that as the 2nd Respondent did not make the application for joinder in his personal capacity, but representative capacity of the 1st Respondent where he is the Managing Director, it was a misdirection on the part of the lower court to hold in the manner it had.

6.5 In relation to ground five, it was contended that pleadings having closed, it was wrong for the court below to re-issue new orders for directions without restricting them to the 2nd Respondent only. Issue was raised that the court below acted in absolute disregard of the fact that orders for directions were issued on 28th March, 2019 and that trial had commenced with four witnesses testifying with only the 2nd Respondent remaining to be re-examined.

6.6 It was submitted that joinder of a party does not entail reopening the whole pleadings or proceedings, more so if prejudice will be occasioned to a party. In this case, by reopening the pleadings and extending them to the 1st Respondent, it was argued that prejudice would be occasioned against the Appellant as the Respondents will have a second bite at the cherry, which would defeat the ends of justice. Reliance was placed on the cases of **Kariba North Bank Company Limited v. Zambia State Insurance Corporation Limited**⁽³⁾ and **Weldon v. Neal**⁽⁴⁾.

6.7 The Appellant prayed that the appeal be upheld.

7.0 THE RESPONDENTS' ARGUMENTS

7.1 In challenging the appeal, the Respondents filed heads of arguments on 21st January, 2020 in which it was argued that the issues raised with respect to the cross-examination of PW1, will be repaired in re-examination if, at all, any damage has been caused. Therefore, it was contended that the pending re-examination of PW1 cannot be said to be another bite at the cherry.

7.2 With respect to the case of **Wilson Masauso Zulu v Avondale Housing Project Limited**⁽¹⁾ cited by the Appellants, it was

submitted that this case actually supports the Respondents' case in that the issues raised by the Appellant will be adjudicated upon and dealt with in finality by the trial court, and hence the granting of the order of joinder of the 2nd Respondent. The argument was made that the Appellant has raised the issues prematurely as they are triable issues to be dealt with by the court below once the Appellant commences its defence.

- 7.3 On the argument that the application for joinder was an afterthought, it was submitted that the court below rightly granted the application because the 2nd Respondent co-owned the land in issue that was given to him in his individual capacity before the 1st Respondent was incorporated. In any case, it was contended that the law allows a party to be joined to the proceedings within a reasonable time, at any time, even after delivery of judgment, provided they have sufficient interest in the subject matter and that they would be affected by the outcome of the litigation. For authority, the Respondents looked to the case of ***London Ngoma and Others v. LCM Company Limited and Another*** ⁽⁵⁾.

- 7.4 In response to ground two, it was submitted on behalf of the Respondents that the ground should fail for three reasons: first, that the 2nd Respondent was joined in his personal capacity; second, that he met the necessary conditions for joinder having made the application through his advocates; and third, that the rule on written consent does not apply to the circumstances of the 2nd Respondent who made the application for joinder through his advocates. For authority, the case of **Simbeye Enterprises Limited and Investrust Merchant Bank (Z) limited v. Ibrahim Yousuf** ⁽²⁾ was called in aid were the Supreme Court reasoned as follows:

"We have considered the evidence on record, the order of the learned trial Judge and the written and oral arguments on both sides. Order 15 Rule 6 sub rule 4, RSC cited by Mr. Yousuf provides as follows:

'No person shall be added as a plaintiff without his consent signified in writing or in such other manner as may be authorised.'

The rule is explicit but does it apply where a person who is desirous of being made a plaintiff personally or through his advocate makes an application to court to be joined as such? We think not because a consent in those circumstances would be superfluous and serve no useful purpose at all. In our view, the rule applies only where the application is made either by a plaintiff to join another person as a co-plaintiff or by another person to join the other as a plaintiff. ..."

- 7.5 Therefore, the Respondent prayed that ground two be dismissed with costs for it lacks merit and is misconceived.
- 7.6 In response to ground five, it was argued that it is not correct that the court below had re-opened the entire pleadings as what had been opened for the first time is the 1st Respondent's case alone. That the case with regard to the 1st Respondent had not been re-opened but will close after the 1st Respondent's witness, PW1 has been re-examined. It was submitted that a scheduling conference simply charts the course the matter will take in light of a joinder of a party. It was further submitted that procedure requires that after a joinder of a party, orders for direction are issued as was rightly done by the court below. Therefore, the court below was on firm ground in issuing orders for direction.
- 7.7 The 2nd Respondent having been joined in his personal capacity as an individual separate from the capacity of a shareholder or director of the 1st Respondent, the Respondents prayed that the appeal be dismissed with costs

8.0 **ORAL ARGUMENTS**

- 8.1 When the matter came for hearing, learned counsel for the Appellants, Mr. Chanda briefly augmented ground one. He

argued that had the trial court addressed its mind to their submissions, Mr. Motala would not have been joined to the proceedings as doing so defeats the purpose of cross-examination if a party is allowed to go back to the drawing board having been cross-examined.

- 8.2 With regard to the case of ***London Ngoma and Others v LCM Company Limited and Another*** ⁽⁵⁾ relied on by the Respondents, Mr. Chanda contended that this is not a one-size-fits-all type of case. He submitted that in that case, two principles were established by the Supreme Court being: first, that the applicants for joinder were not aware of the proceedings, and second, they had sufficient interest in the subject matter. Mr. Chanda distinguished the present case from the London Ngoma Case by arguing that in this case, the 2nd Respondent was aware of the proceedings from 2018. Counsel further stated that they would not have objected to the application had it been made before cross-examination.
- 8.3 In response, Dr. Banda, learned counsel for the Respondents relied entirely on their written submissions and submitted that the appeal be dismissed with costs including those for the abandoned grounds three and four.

9.0 **DECISION OF THE COURT**

- 9.1 We have given consideration to the record of appeal, the heads of argument filed herein, the authorities cited and the oral submissions made by the learned counsel.
- 9.2 Before we deal with the issues in contention before us, we wish to note that a perusal of the grounds of appeal show that they do not directly challenge the order of joinder made by the court below in favour of the 2nd Respondent. Rather, the grounds of appeal attack the considerations that the court below had or ought to have had in arriving at its decision. Therefore, in addressing our minds to the appeal, we shall first consider whether the learned Judge in the court below properly guided herself on the applicable law in granting the order of joinder.
- 9.3 The law governing joinder is to be found in Order 14 Rule 5 (1) of the High Court Rules, Chapter 27 of the Laws of Zambia which provides that:

“5. (1) If it shall appear to the Court or a Judge, at or before the hearing of a suit, that all the persons who may be entitled to, or claim some share or interest in, the subject-matter of the suit, or who may be likely to be affected by the result, have not been made parties, the Court or a Judge may adjourn the hearing of the suit to a future day, to be fixed by the Court or a Judge, and direct that such persons shall be made either

plaintiffs or defendants in the suit, as the case may be. In such case, the Court shall issue a notice to such persons, which shall be served in the manner provided by the rules for the service of a writ of summons, or in such other manner as the Court or a Judge thinks fit to direct; and, on proof of the due service of such notice, the person so served, whether he shall have appeared or not, shall be bound by all proceedings in the cause:

Provided that a person so served, and failing to appear within the time limited by the notice for his appearance, may, at any time before judgment in the suit, apply to the Court or a Judge for leave to appear, and such leave may be given upon such terms (if any) as the Court or a Judge shall think fit. The Court or a Judge upon the application of any party may give directions for service upon a new party of copies of any writ of summons or other document or process and also may give such other directions in relation to the adding of such new party as justice and the circumstances of the case may require.”

9.4 Further, Order 15 Rule 6 (1), (2), (3) and (4) of the RSC, 1999 Edition state as follows:

- (1) *No cause or matter shall be defeated by reason of the mis-joinder or non-joinder of any party; and the Court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.*
- (2) *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 of its own motion or on application -*

- (a) *order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be a party;*
- (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 or 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, or*
 - (ii) *any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter.*
- (3) *An application by any person for an order under paragraph (2) adding him as a party must, except with the leave of the Court, be supported by an affidavit showing his interest in the matters in dispute in the cause or matter or, as the case may be, the question or issue to be determined as between him and any party to the cause or matter.*

9.5 No person shall be added as a plaintiff without his consent signified in writing or in such other manner as may be authorised.

9.6 From these provisions of law, it becomes apparent that for a party to be joined to the proceedings, they must meet any of three requirements, being that:

- 1) They must be persons who may be entitled to, or claim some share or interest in, the subject-matter of the suit, or who may be likely to be affected by the result;
- 2) They are persons 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; or
- 3) They are persons between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter.

9.7 The evidence before the court below as per the affidavit of the 2nd Respondent showed that he had an interest or share in the land that is the subject matter of the dispute. The documents

exhibited and collectively marked "IM1" and "IM2" appearing at pages 81 to 102 of the record of appeal attest to this fact.

- 9.8 In this regard, we are satisfied that the 2nd Respondent is a person whose presence before the court below is necessary to ensure that all matters in dispute in the cause or matter are effectively and completely determined and adjudicated upon. Therefore, we find that the court below was on firm ground when it found that Idris Motala had demonstrated that he has sufficient interest in the subject matter of the proceedings and that he is likely to be affected by the outcome of the proceedings.
- 9.9 We now address the grounds of appeal. The gist of ground one is that the 2nd Respondent's application for joinder was an afterthought that arose after he was cross-examined. Counsel for the Appellant, Mr. Chanda further argued that the 2nd Respondent was aware of the proceedings from as far back as 2018 and as such, the London Ngoma case cited by the Respondents, does not apply to him.
- 9.10 A perusal of the record of appeal does show that the application for joinder was made after the 2nd Respondent was cross-examined as PW1. However, Order 14 Rule 5 (1) of our High Court Rules as read with Order 15 Rule 6 (2) of the RSC, 1999

is clear that an application for joinder may be made at or before the hearing of a suit, or at any stage of the proceedings in any cause or matter. The provisions do not necessarily require a person not to have been aware of the proceedings to make an application for joinder as suggested by Mr. Chanda. We hold that provided a person meets the requirement for joinder, whether or not they are aware of the proceedings, they have a right to apply at any stage of the proceedings.

9.11 Therefore, whether the application for joinder arose before, during or after the 2nd Respondent was cross-examined is of no consequence as the law allows any concerned person to apply at any stage of the proceedings. To this end, we find no merit in ground one and it is dismissed.

9.12 The issue in ground two is that the 2nd Respondent made the application for joinder in a representative capacity and as such, he ought to have signified his consent to be joined to the proceedings in writing in terms of Order 15 Rule 6 (4) of the RSC, 1999.

9.13 We have read the affidavit in support of summons to join as a party to the proceedings and the further affidavit appearing at page 62 and 64 of the record of appeal respectively. While we

note that paragraph two of both affidavits is poorly drafted, our reading of them is that the 2nd Respondent deposed to the contents therein in two capacities: that is, his capacity as co-owner of the subject land and as Managing Director of the 1st Respondent that owns a stake in the subject land.

9.14 Evidently, the 2nd Respondent did not depose the affidavit in a representative capacity of the 1st Respondent only but also as co-owner of the subject land. Therefore, the requirement of him signifying his consent to be joined as a Plaintiff could not and does not arise.

9.15 We find that ground two of the appeal is bereft of merit and is dismissed.

9.16 Lastly, ground five contends that the court below, having granted an order of joinder, ought not to have ordered a scheduling conference and re-open the pleadings, trial having commenced and reached an advanced stage.

9.17 We are of the view that the learned Judge in the court below rightly adjourned the matter to a scheduling conference as she was guided by the proviso to Order 14 Rule 5 (1) of the High Court Rules which states as follows:

"Provided that a person so served, and failing to appear within the time limited by the notice for his appearance, may, at any time before judgment in the suit, apply to the Court or a Judge for leave to appear, and such leave may be given upon such terms (if any) as the Court or a Judge shall think fit. The Court or a Judge upon the application of any party may give directions for service upon a new party of copies of any writ of summons or other document or process and also may give such other directions in relation to the adding of such new party as justice and the circumstances of the case may require."

(underlining ours)

9.18 Our understanding of this provision is that once a party is joined to the proceedings, the trial court is enjoined to give directions for service of all the pleadings in that matter including the writ of summons, statement of claim and defence. As there is a new party, this may also entail amending the originating process so as to include the new plaintiff (or defendant as the case may be) with the resultant amendment of the statement of claim and defence to reflect the new status quo.

9.19 We thus, do not see how the matter was supposed to progress and be determined on its merits without the 2nd Plaintiff being given an opportunity to make its case by stating its claims in a writ of summons and statement of claim. Equally, the Appellant, being a Defendant, would also need to be accorded

the opportunity to resist the claims brought by the new plaintiff by filing an amended defence. This would necessarily entail the re-opening of the pleadings subject to directions the trial court would give.

9.20 Therefore, the trial court was on firm ground when it adjourned the matter to a scheduling conference in view of the addition of the 2nd Respondent as 2nd Plaintiff. To this end, ground five must fail.

10.0 CONCLUSION

10.1 For the foregoing reasons, we find no merit in the appeal and uphold the lower court's judgment. The appeal is accordingly dismissed with costs to the Respondents to be taxed in default of agreement.



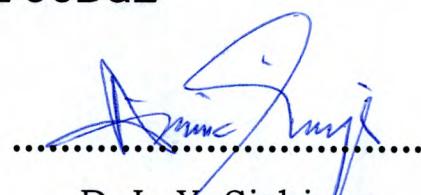
C. F. R. Mchenga

**DEPUTY JUDGE PRESIDENT
COURT OF APPEAL JUDGE**



F. M. Chishimba

COURT OF APPEAL JUDGE



D. L. Y. Sichinga

COURT OF APPEAL JUDGE