

**IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2010/HPC/0653

BETWEEN:

MORRIS CHISENGA MULEBA

PLAINTIFF

AND

**SMART CHANDA (Sued as administrator
of the estate of the late Mr. Joseph Bwalya Chamba)** **DEFENDANT**

BEFORE THE HON. JUSTICE NIGEL K. MUTUNA ON 18th DAY OF JULY, 2011

For the Plaintiff : Mr. M.Z. Mwandenga
For the Defendant : N/A
For the Intended Second Defendant : Mr. T. Ndhovu

RULING

Cases referred to:

- 1. *Anderson Kambela Mazoka, Lt General Christon Sifapi Tembo, Godfrey Kenneth Miyanda -VS- Levy Patrick Mwanawasa, the Electoral Commission of Zambia and The Attorney General (2005) ZLR page 138.***
- 2. *Vandervell Trustees Limited -VS- White and Other (1970) 3 ALL ER page 16.***
- 3. *Nona Mwaanga Kayora and Valizani Banda -VS- Eunice Kumuenda and Andrew Ngulube (2003) ZLR page 132.***

Other authorities referred to:

- 1. *The Supreme Court Practice 1999 Volume 1.***

This is an application by one Imran Patel to be joined to these proceedings as a Second Defendant. The application is by way of summons supported by an affidavit and skeleton filed on 4th May, 2011. It is also made pursuant to order 15 rule 6(2)(b) and (3) of the **Supreme Court Practice (white book)**. The Plaintiff's response was by way of an affidavit in opposition and skeleton arguments filed on 3rd June, 2011.

The affidavit in support was sworn by the applicant, the said Imran Patel. He began by stating that he is a purchaser of property known as LUS/1777 Lusaka which is the subject of this dispute. He went on to highlight how he purchased the property from the Defendant as administrator of the estate of the late Joseph Bwalya Chamba. He also highlighted the fact that he paid an initial deposit of K200,000,000.00 towards the purchase price and a further sum of K200,000,000.00 subsequently. Further that consent to assign was obtained and property transfer tax paid.

The affidavit in opposition was sworn by the Plaintiff and it revealed the following; the deceased Joseph Bwalya Chamba was offered the property in dispute by the liquidator of United Bus Company of Zambia Limited in 1996; the deceased assigned his right to purchase the said property to him; the Defendant has always been aware of this fact and is under a legal duty as administrator to complete the sale; pursuant to the said sale the Plaintiff took occupation of the property; the Defendant has not been willing to conclude the sale which prompted the Plaintiff to lodge a caveat over the property on 31st August, 2010; the Defendant purportedly sold the property subsequent to institution of these proceedings by the Plaintiff; and neither the applicant nor his representatives approached the Plaintiff to enquire into how he is in occupation of the property. He ended by stating that the applicant has been cheated out of his moneys by the Defendant and that it is to whom that he should look for recompense.

The matter came up for hearing on 7th June, 2011. Counsel for the parties relied on the skeleton arguments. Mr. T. Ndhlovu for the applicant argued that the affidavit evidence demonstrates the fact that the applicant purchased the property in dispute. As such he has an interest in the matter. He argued further that it is necessary to join the applicant to these proceedings to ensure that all issues in dispute in this matter are dealt with once and for all. My attention in this respect was drawn to Order 15 rule 6(2) (b) and (3) of the **white book**.

In the Plaintiffs skeleton arguments, Mr. MZ Mwandenga began by highlighting the background to the case. He then proceeded to highlight the issues in contention thus; whether the presence of the intended intervening party is necessary to ensure that all matters in dispute in the cause are effectually and completely dealt with; and whether the intended intervening party will be affected, per se, by these proceedings so as to warrant being joined to this cause or matter.

Regarding issue 1, it was argued that the issues in dispute in this matter have been defined in the pleadings as is the requirement of the law. This is in line with the case of **Andreson Kambela Mazoka, Godfrey Kenneth Miyanda -VS- Levy Patrick Mwanawasa, The Electoral Commission of Zambia and The Attorney General (1)**, which sets out the purpose of pleadings. Counsel argued that the issues in this matter do not affect the applicant and that even if he were made a party and attended Court he would not make any meaningful contribution to the adjudication and determination of the matter. The dispute in issue it was argued further, centres on a contract entered into in 1996, which the Plaintiff now seeks to be enforced as against the Defendant. The applicant it was argued can not make any meaningful contribution to the said issue. For this reason the applicant should not be joined to these proceedings. My attention in this

respect was drawn to the case of **Vandenvell Trustees Limited -VS- White and Others (2)**.

As regards issue 2 it was argued that the applicant will not be affected by these proceedings to warrant his being joined. The fact that the subject matter of these proceedings is the same as the land scam that the Defendant has exposed the applicant to does not entitle the applicant to be joined. This it was argued is because the property should not have been sold to him. It was argued further that the applicant did not take the necessary precautions prior to entering into the contract of sale with the Defendant. Had he taken the said precautionary measures he would have discovered that the property was encumbered by the interest claimed by the Plaintiff and as such he would not have gone ahead with the transaction. Having failed to take such precautions, the applicant has himself to blame. My attention in this respect was drawn to the case of **Nona Mwaanga Kayora and Valizani Banda -VS- Eunice Kumwenda and Andrew Ngulube (3)**.

I have considered the affidavits and arguments advanced by counsel for the parties. In presenting this application, the applicant has relied upon Order 15 rule 6 rule 2 (b) and (3) of the **white book** which states as follows;

“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 ...

(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

(ii) or 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 Court, be supported by an affidavit showing his interest in the matter 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 of matter.”

(The underlining is the Court’s for emphasis only).

As counsel for the Plaintiff has quite rightly argued, the rationale for the order is to ensure that all interested parties to the suit are before Court **“to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon.”**

(Quoting from Order 15) The pleadings are what define the matters in dispute in a matter and in this case they are contained in the writ of summons and statement of claim. By the said pleadings the matter in dispute can best be defined as a claim by the Plaintiff for specific performance of the agreement for the purchase of stand No. 1777 Lusaka. The said dispute arises from an agreement entered into by the Plaintiff and deceased. The applicant’s claim on the other hand is against the Defendant

and it is simply that he should be heard on his alleged purchase of the property in dispute from the Defendant.

In determining the matter in dispute in this matter I shall at trial ascertain the validity of the contract between the Plaintiff and the applicant and determine whether or not it can be enforced. The applicant will therefore have no role to play as he is in no way affected by the differences that exist between the two parties. Further, by joining him to the cause as Second Defendant, as he seeks to be, he will not be in a position to articulate his dispute against the Defendant properly as he will primarily be restricted to defending the Plaintiff's claim. His claim against the Defendant can best be articulated in a separate suit wherein he would be Plaintiff.

The applicant's position is placed in further jeopardy because he transacted with the Defendant despite there being a caveat on the property. He was duty bound prior to committing himself to the deal to enquire into the status of the property. In arriving at the foregoing finding, I am alive to the holding in the case of ***Nona Mwaanga Kayoba and Valizani Banda -VS- Eunice Kumwenda Ngulube and Andrew Ngulube (3)*** referred to me by counsel for the Plaintiff which states at page 133 as follows;

“In purchasing real properties parties are expected to approach such transaction with much more serious inquiries to establish whether or not the property in question has encumbrances”

As I have stated above, if the applicant had been a little more diligent in his inquiry he would have noted the encumbrance in the form of the caveat lodged by the Plaintiff. Having failed to do so, he has himself to blame and can only have recourse against the Defendant and not the property.

In view of my findings in the preceding paragraphs. I find no merit in the application and dismiss it with costs to the Plaintiff. I further direct that the matter come up for a Status Conference on 30th August, 2011 at 08:40 hours.

Leave to appeal is granted.

Delivered on the 18th day of July, 2011.

Nigel K. Mutuna
HIGH COURT JUDGE