

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

2015/HP/526



BETWEEN:

**KENNEDY MAMBWE
KENNEDY MAMBWE**

*(Suing as Guardian Ad Litem a minor Precious Mambwe
and mentally handicapped Snowden Tembo)*

**1ST PLAINTIFF
2ND PLAINTIFF**

AND

**KATIA
KAKUSA S. MUNDIA
MADALITSO KAMANGA
MWAMBA CHITUNDU**

*(Sued in his own behalf and as Partner under
Barnaby & Chitundu Advocates)*

**1ST DEFENDANT
2ND DEFENDANT
3RD DEFENDANT
4TH DEFENDANT**

MAJUMO KHUNGA

(Sued as a Partner under Barnaby & Chitundu Advocates)

5TH DEFENDANT

**NYONDO (POLICE OFFICER)
ATTONERY GENERAL**

**6TH DEFENDANT
7TH DEFENDANT**

BEFORE THE HON. MR. JUSTICE C. KAJIMANGA IN CHAMBERS THIS 6TH DAY OF
AUGUST, 2015

FOR THE PLAINTIFFS:

FOR THE 1ST, 2ND, 4TH and 5TH DEFENDANTS:

FOR THE 3RD DEFENDANT:

In person

Mr. N. Kanyimbo, Messrs Barnaby
and Chitundu Advocates

Mr. S. Imasiku, Messrs Imasiku &
Company

R U L I N G

This is an application by the 1st, 4th and 5th Defendants for an order to dismiss action for

abuse of court process and irregularity pursuant to Order 18, rule 19(1) of the Rules of the Supreme Court (RSC) 1999 Edition. The application is supported by an affidavit sworn by Mwamba Chitundu, the 4th Defendant herein. His affidavit discloses that when the Plaintiff commenced this action the parties initially involved were only the Plaintiff (Kennedy Mambwe) and two Defendants, namely Katia Shamu and Kakusa S. Mundia as the 1st and 2nd Defendants respectively. After the said court process was issued, the Plaintiff applied for leave to amend the writ of summons and the statement of claim which was granted by the Court on 17th April, 2015 as shown on the file record before this Honourable Court. The leave granted by this Honourable Court was to amend only the writ of summons and statement of claim as supported by a search conducted on the file on 3rd June, 2015, which revealed that the Plaintiff was granted leave to amend the writ of summons and the accompanying statement of claim (see exhibit "MC1").

The affidavit further discloses that owing to the leave of court granted on 17th April, 2015 the Plaintiff proceeded to amend the writ of summons and statement of claim and additionally joined new parties being the 2nd and 3rd Plaintiffs; and the 3rd, 4th and 5th, 6th and 7th Defendants. The joining of new parties to this matter is irregular and an abuse of the court process as one can only cause new parties to be joined to an action by way of non-joinder and not a mere leave to amend the writ of summons and accompanying statement of claim. The act by the 1st Plaintiff to join new parties without leave for non-joinder being granted by this Honourable Court is a serious irregularity and total abuse of the court process and total disrespect of the court rules and the court should accordingly disallow such joining of parties to the action. The said amendment of the court process and joining of the parties without leave of court amounts to the creation of a new action being done with total disregard and disrespect to the rules of practice and court process. This amounts to irregularity and abuse of court process. As such the action should be dismissed for abuse of court process and irregularity.

The 1st Plaintiff's affidavit in opposition discloses that he was granted leave to join new parties on 17th April, 2015 (see exhibit "KM1"). The Defendants' application is frivolous and vexatious and is an attempt to waste the Court's time. This is a proper case for the Honourable Court to dismiss the application with costs.

For the 1st, 4th and 5th Defendants, Mr. Kanyimbo submitted that their application was based on the fact that having conducted a search on 3rd June, 2015 there was no order for non-joinder found on the file. He added that the only order that was found was the one to amend the writ of summons and accompanying statement of claim granted on 17th April, 2015.

Counsel submitted that in the affidavit in opposition the Plaintiff has exhibited an order purported to be granted by this court granting him leave to join new parties. He argued that in light of the said order which has resurfaced upon the filing of their application, it was his considered view that if the Court may confirm the said order to be on the file they were at liberty to withdraw the application as the same was filed on the basis that there was no order for non-joinder.

For the 3rd Defendant Mr. Imasiku submitted that if they had been served with the order the application would not have been made and the parties would have been made aware of the order for non-joinder. He contended that if the court confirms that there is an order for non-joinder on the file then the application would be academic and they would ask for costs.

In opposing the application the Plaintiff submitted that if the Court confirms the existence of the order dated 17th April, 2015 allowing the intended interveners to be joined to the proceedings then it should consider awarding costs in favour of the Plaintiffs as it was the responsibility of the Defendants to conduct a thorough search, more so that in the amended writ of summons and statement of claim, it was indicated that the amendments were done pursuant to the order of 17th April, 2015. He

contended that this should have put the Defendants on high alert before proceeding to make the application.

In reply, Mr. Kanyimbo submitted that a thorough search was conducted on the file in the presence of the Marshal to this Court, who had even rendered assistance in searching for any orders that were granted on 17th April, 2015. He argued that upon a thorough search the only order found on the file was the one granted on 17th April, 2015 to amend the writ and statement of claim and not the order for non-joinder. It was counsel's submission that the Plaintiff did not even serve the order for non-joinder on the Defendants and he should therefore bear the costs of this application.

In reply, Mr. Imasiku also submitted that if there had been no service of the order it could not be assumed that it exists and that the Plaintiff cannot have his cake and eat it.

The kernel of the 1st, 4th and 5th Defendants' application is that the joining of new parties, including themselves, to these proceedings in the absence of a court order to that effect is irregular and an abuse of the court process and should therefore be disallowed. According to the applicants, this application was triggered when a thorough search conducted on the case record on 3rd June, 2015 revealed that there was no order for non-joinder on the file. Among other things, Mr. Kanyimbo submitted that the search was in fact conducted in the presence of the Marshal to this Court, who even assisted in searching for any orders that were granted on 17th April, 2015. On the other hand the 1st Plaintiff has produced exhibit "KM1" in his affidavit in opposition. The said exhibit purports to be the order signed by my brother, Sikazwe, J who had initial conduct of this matter before he recused himself and sent it to me for re-allocation.

Mr. Kanyimbo also submitted that if the Court would confirm the existence of the order for non-joinder on the file, the applicants would withdraw this application. In the presence of the 1st Plaintiff and counsel for the 1st, 3rd, 4th and 5th Defendants, I searched the record for the said order but found none. Again in the presence of the

said parties, I gave the record to my Research Advocate, Mrs. C. Chakanika to search for the same order but none was found.

The record shows that on 16th April, 2015 the 1st Plaintiff filed an ex-parte summons for an order for non-joinder of intended parties to the proceedings. On the same day he also filed an ex parte summons for an order for leave to amend writ of summons and statement of claim. However, the record only shows the existence of an order granting leave to amend the writ of summons and statement of claim dated 17th April, 2015 and none for non-joinder. Albeit bearing the same date of 17th April, 2015, what is curious about exhibit "KM1" is that unlike the order for leave to amend writ and statement of claim, as well as the two summonses mentioned above, it is not stamped with the letter "S" which signifies the scanning of a document that has been filed in court.

I am driven to the conclusion that since exhibit "KM1" is not on the record and it is devoid of the stamp signifying that it had been scanned, it may not have existed on the court record on 17th April, 2015. It therefore follows that since exhibit "KM1" does not appear on the court record, it was not granted by the Court.

Having therefore concluded that exhibit "KM1" was not granted by the Court it follows that the joining of the 2nd Plaintiff, 3rd, 4th, 5th, 6th and 7th Defendants to these proceedings is irregular and an abuse of the court process. For this reason the said parties are accordingly struck out of these proceedings forthwith. In view of this conclusion, it is just and proper that I must award costs to the applicants.

DELIVERED THIS 6TH AUGUST 2015



C. KAJIMANGA
JUDGE