

**IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA**

2015/HPC/0143

(Civil Jurisdiction)

BETWEEN:

ANGLERS HAVEN LIMITED

PLAINTIFF

AND

YEXLEY LIMITED

1ST DEFENDANT

**PATRICK ANDREW LAWTON
DEFENDANT**

2ND

**SHARPE & HOWARD LEGAL
DEFENDANT
PRACTITIONERS (*Sued as a Firm*)**

3RD

Before Hon. Mr. Justice N.K. Mutuna this 11th day of June, 2015

**For the Plaintiff : Mr. D. Tembo & Mrs. Chanda of AB and
Darius**

**For the defendants : Ms T. Marietta of Messrs Sharpe &
Howard**

R U L I N G

Cases referred to:

- 1) *William Chipango vs. The Attorney General* (1970) ZR 31
- 2) *Galaunia Farms Limited vs. National Milling Company Ltd.* (2002) ZR 135
- 3) *Christopher Alistar Gribbon vs. Antony Lutton*, [2001]EWCA Civ 1956; [2002] QB 902
- 4) *In Re Vandervel Trust White vs. Vandervele Trustees Limited and Another* (1971) AC 912
- 5) *Eureka Construction Ltd vs. Attorney General, Consolidated Lighting (Zambia) Limited* (2008) Z.R (2) 64 (Volume 2) 64

6) *Abel Mulenga & Others vs. Mabvuto Adan Avuta Chikumbi & Others & The Attorney General (2006) ZR 33*

Other authorities referred to:

- 1) *High Court Act, Cap 27 of the Laws of Zambia*
- 2) *Supreme Court Practice, volume 1, 1999 end White Book*
- 3) *Halsbury's Laws of England, 4th Edition Volume 44 (1) by Lord Hailsham of St. Marylebone, Butterworth, London 1983*
- 4) *Halsbury Laws of England, 4th Edition, Volume 42 by Lord Hailsham of St. Marylebone, Butterworth's, London 1983*
- 5) *Irish Conveyancing Law, 2nd edn 1999, by J.C Wylie, Butterworths, Ireland*
- 6) *Beachcroft Law Review, by David Arnold Cooper LLP 2010*
- 7) *Conveyancing - Volumes 1 and 2, edn (2008) published by Oxford University Press, by Gabriel Brennah and Naula Casey*

This is the Second and Third Defendants' application for misjoinder made pursuant to order 14 rule 5 (2) of the **High Court Act**. By the said application the Second and Third Defendants seek to be struck off the pleadings as parties on the ground of misjoinder. It is contended that Plaintiff has no sustainable cause of action as against the two Defendants.

The background from which the application arises involves the sale of property to the Plaintiff by the First Defendant. The Third Defendant acted as advocate for the First Defendant in the sale and as such the deposit on the purchase price was paid by the Plaintiff as purchase to the Third Defendant which held the said funds as stake holders for and on behalf of the First Defendant, as vendor in accordance with general condition number 9 of the contract of sale. As regards the Second Defendant he is a party to an assets sale agreement entered into by himself and the First Defendant on 22nd October 2014.

The evidence in support of the application is an affidavit sworn by one Andrew Guy Howard a Partner in the Third Defendant firm. The gist of his evidence as it relates to the Second Defendant is that the Second

Defendant is not a party to the contract of sale which is the subject matter of this dispute. As such the Plaintiff's claim against the Second Defendant does not disclose a cause of action.

As regards the Third Defendant the deponent stated that as advocate for the First and Second Defendant, the Third Defendant does not owe a duty to the Plaintiff. Its obligation is only to its clients whose interest it was and remains its duty to safe guard and protect. He stated further that contrary to the assertions made by the Plaintiff, all the moneys paid by the Plaintiff and its agents in pursuance of the sale are still in the Third Defendant's client's account. These moneys amount to USD513,733.74.

The deponent concluded that the issues to be determined in the suit do not relate to nor affect the Second and or Third Defendants and therefore it would be unfair to determine the same as between the Plaintiff and the Second and or Third Defendant.

The evidence in the affidavit opposition is by one Kevin Anthony Bonel. He deposed that the Plaintiff does have a cause of action against the Second Defendant because the sale of assets agreement to which he is a party was made subject to the contract of sale. Further that the latter agreement was also made subject to the sale of asset, agreement. This fact he stated is confirmed by the First Defendant in paragraph 6 of its defence.

As regards the Third Defendant the gist of the deponent's evidence supporting its objection to striking off of the Third Defendant lay in the fact that the funds paid towards the purchase price are in the Third Defendant's custody.

The matter came up for hearing on 20th May 2015. Counsel for the parties submitted written argument and made verbal arguments. For the Second and Third Defendants Ms T. Marietta argued that the application was anchored on Order 14 rule 5(2) of the **High Court Act** and Order 15 rule 6 (2) (a) of the **Supreme Court Practice**.

The gist of her arguments was that the Plaintiff's claim arises from a contract of sale of properties and assets entered into between the Plaintiff and First Defendant 22nd October 2014. As a consequence of this the Plaintiff contends that it has been unfairly deprived of monies it paid to the First Defendant.

It was argued that in relation to the Second Defendant, the Plaintiff has failed to demonstrate that it had any relationship with the Second Defendant apart from stating that it entered into an assets sale agreement on 22nd October 2014 for the sale of certain boats and related equipment which were owned by the Second Defendant. The said agreement, counsel argued, was never concluded because the Plaintiff defaulted on payment. It was argued that the condition precedent to the conclusion of the assets sale agreement was completion of the transaction envisaged by the contract of sale. The agreement was therefore not operative as per ***Chipango vs. The Attorney General (1)***. This being the case, counsel argued that there is no right of relief against the Second Defendant.

As regards the Third Defendant counsel argued that it was engaged as a firm of advocates to represent the First Defendant in the conveyance based on the contract of sale dated 22nd October 2014. It was in this capacity counsel argued, that in accordance with the contract of sale and Law Association of Zambia General Conditions of sale, that it held and continues to hold moneys paid to the First Defendant by the Plaintiff as stakeholder for and on behalf of the vendor (First Defendant herein). Counsel argued that the Third Defendant's duty as advocate is limited only to the First and Second Defendants as its clients on whose behalf the Third Defendant held and continues to hold funds. The Third Defendant's duty does not in any way extend to the Plaintiff. Counsel relied on ***Halsbury's Laws of England***, 4th edition Volume 44. She also referred me to ***Clark and Lindsell on Torts***, 20th edition that when a solicitor is engaged for reward, there is no doubt as to the existence of a contractual duty to exercise care and skill on behalf of his client.

In conclusion, counsel argued that it is possible to pass an effective decree in the absence of the Second and Third Defendants because the claims as endorsed in the pleadings have no bearing on the two. She prayed that the application should be granted and the Second and Third Defendant struck off from the action.

The gist of the arguments by counsel for the Plaintiff in relation to the Second Defendant were that he is a party to the contract of sale by virtue of the recitals in the assets sale agreement between him and the Plaintiff. It was argued that the assets sale agreement having been made subject to the contract of sale, is enforceable with the contract of sale as long as the latter subsists. Further that, the contract of sale between the First Defendant and the Plaintiff was made inseparable from the agreement for the sale of assets, and it was made subject to the contract. This he argued was a representation made by the Second Defendant to the Plaintiff through its advocates, the Third Defendant who prepared the agreement. They cannot now be seen to abrogate the representation as they are estopped. Counsel relied on **Halsbury's Laws of England** Volume 16(2), 4th edition. Counsel also referred to the case of **Galaunia Farms Ltd vs. National Milling Company Limited** in re-in forcing his argument on estoppel.

As regards the Third Defendant counsel's arguments were that the deposit on the purchase price paid to the Third Defendant is held by it as stakeholder for the parties and not the vendor (First Defendant). Counsel argued that this is what is provided for in the Law Association of Zambia General Conditions of sale 1997 pursuant to which the sale was made. Further that, by definition a stakeholder holds funds on behalf of both parties and not one of the parties. He made reference to the text **Irish Conveyancing Law** by J.C. Wylie, the article **Beachcroft Law Review**, by David Arnold Cooper LLP and Conveyancing volumes 1 and 2 by Gabriel Brennan and Nuala Casey. Counsel also referred me to the text **Professional Liability and Property Transactions** by W.D. Duncan

and the case of **Christopher Alister Guibbon vs. Antony Luton, Luton Dunford** (A Firm) (3) on the duties of a stakeholder.

Counsel argued further that the Third Defendant's interest in the matter lies in the fact that the First Defendant has counter claimed for payment of the Third Defendant's fees. It was argued that parties who have an interest, claim or are likely to be affected by the decision in a subject matter are to be joined to the proceedings. Reference in this regard was made to the case of **Vandervel Trust White vs. Vandevell Trustees Limited and Another (4)**. In reinforcing arguments on the matter counsel also referred to the order 14 rule 3(1) of the **High Court Act** and the cases of **Eureka Construction Limited vs. Lighting Zambia Limited (proposed Intervening Party (5))** and **Abel Adan Avuta Chikumbi & Others and The Attorney General (6)**. Counsel prayed that the application be dismissed.

I have considered the affidavit evidence and the arguments by counsel. In determining this application, I will begin by determining the position as it relates to the Third Defendant.

It is not in dispute that the Third Defendant was counsel for the First Defendant vendor in relation to the contract of sale. Further that, it was in pursuance of such capacity as counsel for the vendor that part of the purchase price was paid to the Third Defendant by the Plaintiff. The payment was made in accordance with clause 9 of the special conditions of the contract of sale. The clause states as follows: *"The purchase price shall be paid by the purchaser's Advocates to the vendors Advocates as stakeholders for and on behalf of the vendor ..."* (see exhibit "KB3" to the affidavit in opposition being the contract of sale). The sale was stated to be subject to the Law Association of Zambia General Conditions of Sale 1997. This is evident from clause 1 of the contract of sale which states as follows: *"The property is sold subject to the Law Association of Zambia general Conditions of Sale 1997 so far as the same are not inconsistent with or varied by these special conditions."* (The underlining is the court's for emphasis only).

I have had sight of the Law Association of Zambia General Conditions of Sale 1997 in as far as they relate to the position of the vendor's advocate's receipt of the deposit on the purchase price. The relevant general condition 2 which states as follows:

“(a) Unless the special conditions otherwise expressly provide a deposit of ten per centum of the purchase money shall be paid on the exchange of contracts.

“(b) Such deposit it to be paid to the vendor's Advocates as stakeholder for the parties.”

(The underlining is the court's for emphasis only)

By virtue of the provisions I have quoted in the preceding paragraph it is clear that sale of real property in Zambia is to be governed by the Law Association of Zambia General Conditions of Sale 1997. This is with a rider that as long as they are not inconsistent with or varied by the special conditions incorporated into a contract by the parties. In relation to this matter, what this would mean, on its face, is that the general condition number 2 of the Law Association of Zambia General Condition of sale 1997 on deposit was varied by special condition number 9 to the extent that the Third Defendant (counsel for the vendor) holds the deposit as stakeholder for and on behalf of the vendor and not the parties. However, I am inclined to adopt a different view because, although, the parties are at liberty to vary the general conditions of sale in the special conditions, in my considered view, the said right does not extend to variation of meanings of terms and phrase used in the general conditions. The phrase “stakeholder” has a meaning that has legal implications. This is as has been demonstrated by counsel for the Plaintiff. By way of demonstration, J.C. Wylie in ***Irish Conveyancing Law***: 2nd Edition published in 1999 by Butterworths Ireland states that ***“In the context of conveyancing transactions, a stakeholder is a person whose duty is to hold monies in his hands not for one party or the other to the transaction but for both until an event occurs: upon the happening of which it becomes his duty to hand over the money***

to one or the other. That is, to the vendor if the sale goes through and to the purchaser if it does not.

It is clear from the foregoing definition that a stakeholder holds funds placed in his custody for the benefit of both the parties. Therefore the vendor's advocates as stakeholders, hold the funds for and on behalf of the parties and not just the vendor. As such, in my considered view, either party to a contract can maintain an action against the vendor's advocates.

Further, the effect of a stakeholder status cannot be varied as the parties sought to do in special condition number 9. What can only be varied is the status in which the vendor's advocates holds the deposit as I shall demonstrate in the paragraph that follows. ***Halsbury Laws of England*** 4th edn volume 42 states in this respect as follows:

"Similarly, on a sale by private contract the standard conditions provide for a deposit of 10 per cent to be paid to the vendor's solicitor as stakeholder. If the payment is not made to the solicitor as stakeholder he receives it as agent for the vendor. Thus, the payment is in effect payment to the vendor and cannot be recovered from the solicitor personally."

It is clear from the foregoing that the Third Defendant's argument that it held the deposit as stakeholders only for the vendor is misconceived. This is because the minute one introduces the phrase "stakeholder" to the contract, the interest to be secured is for both parties. Whilst if the phrase is absent, then only does the vendor's advocate hold the funds as agent for the vendor.

Further there is no suggestion in general condition number 2 that the status of stakeholder can be varied. A perusal of the general condition 2 (a) also reveals that the parties are only at liberty to vary the percentage which is payable as a deposit. This can be discerned from the opening words in the general condition which I have underlined in the earlier part of this ruling. These words are *"unless the special conditions otherwise expressly provide a deposit of ten per centum ..."*

As a consequence of the foregoing I find no merit in this application as it relates to the Third Defendant. This is my position even viewed from a purely common sense position. I say this because, it is clear from the writ of summons issued out herein that the first relief sought is that of the return of the funds paid as deposit in the sum of USD453,809.74. These funds are held by the Third Defendant and as such any order by this court directing the payment of such funds, in the event of the Plaintiff succeeding, must be directed to the person or entity holding such funds. The order for repayment of the funds cannot in my considered view, be directed at the First Defendant. For this reason I find that the Plaintiff does have sufficient cause of action to institute these proceedings against the Third Defendant.

As regards the Second Defendant, the position as counsel for the Plaintiff has argued is settled by the recital to the assets sale agreement which is exhibit "AGH1" to the affidavit in support. The recitals read as follows:

"This agreement is and shall be subject and pursuant to a contract of sale dated 22nd day of October 2014 and entered into between YEXLEY LIMITED and ANGLERS HAVEN LIMITED whereby the Purchaser agreed to purchase certain property and assets (herein after collectively referred to as the YEXLEY ASSETS) ..."

The fact that the assets sales agreement is subject and was made pursuant to the contract of sale entails that the two documents must be read together. The consequence of this is that the parties to the two agreements, when one is called into question, should all be present in the suit to ensure that all matters in contention are resolved at once. My finding that the documents are to be read together, is reinforced by the fact that there is no entire agreement clause in the contract or assets sale agreement making either exclusive unto itself. If such a clause were inserted it would have excluded reference to either agreement or indeed, any other agreement in interpreting it. This is not the case in this matter and the parties must be held to their agreement.

In view of the findings I have made in the preceding paragraphs I find that in order for there to be finality in the determination of this matter, the Second and Third Defendants who have a stake in this matter must remain as parties. I accordingly dismiss the application and award costs to the Plaintiff as against the First and Second Defendants. I further direct that the Second and Third Defendants should file their defences and counter-claims (if any) within fourteen days of the date hereof, following which I will give a date for the scheduling conference.

Dated at Lusaka this 11th day of June 2015

**NIGEL K. MUTUNA
HIGH COURT JUDGE**