IN THE HIGH COURT FOR ZAMBIA **2015/HP/2460**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

BEZA CONSULTING **PLAINTIFF**

VS

BARI ZAMBIA LIMITED **1ST DEFENDANT**

GIDEY GENREMARIAM EGZIABHER **2ND DEFENDANT**

BEZA CONSULTING INC (Virginia USA) **PROPOSED 1ST INTERVENEING PARTY**

BEZA CONSULTING ENGINEERS PLC (ETHIOPIA) **PROPOSED 2ND INTERVENING PARTY**

CORAM: HONORABLE JUSTICE MR. MWILA CHITABO, SC

For the Plaintiff: *Mr. M. Museba - Messrs Simeza Sangwa and Associates*

For the Defendants: *Rtd. Cap. I. M. Chooka – Messrs Lewis Nathan Advocates*

RULING

Cases Referred to:

1. *J. K. Rambai Patel v Mukesh Kumar Patel (1985) Z.R. 220*

Legislation Referred to:

1. *High Court Act Chapter 27 of the Laws of Zambia*

This was an Application for Leave to Restore an Application for Joinder by the Defendants' counsel. The learned Defence Counsel filed in an affidavit in support of the application on 19th May, 2017. The said affidavit was deposed to by Captain Ignatius Milimo Chooka, the learned Defence Counsel. He swore that matter herein came up for hearing on 8th May, 2017 whereupon the proposed intervening parties' application for joinder was struck out by this Court on grounds of non-attendance for and on behalf of the Proposed Intervening Parties.

He averred that the reason for the said non-attendance was as a result of a regrettable break-down in communication between the person charged with collecting documents from the High Court pigeon hole and himself in that after the collection of the Notice of hearing from the firm's pigeon-hole, the notice was neither availed to him nor was it placed on file nor was the relevant date communicated to him in time to enable him to diarize the hearing.

He contended that his failure to appear was by no means a result of any disrespect this court. According to him this was a proper case for this Court to restore the proposed intervening parties' application for joinder of the parties.

He stated that it was in the interest of justice for this Court to grant the proposed intervening parties' application.

In opposing this application, the learned Counsel for the Plaintiff filed in an affidavit in opposition dated 6th June, 2017. Counsel swore that the date of hearing the application for joinder by the intending parties was issued by way of summons endorsed with the said date which were served upon them by Counsel for the Defendants and not by a notice of hearing as claimed in the affidavit in support. A copy of the letter of service of the summons for the hearing of the joinder application was marked **"MBM1"**.

He averred that the reason advanced in support of the application for leave to restore the application for joinder was not true representation of the events surrounding the service of the notice of hearing by this Court.

The matter was heard on 6th June, 2017 and both Counsel made oral submissions. Counsel for the Defendants argued that this application was buttressed on the provisions of ordered XXV rule 6 of the High Court rules which provides that any civil cause stuck out may, by leave of the Court, be replaced on the cause list on such terms as the Court may seem fit. It was submitted that it was to the indication of the discretion vested in the Court that the applicant now makes this application. This was a proper case for this court to exercise its discretion in favour of the applicant so that the matter may be heard on merit.

The learned Counsel for the Plaintiff argued that crux of their opposition was that the affidavit in support set out the reason for non-attendance as being due to a break-down in communication relating to a collection of a notice of hearing from the pigeon hall of the Defendants Counsel. The same affidavit also stated that the relevant date of hearing was not communicated to counsel ceased with conduct of the matter. Counsel argued that the record would show, as would exhibit marked **"MBM1"** of the affidavit in opposition, that this matter was scheduled for hearing by way of summons

endorsed with a date and which was served by the Plaintiffs. He contended that it was therefore clear that the reason advanced in the affidavit in support of the application to restore the application for joinder was not a true representation of the events surrounding the issue of the date hearing of the application for joinder.

He further argued that the Court had been referred to Order XXXV rule 6 of the High Court Rules which clothes this Court with the discretion to grant leave to restore matters previously struck out. It was his argument that in view of the reasons put forward as the basis for having missed the scheduled date for the joinder application, this Court would not properly exercising its discretion if it granted this application. According to him the reasons given by Counsel for the Defendants were clearly untrue given that the joinder application was scheduled by way of summons and not by way of notice of hearing as alleged in the affidavit in support.

He further argued that the exercise of the Court's discretion leaned towards this Court's equitable jurisdiction and this would set into consideration the maxim that *"he comes to equity must come with*

clean hands". The perceived falsity given by the Defendants tainted their prayer to this Court's discretion.

He finally argued that this was not a proper case for the exercise of this Court's discretion to restore matters pursuant to Order XXXV rule 6 of the High Court Rules.

When directed to the Court's power under Order III rule 2 Counsel submitted that in view of Ordered III rule 2, the Order clearly subjects the exercise of any discretion thereunder to be subject to any particular rules of Court. In this case there was a rule being Order XXXV rule 6 empowering the Court to make determination on application for restoration. Therefore this was not a fit and proper case for the exercise of power under Order III rule 2. He also prayed for costs.

In Reply Counsel for the Defendants submitted that according to paragraph 5 of the affidavit in support, it was deposed that there was a miscommunication between the filing clerk and himself as Counsel. As such the filing clerk did not enable Counsel to diarize the dates of the hearing for the application for joinder. In that regard it was submitted that the alleged falsity if at all there was any was, which

he submitted there was none, did not take away the inherent right of this Court to exercise its discretion in favour of the Applicant. With respect to the issue of costs, Counsel for the Defendants submitted that he appreciated the provisions of order XXXV rule 5 which states that in the event that this Court is inclined to grant the application it is at liberty to attach such terms as it sees fit. He conceded that these terms invariably included an order for costs.

I have considered the affidavits for and against this application and the arguments by both Counsel.

Order XXXV Rule 6 provides that:

> *"Any civil cause struck out may, by leave of the Court, be replaced on the cause list, on such terms as to the Court may seem fit."*

In the present case it has not been disputed that Defence Counsel did not attend the hearing for joinder that was scheduled for the 8th of May 2017. I have also noted that the summons for the joinder stated the date on which the hearing would be held. Defence Counsel however stated that he did not diarize the dates due to a

miscommunication between himself and his clerk who was to collect the hearing dates from the firm's pigeon hall.

I have considered the totality of the facts before me and I admit that Defence Counsel was at fault in not ensuring that the hearing date is diarized.

However, in the interest of justice I will exercise my discretion and grant the application to restore the matter.

With regard to costs the Supreme Court has guided the Courts on granting of costs in the case of **J. K. Rambai Patel v Mukesh Kumar Patel (1985) Z.R. 220**. They held that:

> *A successful party will not normally be deprived of his costs unless there is something in the nature of the claim or in the conduct of the party which makes it improper for him to be granted the costs.*

In the case in casu, I find that it will be in the interest of justice that the costs be granted to the Plaintiff as the default was on the part of the defendants.

Leave to appeal is granted.

Dated the 14th **day of** July **2017**

MWILA CHITABO, S.C.

JUDGE