IN THE HIGH COURT FOR ZAMBIA **2008/HP/1284**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

NSONDA EAGAN MULAISHO **1ST APPLICANT**

(Suing as Administrator of the Estate of the late Rosemary Zulu Mulaisho)

CHAKUPA MULAISHO **2ND APPLICANT**

AND

DAVID ZULU **RESPONDENT**

(Sued as Administrator of Oswell Zulu)

BEFORE HONORABLE MR JUSTICE MR. MWILA CHITABO, SC

For the Applicants:	*Mr. Peter Matimba of Messrs Lusitu Chambers*
For the Respondent:	*N/A*
For the Intervenor:	*Mrs. Lillian Mushota of Messrs Mushota & Associates*

RULING

Legislation referred to:

1. *Rules of the Supreme Court of England; 1999 Edition, White Book*

Cases referred

1. *Michael Chilufya Sata v. Chanda Chimba III and 3 others (2011) 2 ZR444*
2. *Premish Bhai Megan Patel v. Rephidim Institute Limited*

This is an application by the Intervenor for making a charging order nisi granted on 21st October, 2016, made absolute over property namely subdivision K of Farm 380a, Annisdale Lusaka to secure sums of K490, 000 and K20, 000.00 pursuant to a Judgment of the Court made on 18th July, 2017.

The application is anchored under *Order 50 Rule 1 of the Rules of the Supreme Court of England*[1].

The application was supported by an affidavit deposed to by one **Stewart Martin Simpson**, the Chief Executive Officer of the Intervenor. The essence of which is that the Judgment debtor pursuant to a consent order dated 23rd June, 2013 are truly and justly indebted to the intervenor in the sum of K510, 000.00 out of which a part payment of K390, 000 leaving a balance of K120, 000.00 to which interest of K51, 576.00 ought to be added leaving a net debt balance of K171, 576.00.

It was deposed that 3 years has since elapsed following the alluded to consent order and the indebtedness has not been extinguished to date.

It was further deposed that the applicants and the respondents jointly inherited the property from one **Rosemary Zulu Mulaisho**

and the intervenor knows of no other property they own and consequently the intervenor now prays for the charging order nisi granted on 21st October, 2016 made absolute.

The application was opposed by the applicants who filed in an affidavit in opposition. The gravamen of which is that the intervenor is not infact a Judgment creditor. That the consent Judgment provides for the sum of K490, 000 and K20, 000 to be refunded to the intervenor and one LUFUMA from the proceeds of the sale of 15 hectares of subdivision K of Farm No. 380a Annisdale Lusaka due to the respondent herein Mr. David Zulu.

It was deposed that the intervenor has since placed a caveat on the entire subdivision K of Farm No. 380a Annisdale, Lusaka thereby frustrating the applicants efforts to sell or subdivide their 15 acres as required and authorised by the Court.

It was finally deposed that if a charging order nisi was made absolute, the applicants would suffer much severe prejudice compared to the prejudice and hardship that the intervenor would suffer.

At the hearing the Learned Senior Counsel Mrs. Mushota made brief submissions. She relied on the intervenors affidavit and highlighted the fact that the matter has taken too long for the applicants and respondents to discharge the sums due to the intervenor and it was the intervenors desire to bring this matter to a close.

She pointed out that whilst the consent order of 23rd June, 2013 provided for each party to bear its own costs, the case having taken too long to resolve, the intervenor is entitled to costs incurred after the said consent order.

Learned Counsel Mr. Matimba countered the application and the submissions. He placed reliance on the Applicants' affidavit in opposition and made brief oral submissions the essence of which were that the Judgment Debtor is identified and not the intervenor.

He revealed that efforts have been made to resolve payment of remaining amounts due to the intervenor with the Judgment Debtor and their Advocate, Counsel Mutofwe.

It was his submission that making the charging absolute will prejudice the Applicants' interests.

In respect of costs, it was Counsel's submission that the consent settlement order herein clearly directed that each party was to bear its own costs.

I have considered the affidavit evidence placed on the file and the submissions of the Learned Counsel for the parties which have been helpful.

I will now deal with the issues as raised by the parties.

(1) **Whether the Intervenor is a Judgment Debtor**

To resolve this matter, one has to look at the consent settlement order of 18th July, 2013 filed by the parties. Paragraph 5 clearly

recognises the special monetary interest of the Intervenor and even directs how its dues would be paid.

I have therefore no difficulty in holding that the Intervenor are beneficiaries of the said Consent Settlement Order and as such they have a legal interest to enforce the consent settlement order.

I therefore do not accept the submission that the mere fact that the Applicants have not been styled as "debtor" in the said settlement order does not extinguish their locus standi and declared entitlement under the said Order.

(2) **Placement of caveat on subdivision K of Farm No. 380 a (Annisdale) Lusaka by Applicant**

It is common cause between the parties that the Applicants do not dispute being indebted to the intervenor in the sum of K171, 561 inclusive of interest after paying the bulk of the amount due to the intervenor.

It is also common cause and it is not disputed by the Applicants that a period of 3 years has elapsed without the Intervenor being paid what is truly and justly due to it. In my view, the intervenor has every right to protect and secure his interests by placing a caveat on the property which forms part of the portion from which they are expected to be paid after its disposal.

There is no evidence that the main property has been subdivided and separate title deeds issued so as to enable the intervenor to lodge its interest only to the piece of lands mentioned in the consent

settlement order. How else would the intervenor protect its interests? This is factoring in the situation that a period of 3 years has elapsed without resolving the matter.

In any event, the issue of a caveat is completely separate and distinct issue. The Applicants have the legal recourse to apply for the removal of the caveat on such grounds as they may deem fit.

There is no such application before me. The issue and complaint over the caveat in my view is a moot and redundant issue and destitute of any merit. It is irrelevant to the application in casu.

(3) **Manouvres to resolve matter through meetings**

With respect how the parties go about perfecting the consent Judgment or consent order is the preserve of the parties. It is trite that a successful litigant should not be deprived of the fruits of its Judgment.

This legal edit was well canvassed by Mr. Matibini, SCJ (as he then was) in the case of ***Michael Chilufya Sata v. Chanda Chimba III and 3 others***[1], where his Lordship put it this way in holding No. 9:-

> *"The rationale for these stringent conditions or criteria in exercising the discretion to grant s stay is that a successful party should not be deprived immediate enjoyment of the fruits of Judgment or Ruling unless good or sufficient grounds are advanced or shown"*

I respectfully agree with His Lordships pronouncement as the correct statement of the law and I adopt the edit as my very own and I have nothing useful to add.

The Applicant as already alluded to in one of the preceding paragraphs has sufficient locus standi and is a legitimate beneficiary under the consent settlement order and is entitled to employ any means open to it to harvest the fruits of its Judgments.

In my view, meetings which do not bring resolution to the issue at hand is of little or no comfort to the Intervenor.

Costs

It was submitted by the Learned Senior Counsel Mrs. Mushota that it has taken unreasonably too long for the Applicants and Respondents to pay the balance of sums due to the intervenor. That costs have inevitably been incurred and continues to be incurred following the date of consent settlement order. She pointed out that whereas admitted the said order provided for each party to bear its own costs, the justice of the case is that the intervenor be awarded the costs incurred from the date of the consent order.

Mr. Matimba countered this submission pointing out that the consent settlement order clearly pronounces itself on the apportionment of costs. In his view there is no basis to interfere with the agreement of the parties.

There is force in this submission. Indeed it is trite law that a document is conclusive and exclusive of what it says about itself and extrinsic or parol evidence is inadmissible to tend to charge the written accord.

In support of this legal proposition, I visited the case of ***Premish Bhai Megan Patel v. Rephidim Institute Limited***[2] where her Ladyship Chibomba, J,S as she then was held in

> "*Holding no. 4* *The position of the law however is that a term will not be implied so as to contradict any express term, and that a term might not be implied unless in considering the whole matter in a reasonable manner, it is clear that the parties intend that there should be the suggested stipulation"*
>
> *Holding 4* *Extrinsic evidence can be admitted to prove any terms which were expressly or impliedly agreed by the parties, before or after the execution of the contract, where it is shown the agreement was not intended to incorporate all terms and conditions of the contract"*

These instructive and authoritative pronouncements need no further propounding. In the case in casu, it has not been demonstrated that the claim for variation of costs agreement falls within the exception identified by her Ladyship.

Upholding Senior Counsel Mushota's submissions would have the effect of varying the written accord of the parties. This submission, I therefore hold is not well anchored.

This however does not end the matte. The record reveals that because of the delay in concluding this matter, the Intervenor was obliged to launch the charging order application as a matter of necessity in line with the legal maxim, *equity assists the vigilant and not the indolent".*

In my view, the justice of the case is that the Intervenor is entitled to costs suffered and incurred in the prosecution of the charging order applications.

In conclusion, I hold that the application is meritorious. The charging order nisi granted on 21st October, 2016 is hereby **made absolute**. The costs of the application are for the intervenor which costs are to be taxed in default of agreement.

Leave to appeal to the superior Court of Appeal is granted.

Delivered under my hand seal this ..9th.....day of August, 2017

Mwila Chitabo, SC

Judge