

**IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2016/HP/1444

BETWEEN:



GORDON JAMES GRAY

1st PLAINTIFF

G & J GARDENING ENTERPRISES LIMITED
(T/A First Step Nursery School)

2nd PLAINTIFF

AND

**THE SECRETARY GENERAL OF EUREKA PARK
RESIDENTS ASSOCIATION**

1st DEFENDANT

Lt. Col MIKE REEVE -TUCKER OBE
(Sued in his capacity as Chairperson of EPRA)

2nd DEFENDANT

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 24th DAY OF
JANUARY, 2018**

For the Plaintiffs : Mumba Malila and Partners

For the Defendants : Mr C. Chonta, C. Chonta Advocates

R U L I N G

LEGISLATION REFERRED TO:

- 1. The High Court Act, Chapter 27 of the Laws of Zambia**
- 2. The Law Reform (Miscellaneous Provisions) Act, Chapter 74 of the Laws of Zambia.**

This is a ruling on an application made by Plaintiffs for an order of misjoinder of the first Plaintiff, and an order for the joinder of the

intended 1st Plaintiff, made pursuant to Order XIV Rule 5 of the High Court Rules, Chapter 27 of the Laws of Zambia.

At the hearing, Counsel for the Plaintiffs was not in attendance but Counsel for the Defendants was in attendance, and he stated that they were ready to respond to the application. It was his submission that they relied on the list of authorities filed and added that the application before the court was misconceived, as the appropriate application that should have been made was for alteration of a party, pursuant to Order XVI Rules (1) and (5) of the High Court Rules, replacing the deceased with the Administrator of the estate.

Counsel invited the Court to note that the cause of action may have abated in respect of the 1st Plaintiff upon his death, as the claims were mainly for the deceased's enjoyment of his estate as provided in Order 16 Rule (2) of the said High Court Rules. It was further submitted that the claim for peaceful enjoyment referred to the 1st Plaintiff as well as the claim for enjoyment of Mahogany Drive, while the claim for cars going to the school and the injunction related to both Plaintiffs.

That the claims pertaining to the 1st Plaintiff's enjoyment abated on his death, and therefore the application for misjoinder was misconceived. Counsel prayed that the application be dismissed with costs.

I have considered the application. Order XIV Rule (5) of the High Court Rules, pursuant to which the application was made provides that;

“(2) The Court or a Judge may, at any stage of the proceedings, and on such terms as appear to the Court or a Judge to be just, order that the name or names of any party or parties, whether as plaintiffs or as defendants, improperly joined, be struck out.”

In this case the 1st Plaintiff died hence the application for misjoinder. Counsel for the Defendant submitted that the application for misjoinder was misconceived as the correct application that should have been made was to alter a party pursuant to Order XVI Rules (1) and (5) of the High Court Rules. The said provisions state as follows;

“1. Where, after the institution of a suit, any change or transmission of interest or liability occurs in relation to any party to the suit, or any party to the suit dies or becomes incapable of carrying on the suit, or the suit in any other way becomes defective or incapable of being carried on, any person interested may obtain from the Court or a Judge any order requisite for curing the defect, or enabling or compelling proper parties to carry on the proceedings:

Provided that any person served with such an order may within such time as the Court or a Judge in the order directs apply to the Court or a Judge to discharge or vary the order.

5. In case of the death of a sole plaintiff, or sole surviving plaintiff, the Court or a Judge may, on the application of the legal representative of such plaintiff, enter the name of such representative in the place of such plaintiff in the suit, and the suit shall thereupon proceed; if no such application shall be made to the Court or a Judge within what it or he may consider a reasonable time by any person claiming to be the legal representative of the deceased sole plaintiff or sole surviving plaintiff, it shall be competent to the Court or a Judge to make an order that the suit shall abate, and to award to the defendant the reasonable costs which he may

have incurred in defending the suit, to be recovered from the estate of the deceased sole plaintiff or surviving plaintiff; or the Court or a Judge may, if it or he thinks proper, on the application of the defendant, and upon such terms as to costs as may seem fit, make such order for bringing in the legal representative of the deceased sole plaintiff or surviving plaintiff, and for proceeding with the suit in order to reach a final determination of the matters in dispute, as may appear just and proper in the circumstances of the case.”

Therefore the 1st Plaintiff having died, the appropriate application that should have been made was for alteration of a party pursuant to the above provisions, so that his personal representative could have been joined to the proceedings. On that premise, the application for misjoinder was misconceived. Counsel for the Defendants noted that the causes of action in respect of the 1st Plaintiff may have abated on his death, as they related mainly to his personal enjoyment. Order XVI Rule 2 of the High Court Rules provides that;

“The death of a plaintiff or defendant shall not cause the suit to abate, if the cause of action survive”

Thus the question in this matter is whether the causes of action in respect of the 1st Plaintiff survived on his death?

Section 2 of the Law Reform (Miscellaneous Provisions) Act, Chapter 74 of the Laws of Zambia provides that;

“2. (1) Subject to the provisions of this section, on the death of any person after the commencement of this Act, all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate:

Provided that this subsection shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to claims for damages on the ground of adultery. (2) Where a cause of action survives as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person-

(a) shall not include any exemplary damages;

(b) in the case of a breach of promise to marry, shall be limited to such damage, if any, to the estate of that person as flows from the breach of promise to marry;

(c) where the death of that person has been caused by the act or omission which gave rise to the cause of action, shall be calculated without reference to any loss or gain to his estate consequent on his death, except that a sum in respect of funeral expenses may be included. (3) No

proceedings shall be maintainable in respect of a cause of action in tort which by virtue of this section has survived against the estate of a deceased person, unless either-

(a) proceedings against him in respect of that cause of action were pending at the date of his death; or

(b) proceedings are taken in respect thereof not later than six months after his personal representative took out representation.

(4) Where damage has been suffered by reason of any act or omission in respect of which a cause of action would have subsisted against any person if that person had not died

before or at the same time as the damage was suffered, there shall be deemed, for the purposes of this Act, to have been subsisting against him before his death such cause of action in respect of that act or omission as would have subsisted if he had died after the damage was suffered.

(5) The rights conferred by this Act for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by the Fatal Accidents Acts, 1846 to 1908, of the United Kingdom, or any law for the time being in force relating to carriage by air, and so much of this Act as relates to causes of action against the estates of deceased persons shall apply in relation to causes of action under the said Acts as it applies in relation to other causes of action not expressly excepted from the operation of subsection (1)."

The first claim is for a declaration that the Plaintiffs are not members of the Eureka Residents Association, and are therefore not bound by the resolutions of the said Committee, and are not bound to pay subscriptions or anything to the said Association. The second claim is for a declaration that cars that go the Plaintiff's school are not responsible for the accelerated wear and tear to Mahogany Drive and therefore the demand for the payment of K6, 000.00 is unlawful and disturbing to the Plaintiffs.

The third claim is for a declaration that the Plaintiffs are not responsible for the routine maintenance of roads in Lusaka including Mahogany Drive, and they therefore cannot be forced to make any contributions towards the maintenance of Mahogany Drive. The fourth claim is for an order of injunction restraining the 1st and 2nd Defendant's by themselves,

their agents or servants or otherwise from preventing cars from using Mahogany Drive when going to First Steps Nursery and Primary School and from forcing pupils to walk to the school, and from threatening and disturbing the Plaintiffs or doing anything that has an effect of threatening the Plaintiffs or disturbing the Plaintiff's quiet enjoyment of their premises and running of the school.

The Plaintiffs also claim damages for inconvenience, harassment and loss, as well as costs.

Going by the provisions of Section 2 of the Law Reform (Miscellaneous Provisions) Act, Chapter 74 of the Laws of Zambia cited above, only actions based on defamation or seduction or for inducing one spouse to leave or remain apart from the other or claims for damages on the ground of adultery do not survive against or for the benefit of a person who dies. However looking at the claims outlined above in this matter, membership of the deceased 1st Plaintiff to the Eureka Residents Association was personal and cannot pass on to his personal representative, unless the personal representative opted to join the same.

In relation to the second claim involving the Plaintiffs school, I note that the 2nd Plaintiff is a corporate entity with separate legal personality at law, and can therefore sue and be sued in its own name, so that claim cannot stand in respect of the 1st Plaintiff, by virtue of him having been a director in the 2nd Plaintiff. The third claim relates to the payment of monies to maintain Mahogany Drive and related to the 1st Plaintiff in his individual capacity and is related to the first claim, which I have said cannot pass to the personal representative. The fourth claim is an injunction relating to the 1st Plaintiff's quiet possession and enjoyment of the premises, which cannot in my view be passed on to his personal representative.

In nutshell the claims relating to the 1st Plaintiff are claims that cannot survive his death as they related to his personal rights and enjoyment, and they accordingly fall away. The action stands in respect of the 2nd Plaintiff who becomes the sole Plaintiff in this matter. I have perused the nature of the claims, and I find that this is a matter that can be resolved by way of mediation, and I accordingly direct that the parties proceed to mediation. In the event that mediation fails, and the Defendant having filed its defence, the following shall be the orders for directions;

1. That the Plaintiff shall file a reply to the defence within two weeks after the expiry of forty five days from today, being the period allowed for the mediation process.
2. That there shall be discovery by list within fourteen days of the reply.
3. That there shall be inspection of documents within fourteen days of the discovery.
4. That the parties shall file their respective bundle of documents and bundle of pleadings within fourteen days of the inspection.
5. That there shall be liberty to apply by either party.
6. That the matter shall come up for status conference on 31st May, 2018 at 08:30 hours.

Costs shall be in the cause, and leave to appeal is granted.

DATED THE 24th DAY OF JANUARY, 2018



S. KAUNDA NEWA
HIGH COURT JUDGE