

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

2016/HPC/0200



BETWEEN:

SWIFT CARGO SERVICES LIMITED

PLAINTIFF

AND

AFRICAN BANKING CORPORATION ZAMBIA

LIMITED (T/A BancABC)

DEFENDANT

Before the Hon Madam Justice Mrs. Irene Zeko Mbewe in Chambers

Appearances

For the Plaintiff: Mr. M Haimbe of Messrs Sinkamba and Company

For the Defendant: Mr. Mwala of Messrs AMW and Company

RULING

Cases referred to:

1. *Mike Hamusonde Mweemba v Kamfwa Obote Kasongo Zambia State Insurance Corporation Limited (Intended Joinder)* (2006) Z.R. 101
2. *Abel Mulenga and Others v Chikumbi and Others* (2006) ZR 33
3. *Sachar Narendra Kumar v Joseph Brown Mutale* [2013] Volume 1 ZR 399

Legislation cited:

High Court Rules, Chapter 27 of the laws of Zambia

This is the Defendant's application for joinder pursuant to *Order 14 Rule 5 of the High Court Rules, Chapter 27 of the laws of Zambia* and provides as follows:

“If it shall appear to the Court or a Judge, at or before the hearing of a suit, that all the persons who may be entitled to, or claim some share or interest in, the subject-matter of the suit, or who may be likely to be affected by the result, have not been made parties, the Court or a Judge may adjourn the hearing of the suit to a future day, to be fixed by the Court or a Judge, and direct that such persons shall be made either Plaintiffs or Defendants in the suit, as the case may be. In such case, the Court shall issue a notice to such persons, which shall be served in the manner provided by the rules for the service of a writ of summons, or in such other manner as the Court or a Judge thinks fit to direct; and, on proof of the due service of such notice, the person so served, whether he shall have appeared or not, shall be bound by all proceedings in the cause:”

The application is supported by an affidavit filed on 20th May 2016 and deposed to by Patricia Kalaba the Credit Administration Manager in the employ of the Defendant. According to the deponent, the Defendant has a claim against Mr. Mark Haimbe for damages for breach of statutory duty and acting without instructions which claims arise from this action. It is contended that Mr. Mark Haimbe ought to be joined to these proceedings to avoid multiplicity of actions as he is a crucial witness.

In opposing the application, Counsel for the Plaintiff Mr. Mark Haimbe filed an affidavit on 8th June 2016 in which he deposes that the Defendant has not provided facts to substantiate why he should be joined to the proceedings neither has the affidavit in support disclose the alleged breach of statutory duty.

The deponent avers he issued the notice of claim on the instruction of his client who was the Defendant under cause number 2014/HPC/0365 in respect of an interest

which was created in favour of the Defendant pursuant to a debenture dated 28th September 2012.

He further contends that by issuing the said notice of claim, the deponent did not join the Defendant herein to the said matter but merely gave notice to the Sheriff who was to verify the claim of ownership of the seized goods.

The deponent avers that by letter dated 11th December 2015, the Defendant herein was informed of the circumstances under which the notice of claim was issued and took no issue over the same. He denies liability attributed to him by the Defendant as a result of the notice of claim and avers that the procedure required the Defendant to confirm to the Sheriff whether or not it had interest in the goods liable to execution. Further, that as Counsel he cannot be compelled to be a witness by reason of him having acted for the Plaintiff herein.

In conclusion, it is deposed that the Defendant has not shown how Mr. Mark Haimbe has an interest in the dispute or how he shall be affected by the outcome of these proceedings.

I have considered the affidavit evidence and the skeleton arguments advanced by the respective parties in support and in rebuttal.

It is an established principle that if a party is likely to be affected by the outcome of a Judgment or has an interest in a matter, that party ought to be joined to the proceedings. In the case of *Mike Hamusonde Mweemba v Kamfwa Obote Kasongo Zambia State Insurance Corporation Limited (Intended Joinder)* (2006) Z.R. 101⁽¹⁾, the Supreme Court held that:

“A court can order a joinder if it appears to the Court or judge that all person who may be entitled to or claim some share or interest in the subject matter of suit or who may be likely to be affected by the result require to be joined.”

Further, in the case of *Abel Mulenga and Others v Chikumbi and Others (2006) ZR 33⁽²⁾*, the Supreme Court held that:

“In order for a party to be joined to an action, the party ought to show that they have an interest in the subject matter of the action.”

The rationale for a joinder as stated by the Supreme Court in the case of *Sachar Narendra Kumar v Joseph Brown Mutale [2013] Volume 1 ZR 399⁽³⁾* is to allow the Court to determine all matters in dispute in one cause, and thus prevent a multiplicity of actions.

The brief background to this application is that in 2014 an action was commenced by Lake Petroleum Limited against Swift Cargo Services Limited the Plaintiff herein under cause number 2014/HPC/0365 in which Judgment was entered on 6th November 2015 against the Plaintiff herein.

On 3rd December 2015 a notice of claim was issued purportedly on behalf of African Banking Corporation (Z) Limited the Claimant (the Defendant herein) by Mr. Mark Haimbe and subsequently the notice of claim was expunged from the record by Order of the Court dated 23rd December 2015 under which the Defendant (Plaintiff herein) was condemned to costs.

It is against this background that the Defendant herein who was the Claimant under cause 2014/HPC/0365 now seeks to join Mr. Haimbe to these proceedings on account that his act of issuing the notice of claim was illegal as it was done without instructions and that the Defendant suffered loss and damage as a result of such act.

In applying the law to the facts and in determining whether Mr. Haimbe should be joined as a party to these proceedings, it has to be shown to the Court that he has sufficient interest in the subject matter of the suit or is likely to be affected by the outcome of a Judgment.

According to the Defendant's supporting affidavit, Mr. Haimbe caused the Defendant to suffer loss and damage arising from the issuance of a notice of claim. Conversely, Mr. Haimbe contends that he only issued the notice of claim in his capacity as Counsel for the Plaintiff (then Defendant) and does not have any interest in the matter.

A perusal of the record reveals that vide a letter dated 11th December 2015, Mr. Haimbe was informing the Claimant (Defendant herein) that a notice of claim was issued on 3rd December 2015 by the Plaintiff herein citing the Defendant herein as Claimant (Exhibit "MMH3"). It is my considered view that Mr. Haimbe as Counsel for the Plaintiff herein was acting on his client's instructions and not on his own accord.

I am of the settled mind that the Defendant has not disclosed Mr. Haimbe's interest in the subject matter neither has it been demonstrated how he is likely to be affected by the outcome of this case.

For the foregoing reasons, I find there is no merit in the Defendant's application and I dismiss it accordingly.

Costs follow the event.

Leave to appeal is granted.

Delivered at Lusaka this 26th day of August 2020.



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Irene Zeko Mbewe
HIGH COURT JUDGE