

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

2020/HP/0164



BETWEEN:

EVANESS KATONGO

(Suing as Administratrix of the estate of the late Alfred Katongo)

PLAINTIFF

AND

STEPEHEN MUKUKA

MOUNT MERU PETROLEUM ZAMBIA LIMITED

KASAMA MUNICIPAL COUNCIL

THE COMMISSIONER OF LANDS

THE ATTORNEY GENERAL

1st DEFENDANT

2nd DEFENDANT

3rd DEFENDANT

4th DEFENDANT

5th DEFENDANT

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA IN CHAMBERS THIS
27th DAY OF AUGUST, 2020**

For the Plaintiff : *Mr J. Zulu, Japhet Zulu Advocates*

For the 1st Defendant : *No appearance*

For the 2nd Defendant : *Mr W. Simutenda, TMB Advocates*

For the 3rd Defendant : *In house Counsel*

For the 4th and 5th Defendants : *Mr P. Kachimba, Senior State Advocate*

R U L I N G

CASES REFERRED TO:

- 1. Corburn v Colledge 1897 1 QB 702**
- 2. Letang v Cooper 1965 1QB 232**
- 3. William David Carlisle Wise v EF Hervey Limited 1985 ZR 179**

4. *Chrispin Lwali, Saviour Chishimba v Michael Chilufya Sata and Others Supreme Court Judgment No. 7 of 2009*

LEGISLATION REFERRED TO:

- 1. *The High Court Rules, Chapter 27 of the Laws of Zambia***
- 2. *The Rules of the Supreme Court of England, 1999 edition***
- 3. *Urban and Regional Planning Act No. 3 of 2015***

This is a ruling on an application filed by the 3rd defendant on 19th March, 2020, for an order for misjoinder from the proceedings, which was made pursuant to Order XIV Rule 5(2) of the High Court Rules, Chapter 27 of the Laws of Zambia.

The application is supported by an affidavit, which is deposed to by Counsel for the 3rd defendant. The background leading to the application is that the plaintiff suing by way of writ and summons and statement of claim, on 28th January, 2020, commenced these proceedings seeking;

- i. A declaration that Property Number KAS/2923 situate in Kasama belongs to the plaintiff.*
- ii. A declaration that the extent of Property Number KAS/2923 situate in Kasama is 3796 square metres and its boundaries are as indicated on the Survey Diagram Number 6026/2013.*
- iii. An order of possession in favour of the plaintiff and against the defendants of all that piece of land that falls within the boundaries of Property Number KAS/2923 situate in Kasama.*
- iv. An order for the cancellation of any purported grant of title to land to the 1st and 2nd defendants in so far as the same amounts to an*

encroachment on the plaintiff's land, for having been illegally or erroneously obtained.

- v. An order for compensation of the shopping mall, two caretaker's houses and a wall fence that were demolished by the 2nd defendant or its servants or agents.*
- vi. Damages for trespass.*
- vii. Damages for stress and mental anguish.*
- viii. An order of injunction restraining the 1st and 2nd defendants, whether by themselves, their servants, agents or otherwise whomsoever from entering on, demolishing any structures on or carrying out any works on any portion of the land falling within the boundaries of Property Number 2923 as indicated on Survey Diagram Number 60226/2013 until final determination of the matter.*
- ix. Costs of and incidental to this action.*
- x. Any further or other relief that the court may deem appropriate.*

On 3rd February, 2020, the 3rd defendant entered conditional appearance and filed summons for misjoinder, endorsed for the Deputy Registrar to hear and determine. The summons was refiled on 19th March, 2020 to be heard by me. The affidavit in support of the application which is deposed to by Chikonjiwe Daka, Counsel for the 3rd defendant states that upon perusal of the statement of claim, it has been found that the facts alleged therein do not disclose any cause of action against the 3rd defendant.

Further, no relief has been specified as being claimed against the 3rd defendant. Therefore, the 3rd defendant has been unnecessarily made

a party to the proceedings, and this will be prejudicial to its interests, as it shall suffer great expenses in defending the action. Counsel deposes that the 3rd defendant will be available to appear as a witness when or if requested to do so by the Court.

In the skeleton arguments, Counsel reiterates that a thorough perusal of the plaintiff's statement of claim reveals no cause of action against the 3rd defendant. On what constitutes a cause of action, **Order 18 Rule 19 sub rule 10 of the Rules of the Supreme Court of England 1965, 1999, Edition** is relied on. The Order provides as follows:

“A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleading are considered”.

Reliance is further placed on the case of ***Letang v Cooper*** ⁽²⁾, where the Court held that a cause of action is;

“A factual situation, the existence of which entitles one person to obtain from the Court a remedy against another person”.

Also relied on in this regard, is the case of ***William David Carlisle Wise v EF Hervey Limited*** ⁽³⁾ where it was held that;

“A cause of action is disclosed only when a factual situation is alleged which contains facts upon which a party can attach liability to the other or upon which a party can attach liability to the other or upon which he can

establish a right or entitlement to a judgment in his favour against the other.”

The case of ***Chrispin Lwali, Saviour Chishimba v Michael Chilufya Sata and Others*** ⁽⁴⁾ is also relied on as authority. The argument is that the plaintiff has not established any cause of action against the 3rd defendant, and it will be very prejudicial to its interests, as it shall suffer great financial expenses in defending the action. Further, that if allowed to remain as a party to the proceedings, the 3rd defendant will not know what allegations it will be answering to.

It is also the 3rd defendant's argument that if it is not struck off from the proceedings, it may be held liable jointly with the other defendants. In substantiating that argument, reliance is placed on ***Order 15 rule 6 sub rule 15 of the Rules of the Supreme Court of England, 1999 edition***, which provides that;

“If defendants improperly joined do not move without delay to be struck out, and take part in the defence, they may be held liable jointly with the other defendants for the costs of the action or be deprived of costs if they have taken an active part in the litigation...The order giving leave to strike out a defendant should provide for his costs”.

It is thus argued that the 3rd defendant has made the application to be struck out timely, before the proceedings advance any further. The 3rd defendant prays that it be awarded costs for being improperly and without cause added to the proceedings. It is also argued that the plaintiff's statement of claim has not claimed any remedies or reliefs

against the 3rd defendant. Further, that **Order 18 rule 15 sub rule 1 of the Rules of the Supreme Court of England** provides that;

“A statement of claim must state specifically the relief or remedy which the plaintiff claims; but costs need not be specifically claimed.”

Therefore, as no cause of action, relief or remedy has been established against the 3rd defendant, the plaintiff will not suffer any prejudice if the court grants the application.

In response, an affidavit in opposition was filed by the plaintiff on 25th March, 2020. The said affidavit which is sworn by Counsel for the plaintiff states that the averment that the statement of claim does not disclose a cause of action against the 3rd defendant is incorrect. In this regard, Counsel deposes that paragraph 4 of the statement of claim states that the 3rd defendant is the Local Authority for the Kasama district.

Further, paragraph 8 of the statement of claim clearly indicates that the 3rd defendant was aware of the land dispute in question as per search on 29th June, 2009. It is also Counsel's averment that paragraph 15 of the statement of claim shows that the 2nd defendant started construction on the plaintiff's piece of land, and the plaintiff in paragraph 17 of the said statement of claim avers that the 3rd defendant as a planning authority had no right to grant building permission to the 2nd defendant to start construction on the plaintiff's land.

It is also deponed that the statement of claim clearly establishes a cause of action against the 3rd defendant, as a Local Authority, as it had no right to grant building permission to the 2nd defendant to demolish structures, and to build on the plaintiff's land. The contention is further that paragraphs (i) to (v), (vii), (ix) and (x) of the plaintiff's claims, cover all the defendants in this matter, and particularly paragraph (iii) is couched in plural term. Finally, Counsel prays that this honourable court is beseeched to deny the 3rd defendant's application for misjoinder as the 3rd defendant, as a planning authority, granted building permission to the 2nd defendant, which is part of the claims in dispute in this matter.

No affidavit in reply was filed.

I have considered the application. It was brought pursuant to **Order XIV Rule 5(2) of the High Court Rules**, which provides as follows;

“(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.”

This order grants authority to the Court to strike out a party that has been improperly joined from the proceedings. The claim by the 3rd defendant herein is that it has been improperly joined to these proceedings. This is on the basis that no cause of action has been revealed against it, and further that no relief is being claimed against it. A number of authorities that speak to what amounts to a cause of

action, have been relied on, the case of **William David Carlisle Wise v EF Hervey Limited** ⁽³⁾ being one such authority.

In that matter, the court held that a cause of action exists, where there is a factual situation that has been alleged, to which a party can attach liability. Indeed, this is the law. The 3rd defendant in arguing that no cause of action has been revealed against it, had placed reliance on **Order 18 rule 15 sub rule 1 of the Rules of the Supreme Court of England** which requires that a statement of claim must specifically state the relief or remedy that the plaintiff claims.

In response, the plaintiff has argued that there is a cause of action and that reliefs have been claimed against the 3rd defendant. This is on the basis that in the statement of claim it has been shown that the 3rd defendant is the Local Authority, and that it was aware of the land dispute between the plaintiff and the 2nd defendant. Therefore, it had no authority to grant building permission on the plaintiff's land to the 2nd defendant.

A perusal of the statement of claim particularly paragraph 17 refers to the 3rd defendant. It states that;

“The 3rd Defendant had no right to grant building permission to the 2nd Defendant to start constructing on the plaintiffs land.”

Paragraph 17 partly quoted above refers to the 3rd defendant in a material particular, being the body responsible for the granting of building permission. However, it is trite the Urban and Regional Planning Act No 3 of 2015 in Section 13 establishes the local

authorities as being responsible for the granting of building permission. The said Section provides as follows;

“13. (1) A local authority shall, for the purposes of this Act, be designated as a planning authority for its area by the Minister, by statutory instrument.

(2) The functions of a local planning authority are to—

(a) regulate, control and plan for the development and use of land and buildings within its area;

(b) prepare and implement integrated development plans, local area plans and sectoral plans in accordance with this Act;

(c) receive and process applications for planning permission for the development of land;

(d) operate services and maintain infrastructure in its area;

(e) promote and facilitate sustainable land use in accordance with this Act and any other written law; and

(f) perform any other planning and development functions as are necessary for the implementation of this Act”.

From the statement of claim, it is clear that this matter involves a dispute over how much land the plaintiff owns in relation to the 2nd defendant, and the fact that the 2nd defendant has built on land that the plaintiff alleges that she owns. From the provisions of the law in the Urban and Regional Planning Act seen above, the 3rd defendant plays a material role, with regard to the granting of planning permission, and buildings erected in its area of jurisdiction.

Section 71 of the **Urban and Regional Planning Act No. 3 of 2015** makes it an offence to erect a building without the prior approval of a planning authority in whose jurisdiction the land is situated. This therefore suggests that the 3rd defendant's involvement is crucial in land matters in a local area. However, this on its own does not establish liability on the 3rd defendant.

The plaintiff in the affidavit in opposition alleges that it has been averred in the statement of claim that the 3rd defendant was aware of the land dispute that existed between the parties. However, a perusal of the statement of claim shows that this has not been pleaded. From the definition of what constitutes a cause of action, the facts pleaded if not traversed would entitle a plaintiff to relief.

Thus, pleading that the 3rd defendant had no authority to grant building permission to the 2nd defendant on land that belongs to the plaintiff on its own is not sufficient. The plaintiff must plead facts which would attach liability to the 3rd defendant, such as being aware of the dispute between the plaintiff and the 2nd defendant, but going ahead to grant the building permission to the 2nd defendant.

In the case of **Corburn v Colledge (1)**, Lord Esher M.R stated that;

“If the plaintiff alleges facts which if not traversed would prima facie entitle him to recover, then he makes out a cause of action.”

Therefore, looking at the absence of those pleadings indicating a cause of action against the 3rd defendant, and the relief sought against it, I direct the plaintiff to so amend the writ of summons and statement of

claim to reflect the liability that it wishes to attach to the 3rd defendant.

This shall be done within thirty (30) days from today, failure to which the writ of summons and statement of claim against the 3rd defendant shall be struck out for want of cause of action. In that regard, the 3rd defendant will be entitled to costs. If, however the amended writ of summons and statement of claim shall be filed as directed, costs shall be in the cause. Leave to appeal is granted.

DATED AT LUSAKA THIS 27th DAY OF AUGUST, 2020

S. Kaunda
S. KAUNDA NEWA
HIGH COURT JUDGE