

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)**

2017/HP/1020

BETWEEN:

SOLWEZI DAIRY FARM LIMITED

AND

**SOLWEZI DISTRICT COUNCIL
ISMAIL JASAT FAIZEL
UNKNOWN ILLEGAL OCCUPIERS
ATTORNEY GENERAL
TULAMBO KUMWENDA AND OTHERS**



PLAINTIFF

1ST DEFENDANT

2ND DEFENDANT

3RD DEFENDANT

4TH DEFENDANT

INTENDED JOINDERS

Before the Honourable Mrs. Justice R. Chibbabbuka on the 30th May, 2024

For the Plaintiff:	Mr P. Mapulanga – In house Counsel
For the 1 st Defendant:	Ms V. Mulayi, In house Counsel
For the 2 nd Defendant:	No appearance
For the 3 rd Defendant:	No appearance
For the 4 th Defendant:	No appearance
Intended Joinders:	Mr J.N. Hara, Mr M.C. Sampa & Mr M. Phiri, Messrs Bwalya Sampa Legal Practitioners

RULING

Cases referred to:

1. *Attorney General Vs Aboubacar Tall & Another* 1995/1997 ZR 54
2. *Zulu Vs Avondale Housing Project Ltd* (1982) ZR 172
3. *London Ngoma and others Vs LCM Company Limited and another* (1999) Z.R 75
4. *Enala Chirwa, Kachena Financial Limited, Annie Zulu Vs Noah Mwansa* Appeal No. 030/2012 (unreported)
5. *E D and F Man Liquid Products Ltd Vs Patel and Another* (2003) EWCA Civ 472.
6. *Zambia Seed Company Limited Vs Chartfield International (PVT) Ltd* (1999) Z.R 151.
7. *National Movement Against Corruption Vs Sofram Safaris Limited, Mbeza Safaris Limited, Swanepool and Scandrol Limited and Leopold Ridge Safaris Limited*, Appeal No. 16/2007
8. *Eureka Construction Limited Vs Attorney General, Consolidated Lighting Zambia Limited (Proposed Intervening party)* (2008) Z.R. 64 Vol. 2 (SC)
9. *Abel Mulenga and Others Vs Mabvuto Adam Avuta Chikumbi and Attorney* (2006) Z.R
10. *Sonny Mulenga and others Vs Investrust Merchant Bank Limited* (1999) Z.R 101

Legislation referred to:

The High Court Act, Chapter 27 of the Laws of Zambia

The Rules of the Supreme Court (white book) 1999 edition.

1.0 Introduction

This matter was concluded by way of consent judgment on 30th January, 2023. By this application filed on the 8th December, 2023, the applicants seek to be joined to this action, and to stay execution of the consent judgment entered herein, pending subsequent proceedings to set aside consent judgment. The application is made pursuant to *Order 14 Rule 5 (1)* and *Order 36 Rule 10* of the *High Court Rules, Chapter 27 of the Laws of Zambia*.

2.0 The Intended Joinders' Affidavit in Support

In support of their application, the intended joinders filed an affidavit on 8th December, 2023 and deposed to by Tulambo Kumwenda who avers as follows: by a consent judgment dated 30th January, 2023 executed between the plaintiff, 1st defendant, 2nd defendant and the 4th defendant, it was adjudged that the property in issue is owned by the plaintiff. It was further held that the plaintiff as owner of the land is at liberty to take possession of the property excluding the 5 hectares which was given to the 1st defendant without further recourse to the court.

The intended joinders reside on the alleged plaintiff's land and did not know of this case. The plaintiff knows very well that the intended joinders have bought and paid for different plots within the Dairy Farm area which the plaintiff wants to take possession of through this consent judgment. A number of transactions have been done by Mr Mwanza Mulonga, who is a director in the plaintiff company. Following the discovery of the consent judgment, the intended joinders tried to engage the plaintiff on a number of occasions, the latest being a demand letter written by their lawyers but they have not received any response from the plaintiff.

The portion of the land the plaintiff wants to take is the same land that the intended joinders bought from the plaintiff through its directors and agents. The plaintiff failed to disclose to the court before it entered into the consent judgment that it had previously sold some portions of land to a number of people within the Dairy Farm area. The intended joinders have an interest in this matter as they are directly affected by the consent judgment which was entered into without their knowledge. If the court does not stay the consent judgment entered on the 30th January, 2023, the intended joinders shall be evicted from the farm even though they have paid for the plots they are staying on.

2.1 The Intended Joinders' Skeleton Arguments

In their skeleton arguments, counsel referred to *Order 14 Rule 5 (1)* of the *High Court Rules, Chapter 27* of the *Laws of Zambia* for the argument that all interested parties to a suit before court should be joined so that all matters in dispute in the cause may be effectually and completely determined. To buttress this argument, reference was also made to the cases of **Attorney General Vs Aboubacar Tall & Another**¹, and **Zulu Vs Avondale Housing Project Ltd.**²

Reference was also made to the cases of **London Ngoma and others Vs LCM Company Limited and Another**³ and **Enala Chirwa, Kachena Financial Limited, Annie Zulu Vs Noah Mwansa Appeal**⁴ where the Supreme Court clarified that the High Court has inherent jurisdiction to order joinder even after judgment. Counsel argued that there were exceptional circumstances disclosed by the intended joinders as they have an interest in the land in dispute as they bought some portions of it from the plaintiff who did not disclose this to the court. That as the intended joinders have shown that they possess sufficient interest in the land, this is an appropriate case for the intended joinders to be joined to these proceedings.

In relation to the application for a stay of execution, reference was made to *Order 36 Rule 10* of the *High Court Rules* which provision empowers this court to stay the consent judgment. That what must be considered by the court in so doing is the prospect of success of the intended joinder's case. To fortify this argument, reference was made to the case of **E D and F Man Liquid Products Ltd Vs Patel and Another**.⁵

Counsel contended that the intended joinders are desirous of challenging the consent judgment which was executed to their exclusion and detriment as owners of the subject land in issue. It was counsel's further contention that it is trite law that a consent judgment can only be set aside by a fresh action. For this argument reference was made to the case of **Zambia Seed Company Limited Vs Chartfield International (PVT) Ltd**.⁶ Reference was also made to the case of **National Movement Against Corruption Vs Sofram Safaris Limited, Mbeza Safaris Limited, Swanepool and Scandrol Limited and Leopold Ridge Safaris Limited**⁷ where the Supreme Court held that a non-party can challenge a consent judgment even when they are not party to the same.

It was counsel's further argument that the intended joinders intend to challenge the consent judgment on the grounds that:

- i) The plaintiff sued other people instead of suing the intended joinders as they are the people that bought the land from the plaintiff.
- ii) The plaintiff did not inform the intended joinders that there was a matter actively in court so as to give them an opportunity to defend themselves before the consent judgment could be executed by the court.
- iii) The plaintiff willingly entered into contracts with the intended joinders and acquired money for the sale of the said portions of land.
- iv) There was a material non-disclosure by the plaintiff as they did not bring it to the attention of the court that there were

contracts entered into relating to the piece of land, they want to take over.

- v) These matters ought to be resolved through trial.

It was counsel's considered view that for the foregoing reasons, it is in the interest of justice that the consent judgment be stayed otherwise the intended joinders will likely be evicted from the portions of land they are occupying. Counsel prayed that the application for non-joinder succeeds with the intended joinders being made a party to these proceedings. Additionally, that the consent judgment be stayed.

3.0 The Plaintiff's Affidavit in Opposition

The plaintiff filed an affidavit in opposition on 16th February, 2024, sworn to by Teddy Mulonga, a Director in the plaintiff company who avers as follows:

All parties to the action herein who appeared to have an interest in the subject property were sued by the plaintiff from inception and duly served with court process. The title holder of the subject property has never sold any portion of the disputed land to any of the intended parties or any other party and this is confirmed by the fact that the affidavit in support does not contain any contract of sale between the plaintiff as the title holder and the any of the intended joinders. Persons masquerading as agents for the plaintiff are the ones that may have attempted to sell portions of the subject property to the unsuspecting members of the public, yet they have no mandate of the plaintiff to do so. These persons have since been reported to the police and the matter is currently active in the hands of the police.

The consent judgment equally extended an opportunity to all illegal developers and occupiers of various portions of the land in issue, including the intended joinders, notwithstanding their illegal stay on the property, to approach the plaintiff and legalize their stay. Only 15 of the illegal developers and occupiers have approached the plaintiff to legalize their illegal developments and occupation of the plaintiff's subject property, and that the said 15 individuals do not wish to be part of this action as there is an agreement between themselves and the plaintiff. The said transactions in

which one Mwanza Mulonga received funds on behalf of the plaintiff are transactions with those 15 individuals out of a total number of 272 persons.

The plaintiff has maintained an open-door policy to all persons that have illegally settled and developed on the plaintiff's subject property to have their developments and stay legalized by approaching the plaintiff, which regrettably the intended joinders have not done. The intended joinders have not demonstrated sufficient interest in the subject property as they are only but illegal squatters.

3.1 The Plaintiff's Skeleton Arguments

In the plaintiff's skeleton arguments, counsel gave a brief background to the proceedings as follows:

- i) The plaintiff is the title holder of the subject property. Without the authority, knowledge and consent of the said title holder, several squatters and/or trespassers, inclusive of the ones that have applied to be joined to this action, illegally settled on the said land.
- ii) The said persons alleged to have purchased the pieces of the land from the plaintiff's purported representatives when the plaintiff had not given mandate to anyone to sell portions of the subject land. In fact, the plaintiff has since reported the said persons to the police and the matter is actively being pursued by the police.
- iii) The above developments led to the plaintiff commencing this action so that the court determines the interest, if any of the said persons who illegally settled on the plaintiff's land. By way of consent judgment, the subject property was declared to be that of the plaintiff and further gave room for persons that had settled on the land to approach the plaintiff as title holder and legalise their stay of which very few have done whilst the rest ignored that completely.
- iv) The said illegal occupiers/developers of the plaintiff's land without any form of documentation giving them interest in the land wish to

set aside the consent judgment of this court hence this application for joinder.

Counsel argued that while *Order 14 Rule 5 (1)* of the *High Court Rules* gives this court jurisdiction to order the joinder of party, and while the court has power to grant an order for stay of execution, the intended joinders in this matter have not met the threshold for grant of such reliefs sought. Counsel argued that the plaintiff, who is the title holder, has never sold any portion of the disputed land to any of the intended parties or any other party as confirmed by the intended joinders' failure to exhibit any contracts of sale between the plaintiff and any of them. That if the intended joinders reside on the subject land, they do so without authority and as such are trespassers.

Counsel referred to the case of **Eureka Construction Limited Vs Attorney General, Consolidated Lighting Zambia Limited (Proposed Intervening party)**⁸ for the argument that a party who has failed to show sufficient interest or locus standi should not be joined to an action. Counsel further relied on the case of **Abel Mulenga and Others Vs Mabvuto Adam Avuta Chikumbi and Attorney**⁹ wherein the court held that in a joinder application, a party must show sufficient interest in the subject matter to which he desires to be joined to. In view of the above authorities, counsel submitted that the intended persons cannot be joined to this action as they have not demonstrated sufficient interest in the subject property as they are only but trespassers.

With regards to the application for stay, Counsel argued that the intended persons have no interest in the subject property as they have not shown proof of their interest, and hence have no basis to be granted an order for stay. Counsel relied on the case of **Sonny Mulenga and others Vs Investrust Merchant Bank Limited**¹⁰ wherein the Supreme court of Zambia held that a successful party should be denied immediate enjoyment of a judgment only on good and sufficient grounds, and that in exercising its discretion whether to grant a stay or not, the court should preview the prospects of the application. Counsel further referred to *Order 59 Rule 13/2*

of the *Rules of the Supreme Court of England, 1999 edition*, to buttress the argument. In conclusion, counsel prayed that the intended joinders' application be dismissed.

4.0 The 1st Defendant's Affidavit in Opposition

The 1st defendant filed an affidavit in opposition on 24th January, 2024, wherein Julaki Muchima deposed as follows:

The plaintiff is the title holder of farm No. 9047 Solwezi, and thus the intended joinders' admission under paragraph 6 and 7 of their affidavit in support, makes them squatters of farm No. 9047. As squatters, the intended joinders are not entitled to an order of non-joinder. This matter was active for 7 years, having commenced in 2017, and hence the intended joinders cannot allege that they were unaware of the matter until after the execution of the consent judgment. The intended joinders had an opportunity to apply for non-joinder before the execution of the consent judgment, and their allegation that they were not aware of the matter is an afterthought intended to mislead this court.

The law requires an end to litigation and so the granting of the order will fly in the face of this well settled principle of law. The grant of the orders sought will further deprive the 1st defendant from enjoying the fruits of the consent judgment and occasion it more costs of subsequent litigation. The intended joinders are not entitled to the reliefs sought.

4.1 The 1st Defendant's Supporting Arguments.

The 1st defendant filed skeleton arguments wherein counsel argued that *Order 14 Rule 5 (1)* of the *High Court Rules* pursuant to which the intended joinders have made their application is the wrong law, and hence the application is incompetently before this court. Counsel argued that *Order 14 Rule 5 (1)* of the *High Court Rules* can only be used to join a party at or before the hearing of the suit and before judgment. Counsel referred this court to the **Aboubacar Tall** case to buttress the argument that a party can only be joined to an action before judgment is passed by the court. That

while the court has discretion to join a party to a matter after judgment, the Supreme Court emphasizes in the **London Ngoma** that the joinder may be made where there is an appeal or review. That in this case, there is no appeal or review, and that in any case, there cannot be an appeal against a consent judgment. That this court is functus officio and is precluded from ordering any joinder of any person. Counsel relied on the case of **Stanbic Bank vs Micoquip Zambia Limited**¹¹ to buttress the argument.

As regards the application for stay of execution, counsel relied on the **Nyampala Safari Zambia Limited and Others vs Zambia Wildlife and Others**¹² case for the argument that a stay of execution is granted on good and convincing reasons, which according to counsel the intended joinders herein have failed to demonstrate. Counsel further relied on the **Sonny Paul Mulenga** case for the argument that the court faced with an application for stay of execution is entitled to preview the prospects of appeal. That the intended joinders have admitted in their affidavit that they are occupying portions of the plaintiff's land which was subject of the consent judgment and all they possess are contracts of sale but no title.

That the intended joinders have failed to demonstrate that the consent judgment herein has prospects of being set aside once a fresh matter is commenced. Further, that the intended joinders have not demonstrated that they are aggrieved by the terms of the consent judgment but the plaintiff's failure to recognize the contracts of sale that they executed with plaintiff's directors and agents.

The issue between the intended parties and the plaintiff does not affect the 1st defendant or other defendants for them to suffer the joinder that will occasion them costs. Counsel prayed that the intended joinders' applications be dismissed with costs.

5.0 The Intended Joinders' Affidavit in Reply

The intended joinders filed an affidavit in reply on 18th March, 2024, wherein Tulambo Kumwenda deposed as follows:

The plaintiff through its agents sold them pieces of land and that that is enough consent. They were neither sued nor served with any court documents. That had they been served with court process, the plaintiff would have produced a letter of service to that effect.

The 1st and 2nd defendants are in a similar position as the intended parties as they also got their pieces of land from agents of the plaintiff who happen to be sons, daughters and nephews of the plaintiff's shareholders, Teddy David Mulonga and Sande Langeni Kayumba. That the said children of the shareholders informed them that their fathers gave them portions of land which they decided to dispose of before changing ownership. The named persons are not masquerading as agents as purported by the affidavit in opposition. The intended jointers are not illegal developers as alleged. The intended jointers have not approached the plaintiff to re-purchase the properties they already purchased. The intended jointers have been threatened by one Mr. Teddy David Mulonga on television and radio stations.

Mwanza Mulonga is a child to one of the plaintiff's shareholders and he has been selling land on behalf of the plaintiff, in which he himself is a director. Further, exhibit marked "TK5" in the affidavit in support shows that the other children and nephews of the plaintiff's shareholders that were given land which they are now selling. That these are:

1. Mwanza Mulonga
2. Andrew Kayumba
3. Mumba Mulonga
4. Mick Lilema
5. Martin Lilema
6. Nathain Mulonga
7. Mesmond Kayumba
8. Fridah Jikita
9. John Katota

The above-named persons are willing to testify to how the property in dispute was given to them to sell in their names. This court has power to order the joinder of the intended joinders who are not trespassers but bonafide purchasers of their respective plots. Their interest has been shown by the different contracts of sale and the connection made between the plaintiff and all the sellers of different plots.

Interest in a property is not only shown by a Title but evidence of purchase and any other circumstances surrounding the acquisition of the said plots. The intended joinders have exhibited contracts of sale and proof of payments that show their interest. The lists of persons to be joined was arrived at in or about November, 2023 when the intended joinders came to know that there actually existed a matter before this court which resulted into a consent judgement. The consent judgement they wish to set aside only has signatures for the plaintiff, the 1st defendant and the 4th defendant without signatures for the 2nd and 3rd defendants.

4.0 The Hearing

At the hearing of 29th January, 2024, the parties were not ready to proceed as the applicants had just been served with the 1st defendant's affidavit in opposition. This court granted an adjournment to allow the applicants to examine the 1st defendant's affidavit and skeleton arguments. The applicants were granted leave to file documents in reply, if any, and it was directed that the decision would be made based on the filed documents.

5.0 The Decision of the Court

I am indebted to counsel for the argument, I have carefully considered the same. Before making a determination on the substantive issues, the intended joinders raised an issue that the Consent Judgment does not have the signatures of the 2nd and 3rd defendants. The 2nd defendant was by consent misjoined from the proceedings on the 9th May, 2022. The 3rd defendant's signature is missing as they never responded to this cause of action despite being served as leave to serve court process was granted on the 16th June, 2022.

As regards the substantive issue, the applicants seek to be joined to these proceedings and to stay execution of -the consent judgment entered herein. The applicant's application for non-joinder is made pursuant to *Order 14 Rule 5 (1)* of the *High Court Rules of the High Court Act Chapter 27* of the *Laws of Zambia*, which the 1st defendant argues is the wrong law to rely on for non-joinder of a party after judgment. The said provision of the law provides as follows:

"If it shall appear to the Court or a Judge, at or before the hearing of a suit, that all the person who may be entitled to, or claim some share or interest in, the subject-matter of the suit, or who may likely be affected by the net 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 person shall be made either plaintiffs or defendants in the suit, as the case may be."

It is clear from the above provision that the joinder of a party envisaged under *Order 14 Rule 5 (1)* is one done at or before the hearing of the matter. The Supreme Court however guided in the **Aboubacar Tall** case that *Order 14 Rule 5 (1)* of the *High Court Rules* may also be relied for non-joinder of a party after a hearing but before judgment. The court stated that:

"In a proper case a court can join a party to the proceedings when both the plaintiff and the defendant have closed their cases and before judgment has been delivered by invoking order 14 rule 5"

Based on the above, *Order 14 Rule 5 (1)* of the *High Court Rules* can only be used to join a party in the circumstances outlined above. It cannot be used to join a party to an action after judgment has been entered. Where judgment has been entered, a party may be joined to the action only if there is an appeal or an application for review as was held in the **London Ngoma** case. In the **Stanbic Bank vs Micoquip** case, the Supreme Court stated that:

“...an action usually terminates with the delivery of the judgment and enforcement of the judgment unless, of course, there is an appeal or an application for review, none of which have happened in the present case.”

The Supreme Court went on to hold, in the **Stanbic** case, that a joinder made after judgement in the absence of an appeal or application for review is irregular as the court upon delivering a judgment is rendered functus officio. It follows therefore that upon the entry of the judgement herein, this court became functus officio, and cannot therefore competently join the applicants to this matter in the absence of an appeal.

As regards the application for stay of execution, it is trite that the court will grant a stay of execution on good and convincing reasons as was held in the **Nyampala Safaris** case. In *casu*, the applicants have in the affidavit in support of this application stated that the portion of land in issue is the land that was held in the consent judgment to belong to the plaintiff. It will be unjust therefore for the 1st defendant to be prejudiced by a stay of execution when the land allocated to it in the consent judgment is not in contention. There are no convincing reasons upon which the judgment entered herein must be stayed. The application for joinder and stay of execution fails and is accordingly dismissed with costs to the plaintiff and 1st defendant.

Leave to appeal is granted.

Delivered at Lusaka this 30th day of May 2024

