THE ATTORNEY GENERAL v ABOUBACAR TALL AND ZAMBIA AIRWAYS CORPORATION LTD (1995) S.J. (S.C.)

SUPREME COURT
GARDNER, SAKALA AND CHAILA, JJ.S.
9TH FEBRUARY 1995 AND 2ND MARCH 1995.
(S.C.Z. APPEAL NO. 77 OF 1994)

Flynote

Civil procedure - Joinder - When court can order.

Heanote

Appellant ordered by High Court to be joined as second defendant in an action between first respondent as 15 plaintiff against second respondent wherein was claimed, by specially endorsed writ, payment of moneys for breach of contract. At conclusion of evidence, matter adjourned for judgment. Court, instead of delivering judgment, issued order that appellant be joined.

Held:

(i) 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
(ii) The court had jurisdiction and discretion to join the Attorney General as a party to these proceedings

Case referred to:
(1) Zulu v Avondale Housing Project Ltd (1982) Z.R. 172

For the Appellant: Mr A G Kinariwala, Principal State Advocate.
For the 1st Respondent: Mr E.J Shamwana S.C. of Shamwana & Company with S.S Kakoma of Mundia Kakoma & Company
For the 2nd respondent: No appearance

Judgment

SAKALA, J.S.: delivered the judgment of the court.

On 9th February, 1995, we dismissed this appeal and ordered that an amended statement of claim be served on the appellant within 30 days from that day and thereafter the Order of Directions to be followed. We said that we would give our reasons later. This we now do.

This is an appeal by the Attorney General against an Order of the High Court joining him as the second defendant in the proceedings, originally commenced by the first respondent as plaintiff against the second respondent as the defendant in the main cause. The Attorney General was also granted liberty to file a defence within 14 days from the date of the Order and to recall any witnesses who had already given evidence and further to call witnesses in his

defence.

The brief facts of the case are that the first respondent issued specially endorsed writ claiming, among others, a sum of money against the second respondent which sum he would have received for two years had the second respondent not breached the contract agreed upon by both parties. The second respondent entered unconditional appearance to the writ. After the consent order for directions the parties exchanged pleadings and thereafter the matter was set down for trial. At the trial the parties gave evidence and called witnesses in support of their cases and their respective counsel filed written submissions. The case then adjourned for judgment.

On 2nd September 1994, instead of the court delivering its judgment in the matter, it made an order the subject of the present appeal. In making the order the learned trial judge observed that both parties had closed their cases and that the case had been adjourned for judgment. The learned trial judge indicated in the order that she had completed the draft judgment but that after considering the evidence on record she had found that it was necessary to join the Attorney General to the proceedings. In joining the Attorney General to the proceedings she relied on the provisions of order 14 rule 5 of the High Court Act Cap. 50.

On behalf of the appellant, Mr. Kinariwala argued three grounds of appeal before us.

The first ground was that, in invoking the provisions of order 14 rule 5 (1), and in ordering the appellant to be joined as second defendant in the proceedings at a stage where the plaintiff and the defendant had already closed their case and had already made submissions and further the court had already prepared a draft judgment, the learned trial judge seriously misdirected herself.

In his submissions on this ground Mr. Kinariwala contended that upon a true construction of order 14 Rule 5, the stage at which the court can invoke this rule is "at or before the hearing of a suit." He submitted that, in the case before the court, the court invoked the order at a stage when hearing had been completed in that the evidence had already been adduced by the plaintiff and the defendant and both the plaintiff and the defendant had closed their cases, and counsel for the plaintiff and the defendant had already filed their written submissions and court had already made up its mind since a draft judgment had already been prepared. He further submitted that in these circumstances by invoking the provisions of order 14 Rule 5 (1) at that stage, the learned trial judge acted against the letter and spirit of the said provisions and seriously misdirected herself in ordering the appellant to be joined as a second defendant in the proceedings.

It was Mr Kinariwala's contention that "at the hearing" must mean before the defence closed its case. He also pointed out that even the elaborate provisions of the English Rules as per order 15 Rule 6 of the Rules of the Supreme Court (White Book) could not have been invoked at the stage the proceedings had reached.

The second ground was that the learned trial judge further seriously misdirected herself in ordering the appellant to file a defence when she knew or ought to have known that none of the parties to the proceedings had claimed or were claiming anything from the appellant and none of the parties to the proceedings delivered any statement of clain to the appellant to which the appellant could deliver his defence.

The submission on this ground was that the learned trial judge knew or ought to have known that a party can deliver a defence only when he is served with a statement of claim and that in

the present case, none of the parties to the proceedings had claimed or were claiming anything from the appellant and non of the parties to the proceedings had delivered any statement of claim to the appellant and the question of the appellant delivering a defence did not therefore arise.

The third ground was that the order of the learned trial judge in joining the appellant as second defendant and ordering the appellant to deliver defence at a stage when the trial had already ended was against the law. For this ground Mr Kinariwala relied on the arguments in support of the first ground.

Mr Shamwana supported the decision of the lowere court. Mr Shamwana submitted that "at" means and must mean everything from the opening of the case to the delivery of judgment. He contented that if there was any doubt then the provisions of Section 10 of the High Court Act Cap. 50 could be relied upon by adopting the law and practive for the time being observed in England as there appears to be a default in our laws. mr shamwana also pointed out that our order 14 Rule 5 (1) is too abbreviated and restrictive while the English order 15 Rule 6 of the rules of the Supreme Court (White Book) goes beyond "at or before the hearing of a suit" by stating that "at any stage of the proceedings in any case." According to Mr Shamwana an application can be made before a judge becomes functus officio. He submitted that our order 14 is not exhaustive and therefore the court could rely on the English Order 15 which provides for other circumstances in which a court may order a party to be joined. Order 14 Rule 5 (1) of Cap.50 reads 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 person shall be made either paintiffs or defendants in the suit, as the case may be."

We have carefully considered the submissions by both learned counsel and we have also examined the provisions of order 14. In our view, a true construction of the words " at or before the hearing of a suit" as contained in our order 14 of Cap. 50 mean or must be interpreted to mean before the delivery of a judgment in a suit. This to us appears to be the only reasonable interpretation of that phrase in the order because the delivery of a judgment is a hearing of and a process of a suit.

It follows therefore 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. We take note however that the application of the provisions of our order 14 is limited to "all the persons who may be entitled, or claim some share or interest in the subject matter of the suit, or who may be likely to be affected by the results" and who have not been parties are the only ones the court may order to be made parties. We therefore agree with Mr Shamwana that our order is too abbreviated and restrictive and in the present case we cannot see how the Attorney General can be a person entitled to, or claim a share or an interest in the suit or may be likely to be affected by the result of the present suit. But the answer to this argument which was in any case not the basis of the appeal lies in Section 13 Cap. 50 which gives jurisdiction to the court to determine all matters in controversy between the parties in order also to avoid a multiplicity of litigation. In the case of *Zulu v Avondale Housing Project Ltd* (1), Ngulube, D.C.J., as he then was had this to say:

"I would express the hope that trial courts will always bear in mind that it is their duty to adjudicate upon every aspect of the suit between the parties so that every matter in controversy is determined in finality. A decision which because of uncertainity or want of finality, leaves the doors open or further litigation over the same issues between the same parties can and should be avoided."

This must entail that all the parties will be before court. If a party to the proceedings can apply to court to have another party joined we see no reason why a court on its own motion cannot order a party to be joined to the proceedings in the interest of justice. We are satisfied that the court had jurisdiction and discretion to join the Attorney General as a party to these proceedings.

Mr Shamwana has also invited us to apply the English order 15 Rule 6 (2)b)(i)(ii) (White Book) on the basis of Section 10 of Cap.50. Mr Shamwana' s argument is that there is a defect in our law. To the extent that our order 14 is restrictive we agree that there appears to be a defect in our law. The English order 15 rule 6 (2) (b)(i)(ii) reads as follows:

(2) Subject to the provisions of this rule, at any stage of the proceedings in any cause or matter the court may on such terms as it thinks just and either of its own motion or application.
(b) Order any of the following persons to be added as party namely:

(i) any person who ought to have been joined as a party, or whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon or
(ii) Any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the court it would be just and convenient to determine as between him and that party as between the parties to the cause or matter.

In our view, without predudicing the outcome of the trial court's judgment, but going by the documentary and oral evidence on record, the joining of the Attorney General in these proceedings would be necessary to ensure that the matters in the cause may be effectually and completely determined and adjudicated upon to put and end to any further litigation. Both our order 14 and the English order 15 as well as Section 13 of Cap.50 are intended to avoid a multiplicity of actions. Although the learned trial court relied on a wrong provision of the law in joining Attorney General to these proceedings, the court had still an inherent jurisdiction to make the order in the interest of justice.

For these reasons we dismissed the appeal and ordered that an amended statement of claim be served on the Attorney General within 30 days from the date when we heard the appeal and thereafter the order for directions to be followed. Costs to be in the cause.

Appeal dismissed
