

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

APPEAL NO. 86/2005
SCZ/8/08/2005

BETWEEN:

ALBUES NGOSA MAKALU

APPELLANT

AND

BARCLAYS BANK ZAMBIA LIMITED

1ST RESPONDENT

CARGO BUREAU LIMITED

2ND RESPONDENT

WATERSIDE FARM LIMITED

3RD RESPONDENT

Coram: Lewanika(Late) DCJ, Chitengi, JS and Kabalata, AJS on 26th
September, 21 November 2006, 15 May, 2007 and 14th August, 2008

For the Appellant: Mr. N.K. Mutuna, Messrs NKM and
Associates

For the 1st Respondent: Mr. K.H. Makala, Makala and Company

For the 2nd and 3rd Respondents: No appearance

JUDGMENT

Kabalata AJS delivered the judgment of the court.

Case referred to:

- 1. Attorney General vs. Abubacas Tall and Zambia Airways Corporation Limited (1995/97) ZR 54.**

This appeal was presided by the late justice David M. Lewanika. Due to his untimely death, this judgment is a majority judgment.

This is an appeal against a ruling of the High Court dated 9th January, 2004 in which the court refused an application by the Appellant to be joined to the proceedings as an Intervening Party.

The facts leading to this appeal can be briefly stated. On 24th April 2003, judgment in favour of the 1st Respondent was entered against the 2nd and 3rd Respondents in the sum of K175,613,495-31. On 12th September, 2003 the proposed Intervening Party (now appellant) was granted an Ex parte Order staying execution pending the determination of the summons to add an Intervening Party.

After considering the affidavit evidence, the skeleton arguments and the oral submissions of Counsel, the learned judge found that the Appellant had not shown his interest in the matter in dispute. Further, by reason of the fact that the 1st Respondent here is a mortgagee in possession, the Appellant's application could not succeed. Further still, the learned judge found that the Appellant had no cause of action against the first Respondent as the alleged contract was between him and the 2nd Respondent. Besides, the Appellant was aware of the

existing encumbrance over the property in terms of the mortgate in favour of the 1st Respondent. Hence this appeal.

The Appellant has advanced three grounds of appeal namely:

1. That the learned judge in the Court below erred in both law and fact when she held that the Appellant could not be joined to the proceedings because he did not show sufficient interest in the matters in dispute.
2. That the learned Judge in the court below erred in both law and fact when she held that the facts or circumstances disclosed in the Affidavit in Support of the Appellants' application to be added as an Intervening Party did not justify the joining of the Appellant to the proceedings.
3. That the learned judge in the Court below erred in both law and fact when she held that the Appellant had no cause of action against the 1st Respondent herein as the alleged contract was between the Appellant and the 2nd and 3rd Respondents.

It was argued on behalf of the Appellant that the Appellant had demonstrated sufficient interest in the subject matter in the affidavit filed in support of the application to join him to the proceedings to warrant his being joined to the proceedings. In the said affidavit, the Appellant demonstrates that the negotiations for the sale of the property in dispute which were between himself

and a representative of the 2nd and 3rd respondents were held in the presence of a representative of the 1st Respondent at its headquarters in Lusaka. Furthermore, it is clear from paragraphs 8 and 9 of the affidavit in opposition that the 1st Respondent gave its blessings to the arrangement between the Appellant and the 2nd and 3rd respondents. It was further submitted that the Appellant is clearly an interested party in what is the subject matter of the proceedings in the Court below. Having so established his interest in the subject matter, the court below ought to have joined the Appellant to the proceedings as a party. Further still, it was submitted that the court also has discretion to order a party to be joined in the proceedings. Reference was made to the case of **Attorney General vs. Abubacas Tall and Zambia Airways Corporation Limited¹**.

On the issue of the courts' finding that the Appellant had not established that he had locus standi, it was submitted that the facts and surrounding circumstances clearly show that the Appellant had sufficient interest in the matter warranting him to have a right to sue or a standing in law.

For the foregoing reasons it was prayed that the appeal be allowed.

In response, it is argued on behalf of the 1st Respondent that an application for joinder may only be made before entry of judgment. Reference was made to the case of the **Attorney General vs. Abubacas Tall and Zambia Airways Corporation**

Limited¹ where this court restated the principle. It was submitted that in view of our holding in the matter of the **Attorney General vs. Abubacas Tall and Zambia Airways Corporation Limited**¹ this appeal is ill conceived and must accordingly be dismissed with costs.

We have carefully considered the ruling of the court below and the arguments of counsel on either side.

We entirely agree with the 1st Respondents argument that an application for joinder may only be made before entry of judgment. In the case of **Attorney General vs. Abubacas Tall and Zambia Airways Corporation Limited**¹ this court restated this principle in the following terms:

"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 judgment in a suit.

This to us appears to be the only reasonable interpretation of that phrase in the Order because delivery of a judgment is a hearing 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."

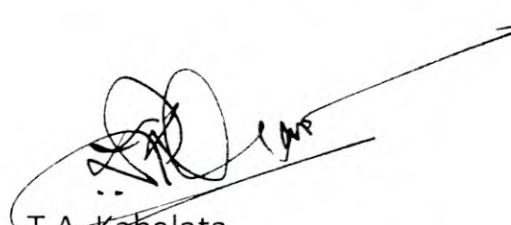
In the case in casu, the trial court entered judgment against the 2nd and 3rd Respondents (**who were the 1st and 2nd Defendants in the court below**) on 24th April 2003. The Appellant filed his application for joinder on or about 9th September 2003.

In view of what we said in **Tall and Zambia Airways Corporation Limited**¹ this appeal cannot succeed as it is ill conceived and must accordingly be dismissed with costs to be taxed in default of agreement.

D.M. Lewanika (Late)
Deputy Chief Justice



P. Chitengi
Supreme Court Judge



T.A. Kabalata
Acting Supreme Court Judge