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**IN THE SUPREME COURT OF ZAMBIA Appeal No. 41/2008**

**HOLDEN AT LUSAKA** **SCZ JUDMENT NO. 8 OF 2012**

**(Civil Jurisdiction)**

**B E T W E E N:**

**ROSEMARY BWALYA 1ST APPELLANT**

**ATTORNEY GENERAL 2ND APPELLANT**

**COMMISSIONER OF LANDS 3RD APPELLANT**

**AND**

**MWANAMUTO INVESTMENTS LIMITED RESPONDENT**

***Coram: Chirwa, Chibesakunda and Chibomba JJS.***

***On 17th November, 2009 and on 17th February, 2012.***

*For the 1st Appellant: Present in Person.*

*For the 2nd and 3rd Appellants: Mrs. S. Anderson, Assistant Senior State. Advocate, Attorney General’s Chambers.*

*For the Respondent: Mr. J. Chashi of Mweemba Chashi & Partners.*

**J U D G M E N T**

**Chibomba, JS, delivered the Judgment of the Court**.

**Cases and other materials referred to:-**

1. Rural Development Corporation Limited vs Bank of Credit and Commerce (Z) Limited 1987 Z. R. 35.

2. Baker Limited vs. Medway Building and Supplies Limited (1958) 1 WLR 1236.

3. Sir Jack Jacob and Ian S. Goldrein’s, Pleadings, Principles and Practice, 1990 edition page 189

**Legislation referred to:-**

1. The Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia.

2. High Court Rules, Chapter 27 of the Laws of Zambia.

3. The Supreme Court Act, Chapter 25 of the Laws of Zambia.

4. The Rules of the Supreme Court, 1999 edition.

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When the matter came for hearing of this appeal, the learned Counsel for the respondent, Mr. Chashi, informed us that he had filed a Notice to raise a preliminary issue. Therefore the first part of this Judgment deals with the Preliminary Issue raised while the latter part deals with the appeal.

Mrs Bwalya, who is the 1st appellant in this matter, then applied for leave to orally respond to the Notice to Raise a preliminary issue. This application was granted.

In support of the Notice to Raise Preliminary Issue, Mr. Chashi, submitted that the Notice was filed pursuant to Rule 19 of the Supreme Court Rules (SCR) and that the objection was that the documents specified in the Notice to Raise a Preliminary Issue and the documents contained in the Supplementary Record of Appeal filed on 10th November, 2009 were not part of the documents produced during the proceedings in the Court below. And that as such, these documents should be expunged from the Record.

**(200)** Mrs Anderson, on behalf of the 2nd and 3rd appellants, informed the Court that the 2nd and 3rd appellants had no interest in this matter.

In response to the Preliminary Issue raised, Mrs Bwalya referred us to her response which was filed in Court that day. In accordance with this response, the Preliminary Issue raised was objected to on the basis of the provision of Section 25 (1)(b)(i) of the Supreme Court Act. Section 25(1) (b) (i) provides that:-

**“25(1) On the hearing of an appeal in a Civil matter, the Court**

**(b) may, if it thinks it is necessary or expedient in the interest of justice**

**(i) Order the production of any document, exhibits or other things connected with the proceeding, the production of which appears to it necessary for the determination of the case.”**

It was contended that the Court should not be deprived of the chance to consider these documents as those documents are necessary in the interest of justice and for the determination of the appeal. That the respondent opposes the production of these documents because the documents contain true and correct facts of the case and hence, the respondent chose to dispense with such vital evidence.

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We have seriously considered the Preliminary Issue raised and the submission by the parties. There is no dispute that the documents specified in the Notice to Raise a Preliminary Issue and those in the Supplementary Record of Appeal were not part of the documents produced in the proceedings in the Court below. This is conceded by the appellant. However, the appellant’s position was that this Court has power under Section 25(1)(b)(1) of the Supreme Court Act to admit the documents in question even though they were not part of the record in the Court below. It was argued that admitting the documents, would be in the interest of justice as the documents are necessary for the determination of this appeal.

Our response is that although Section 25(1)(b)(1) of the Supreme Court Act empowers this Court to order the production of any documents which may be necessary for the determination of a case, this power is discretionary. It is trite that discretionary power must be exercised judiciously and for good and convincing reasons.

In the current case, the appellant has not disclosed any reasonable grounds to justify the production of the documents that

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were not part of the record in the Court below. This means that the Court below was deprived of the opportunity to consider these documents. We, however, have noted from the record that trial has not yet taken place as the Originating Summons has not been heard. Therefore, the 1st appellant still has an opportunity to apply to produce those documents should she consider this necessary in the Court below. We, therefore, find that the Preliminary Issue raised has merit. We order that the said documents be and are hereby expunged from the record of appeal.

Coming to the main appeal, the 1st appellant appeals against the Ruling of the High Court dated 29th August, 2009 in which the learned Judge granted leave to the respondent to amend the Originating Summons.

The history of this appeal is that the respondent, filed in the Court below, an Originating Summons accompanied by an Affidavit in Support. Before the Originating Summons could be heard, the respondent applied to amend the Originating Summons. The appellant opposed this application and filed an Affidavit in Opposition. The gist of the Affidavit in Opposition was that the

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respondent’s Counsel did not file a Notice of Appointment to show that he had authority to represent the 3rd appellant as the 3rd appellant was represented by the 2nd appellant. Therefore, that in the absence of such Notice, the Affidavit ought to have been deposed to by a State Advocate. Further that Lawyers do not swear Affidavits on behalf of clients and that therefore, paragraph 6 of the Affidavit in Support was hearsay.

After considering the Affidavits and arguments, the learned trial Judge, granted the application to amend the Originating Summons holding that it was clear from the correspondence before him that no prejudice would be occasioned to the parties as a result of the proposed amendment.

Dissatisfied with this order, the 1st appellant appealed to this Court advancing four grounds of appeal as follows:

“**1. The Court below erred in fact and in law when it held that an Originating Summons filed in 2004 could be amended when the Plaintiff no longer had locus standi, having assigned their interest in the property LUS/12500 to West Star Properties Limited and were no longer the legal owner.**

**2. The Court below erred in fact and in law in allowing amendment of the Originating Summons which related to property LUS/12500 which has been subject of caveat but removed corruptly to create subdivision which the respondent assigned to KOBIL (Zambia) Limited.**

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**3. The Court below erred in fact and in law when the Originating Summons related to the whole property LUS/12500, but allowed it to apply to a subdivision, when at the time of subdivision there was already a caveat on the whole property.**

**4. The Court below erred in fact and in law when it allowed this amendment, stating that there would be no prejudice to the appellant when there would be.”**

In support of the first ground of appeal, it was submitted in the 1st appellant’s Heads of Argument, that the Court below erred in fact and in law when it held that the Originating Summons which was filed in 2004 could be amended as the respondent had no locus standi in the matter. It was argued that the respondent, had by the time the amendment was sought, assigned its interest in the property in question to West Star Property Limited who is also no longer the legal owner.

It was submitted that the back ground of this matter shows that on 6th May 2003, the 1st appellant placed a caveat on the property in question. This caveat was later removed by the Registrar of Lands on the advice of the Solicitor General. However, that the Registrar of Lands had no power to remove the caveat as a caveat can only be removed pursuant to Sections 81 and 83 of the Lands and Deeds Registry Act. Section 81 provides that:-

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**“(i)** **Such registered Proprietor or other interested person may, if he thinks fit, summon the caveator, or the person on whose behalf such caveat has been lodged, to attend before the Court or a Judge thereof to show cause why such caveat should not be removed.**

**(ii) Such Court or Judge, upon proof that such person has been summoned, may make such order in the premises, either ex-parte or otherwise as to such Court or Judge seems fit.”**

Section 83 provides that:-

“**Any caveat may be withdrawn by the Caveator or by his Attorney or agent under a written authority and either as to the whole or any part of the land affected, or the consent of the Caveator may be given for the registration of any particular dealing expressed to be made subject to the rights of the Caveator.”**

It was contended that after the caveat was removed, the respondent applied for issuance of two separate Certificates of Title while the remaining extent remained in the respondent’s name. That however, the respondent later sold this to Kobil Investment Limited and then transferred the remaining extent to West Star Properties Limited, a sister Company to the respondent.

It was contended that this left the respondent with no land or interest in the land, the subject matter of this litigation. And that these transactions were done after the matter was already in Court and hence the contention that the application to amend the

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Originating Summons after the said land had been subdivided and sold to Kobil Investments Limited and transferred to West Star Property Limited, shows that the respondent had no locus standi left in the land. Therefore, that since the respondent had no locus standi, the trial Court erred in granting the respondent the application to amend the Originating Summons.

In support of the second and third grounds of appeal which were argued together, the 1st appellant argued that a caveat was placed on Stand No. 12500 on 6th May 2003. That once placed, such a caveat can only be removed by order of Court pursuant to Section 81 of the Lands and Deeds Registry Act or by withdraw of the caveat under Section 83 of the Act by the Caveator. Therefore, that the Court below erred in law and in fact by allowing an amendment of the Originating Summons. It was argued that even at the time of the subdivision, the caveat was still in force as the caveat cannot be administratively removed. Therefore, that the subdivisions were illegal, fraudulent and inoperational. The case of **Rural Development Corporation Limited vs Bank of Credit and Commerce (Z) Limited1**  was cited in which it was stated that:-

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“**Although Section 81 of the Lands and Deeds Registry Act, Chapter 287 provides no procedure for the removal of a caveat, an Originating Summons is a proper form for the commencing of proceedings for the removal of a caveat.”**

It was contended that since the caveat was placed on Stand No. 12500, Lusaka, allowing the amendment meant that there was no caveat on the new subdivisions and that this diluted the subject matter of the Originating Summons in question and that to that extent, the 1st appellant was disadvantaged by the removal of the caveat. Therefore, that the amendment involved a new cause of action to which the appellant was excluded as the caveat was placed on Stand No. 12500. And that the respondent’s action was not only an abuse of the Court process but also contemptuous as the matter was already in Court before the caveat was administratively removed.

In support of ground four, it was contended that the learned Judge erred in law and in fact when he allowed the amendment of the Originating Summons on ground that there would be no prejudice caused to the 1st appellant. That in fact, the 1st appellant was prejudiced and embarrassed by the amendment as the disposal of the case was delayed. And that allowing the amendment meant

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that the caveat which was on Stand No. 12500 was no longer there and that the subject matter of the caveat was therefore, extinguished. Further that the learned Judge ought not to have allowed the amendment as it was also an abuse of the Court process and contemptuous as the litigation was tempered with. Therefore, that since the 1st appellant had not placed a caveat on Subdivision A on Stand No. 12500, she could not defend the application for amendment.

In support of this argument, reference was made to Order 48 of the High Court Rules which provides for amendment of proceedings.

It was contended that to date the Originating Summons has not been heard. And that therefore, this appeal should be upheld and the order of amendment set aside or removed.

On the other hand, in opposing this appeal, Mr. Chashi relied on the arguments in the respondent’s Heads of Argument. It was contended that the learned trial Judge did not err in law and in fact when he allowed the respondent’s application to amend the

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Originating Summons. Counsel then proceeded to give the back ground of this matter as follows:-

“**Stand No. 12500 Lusaka belongs to the respondent, in this matter. On the 6th of May 2003 the 1st appellant entered a Caveat on Stand No. 12500 Lusaka, claiming an interest in the property as the property was subject to Court Proceedings.**

**The appellant attached the Affidivait in Support of Originating Summons under the Cause Number 2003/HP/0068 in which she was seeking the following relief**:

1. **An Order for the respondent to yield vacant possession of the circular part of Carousel to the 1st appellant;**
2. **Damages for loss of business.**

**Cause No. 2003/HP/0068 was subsequently discontinued for irregularity by the Plaintiff’s Advocates and is now a subject of costs and currently on appeal in the Supreme Court.**

**On the 19th of April, 2004 the Registrar of Lands on the advice of the Solicitor General Administratively removed the caveat stating that the appellant had not demonstrated any interest in the land.**

**The respondent then subdivided the Land into two. S/D A Stand 12500 was sold to Kobil Investment Limited and the respondent remained with the remaining Extent of Stand No. 12500 Lusaka.**

**After protestations to various Institutions too numerous to mention by the 1st appellant, the caveat was restored on Stand No. 12500 Lusaka.**

**In between the removal and restoration of the caveat, the respondent had taken out an action by Originating Summons for removal of the caveat mistakenly on Subdivision A of Stand No. 12500 Lusaka instead of the remaining extent of Stand No. 12500 Lusaka under Cause No. 2005/HP/0230.**

**When the appellant put more pressure on the Commissioner of Lands and Registrar of Lands using various institutions alleging corruption, the Registrar of Lands cancelled all the transactions which had been entered after the removal of the caveat and restored the caveat on Stand No. 12500 Lusaka. It therefore became**

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**apparent and necessary to amend the Originating Summons so as to read that the removal of the caveat is on Stand No. 12500 Lusaka.”**

It was contended that it is not in dispute that the caveat was originally entered on Stand No. 12500, Lusaka. And that after cancellation of the transactions, the caveat was restored on Stand No. 12500, Lusaka, as can be confirmed from the documents in the Record of Appeal. These are:-

**“(a) Letter from the Chief Registrar of Lands and to the Respondent’s Advocates dated 5th April 2007 (Refer page 23 of the Record of Appeal).**

**(b) Letter from the Permanent Secretary Ministry of Lands to the Chief Registrar dated 2nd April 2007 (Refer page 26 of the Record of Appeal).**

**(c) Affidavit verifying facts deposed to by Justin Chashi (Refer Page 34 of the Record of Appeal).**

**(d) Affidavit in Support of Summons for Leave to Appeal deposed to by the appellant (Refer page 49 and 50 of the Record of Appeal)**

It was contended that the application to amend the Originating Summons was brought pursuant to Order XVIII of the High Court Act, which states that:-

“**The Court or Judge may, at any stage of the proceedings, order any proceedings to be amended, whether the defect or error be that of the party applying to amend or not; and all such amendments as may be necessary or proper for the purpose of eliminating all statements which may tend to prejudice**, **embarrass or delay the fair trial of the suit, and for the purpose of determining, in the existing suit, the real question or questions in controversy between the**

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**parties, shall be so made. Every order shall be made upon such terms as to costs or otherwise as shall seem just.”**

It was contended that even considering that the error was made by the respondent, this did not inhibit the respondent from applying to amend pleadings as it was not in dispute that the existing caveat is on Stand No. 12500, Lusaka. Further that the learned authors of **“Pleadings Principles and Practice3**,have stated that:-

**“The wide and extensive powers of amendment vested in the Courts are designed to prevent the failure of justice due to procedural errors, mistakes and defects and they are exercised to further and serve the aims of Justice. The power of amendment are intended to make more effective the function of the power of the Courts to determine the true substantive merits of the case, to have more regard to substance than form, and this is to free the parties and the Court from the technicalities or formalities of procedure and to correct errors and defects in proceedings.**

**PRACTICE the object of the amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of facts or the true relief or remedy which the parties really and finally intend to rely on or to claim.”**

It was contended that in the case of **Baker Limited vs. Medway Building and Supplies Limited2**,Jenkins L. J. stated that:-

“**The proposed amendment raised what was a vital point in the case and that unless it was adjudicated upon, the real matter in issue between the parties would not be decided, for the case would**

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**proceed on an assumed state of facts which more likely than not, was wholly at variance with and bore no relation to the true facts of the case**.”

Therefore, that the learned trial Judge was on firm ground when he allowed the amendment and that this appeal therefore, has no merit and should be dismissed with costs as it is an abuse of the Court process and purely designed to delay the proceedings of the Court below.

We have seriously considered this appeal together with the arguments in the respective Heads of Argument, the oral submissions and the authorities cited. We have also considered the Ruling by the learned Judge in the Court below.

Although four grounds of appeal were filed, we intend to resolve all the grounds of appeal together as they raise one major question and this is whether in the circumstances of this case, it was proper for the Court below to allow the respondent to amend the Originating Summons.

In accordance with the Affidavit Verifying Facts deposed to by the learned Counsel for the respondent, the respondent, on 8th

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March 2007, filed an application to Amend the Originating Summons and in particular paragraph 6 of the Affidavit in Support which stated that the caveat which was in existence should only subsist on the remaining extent of Stand No. 12500, Lusaka. And that the Commissioner of Lands, having reversed all the entries on these properties as per computer print out in the Notice to Produce filed on 10th April 2007, the caveat which ought to be restored is one on Stand No. 12500, Lusaka. And that the Originating Summons should be so amended.

We have considered this appeal. It is trite law that pleadings may be amended at any stage of the proceedings before Judgment is passed as provided by Order 48 of the High Court Rules and by Order 20/5 of the Rules of the Supreme Court (RSC). Order 20/7 of the RSC also provides that Rule 5 shall have an effect on actions began by Originating Summons. This means that an Originating Summons may be amended pursuant to Order 20/5 of the Rules of the Supreme Court. For avoidance of doubt, Rule 5 of Order 20 of the RSC provides that:-

“**20/5 5(1) Subject to Order 15, rules 6, 7 and 8 and the following provisions of this rule, the Court may at any**

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**stage of the proceedings allow the Plaintiff to amend his Writ, or any party to amend his pleadings, on such terms**

**as to costs or otherwise as may be just and in such manner (if any) as it may direct**.”

Although the 1st appellant has argued that she was prejudiced by the said amendment as the determination of the Originating Summons has been delayed, we do not agree with this argument as the law is very clear. This is that an amendment may be granted at any stage of the proceedings so long as it is before Judgment.

Although the appellant also went on to argue on the wrong actions taken to remove the caveat that she had placed on the property in question by the Registrar of Lands and the effort that she made to have it restored, proper perusal of the proposed amendment as reflected in the Affidavit Verifying Facts, shows that indeed, the status quo was maintained as the alleged sale and transfer of the property after the subdivisions were done was later cancelled and the caveat that was wrongly discharged was restored on the property in question.

We, therefore, see no merit in all the four grounds of appeal as the status quo was restored to what was obtaining before the alleged transactions were done.

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The sum total is that this appeal has no merit. The same is dismissed with costs to the respondent to be taxed in default of agreement.

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D. K. CHIRWA

**SUPREME COURT JUDGE**

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L. P. CHIBESAKUNDA

**SUPREME COURT JUDGE**

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H. CHIBOMBA

**SUPREME COURT JUDGE**