

**IN THE HIGH COURT FOR ZAMBIA
IN THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA**
(Commercial Jurisdiction)

2019/HPC/0379

IN THE MATTER OF : **STAND NO. 18628/1080
KAMWALA SOUTH; STAND
NO. 51 CHUUNDU,
MAZABUKA AND LOT NO.
28008/M KAFUE ROAD,
CHILANGA**



AND IN THE MATTER OF : **ORDER 30 RULE 14 OF
THE HIGH COURT RULES,
CHAPTER 27 OF THE LAWS
OF ZAMBIA AS READ WITH
ORDER 88 OF THE RULES
OF THE SUPREME COURT
OF ENGLAND (1999)
EDITION**

BETWEEN:

CAVMONT BANK LIMITED

APPLICANT

AND

TAKAWIRA ENTERPRISES LIMITED

1ST RESPONDENT

TAKAWIRA GRIFFINS MAHERE

2ND RESPONDENT

BERLY BEENE LIKANDO KUNDA

3RD RESPONDENT

LAZAROUS SICHULA

4TH RESPONDENT

JUDITH MAKUNKA

INTENDED INTERESTED PARTY

**CORAM: Before Hon. Mr. Justice B. C. Mbewe in Chambers on
15th July, 2020.**

Marshal : Ms. Esther Nguni

Research Advocate : Mwiche Ntinda

*For Applicant : Mr. L. C. Ng'onga of
Messrs. P. M.
Kamanga & Associates*

For 1st, 3rd & 4th Respondents : N/A

*For the 2nd Respondent : Mr. M. Takawira, In
person*

*For Intended Interested Party : Mrs. D. M. Mulenga
from the National
Legal Aid Clinic for
Women*

R U L I N G

Cases and Authorities Referred to:

- 1. Abel Mulenga and Others v. Mabvuto Adan Avuta Chikumbi and Others and The Attorney General (2006) ZR 33;*
- 2. Mike Hamusonde Mweemba v. Kamfwa Obote Kasongo and Zambia State Insurance Corporation Limited 2006 ZR 101;*

3. *London Ngoma and Others v. LCM Company Limited and United Bus Company of Zambia Limited (In Liquidation) SCZ Judgment No. 22 of 1999;*
4. *Aboubacar Tall v. Zambia Airways Corporation Limited and Attorney General SCZ Appeal No. 77 of 1994;*
5. *Enala Chirwa v. Kachena Financial Limited and 2 others (2012) SCZ Judgment No. 30;*
6. *The High Court Rules, Chapter 27 of The Laws of Zambia;*
7. *The Rules of The Supreme Court of England (1999) Edition;*
8. *Halsbury's Laws of England Third Edition Volume 23 at Paragraph 1672.*

INTRODUCTION

This action was lately before this Court in a mortgage action at the suit of the Applicant, Cavmont Bank Limited against the 1st Respondent under a loan facility for which the 2nd to 4th Respondents were guarantors for the recovery of the sum of ZMW1, 033, 643.57 and interest and costs which loan was secured by the properties Stand 18628/108 Kamwala South, Stand 51 Chuundu, Mazabuka and Lot 28008/M Lusaka.

The parties filed a Consent Judgment on 26th November, 2019 which the salient Orders read as follows;

“1. The Respondents will put on sale Stand No. 51 Chuundu, Mazabuka and Stand No. 28008/M Kafue Road, Chilanga which are valued at K430,000.00 and K450,000.00 respectively.

4. The Parties further consent that the Respondents be given an initial period of 120 days from 1st December, 2019 in which they will endeavor to sell the aforesaid properties with the cooperation of the Bank as they are in possession of the Certificate of Title.

8. Should there be default on any part of the Judgment, the Applicant shall be at liberty to foreclose and sale the mortgaged property without further recourse to the Courts.

Dated 20th November, 2019

Justice B C Mbewe.”

THIS APPLICATION FOR JOINDER

The Intended Interested Party, one Judith Makunka has applied to be joined to this action by Summons filed on 8th June, 2020 pursuant to **Order 14, Rule 5 (1) of The High Court Act, Chapter 27 of The Laws of Zambia** as read with **Order 15 Rule 6 (2) (B) (ii) of The Rules of The Supreme Court of England (White Book) 1999 Edition**. The Summons is supported by an Affidavit in Support sworn by the said Judith Makunka, the interested party and also Skeleton Arguments and List of Authorities.

The Affidavit attests that the deponent was married to the 2nd Respondent until dissolution of her marriage to the 2nd Respondent in 2007. That the couple during their marriage acquired Stand 51, Chuundu Mazabuka inter alia which property was awarded to her in property settlement proceedings in the Mazabuka Local Court and she has been residing there since 2010. The affidavit deposes that sometime in 2013, the 2nd Respondent fraudulently obtained a duplicate Land Record Card from the Mazabuka Council and used this to obtain a loan from the Applicant. That she commenced an action in the High Court under Cause number **2020/HP/0266** wherein she has sued the 2nd Respondent and the Applicant herein, commenced on 27th February, 2020. The Affidavit deposes that the Consent Judgment entered herein has now come to the deponent's attention and she was not party to the action wherein a Consent Judgment was entered. That she is a person with an interest in Stand No. 51, Chuundu Mazabuka and will be affected by the sale or foreclosure thereof and ought to be joined to this action.

The Intended Interested Party claims in her action before the High Court General List the following relief;

- i. *An Order that the Plaintiff is the beneficial and legal owner of Stand No. 51 Mazabuka, Southern Province;*
- ii. *An Order for the cancellation of the Land Record Card issued by the Mazabuka District Council;*

- iii. *An Order of injunction restraining the 1st and 2nd Defendant from evicting the Plaintiff or selling Stand No. 51, Mazabuka until the final determination of the matter;*
- iv. *An Order setting aside the Order of Possession and sale, if any, obtained by the 2nd Defendant;*
- v. *In the alternative, for an Order compelling the 1st Defendant to pay the Plaintiff the market value of House No. 51, Mazabuka;*
- vi. *Any other relief the court may deem fit;*
- vii. *Costs.*

The Intended Interested Party's Skeleton Arguments rely on the following Orders in making the application;

Order 14, Rule 5 (1) of The High Court Act, Chapter 27 of The Laws of Zambia which reads:

“5. (1) 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 persons shall be made either plaintiffs or defendants in the suit, as the case may be. In such case,

the Court shall issue a notice to such persons, which shall be served in the manner provided by the rules for the service of a writ of summons, or in such other manner as the Court or a Judge thinks fit to direct; and, on proof of the due service of such notice, the person so served, whether he shall have appeared or not, shall be bound by all proceedings in the cause.”

As well as **Order 15 Rule 6 (2) (B) (ii) of The Rules of The Supreme Court of England (White Book) 1999 Edition** which reads:

“(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 on application—

(b) order any of the following persons to be added as a 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 well as between the parties to the cause or matter.”

The case of **Abel Mulenga and Others v. Mabvuto Adan Avuta Chikumbi and Others and The Attorney General (1)** as well as that of **Mike Hamusonde Mweemba v. Kamfwa Obote Kasongo and Zambia State Insurance Corporation Limited (2)** are also cited.

The Intended Interested Party also relies on the case of **London Ngoma and Others v. LCM Company Limited and United Bus Company of Zambia Limited (In Liquidation) (3)** wherein it was held that;

“(2) That the lower court erred in holding that the appellants could not be joined to the action after consent judgment had been granted; the consent judgment was one of which the appellants were not parties and were not aware of a hearing.

DECISION OF THE COURT

I have considered the arguments and submissions by the parties on this application. I believe that I do not have jurisdiction to hear this application as provided for under **Order 14 Rule 5 (1) of the High Court Rules**.

In the case of **London Ngoma and Others v. LCM Company Limited and United Bus Company of Zambia Limited (In Liquidation) (3)** the Supreme Court looked at **Section 67 of the Supreme Court Rules** which deals with joinder in appeal matters. The Court also looked at **Order 13/9/3 of the Rules of the Supreme Court of England**.

We have **Order 14 5 (1)** cited by the Intended Interested Party which clearly states that **"5. (1) 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 persons shall be made either plaintiffs or defendants in the suit, as the case may be.**

The law clearly spells out that joinder can only be done at or before the hearing of a suit and compels the Court or a Judge to adjourn a matter to effectuate such joinder.

Order 14 Rule 5 (1) of the High Court Rules, Chapter 27 of the Laws of Zambia should be contrasted with **Order 15 Rule 6 (2) (B) (ii) of The Rules of The Supreme Court of England (White Book) 1999 Edition** which reads that joinder can be ordered “**(2) Subject to the provisions of this rule, at any stage of the proceedings in any cause or matter**”. The Supreme Court in the **Aboubacar Tall v. Zambia Airways Corporation Limited and Attorney General (4)** case agreed that the **Zambian Order 14, Rule 5** is more restrictive than English **Order 15, Rule 6 (2) (b) (i) and (ii) of the Rules of the Supreme Court of England** and both Orders as well as **Section 13 of the High Court Act** are intended to avoid a multiplicity of actions.

The case of **Aboubacar Tall v. Zambia Airways (4)** followed by the Supreme Court in its holding in **London Ngoma and Others v. LCM Company Limited and United Bus Company of Zambia Limited (In Liquidation) (3)** clearly states that;

“We have carefully considered the submissions by both 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, Cap 50 mean or must be interpreted to mean before the delivery of a judgment in a suit. This appears to us 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.”

before going on to hold that;

“(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.”

The case of **Aboubacar Tall v. Zambia Airways (4)** considered **Order 14, Rule 5 (1)** whereas in the **London Ngoma (3)** case, the Supreme Court was dealing with **Order 67 of the Supreme Court Rules** relating to the Supreme Court’s inherent jurisdiction as an appellate court. As this case is not an appeal. I am of the position that the authority of the London Ngoma does not apply to the matter *in casu* whereas the **Aboubacar Tall v. Zambia Airways (4)** case does apply and the Supreme Court was clear therein that joinder can be allowed before Judgment of the Court. The case of **Enala Chirwa v. Kachena Financial Limited and 2 others (5)** held that joinder can be allowed after judgment where exceptional circumstances are disclosed. There are no exceptional circumstances disclosed in this application.

The Law on overturning consent judgments and orders is such that a party has to commence a new action to set aside the consent judgment or order. **Halsbury's Laws of England Third Edition Volume 23 at Paragraph 1672** guides as follows;

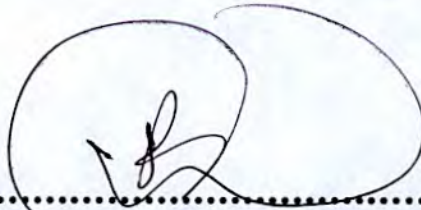
“A judgment given or an order made by consent may on fresh action brought for the purpose be set aside on any ground that would invalidate a compromise not contained in a judgment or order. Compromises have been set aside on the ground that the agreement was illegal as against public policy, or was obtained by fraud or misrepresentation or non-disclosure of a material fact which there was an obligation to disclose or by duress or was concluded under a natural mistake of fact, ignorance of a material fact or without authority.”

The applicant does aver that she commenced an action to challenge the Order made by this Court in a new action under Cause number **2020/HP/0266** which action the Bank that was successful in the mortgage action before me is a party. I therefore find that the commencement of this action is the correct way for the Applicant to challenge the consent judgment and she can plead that relief if she has not already done so in that action.

I find that the application for joinder before this Court has been wrongly laid having been made after Judgment of this Court and I

therefore do not have the jurisdiction to hear it. I dismiss the same and make no order as to costs.

Delivered at Lusaka this 31st day of July, 2020.

A handwritten signature in black ink, consisting of several loops and a central vertical stroke, positioned above a horizontal dotted line.

**Bonaventure C. Mbewe
HIGH COURT JUDGE**