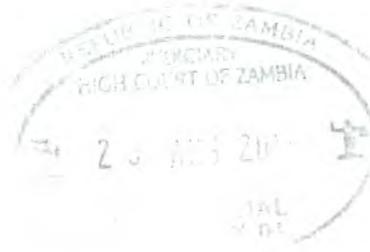


**IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT KITWE**

2016/HKC/0011

(Civil Jurisdiction)



BETWEEN:

ZCCM INVESTMENTS HOLDINGS PLC

PLAINTIFF

AND

**MRS CHILESHE (Sued as Administrator of
the Estate of Mr. Benedict Chileshe)**

DEFENDANT

Before Lady Justice B.G Lunguon 23rd August, 2017 in chambers at Kitwe.

For the Plaintiff, Ms. Y.E Mkandawire, In-house (General Counsel)

For the Defendant, Ms. M. D. Phiri & Mr. C. Mukumwa, Messrs ECB Legal Practitioners

RULING

Cases referred to

- 1. Sir Ralph Bovey's Case (1684) Vent, 217;*
- 2. William David Carlisle Wise vs. E.F. Hervey Limited (1985)
Z.R. 179 (S.C.);*
- 3. Associated Chemicals Limited vs. Hill and Delamin Zambia Limited
and Ellis and Company (AS a Law Firm) (1998) S.J. 7 (S.C)*

Legislation and Other Materials referred to:

- 1. Order XIV Rule 5(2), High Court Rules, High Court Act, Chapter 27
of the Laws of Zambia;*
- 2. Order XIV, Rule 5(1), High Court Rules, High Court Act, Chapter 27
of the Laws of Zambia;*

3. *Odgers on Civil Court Actions, 24th Edition, Sweet & Maxwell, page 159;*
4. *Thomas A Zonay, Judicial Discretion, Ten Guidelines For Its Use, (2015) National Judicial College, Reno, Nevada, USA*

This is an application on the part of the Defendant for an order to remove a party from the action for Misjoinder.

The application is brought forth by way of Summons pursuant to ***Order XIV Rule 5(2) of the High Court Rules, High Court Act, Chapter 27 of the Laws of Zambia.***

The application, on the one hand, was supported by an Affidavit in Support and Skeleton Arguments tendered by the Defendant on 11th July, 2016.

On the other hand, the application was opposed by the Plaintiff through an Affidavit in Opposition and Skeleton Arguments filed on 21st August, 2017.

According to the Affidavit in Support deposed to by the Defendant, she was joined to the proceedings because of the Plaintiff's belief that she ought to be a party by virtue of her position as Administrator of the late Mr. Benedict Chileshe.

I will pause here to interpolate my observation that the deponent, in making the aforementioned attestation, was clearing pre-empting the Plaintiff's response regarding why it elected to join her to these

proceedings. Such anticipatory behavior is akin to leaping before one comes to the stile, as was aptly coined by Hale C.J in *Sir Ralph Bovey's Case (1684) Vent, 217¹*, quoted in *Odgers on Civil Court Actions, 24th Edition, Sweet & Maxwell, page 159*. The caution is therefore, that there is no need to anticipate the answer of an adversary.

The Affidavit in Support goes on to reveal that the Certificate of Title relating to the property subject to the dispute before Court is registered in the name of Twim Rivers Estates Limited. It was deposed that the said proprietor was a corporate entity with legal capacity to sue and be sued in its own name. In summation, it was avowed that the Plaintiff had not disclosed any cause of action against the Plaintiff.

In terms of the legal arguments that underpinned the application, I have discerned that the gist of the Defendant's argument, as contained in the Skeleton Arguments, is that the Plaintiff has failed to establish a cause of action against the Defendant and therefore the Defendant should not be a party to the proceedings.

In advancing that argument, the Defendant posits that a cause of action is disclosed only in two instances: Firstly, where liability can be attached to a party on the basis of facts contained in factual allegations made by another party; or where a right or entitlement to judgment in favour of one party against the other can be

established from the facts contained in the factual allegations made. The Defendant's proposition was premised on the authority of the Supreme Court case of ***William David Carlisle Wise vs. E.F. Hervey Limited (1985) Z.R.179 (S.C.)***². In that case, the Supreme Court held, inter alia, as follows:

"A cause of action is disclosed only when a factual situation is alleged which contains facts upon which a party can attach liability to the other or upon which he can establish a right or entitlement to a judgment in his favour against the other."

As regards the facts before Court, the Defendant highlighted two observations which they regarded as pertinent to their application. The first observation was that the Plaintiff's Statement of Claim merely set out the Defendant's capacity as the Administrator of the estate of the late Mr. Benedict Chileshe. It was averred that the Statement of Claim lacked facts that disclosed or supported the Plaintiff's entitlement to any judgment against the Defendant.

The second observation was that the Certificate of Title relating to the property in dispute, namely, Subdivision B151 of Farm No.1883, Copperbelt, was registered in the name of Twim Rivers Estates Limited.

The Defendant contended that Twim Rivers Estates Limited is a limited liability company, in which the deceased served as one of

the Directors and that he only acted as an agent of Twim Rivers Estate Limited in the purchase of the property in question.

In addition, on the authority of the case of ***Associated Chemicals Limited vs. Hill and Delamin Zambia Limited and Ellis and Company (AS a Law Firm) (1998) S.J. 7 (S.C)***³, it was submitted that in law, a company is a metaphysical entity that enjoys a distinct persona from its members, albeit it could only do things through its officers.

The Defendant further advanced the argument no person could sue or be sued on a contract unless he was a party. In this regard, it was contended that the Defendant was not a party to the contract of sale and as such could not be sued on the contract.

In essence, the Defendant's position was that the deceased was not a party to the contract of sale relating to the purchase of Subdivision B151 of Farm No.1883 and as such his estate was equally not privy to the contract. Consequently, the argument goes, no cause of action has been disclosed against the Defendant to sustain an action against her.

In opposing the application, the Defendant tendered an Affidavit in Opposition sworn by the General Counsel in the Plaintiff Company.

The Affidavit in opposition drew the Court's attention to the Affidavit in Support wherein the Defendant, in paragraph 5, not

only confirmed that she is the administrator of the Estate of the Late Benedict Chileshe but admitted that the said late Benedict Chileshe was in fact the purchaser of the property in question.

The Plaintiff argued that the admission, by the Defendant, that the deceased was the purchaser of the property subject to these proceedings placed the Administrator of his Estate in the position of the deceased as the rightful party to these proceedings.

I am grateful to the parties for articulating their antagonistic views because in so doing they have enabled the Court to analyze the issues and arguments before Court from all points of vantage.

As such, I have carefully considered all the Affidavit evidence, arguments and authorities before me. I will begin by addressing the contention that Twim Rivers Estates Limited is a limited liability company in which the deceased was a director because it drew my attention and prompted me to revisit the Affidavit in Support.

My examination of the Affidavit in Support revealed that the Affidavit contained no attestation that the deceased was a director in Twim Rivers Estates Limited, nor did it contain any deposition that there was a transaction between the company and the Plaintiff, nor was there any attestation that the deceased acted in his capacity as a director in respect to the execution of any contract of sale for the purchase of Subdivision B151 of Farm No. 1883.

Consequently, I am hemmed in by the law and cannot give that aspect of the Applicant's contentions any evidentiary credence.

On the Other hand, I am persuaded that the Affidavit evidence before me reveals that the deceased was the purchaser of the property which is subject to these proceedings. I premise my conviction on the express admission contained in paragraph 5 of the Affidavit in Support. That being the case, I not only see a nexus between the facts and the reliefs claimed, but and I am satisfied that the estate of the deceased has an interest in these proceedings and is likely to be affected by the outcome herein.

I now move to consider Order XIV, rule 5(2) of the High Court Rules, pursuant to which this application was brought. Order XIV, rule 5 (2) gives the Court power to strike out a party who has been improperly joined. The power may be exercised at any stage of the proceedings. The Court's power, as vested in rules 5 (2), is discretionary.

Given that the application before me beckons the use of judicial discretion, I will give a synopsis of the erudition on judicial discretion as articulated by Judge Thomas **A Zonay, *Judicial Discretion, Ten Guidelines For Its Use, (2015) National Judicial College, Reno, Nevada, USA.*** Judicial discretion is said to be the act of making a choice in the absence of a fixed rule. The choice must not be made arbitrarily or capriciously but with regard to what is fair

and equitable under the circumstances and the law. Clearly, discretion involves situational circumstances.

In the case before me, the circumstances are such that there is a dispute over the completion of a transaction involving the sale of land which the deceased is attested to have purchased. It is my position that it would serve the interest of justice and equity for the estate of the deceased to be carried along in these proceedings. Consequentially, I decline to exercise my discretion to strike out the Defendant in her representative capacity.

I have also reflected on the fact that the evidence before Court shows that the current registered owner of the property is Twim Rivers Estate Limited. That proprietorship, in my view, brings Twim Rivers Estate Limited in the class of persons with an interest in the land transaction and it is likely to be impacted by these proceedings.

This brings me to the Defendant's argument that that a company enjoys distinct legal persona. I agree with that position of the law. As a result, and bearing in mind its legal capacity, Twim Rivers Estate Limited is in a position to be joined to these proceedings.

In considering joinder, I am sentient of the provisions of **Order 14 Rule 5 of the High Court Rules, High Court Act, Chapter 27 of the Laws of Zambia** which vests, in this Court, the power to, *suomoto*, ensure

that a party who has an interest in the subject-matter of the suit, or who may be likely to be affected by the result, be joined as a party.

As I am of the firm view that there is a likelihood that the Twim Rivers Estates Limited will be affected by the outcome of these proceedings, I direct that it be and is hereby joined as 2nd Defendant.

The Plaintiff shall accordingly amend the originating process to include the 2nd Defendant and effect service within fourteen days from date of the amended process.

If the registered proprietor of the property subject to these proceedings is not joined at this stage, it may be encouraging a multiplicity of actions, which by a plethora of authority is frowned upon in this Jurisdiction.

Costs are awarded to the Plaintiffs to be taxed in default of agreement.

Leave to appeal is granted

Dated this 23rd Day of August, 2017



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Judge B. G. Lungu
High Court