SIMBEYE ENTERPRISES LIMITED AND INVESTRUST MERCHANT BANK (Z) LIMITED v IBRAHIM YOUSUF

Chirwa, Muzyamba and Chibesakunda, JJS
26th October, 2000 and 2nd November, 2000
(SCZ Judgment No. 36 of 2000)

Flynote

Civil Procedure – Joinder of a Plaintiff – Conditions for Joinder.

Headnote

This is an appeal against a refusal by the High Court to join the first appellant as second plaintiff to the originating summons issued out of the Principal Registry on 9th February 1999, between the second appellant as plaintiff and the respondent as defendant, for the removal of a caveat placed on Plot 16835, Lusaka.

Held:

(i) No person shall be added as a plaintiff without his consent signified in writing or in such other manner as may be authorised.

(ii) The rule applies only where the application is made either by a plaintiff to join another person as a co-plaintiff or by another person to join the other as a plaintiff.

(iii) It has been the practice of the Supreme Court to join any person to the appeal if the decision of the court would affect that person or his interest. The purpose of the rule is to bring all parties to disputes relating to one subject-matter before the court at the same time so that disputes may be determined without the delay, inconvenience and expense of separate actions and trials.

N. Mutti (Mrs) of Lukona Chambers for the first appellant.

M. Mutemwa of Mutemwa Chambers for the second appellant.

A .D .Adam, SC, appearing with M .A. A. Yousuf of Adam and Company for the respondent.

Judgment

MUZYAMBA, JS delivered the judgment of the court.

This is an appeal against a refusal by the High Court to join the 1st appellant as second plaintiff to the originating summons issued out of the Principal Registry on 9th February 1999, between the 2nd appellant as plaintiff and the respondent as

defendant, for the removal of a caveat placed on Plot 16835, Lusaka. For convenience, we shall refer to the 2nd appellant as plaintiff and the respondent as defendant and the 1st appellant as applicant for that is what they were in the court below.

When we heard the appeal we allowed it and said we would give our reasons later. We now do so.

The brief facts of this case were that Cotmark Limited got a loan of K200,000,000 from the plaintiff. As a security for repayment of the loan, the defendant mortgaged his property, plot 16835, Lusaka and signed a third party Mortgage Deed. When Cotmark Limited failed to repay the loan, the plaintiff took possession of the mortgaged property and in the exercise of its right of sell under the mortgage deed, advertised the property for sale. The applicant responded by its agents and offered to buy the property. The offer was accepted by the plaintiff and they entered into a written contract of sale. Later, the property was conveyed to the applicant and a certificate of title at page 113 of the record of appeal issued in its name. It is dated 7th September 1999. On 21st September 1999, the applicant applied to court to be joined as a plaintiff to the action between the plaintiff and defendant. The application was refused. The applicant now appeals to this court.

There is one ground of appeal that the learned trial Judge erred in fact and law in refusing the application.

Learned Counsel for the applicant argued that the affidavit in support of the application for joinder disclosed sufficient interest on the part of the applicant in the property, the subject of the originating process proceedings. He referred us to the certificate of title at page 113 in the name of the applicant and to the official search at the Lands and Deeds Registry at page 89 which showed that the property was still registered in the name of the applicant. That having disclosed sufficient interest in the property, the applicant ought to have been made a party to the action and therefore that the learned trial Judge erred in refusing the application. Mr Mutemwa simply concurred with Mrs Mutti and we commend him for this. And learned counsel for the defendant argued that the learned trial Judge was right in refusing the application because it did not comply with Order 15 Rule 6 RSC 1999, Edition, in that there was no written consent for the applicant to be joined as a plaintiff. Further, that the affidavit in support of the application was not sworn by a member of the applicant. Nor did the affidavit disclose a cause of action between the applicant and the defendant. He wondered how the caveat could have been removed without citing the caveator, Yousuf Essa.

We have considered the evidence on record, the order of the learned trial Judge and the written and oral arguments on both sides. Order 15 Rule 6 sub rule 4, RSC cited by Mr Yousuf provides as follows:

"*No person shall be added as a plaintiff without his consent signified in writing or in such other manner as may be authorised.*"

The rule is explicit but does it apply where a person who is desirous of being made a plaintiff personally or through his advocate makes an application to court to be joined as such. We think not because a consent in those circumstances would be superfluous and serve no useful purpose at all. In our view the rule applies only

where the application is made either by a plaintiff to join another person as a co-plaintiff or by another person to join the other as a plaintiff. It is only fair and proper that, that person do consent because of the attendant consequences of being a litigant. In this case, the motion for joinder was filed by the applicant's advocates. There was, therefore, no need for written consent on the part of the applicant to be joined as a plaintiff.

As regards Mr Yousuf's argument that the affidavit in support of the application was not sworn by a member of the applicant company and that it did not disclose a cause of action, at law a company can appoint an agent and the deponent said he was an agent of the applicant who negotiated on behalf of the applicant for the purchase of the plot from the mortgagee. Regarding disclosure of a cause of action we note that this is not a necessity of Order 15 cited by Mr Yousuf. It is sufficient merely to show that the outcome of those proceedings would affect the applicant or his interest. It has in fact been the practice of this court, even at this late stage, to join any person to the appeal if our decision would affect that person or his interest. The fact that the applicant has an interest in the property, the subject of the proceedings in the court below cannot be doubted. This is evidenced by a certificate of title which is prima facie evidence of ownership. It was argued by both Mr Yousuf and Adam that the applicant's interest was acquired after the proceedings in the court below had commenced and that for this reason the applicant should, if it has any cause of action, commence an action instead of being joined as a plaintiff to the proceedings. This argument is contrary to Order 15 cited and relied upon by Mr Yousuf. The foot note reads in part: *"EFFECT of Rule:*

This rule should be construed so as to effectuate what was one of the great objects of the Judicature Acts, namely, to bring all parties to disputes relating to one subject-matter before the Court at the same time so that the disputes may be determined without the delay, inconvenience and expense of separate actions and trials."

This is the overriding principle which we drew to the attention of Mr Yousuf but which he unfortunately scoffed at without giving it a thought.

It was for these reasons that we allowed the appeal and ordered that the applicant be joined as a second plaintiff and that costs do abide by the outcome of those proceedings.

Appeal allowed