

USEBIA MUZONDO
versus
ASSETFIN (PVT) LIMITED
and
MANSEL EMMANUEL MACHAYA
and
SHARON TOKODA
and
SHAFFINE SANDRA MACHAYA
and
KEVIN KUDAKWASHE MURONDA
and
COSMAS NYAMUTSWA
and
CAECELIA NYAMUTSWA (Nee MADAWO)
and
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
ZHOU
HARARE, 10 November 2020 and 18 March 2022

Opposed Application

Ms A.Y Saunyama, for the applicant
G. Madzoka, for the 1st respondent
F.T Chingoma for the 2nd, 3rd and 4th respondents
A. Masango for the 5th respondent

ZHOU J: This is an application for the joinder of the second to the eighth respondents as the second to eighth defendants, respectively, in Case No. HC 9354/18 and for the applicant to be granted leave to amend the summons, declaration and other pleadings in order to reflect the claim in so far as it affects the additional defendants. The applicant also asks the court to order that the newly joined defendants be given leave if they are so minded, to defend her claims. Costs are sought to be in the cause.

The application is contested by the first, second, third, fourth and fifth respondents.

The material facts grounding the application are as follows: the applicant is the plaintiff and the first respondent herein is the defendant in an action instituted under Case No. HC

9354/18, wherein the applicant is seeking an order compelling the first respondent to transfer to her the immovable property known as Stand 1135 Bannockburn Township, Mt Pleasant, Heights, Harare. The transfer of title is sought based on an agreement of cession of rights between the first respondent on the one hand and on the other hand, the sixth and seventh respondents. The sixth and seventh respondents ceded their rights, title and interest in the immovable property to the applicant in 2001. Applicant took occupation of the immovable property. In its plea in HC 9354/18 the first respondent objected to the non-joinder of the sixth and seventh respondents herein on the basis that they ought to have been cited owing to their legal interest in the property which was the object of the claim. It further contended that the agreement between it and the sixth and seventh respondents was cancelled for failure to pay the agreed purchase price, hence these respondents could not cede any right, title or interest in the property because they had no such right. It further pleaded that it could not transact in 2009 because it had been specified in terms of the applicable law.

A letter dated 23 January 2018 which was written by the first respondent's Legal Practitioners, *Muronda Malinga*, advised that the immovable property had been sold by the first respondent to the second to fourth respondents. By letter dated 10 April 2018 the applicant through her Legal Practitioners, asserted her claim to the property and, further, cautioned the fifth respondent against transferring the property to the second to fourth respondents. The letter also referred to the invitation by the first respondent's appointed conveyancers, Gutu and Chikowero, to the sixth and seventh respondents, to attend at their offices to enable the processing of the deed of transfer to be done.

It is common cause that in 2019 the first respondent went on to pass transfer in the disputed property to the second, third and fourth respondents. The fifth respondent acted as the conveyancer in the passing of the transfer. At the time that the transfer was effected Case No. HC 9354 had reached the pre-trial conference stage as evidenced by the dates on the draft pre-trial conference minute and the application for a pre-trial conference date.

The first respondent opposed the present application on the basis of the objection *in limine* that the main matter to which the joinder relates had been deemed abandoned after the applicant failed to set it down within the time prescribed following its postponement. The postponement was granted pending the making of the instant application for joinder. I dismissed the objection and advised that my reasons for the dismissal would be contained in

the final judgment. On the merits, the first respondent took the attitude that it did not contest the joinder.

Mr *Chingoma* for the second, third and fourth respondents who had initially contested the application later abandoned the opposition, acknowledging that these respondents do have a legal interest in the subject matter of the application. The concession was properly made. The fifth respondent submitted that he ought not to be joined because he merely acted as agent. He argued, further, that the issues raised can be determined without hearing him. Sixth and seventh respondents advised by letter that they do not oppose the application.

Regarding the objection *in limine*, no proof was produced to show that the main case was dismissed. Clearly, it could not be argued before the instant matter was determined. The submission that the relief sought *in casu* has been overtaken by the alleged abandonment and dismissal is therefore not based on facts. The instant application was filed on 3 June 2020. There was no communication advising the parties of the dismissal of the application then. Even at the time of the hearing of the application no such dismissal had taken place. The objection is therefore without merit, hence its dismissal.

On the merits, as noted earlier on, only the fifth respondent has persisted with the opposition to his joinder. The fifth respondent is the legal practitioner for the first respondent. He was also the conveyancer in the registration of the deed of transfer in favour of the second, third and fourth respondents.

The trite position of the law is articulated in the case *Zimbabwe Teachers Association and Others v Minister of Education* 1990 (2) ZLR 48 (HC) at 52F-H, as follows:

“It is well settled that, in order to justify its participation in a suit such as the present a party ...has to show that it has a direct and substantial interest in the subject matter and outcome of the application. In regard to the concept of such a direct and substantial interest, CORBETT J in *United Watch and Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another* 1972 (4) SA 409(C) quoted with approval the view expressed in *Henric Viljoen (Pty) Ltd v Awerbuch Brothers* 1953(2) SA151 (0) that it connoted –

.....an interest in the right which is the subject matter of the litigation and ...not thereby a financial interest which is only an indirect interest in such litigation.”

The above authorities also emphasize that what is required is a legal interest in the subject -matter of the action which could be prejudicially affected by the judgment of the Court, see *United Watch and Diamond Co (Pty) Ltd and others v Disa Hotels Ltd and Another, supra*, at 415H.

The first respondent does have a legal interest which is directed and substantial, in the immovable property because it was the owner of the property which it had sold to the sixth and seventh respondents. It is also the party that passed title in the property to the second, third and fourth respondents, hence their interest in the property as well. The position of the fifth respondent is different from that of the other respondents in that as conveyancer, he was merely acting as the agent of the owner of the property. In other words, the fifth respondent was merely executing the mandate given to him by the first respondent. He has no direct and substantial legal interests in the immovable property. For these reasons, he should not have been joined to the proceedings.

The application for the joinder of the fifth respondent to the main matter must, therefore, be dismissed.

The applicant asked that costs must be in the cause. In respect of the fifth respondent's costs, the general rule would be that costs should follow the result. However, in this case the fifth respondent is to blame in a very serious way for the predicament of the other respondents. He is a legal practitioner and officer of this court, yet he went on to process the transfer of the property into the names of the second, third and fourth respondent with the full knowledge that the property was the subject of pending litigation which had reached the pre-trial conference stage. What makes the fifth respondent's conduct reprehensible is that he is involved in the main matter as the legal practitioner for the defendant. His law firm, through him, represents the first respondent in the present case. His conduct of facilitating the transfer of the property raises serious ethical questions which justify depriving him of the costs of this application. In fact, he should consider himself lucky that costs were not sought against him, otherwise the court would have readily acceded to such a request.

In the result, IT IS ORDERED THAT:

1. The second, third, fourth, sixth, seventh and eighth respondents are to be joined as the second, third, fourth, fifth, sixth and seventh defendants respectively, in Case No. HC 9354/18.
2. The application for the joinder of the fifth respondent as a defendant in HC 9354/18 is dismissed with each party bearing its own costs.

3. The applicant is granted leave to file an amended summons and a declaration, to incorporate the joined defendants and to reflect the claims and /or relief which is being sought against them. The amended summons and declaration shall be filed and served on all the defendants within 7 days after the date of this order.
4. The filing of the rest of the pleadings and other subsequent procedures shall be in terms of the rules of court.
5. Costs shall be in the cause in HC 9354/18.

H Mukonoweshuro and Partners, applicant's Legal Practitioners
Muronda Malinga Legal Practice, first respondent's Legal Practitioners
Siti Law Chambers, second, third, fourth respondents' Legal Practitioners
Mazhande Mazhande Legal Practice, fifth respondent's legal practitioners