

FUTURE CHIRANGO  
and  
PETRONELLA MUVIRIMI  
versus  
LEATHOUT INVESTMENTS (PRIVATE) LIMITED  
and  
ZIMBABWE REVENUE AUTHORITY  
and  
THE REGISTRAR OF DEEDS N.O

HIGH COURT OF ZIMBABWE  
BACHI MZAWAZI J  
HARARE, 6 September & 14 September 2022

*W. Ncube* for the applicants  
*T. Mpofu* for the 1<sup>st</sup> respondent

### **Opposed Application**

BACHI MZAWAZI J: This is an opposed application for the joinder of the second and third respondents, brought in terms of rule 32 of the High Court rules, 2021. The second and third respondents did not oppose the application.

Most of the facts and background to this dispute are not in contention. It suffices to note that, the first respondent is the applicant in suit HC 2741/14, in which the applicants, herein are the respondents. It is the same case in which the applicants seek the joinder of the said respondents. Central to the dispute in case HC 2741/14 is property 69 Glenara Avenue, Highlands, Harare, also known as Lot 1 of stand 21A, Oval Park, Township, held under deed of transfer number 06177/2007 and 6021/2010 respectively. It is evident that there are two title deeds over the same property issued by the third respondents. It is also a common fact that the applicants had contested their rights in the said property in case HC, 10985/15 and lost on technicality. Evidence has also been placed on record of both the above mentioned case and its subsequent appeal with the Supreme Court in case SC955/12, judgment number SC60/21, which was remitted back to this court for determination.

Applicants contend that, they acquired the said property, obtained title under deed of transfer 06177/2007 and had been in occupation ever since. It is their further averment that, the first respondent brought an action, under case HC 2741/14, for their eviction from the property after

claiming that they had ownership of the same through a deed of transfer, number 6021/2010. In that action, the applicants raised the defence of fraud arguing that the second deed of transfer issued over the same property was fraudulently obtained. They claim that in their quest for answers they have challenged the impropriety of actions in the offices of both the second and third respondents in the whole saga. This culminated in the written acknowledgement from the second respondents, of their lack of diligence, but for fear of incriminating themselves and attracting a deluge of law suits, they could not take any actions to reverse the situation. It is alleged that they urged the applicants to take the courts route.

After a pretrial conference had been held pursuant to the Supreme Court order, the issue that emerged for determination in case HC 2741/14, is whether or not the first respondent's alleged title to the property in question was as a result of fraud? It is on the basis of the above issue that the applicants are seeking the joinder of the other two mentioned respondents.

Their grounds for the joinder are that, both the first and second respondents are key players in the issuance of the capital gains certificates and the title deeds. The offices work hand in hand. As such since the first respondent has in a way, admitted liability of the irregular procedure done by his office through a letter dated the 26 of October, 2017, then they are both crucial to the resolution of the case as co-defendants.

In opposition, the first respondent raised several points *in limine*. Notably, though counsel for the applicant made submissions on them, counsel for the respondent did not motivate them any further. In my view they have been vacated and I find nothing turning on them. On the merits, the first respondent argues that, there is no need to join the said two respondents as no claim has been made against them, no relief is being claimed from them and the outcome of the matter does not affect them. They argue further that, HC 2741/14 being an eviction matter, can be determined and adjudicated upon, without the addition of the second and third respondents as parties and co-defendants. They contend that their inclusion is prejudicial as it is meant to frustrate their claim and will cause undue delay as they are not in occupation of the contentious property.

They argue that the joinder is premised on a plea and a plea does not entitle the obtaining of relief as it is a shield of defence and not a sword for attack. From their perspective, what the applicants seek from the said respondents is evidence to buttress their plea. As such, the best recourse is to call the two respondents as witnesses to support their defence in the main action. They assert that the

joining of the defendants is a disguised move to bring in issues that have already been dealt in HC10985/15 and is subject of appeal, in SC256/20.

In addition, they argue that, the application for joinder is procedurally wrong, as the rule cited, specifically, speaks to an option only applicable to the joining of plaintiffs and their claims. In their assertion, a defendant cannot join another defendant in terms of r32 which is of general application, in the face of a rule of special application, rule 35 of the 2021 High Court rules.

I am persuaded by applicants' averments that r 32(12) (b) is the most applicable. They state that the applicants as defendants in the main matter, are not claiming anything from the co-defendants they seek to be enjoined. They therefore submit that, rule 35, does not apply. In their summarised response, r 35 speaks to instances where the defendant wants to add another defendant for the purpose of satisfying its own claim.

In light of the submissions of the parties, the issue for determination is whether or not the applicants as defendants in the main action, in case HC 27/14, can join the second and third respondents as co-defendants in the same suit?

The law in relation to the joinder of parties has been well captured both in the old and new rules of this court. In the 1971, rules it was in terms of r 85. In the current high court rules, it is, in terms of r32, and in concurrence with the respondents, r 35. I do agree, that both r 32 and 35, apply but in different contexts. Whilst both r32 (12) (b) and rule 35 deal with the joining of co- defendants, I am not convinced that r35 is applicable in this matter. I am inclined to agree with the applicants' averments that r 32(12) (b) is the most applicable. Rule 32(12) of the High Court rules 2021 provides that;

(12)

at any stage of the proceedings in any cause or matter, the court may on such terms as it thinks just and either on its own initiative or application;

(12(a)...

12(b), orders that 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 effectively and completely determined and adjudicated upon, to be added as a party.

In, *Aerosume Property Developers vs Tecla Chipu Muvindidze HH 434-22* (unreported) this court, relying on the authority of *Nyamweda vs Georgias SC 200-88*, examined the issue of the joinder of co-defendants to the defendant and concluded that a co-defendant can enjoin another defendant to the suit within the bedrock of r 32(12)(b) of the High court rules.

I am further, fortified in this view, as the same conclusion was reached in terms of the old rules, in *MBCA Bank Ltd vs RBZ & Anor HH 482/2015*. In that case it was held that:

“A defendant has a right to seek the joinder of a co-defendant at any stage of the proceedings. In terms of rule 85 of the High Court r 1971. Two or more persons may be joined in the action as plaintiffs or defendants ... Joinder of a party to proceedings is something within the discretion of the court, which discretion, of course, should be exercised judiciously. The proceedings are commenced when summons are issued and completed upon delivery of judgement.”

See, *Terera vs Lock & 3 Others SC 93/2021*.

Evidently, Rule 12, speaks to both the joinder of parties and causes of action. I am inclined to agree with the applicants, in that the respondents are key players in the whole matrix. It is the office of the first respondent that is equipped with all safeguard mechanisms pertaining to the issuance of capital gains tax and certificates in transit to the Deeds registry. It is the office where admittedly, laid down safe guard procedures were flouted and not complied with. It admitted its misfeasance. They therefore must be incorporated in the law suit to explain themselves, bearing in mind that there are allegations of fraud as a defence to the claim of eviction in the main action. It is also a given that, the office of the registrar of deeds acts on the information emanating from the office of the second respondent. The second respondent issued title of one property to two people in succession, one in 2007 to the applicants and the other in 2010 to the applicant in the main action. It has to explain itself and the basis and circumstances upon which an error of such magnitude was occasioned, if not through fraud? In my view this is main and central issue to be interrogated and necessitates their inclusion as co-defendants.

As such, I do not see anything wrong in joining the two mentioned parties as co-defendants. The *MBCA Bank Ltd* case above, is authority that, this can be done at any stage before the conclusion of a case. The 2021 rules, from 32(15) to (17), also stipulates the procedures to be followed once an order of a joinder is made. In summation, the applicants have stated that they have no claim against the defendants and that, that the respondents have neither claimed nor sought any relief from the said parties but that should not exclude them from seeking their joinder. As explained earlier on, the two respondents in question, are crucial to the resolution of the defence raised in the main action. I am

not of the view that the applicants seek to challenge the decisions already made by this court currently on appeal. ZHOU J's decision is hinged on prescription and the outstanding case, which is the main action is based on a common law remedy of *rei vindicatio*.

In the final analysis my construction of rule 35 of the 2021 high court rules, which are very clear and self-explanatory, is that, it relates to situations where the defendant claims (underscored for emphasis) from co-defendants, wherein the relief would need apportionment and the co-defendants will be liable to meet the defendant halfway. In other words, where the defendant would join liability with a co- defendant who would not have been joined as a party. I have already made a finding that in terms of r 32(12(b) the Applicants can join the second and third respondents to this suit. The application for joinder thus succeeds.

Accordingly, it is ordered that:

1. The application be and is hereby granted
2. The second and third respondents be and are hereby joined to action under HC 274/14 as the second and third respondents respectively.
3. The parties to comply with rule 32(15) (16) and (17) of the 2021 High Court rules.
4. Each party to bear its own costs

*L T Muringani Law Practice*, applicant's legal practitioners  
*Atherstone & Cook*, first respondent's legal practitioners