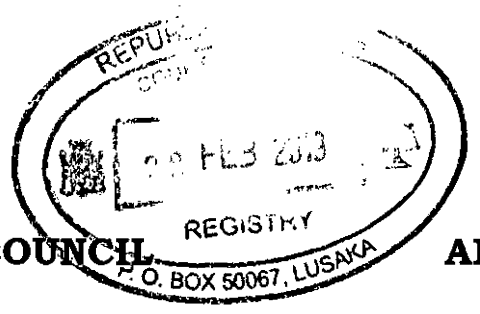
IN THE COURT OF APPEAL **APPEAL NO. 149 OF 2018**

OF ZAMBIA

HOLDEN AT NDOLA

(Civil Jurisdiction)



BETWEEN:

ZAMBEZI DISTRICT COUNCIL **APPELLANT**

AND

ZOLICK KAZANDA CHANYIKA III *(Suing in his capacity as Senior Chief Ishindi of the Lunda Chiefdom)* **RESPONDENT**

CORAM: Chashi, Lengalenga and Siavwapa, JJA

ON: 20th and 28th February 2019

For the Appellant: *S. A.G Twumasi, Messrs Kitwe Chambers*

For the Respondent: *D. Tambulukani, Messrs Derrick Mulenga and Company*

J U D G M E N T

CHASHI, JA delivered the Judgment of the Court.

Cases referred to:

1. **The Attorney General v Aboubacar Tall and Zambia Airways Corporation - SCZ Appeal No. 77 of 1994**
2. **Abel Mulenga and Others v Mabvuto Adan Avuta Chikumbi and Others and The Attorney General (2006) ZR, 33**

3. **Zega Limited v Zambezi Airlines and Diamond General Insurance Limited - SCZ Appeal No. 39 of 2014**
4. **Eureka Construction Limited v The Attorney General, Consolidated Lighting Zambia Limited** (Proposed intervening Party) **(2008) ZR, 64 Vol 2**
5. **Premesh Bhai Megan Patel v Rephidim Institute Limited - SCZ Judgment No. 3 of 2011**
6. **Jennifer Nawa v Standard Chartered Bank - SCZ No. 1 of 2011**
7. **Ellis v Allen (1911-13) All ER, 906**
8. **Himani Alloys Limited v Tata Steel Limited (2011) 3, Civil Cases, 721**

Legislation referred to:

1. **The High Court Act, Chapter 27 of The Laws of Zambia**
2. **The Urban and Regional Planning Act, No. 3 of 2015**
3. **The Provincial and District Boundaries Act, Chapter 286 of the Laws of Zambia**
4. **The Constitution of Zambia (Amendment) Act No. 2 of 2016**
5. **The Supreme Court Practice (White Book) 1999**

Other works referred to:

1. **Black's Law Dictionary by Brian A Garner 9th edition**

Zambezi District Council (the Appellant) lies in two chiefdoms, that of Ngungu and the Respondent.

The brief background to this matter is that, the parties herein had disputes over land. Sometime in 2008, the Respondent suspected the Appellant of encroaching into its customary/traditional land.

Negotiations aimed at finding an amicable settlement took place, as a result of which several correspondences were exchanged.

However, the parties failed to settle the matter.

On 5th November 2012, the Respondent commenced proceedings in the High Court by way of writ of summons seeking a declaratory Order that the Appellant had encroached the Respondent's land and damages.

When the Appellant settled its defence, it denied the claim and averred that it was within the boundaries of State land.

On 14th September 2017, the Respondent took out summons for Judgment on admission pursuant to Order 21/6 of **The High Court Rules (HCR)**[1].

The learned Judge in the court below, entered Judgment on admission on 22nd January 2018.

On 15th February 2018, the Appellant took out the following applications:

(1) For joinder of the Surveyor General through the office of the Attorney General as a party to the proceedings.

(2) To set aside the Judgment on admission, which they alleged was obtained in the absence of the Appellant

AND

An order that the action was irregular as it ought to have been commenced before the Planning Appeals Tribunal (PAT) under Section 62 of **The Urban and Regional Planning Act**[1].

Both applications were refused by the learned Judge on 13th June 2018.

Dissatisfied with the Ruling, the Appellant has appealed to this Court advancing three grounds couched as follows:

(1) The trial court erred in law and fact when it held that the application to join the Attorney General to the proceedings was baseless and misconceived.

(2) The trial court erred in law and fact in not considering whether or not the Judgment on admission was not contrary to the **Constitution of Zambia** (Amended), **The Urban and Regional Planning Act** or Chapter 286 of the Laws of Zambia.

(3) The trial court erred in law and fact in holding that there was an admission on the part of the Appellant.

On the first ground of appeal, Mr. Twumasi, Counsel for the Appellant, drew our attention to the provisions of Order 14/5 (1) **HCR** and several cases on joinder of parties, notable amongst them, **The Attorney General v Aboubacar Tall and Zambia Airways Corporation**[1] and **Abel Mulenga and Others v Mabvuto Adan Avuta Chikumbi and Others and The Attorney General**[2] and submitted that, it is trite law that an application for joinder is necessary to join persons who may be entitled to, or claim some share or interest in the subject matter of the suit or who may be likely affected by the result.

According to Counsel, the Attorney General should have been joined to the proceedings as the State has an interest in this action. That, this is so, because the determination of the correct boundaries in the action affects the Ministry of Lands, the Surveyor General and ultimately the State; in terms of the State's boundary.

As regards the second ground of appeal, it is Counsel's argument that the court below did not consider the purported admission in light of **The Provincial and District Boundaries Act**[3] as well as Article 152 (1) of **The Constitution of Zambia**[4].

According to Counsel, the Zambezi District boundaries were defined as submitted in the court below in the defendant's list of authorities and arguments as appearing at page 139 – 141 of the record of appeal (the record).

Counsel further submitted that, the court below did not make any determination whether the Judgment on admission was in line with the aforesaid law.

In arguing the third ground of appeal, Counsel contended that the purported admission was made subject to the approval by the Appellant Council and that there was a defence on the merit in the matter.

Counsel cited the case of **Zega Limited v Zambezi Airlines Limited and Diamond General Insurance Limited**[3] where the Supreme Court held that:

> *"The power of the court to enter Judgment on admission is discretionary and that in order to exercise its discretion to enter Judgment on admission, the admission relied upon must not be limited by any conditions and that it must be clear."*

That whilst the court below correctly noted that the admission was made subject to approval by the Appellant Counsel, it went on to hold that there was a clear admission on the encroachment for which a payment was made.

Counsel contended that there was no clear and unequivocal admission of the encroachment when the Appellant pleaded in its defence that the allocation of the land was done within State land, and therefore, the matter should have been heard on merit at the full trial.

As far as Counsel is concerned, there were no minutes and/or resolution of the Council produced before the court to confirm the admission, which minutes or resolutions are open to the public for inspection.

Further, that the notice to produce filed in the court below on 20th April 2018, clearly showed that the Appellant conformed to Statutory Instrument No. 45 of 1978. That the court below did not consider the report of the Surveyor General in exercising its discretion to enter Judgment on admission.

According to Counsel, the Judgment on admission flies in the teeth of the report.

In turn, Mr. Tambulukani, Counsel for the Respondent relied on the Respondent's heads of argument. In response to the first ground of appeal, Counsel submitted that, the Appellant does not seem to appreciate what the subject matter of the action was. Counsel submitted that, there was already determined boundaries between customary land and Council land in all districts and provinces in Zambia. These boundaries are defined in maps that have been drawn and approved by the State through the office of the Surveyor General.

It was Counsel's submission that in *casu*, the dispute falls under customary land to be administrated by the Respondent or township land to be administrated by the Appellant.

Counsel submitted that, the State is just the custodian of the maps and therefore does not have sufficient interest in the disputed land to justify it being joined to the action.

Counsel also drew our attention to Order 14/5 (1) **HCR** and submitted that the rule is subject to the party to be joined to show *locus standi* or sufficient interest in the matter. It is not sufficient to show merely that the outcome to the proceedings would affect the applicant or his interest. The case of **Eureka Construction Limited**

v The Attorney General, Consolidated Lighting Zambia Limited[4] (Proposed intervening Party) was to that effect cited.

That, it follows that, where a party cannot show sufficient interest or *locus standi* by showing evidence to the court of his share, interest and how he will be affected by the result, an application for joinder will be dismissed.

In response to the second ground, it was Counsel's contention that whether the Judgment on admission was contrary to **The Constitution of Zambia**[4] was not raised in the court below and therefore cannot be raised in this Court.

Reliance in that respect was placed on the case of **Premesh Bhai Megan Patel v Rephidim Institute Limited**[5].

According to Counsel, the only question which was raised in the court below was that, the High Court had no jurisdiction to determine the matter in light of **The Urban and Regional Planning Act**[2] and that the Judgment on admission did not make any reference to the law relating to the determination of boundaries of Councils.

Counsel noted that, the Appellant has placed heavy reliance on Statutory instrument No. 118 of **The Provincial and District**

(Division) Amendment Act No. 2 of 1997 as read with **The Provincial and District Division** 1996 when the argument is not between provincial or district boundaries but between township and customary boundaries.

As regards the reliance placed on **The Urban and Regional Planning Act[2]**, Counsel submitted that, as rightly noted by the court below, the Act came into force after the action had already been commenced and therefore not applicable because the law does not apply retrospectively, as was held in the case of **Jennifer Nawa v Standard Chartered Bank[5]**.

In respect to the third ground, it was submitted that, the court below found as a fact that the Appellant admitted to have encroached into the customary land and what was subject to approval was the compensation to be paid to the Respondent.

Our attention was drawn to Order 27/3 of **The Rules of the Supreme Court (RSC)[5]** which provides with regard to admissions of fact that, such admissions may be express or implied but they must be clear.

Counsel submitted that, in this case the Appellant made both express and implied admissions to encroaching into the

Respondent's customary land. Our attention was drawn to the letter at page 80 of the record, dated 4th October 2011.

It was Counsels argument that the power of the court to enter Judgment on admission applies not only to admissions contained in pleadings, but it also applies to admissions contained in any other form.

On the issue of Council's minutes or resolution, Counsel submitted that, there is no legal requirement that a court can only enter Judgment on admission against a local authority based on minutes or resolutions of the Council. That the Appellant is subject to the same principles of law with regard to admissions upon which the court can enter Judgment.

Counsel argued that, the letters upon which Judgment was entered were written by the Council Secretary on the Appellant's letter head. The Council Secretary was therefore discharging his duties as the chief executive and the Applicant is bound by his letters. Our attention in that respect was drawn to Statutory instrument No. 56 of 1992 under Chapter 281 of The Laws of Zambia under the schedule where the functions of the Council Secretary are set out.

As regards the notice to produce, which was filed into court by the Appellant, it was submitted that it was irregularly before the court

and falls in the realm of matters not raised in the lower court and should not therefore be considered.

Counsel argued that in the event that the court considers the notice to produce, it should be noted that there were three maps. That is of 1958, 1978 and 1985, and that the 1958 and 1985 maps had the same information, unlike the 1978 which did not have the record of consultative process with relevant stakeholders and as far as the Respondent was concerned, it was a disputed map and illegal.

We have considered the arguments by the parties and the Ruling being impugned. It should be noted from the onset that the Ruling being impugned is the one dated 13th June 2018 in which the learned Judge refused to join the Attorney General as a party, dismiss the matter for want of jurisdiction and to set aside the Judgment on admission and not the Ruling of 22nd January 2018 in which Judgment was entered on admission.

The first ground of appeal attacks the learned Judge's refusal in joining the Surveyor General, through the office of Attorney General to the proceedings.

In refusing the application, the learned Judge took into consideration the provisions of Order 14/5 **HCR** whose import is that any person who is entitled to or who may likely be affected by

the result may be joined to the proceedings. The learned Judge opined that the Appellant had not shown that the Surveyor General was entitled to a share or interest in the subject matter.

The learned Judge found that the Surveyor General had no *locus standi* and there was no cause of action against him and therefore the application was baseless and misconceived.

The learned Judge was of the view that the Surveyor General can be called as an expert witness to assist either party or indeed the court to ascertain the correct boundaries.

We note from the affidavit in support of summons for leave to join a party to the proceedings at page 116 of the record deposed to by Counsel for Appellant, in particular paragraphs 4, 5, 6 and 7 that the reasons advanced for the application were as follows:

(1) That a perusal of the matter shows that in order for the court to determine the matter on a proper footing, the Attorney General need to be made a party to the proceedings.

(2) That boundaries between the urban area and traditional land are determined by statutes, including the Constitution of Zambia, The Urban and Regional Planning Act and The

Provincial and District Boundaries Act, which are administered by the Surveyor General.

(3) That the only proper person to know is the Surveyor General of Zambia.

(4) That therefore for the proper determination of whether or not there is an encroachment, the Attorney General must be made party to the proceedings.

In our view, the reasons proffered by the Appellant do not meet the threshold under Order 14/5 **HCR**. The Appellant failed to show that the Surveyor General had *locus standi* and was entitled to a share or interest in the subject matter nor that he would be affected by the outcome of the proceedings.

We agree with the learned Judge that the interests of the parties would best be served in calling the Surveyor General as a witness.

We find no fault in the manner the learned Judge exercised her discretion.

The second ground of appeal attacks the learned Judge's failure in not considering whether or not the Judgment on admission was not contrary to **The Constitution of Zambia**[4], **The Urban and Regional Planning Act**[1] and **District Boundaries Act**[3].

We note that the issue which was being advanced in the court below under the application to set aside the Judgment on admission was that the court below had no jurisdiction to hear the matter because **The Urban and Regional Planning Act**[1] provides that all disputes concerning boundaries should be determined by the **PAT**.

In determining this issue, the learned Judge noted that the matter herein was commenced in 2012 and there is no provision under the aforesaid Act for retrospective application.

This matter having been commenced in 2012 as rightly observed by the learned Judge and the Act only having come into effect in 2015, the Act is not applicable. We agree with the reasoning of the learned Judge that the High Court had jurisdiction and we find no basis to fault her.

In the argument under this ground, Counsel for the Appellant has advanced further arguments that the learned Judge did not consider the effect the Judgment on admission has on **The Provincial and District Boundaries Act**[3] and **The Constitution of Zambia**[4].

We have had occasion to peruse the affidavit in support of the application to set aside the Judgment on admission and the heads of argument at page 135 of the record.

We agree with Counsel for the Respondent that the issue in respect to the Constitution was not before the court below under this application. The only issue which was raised in the arguments at page 139 of record is that the alleged admission on the Judgment did not make any reference to the law relating to the determination of boundaries of the Council.

We shall revert to this issue when we consider the third ground of appeal as in our view it is an issue bordering on the Judgment on admission.

We now turn to consider the third ground of appeal. This ground attacks the learned Judge's holding that there was an admission on the part of the Appellant. In arriving at this finding the learned Judge made reference and reproduced the entire letter dated 20th January 2017, appearing at page 19 of the record.

The learned Judge arising from the said letter was of the view that the letter clearly showed that the Appellant had encroached on the Respondent's land. That this letter was done after a diligent investigation by the Appellant, which thereafter opted to negotiate the extension of the township boundaries and paid K20,000.00 towards damages, in settlement of the matter.

The learned Judge then opined that, when all the correspondence between the parties on record is analysed, it is clear that the Appellant admitted that, going by the latest map of 1985, it had encroached on the Respondent's land.

The issue which arises is whether there was an unequivocal and clear admission of liability by the Appellant.

Order 21 **HCR** and Order 27/3 **RSC** provide for entering of Judgment on admission by a party to a cause or matter on application either by pleadings or otherwise. The court in that respect exercises discretion.

Order 27/3/2 **RSC** states that admission may be express or implied, but they must be clear on the meaning of *"either by the pleadings or otherwise."*

Order 27/3/4 **RSC** states that such admissions may be made express in a defence or in a defence to counter claim or by virtue of the rules as where the defendant fails to traverse an allegation of fact in a statement of claim or there is default of a defence or a defence is struck out and accordingly the allegations of fact in the statement of claim are deemed to be admitted.

The rule also goes on to state that the admission may be made in a letter before or since the action or even orally if the admission can be proved.

The case of **Ellis v Allen**[7] confirmed the object of the rule as being to enable a party obtain a speedy Judgment where the other party has made a plain admission entitling the plaintiff to succeed and that it applies where there is a clear admission on the face which it is impossible for the party making it to succeed.

This position was confirmed in the case of **Himani Alloys Limited v Tata Steel Limited**[8] and by our Supreme Court in the case of **Zega Limited**[3] where they had this to say:

> *"We wish to state from the outset that it is true that under both Order 21/6 HCR and Order 27/3 RSC, the court is empowered to enter Judgment in favour of a party based on admissions of fact made by the other party on its claim(s).*
>
> *However, we must hasten to mention that the position of the law as spelt out under Order 21.3/2 RSC is that admission of liability by the party against whom Judgment on admission is sought to be entered may be express and or implied and the admission must be clear. This position*

was echoed in the case of ***Himani Alloys Limited*** *in which the Supreme Court of India made it clear inter alia that the admission must be a conscious and deliberate act of the party making it and showing an intention to be bound by it. And that unless the admission is clear, unambiguous and unconditional, the discretion of the court should not be exercised to deny the valuable right of a defendant to contest the claim against him."*

The Supreme Court went on to state that:

"The purpose and applicability of the rule relating to admissions which may be relied upon in an application for Judgment on admission was discussed in the ***Ellis case*** *and from the above, it is clear that the admissions relied upon must be unconditional and/or unequivocal. The learned authors of* ***Black's Law Dictionary*** *at page 1663 and 1667 define the terms "unconditional and unequivocal" respectively as follows:*

"Unconditional – not limited by a condition, not depending on uncertain event or contingency absolute"

Unequivocal – unambiguous, clear, free from uncertainty"

We agree with the manner in which the learned Judge exercised her discretion and the finding that there was express admission from the Appellant vide the letter dated 20th January 2017 which was clear and unconditional and also from the Appellants conduct as they unreservedly apologized and went on to make the initial payment in damages.

The admission was not subject as being alleged by the Appellant to the approval the full Council meeting or any provisions of the law such as **The Constitution of Zambia**[4] or the report of the Surveyor General. The Appellant only brought up the issue of the report at the time they were applying to set aside the Judgment on admission.

On the issue of Counsel for the Appellant not being present at the hearing of the application to enter Judgment on admission, we note that the court below in arriving at its decision took into consideration the Appellants affidavit evidence and as such they were not prejudiced.

In the view that we have taken, this appeal has no merit.

Before we rest this appeal, we have noted that, the applications which were before the court below which are subject of this appeal, were heard on 26th March 2018 and the learned Judge reserved the Ruling.

Before the Ruling could be delivered, the Appellant under unexplained circumstances filed a notice to produce on 20th April 2018, which appear at page 193 of the record, containing the Surveryor Generals report based on the 1978 maps , which the parties had agreed was illegal and therefore of no effect. The said report concluded that there was no encroachment by the Appellant.

The notice to produce containing the report in our view was sneaked in and was therefore not property before the court.

That perhaps explains why the learned Judge never took it into consideration. In the view we have taken, the said notice to produce cannot therefore be subject of this appeal. The Appellant perhaps must explore other avenues relating to evidence discovered post Judgment on admission.

The net result of this appeal is that it is dismissed, with costs to the Respondent. Same to be taxed in default of agreement.

J. CHASHI
COURT OF APPEAL JUDGE

F. M. LENGALENGA
COURT OF APPEAL JUDGE

M. J. SIAVWAPA
COURT OF APPEAL JUDGE