FTC 254/18 2018 Z NO.12

ZENITH BANK (SL) LIMITED -PLAINTIFF

AND

MICHAEL COLLIER & ANO -DEFENDANTS

RULING OF THE HONORABLE JUSTICE LORNARD TAYLOR DELIVERED ON THE 20th JANUARY 2022.

Solicitors for the Plaintiff have come before this court seeking orders which when read in context, are for the Plaintiff Zenith Bank to be removed as Plaintiff and replaced by two proposed Plaintiffs, Madam Aminata Kallay and FiFi International and Construction. In the process, that the writ of summons be amended to reflect this change.

The facts as deposed to in the affidavit in support of the application is to the effect that on diverse dates in February 2016, the proposed 1st Plaintiff instructed the then Managing Directors of Zenith Bank (SL) Limited Mr. George Meze to provide a loan in the sum of US$ 130,000 from her account for the use of the 1st and 2nd Defendants for their NASSIT projects as well as their project in precious minerals. Three undertakings were attached as exhibits in that regard.

This state of affairs added to the fact that the current plaintiff is quite reluctant to prosecute the claim even though their former Managing Director played a significant role in the transaction have spurred the solicitors for the proposed plaintiffs who also happen to be solicitors for the current plaintiff to ask that the proposed plaintiffs be added as Plaintiffs in the matter and that the current plaintiff be removed as Plaintiff.

In opposing the application, solicitors for the 2nd defendant filed and relied on their affidavit in opposition dated 2nd December 2021 and a supplemental affidavit deposed to on the 10th January 2022.

Counsel for the 1st Defendant argues that the application itself is made in bad faith to give the impression that the proposed plaintiffs have a case when in fact there is no relationship between them and the 2nd defendant. He went on to argue that as a result of this matter, judgment was taken and property not belonging to the 2nd Defendant was sold to satisfy same. He

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maintained that it is quite clear that this action lacks legal premise and that there is nothing to confirm that the 2nd defendant obtained a loan from any one including the plaintiff.

In making legal submissions, counsel for the Plaintiff relied on the case of **Union Trust Bank v Mohamed Bah &Hawa Bah MISC/APP 493/14** and made the application pursuant to Order 18 rule 6 of the High Court Rules 2007.

Counsel for the 2nd defendant relied on the case of **Benares Bank Limited v Bhagwan Das AIR (1947) ALL 18 (FB)** citing that before an application of this nature is granted the court must ascertain the following;

1. That there has been a right of relief against or in favour of such party in respect of the matters involved in the suit.
2. The court must not be in position to pass an effective decree in the absence of such a party.

He relied also on the case of **Competition Commission of India v Steel Authority of India Limited 2010 CCC 944** and submitted that "in substituting or adding a party as a Plaintiff, the court must be satisfied that the action was commenced in the name of the wrong party and such mistake must be bonafide".

Having considered the respective arguments of counsel, I must reproduce Order 18 rule 6 (1) and (2) of the High Court Rules 2007 pursuant to which this application was made for a proper understanding of the issues raised by counsel for the Plaintiff/Applicant. Its states thus;

> *"6. (1) No cause or matter shall be defeated by reason of the misjoinder or non-joinder of any party; and the Court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.*
> *(2) Subject to this rule, at any stage of the proceedings in any cause or matter the Court may, on such terms as it thinks just and either of its own motion or on application -*
> *(a) order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be a party;*
> *(b) order any of the following persons to be added as a party:-*
> *(i) 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 be effectually and completely determined and adjudicated upon; or*
> *(ii) any person between whom and any party to the cause or matter where there may exist a question or issue arising out of or relating to or*

connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter."

This provision is quite literal and unequivocal. Firstly, a cause or matter cannot be defeated simply because the wrong parties are before the court at a particular point in time. The court however in determining a cause or matter is limited to the rights and interests of the parties before it.

In the present case, I understand the respective affidavits and exhibits before this court to be pointing to the fact that even though this suit was taken at the behest of Zenith Bank (SL) Limited, the available evidence at this stage go to support the fact that it was in fact the proposed Plaintiffs who ought to have taken out proceedings against the defendants. The Managing Director of Zenith Bank at the time of the transaction seemed to have played a critical role but definitely not enough for Zenith Bank to make the claim against the defendants. Should the matter be defeated as a result of this anomaly? Order 18 rule 6 (1) of the High Court rules says no. Had the matter continued as it is, this court would have no option but to consider the respective interests of the parties as per the evidence presented before the court and give judgment accordingly.

However the present application as I understand it, is focused on amending this state of affairs and substituting the present Plaintiff Zenith Bank (SL) Limited with the proposed Plaintiffs herein who upon re-examination of the facts claim to be better placed to make the claim against the defendants. I must at this point hasten to point out that the purport of this application is to replace the Plaintiff and that the claim as prayed for in the writ of summons remains the same.

Based on this circumstance, sub-rule 2 of the authority cited above cloaks this court with authority, where the wrong personality had been made a party, order the removal or addition of any party to the action based on certain conditions as highlighted therein. This authority I must point out is largely discretionary and this court can exercise same with or without an application made to the court.

Regardless of its discretionary nature, the application of order 18 rule 6 (2) of the High Court Rules 2007 does have boundaries and same have been reconstructed in numerous instances based on the facts before the court in several different matters. Every court has sought to define its boundaries based on the peculiar nature of the matter before it but the principles used in defining these boundaries have not changed.

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Firstly, for a person or institution to be joined as a party under this rule, his presence as a party in the matter ought to be necessary for the claim to be investigated, tried and adjudicated upon. This position was succinctly summarised in the matter of **Benares Bank Limited v Bhagwan Das AIR (1947) ALL 18 (FB)** cited by Counsel for the Respondent. He stated;

> *"Before an application of this nature is granted the court must ascertain the following;*
>
> 1. *That there has been a right of relief against or in favour of such party in respect of the matters involved in the suit.*
> 2. *The court must not be in position to pass an effective decree in the absence of such a party."*

In the present case, the claim is for payment of the sum of US$ 130,000 (One hundred and thirty thousand United States dollars) being a debt due and owing the Plaintiff by the 1st and 2nd Defendant. There is no indication that this application intends to change this claim or the nature of it. The facts as argued by the Plaintiff are that the wrong plaintiff was named on the face of the writ of summons. That the claim as contained therein can only logically be prosecuted by the proposed Plaintiffs.

This was challenged by the 2nd Defendant who alleges that the proposed plaintiffs have no claim to any right of relief as per the writ of summons.

At this point this court must endeavour to make clear the line, and not venture into the realm of trying the matter even before the trial itself. The authority of the court at this stage is limited. In determining whether there is a right of relief against the defendant, the standard definitely has to be prima facie. The court will ask itself the question, if at the start of this matter the proposed plaintiff was named plaintiff, would the writ of summons not be said to have disclose a prima facie claim against the defendant? In my estimation based on the averments contained in the respective affidavits of the parties and the exhibits attached thereto, it is quite clear that the proposed plaintiffs in this application are canvassing the point that the sum claimed by Zenith Bank in the writ of summons is property of the proposed plaintiffs and as such this action ought to have been instituted in their name. I can therefore only hold that the proposed plaintiffs do have a right of relief against the defendants to be inquired into and adjudicated upon.

The second point in the **Benares Bank Limited** case cited above is that the court must not be in position to pass an effective decree in the absence of such a party. The exhibits before this court show that the 1st Defendant obtained a facility from George Meze for which the proposed plaintiffs

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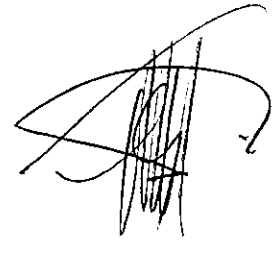
deposited collateral and a part of which said debt was assigned to the 2nd defendant. I see no permutation in which a judgment can be given that would not in one way or the other affect the proposed Plaintiffs and the 2nd defendant. The debt was allegedly incurred by the 1st defendant. A part of same was allegedly assigned to the 2nd defendant. The proposed plaintiffs allegedly stood surety for the whole debt. This means that if the debt is not paid by the 1st and 2nd Defendants, the proposed plaintiffs become liable for same. In this regard, any judgment touching and concerning the debt will without doubt affect the proposed plaintiffs. As such, this court cannot pass an effective decree in their absence.

Counsel for the 2nd Defendant in addressing the court also relied on the case of **Competition Commission of India v Steel Authority of India Limited (2010) 10 CCC 944.** The court in that case held that in substituting or adding a party as Plaintiff, the court must be satisfied that the action was commenced in the name of the wrong party and that such mistake must be bonafide. It is quite clear that in the present matter, Zenith Bank (SL) Limited do not have a claim against the Defendants. This has been made quite clear by both parties. Nonetheless, the claim of US$ 130,000 remains to be addressed. The proposed plaintiffs have come forward to show that they are entitled to certain rights with respect to that claim. This court will be most unjust to slam the door in their faces without giving them an opportunity to be heard.

Regardless of the above, granting the orders as prayed for by the Plaintiff/Applicant would certainly result in practically commencing this matter all over again. The pleadings will have to be amended to accommodate the facts to be relied on by the parties. This means the defendant would be disadvantaged by the financial losses incurred thus far. However, this is not an issue that cannot be resolved with the award of costs. The focus of the court must not in any way be diverted from the a path that will lead to hearing and determining the matter on its merits.

I therefore make the following orders;

1. Zenith Bank (SL) Limited shall forthwith be removed and cease to be Plaintiff in this matter.
2. Aminata Kallay and FiFi International and Construction shall forthwith be made 1st and 2nd Plaintiffs in this action.
3. The writ of summons shall be amended to reflect the claims of the 1st and 2nd Plaintiffs and such writ shall be filed and served on solicitors for the defendants within 7 days from the date of this order.



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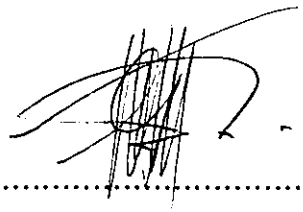
4. Solicitors for the 1st and 2nd Defendants shall file and serve their defence to the amended writ of summons within 10 days after service of the writ of summons.
5. Costs of this application is assessed at Le 15 Million



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HONORABLE JUSTICE LORNARD TAYLOR

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