

**IN THE HIGH COURT FOR ZAMBIA  
HOLDEN AT LUSAKA**  
*(Civil Jurisdiction)*



**IN THE MATTER OF                      STAND NO. 144                      SITUATED AT  
CHILANGA IN LUSAKA PROVINCE OF  
THE REPUBLIC OF ZAMBIA**

**IN THE MATTER OF                      AN APPLICATION UNDER ORDER  
113 RULE 1 OF THE RULES OF THE  
SUPREME COURT 1999 EDITION**

**BETWEEN:**

**JOSEPH MWAANGA**

**PLAINTIFF**

**VS**

**MUTEMWA SILILO**

**1<sup>ST</sup> DEFENDANT**

**NAMAKAU SILILO**

**2<sup>ND</sup> DEFENDANT**

**INUTU SILILO**

**3<sup>RD</sup> DEFENDANT**

**CORAM: HONORABLE JUSTICE MR. MWILA CHITABO, SC**

*For the Plaintiff:                      Mr. K. I. Mulenga of Messrs Kumasonde  
Chambers*

*For the Defendants: Ms. M. Namwila of Messrs Ventus Legal  
Practitioners*

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**RULING**

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**Cases Referred to:**

1. *Communication Authority of Zambia v Vodacom Zambia Limited (2009) ZR 196*
2. *Hondling Xing Xing Building Company Limited v ZamCapital Enterprise Limited*
3. *Shell BP Zambia Limited v Conidaris and Others (1975) Z.R. 174.*
4. *Turnkey Properties Limited v Lusaka West Development Limited and Others (1985) ZR 85.*

The Plaintiff, applied for an Order of injunction to restrain the Defendants from constructing structures on Stand No. 144 Chilanga, Lusaka. The said application was supported by an affidavit which was deposed to by one Joseph Mwaanga, the Plaintiff herein.

He swore that on 4<sup>th</sup> June, 2014 he brought an action against the Defendants in cause No. 2014/HP/0858 in which he was claiming among other things:

- i. *An order for specific performance with regard to a Contract of Sale made between the Plaintiff and the Defendants with respect to a proposed subdivision of Stand No. 144, Chilanga Lusaka.*
- ii. *An order that the Defendants executes all necessary legal documents to ensure the transfer of legal ownership of the proposed subdivision of stand No. 144 Chilanga, Lusaka.*

The deponent averred that on 22<sup>nd</sup> December, 2015 the Court dismissed the Defendants Counter Claim and in default of

defence in relation to the Plaintiff's claim entered judgment against the Defendants. A copy of the Ruling was exhibited and marked "JM2".

He swore that despite being served with the Ruling of the Court dismissing the Defendants counter-claim and entering judgment against them, the Defendants ignored and refused to abide by the Court's Ruling. He averred that it had come to his attention that in fact the Defendants had started constructing structures on the same piece of land in defiance of the law.

He sought the Court's intervention in the matter to ensure that the said piece of land is delivered unto the Plaintiff.

In opposing this Application the Defendants filed into Court an affidavit in opposition. The said affidavit was deposed to by one Mutemwa Sililo who averred that the Defendants did not dispute having received the ruling marked exhibit "JM2". He stated that following the said ruling the Defendants had caused an application to be filed before this Court to set aside the Ruling by the Deputy Registrar.

It was denied that the defendants had commenced any construction on the piece of land in contention. He contended that there are several subdivisions on Stand No. 144, Chilanga Lusaka which was owned by the Defendants severally and by third parties not party to this action. He stated that by seeking an injunction on the proposed subdivision of the property in question the Plaintiff was not being specific and attempting to

obtain an injunction on other property that was not subject of the subject of dispute.

He added that the Plaintiff in his affidavit did not show irreparable damage that would be caused if the injunction was not granted.

In the Plaintiff's affidavit in Reply deposed to by the Plaintiff and filed into Court on 27<sup>th</sup> September, 2016 it was contended that it was not true that the Defendants had not commenced any construction on the piece of land.

He further averred that if indeed there were several subdivisions on Stand No. 144 Chilanga which are owned by the defendants and other third parties not party to this action, the same were a creation of the Defendants in defiance of the ruling of the Court dated 22<sup>nd</sup> December, 2015.

He stated that from the statement of claim filed on 4<sup>th</sup> June 2014, it was clear that his claim was for an order that the Defendants execute all the necessary legal documents to ensure the transfer of legal ownership of the proposed subdivision of the property known as Stand No. 144 Chilanga which the Defendants had not done.

He stated that if the Defendants were not stopped from constructing structures on the land in issue, the Plaintiff would suffer irreparable damage as the Defendants would not be in a position to compensate the Plaintiff adequately for his mischief.

The Plaintiff entirely relied on the affidavits in support and reply while the Defendants filed in their skeleton arguments on 9<sup>th</sup> September, 2016. It was the Defendant's argument that the Plaintiff had not demonstrated any irreparable damage that he would suffer in the event that an injunction was not granted.

It was argued that showing that the applicant would suffer irreparable injury if the injunction was not granted was a very important factor of consideration. The Defendants cited the case of Communications Authority v Vodacom Zambia Limited S.C.Z No. 21 of 2009 to support the argument.

It was the Defendants' contention that the Plaintiff sought an injunction simply on the ground that he obtained a judgment in default in a Ruling dated 22<sup>nd</sup> December, 2015.

It was further contended that the Plaintiff had not exhibited any evidence in its affidavits to show that there were constructions being commenced on the said piece of land. The Defendants denied that they had commenced any construction on the piece of land.

They further argued that as stated by the Defendants there were a number of subdivisions on Stand No. 144 Chilanga which were owned by the Defendants severally and the other third parties not party to these proceedings. The Plaintiff was therefore not being specific when he sought an injunction for the proposed subdivision of Stand No. 144 as the injunction was sought on other property which was not subject of this dispute.

With regard to the issue of balance of convenience, it was argued that the balance of convenience did not lie with the Plaintiff as there was no irreparable injury that the Plaintiff would suffer and cited the case of **ZIMCO Properties LTD V LAPCO Ltd. (1988-1989) Z.R. 92 (SC)**. In light of this the Defendants asked the Court to dismiss the application.

I have considered the affidavits and arguments on record. The starting point in injunctions is clearly espoused in the case of **Hondling Xing Xing Building Company Limited v Zamcapital Zambia Limited (2010) ZR 30** where Justice Matibini stated that irreparable injury is said to be the first and primary element in injunctions.

#### **IRREPARABLE INJURY**

Irreparable injury was clearly defined in the case of **Shell BP Zambia Limited v Conidaris and Others (1975) Z.R. 174**. The Court in that case defined irreparable to mean *injury which is substantial and can never be adequately remedied, or atoned for by damages. It is not injury which cannot be possibly be repaired.*

Thus, an injunction will not be granted were damages would be an alternative adequate remedy to the injury complained of, if the applicant succeeds in the main action.

#### **CLEAR RIGHT TO RELIEF**

Another consideration in granting an injunction is whether the Applicant has a clear right to relief. This was stated in the case of **Shell BP Zambia Limited v Conidaris and Others** where it was

held that *the court will not generally grant an interlocutory injunction unless the right to relief is clear.*

Justice Matibini in the case of *Hondling Xing Xing* stated that *in an application for an injunction the overriding requirement is that the applicant must have a cause of action in law entitling him to relief.*

Similarly in the case of ***Communications Authority v Vodacom Zambia Limited*** cited by the Defendants, the Supreme Court stated that as regards the right to relief, it is for the party seeking an injunction to establish clearly that he is entitled to the right which he seeks to protect by an injunction.

### **STATUS QUO**

Whilst it is generally accepted or acknowledged that an interim injunction is appropriate for the preservation or restoration of a particular situation pending trial, it cannot be regarded as a device by which the applicant can attain, or create new conditions favourable only to himself, and which tip the balance of the contending interests in such a way that he is able, or more likely to influence the final outcome, by bringing about an alteration to the prevailing situation which may weaken the opponents case, and strengthen his own. The preceding formulation was stated by Ngulube D.C.J. as he was then, in ***Turnkey Properties Limited v Lusaka West Development Limited and Others (1985) ZR 85.***

Having outlined the above and having taken the facts of this case I have noted that the Plaintiff in the main matter was an

intending purchaser of a proposed Subdivision of Stand No. 144 Chilanga Lusaka. A contract of sale was executed and the Plaintiff paid a deposit of K2000 and a balance of K1000 was to be paid on completion. The necessary legalities to necessitate the sale were however not done and Judgment in default of defence was entered against the Defendant for failure by the Defendant to follow the Order for Directions.

The Plaintiff has brought this Application because he is of the view that despite the Defendant receiving a copy of the ruling where Judgment was entered in favour of the Plaintiff, there was some constructions that were commenced on the proposed subdivision.

The Defendant however, refuses having commenced such construction and argued that if the Court granted an injunction on the proposed subdivision to Stand 144 Chilanga, it would affect other third parties who owned other subdivisions on Stand No.144. Chilanga and were not a party to the proceedings.

Having considered the authorities cited above, I am of the view that the Plaintiff in this matter has a clear right to relief as his argument is that there was a transaction to buy a proposed subdivision of Stand No. 144 Chilanga but the legalities had not been done by the Defendants.

I have further considered the facts as stated in the Plaintiff's affidavit in support and reply. Taking into account that the subject matter is land, I am of the view that damages would not be adequate compensation in matters dealing with land and as such the Plaintiff will suffer irreparable damage if the injunction



restraining the Defendants from continuing to construct on the piece of land in issue.

In view of the fact that there is already a judgment in default in favour of the Plaintiff and the fact that the Plaintiff is likely to suffer irreparable damage over the land in question I accordingly grant the Order of Injunction and order that the said injunction shall be in force pending the determination of the any matter in relation to this land.

Cost in this matter are for the Plaintiff to be taxed failing agreement.

Leave to appeal is granted.

Dated the <sup>19<sup>th</sup></sup>..... day of October, 2016



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**Mwila Chitabo, S.C.**  
**Judge**