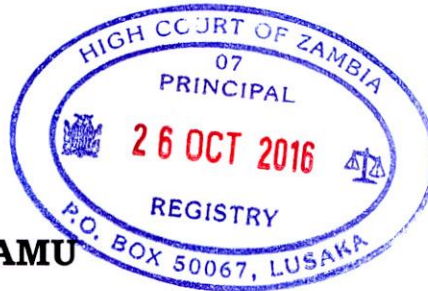


**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2016/HP/1021

BETWEEN:



ANOLD BANDA LIMAMU

PLAINTIFF

AND

CHARLIE BUTTS

1ST DEFENDANT

MONZE DISTRICT COUNCIL

2ND DEFENDANT

COMMISSIONER OF LANDS

3RD DEFENDANT

ATTORNEY GENERAL

4TH DEFENDANT

CORAM: HONOURABLE JUSTICE MR. MWILA CHITABO, SC

For the Plaintiff:

*Mr. A. Tembo of Messrs Tembo Ngulube &
Associates*

For the 1st Defendant:

*Mr. K. Kaunda with Mr. M. Bwalya of
Messrs Ellis & Company*

R U L I N G

Cases referred to:

1. *Hondling Xing Xing Building Company Limited v. Zamcapital Enterprises Limited (2010) ZR 30*

2. *Honorius Maurice Chilufya v. Kangunda* (1999) ZR

3. *Msanzya Paul Zulu and another v. Annah C. Mwape and another* Appeal No. 25/2007 (SCZ) unreported

The legend of this case in so far as it relates to the application for an interim injunction pending the determination of the dispute is that on 24th May, 2016 the Plaintiff launched proceedings against the 4 defendants seeking the following reliefs:-

- (i) *An order that the plaintiff is the legal rightful and beneficial owner of plot No. MONZ/189 having purchased the same from clinic of Hope in 2003.*
- (ii) *An order that the 1st Defendant is not the legal or rightful owner of plot No. MONZ/189 as at no time did the Plaintiff sell the said property to the 1st Defendant.*
- (iii) *An order that the alleged contract of sale or any instrument that conveyed the said plot to the 1st Defendant is illegal, null and void.*
- (iv) *An order that the 2nd and 3rd Defendants offer an account on how plot No. MONZ/189 Monze was conveyed to the 1st Defendant and the Plaintiff be compensated by the 2nd and 3rd Defendant for having granted the land to the Defendant when the land was owned by the Plaintiff.*
- (v) *An order of injunction restraining the 1st Defendant by himself, servants, agents, his lessee relating to plot no. MONZ/189 Monze or otherwise from entering building upon or selling off or indeed doing anything on or with plot No. MONZ/189 Monze.*

title from the Ministry of Lands, however the 3rd Defendant never issued a certificate of title to him. It was his disposition that the plaintiff started developing the plot and erected a concrete slab with the intention of putting up office spaces to let out. He however suspended the construction at the plot to arrange for finances to continue to build.

In 2008, the 1st Defendant started building on the property notwithstanding notice to him that the property belonged to the plaintiff.

It was his further deposition that the 1st Defendant leased the property to a third party by the name of **Laurent** who has continued to build on the plot.

He therefore sought for an interim injunction to restrain the 1st Defendant by himself, servants, agents, lessee to the property or otherwise from entering, building upon or selling of the property. He finally deposed that unless restrained his action will be an academic exercise if he succeeded at trial.

The 1st Defendant countered the allegation by filing an opposing affidavit. The gravamen of which is that he is the registered lessee of the "property" by virtue of a certificate of title No. 25544 issued on 19th October, 2004 which he produced as exhibit "CB1".

He deposed that he purchased the said property from one **Phillimon Chibwanga Hambizyi** who was then the registered

lessee as evidenced by a contract of sale and assignment marked as exhibits "CB2" and "CB3" respectively.

The 1st Defendant exhibited a computer printout from the Lands and Deeds Registry as at 20th July, 2016 showing that he is the legal owner of the property.

It was his affidavit testimony that on or about the 22nd October, 2015 he entered into an agreement with a **Mr. Tubane Laurent** to complete the construction of the structure on the property as evidenced by exhibit "CB5" being a copy of the said construction agreement.

The said structures are complete and Mr. Tubane Laurent is ready to commence business, but has not been able to do so due to the interim injunction granted on 2nd June, 2016.

He finally deposed that the Plaintiff has not exhibited any document to tend to prove ownership of the property and therefore the application lacks merit.

The Plaintiff filed in an affidavit in reply. In a nutshell it was deposed that the 1st Defendant's certificate of title was fraudulently obtained.

The Plaintiff then exhibited the following documents:

- (i) Letter dated 29th June, 2000 from the 2nd Defendant to the Commissioner of Lands recommending repossession of land vide elect exhibit "ALB 1".

- (ii) Offer from 3rd Defendant to Henen Clinic of Hope being exhibit "ALB 2".
- (iii) A document styled change of ownership dated 16th January, 2003 being exhibit "ALB 3".
- (iv) Letter marked exhibits "ALB 4 – ALB 6" being correspondence alluding to the dispute over ownership.

Both learned counsel on behalf of their respective clients filed written submissions and made reference to relevant judicial precedence within and outside jurisdiction. I am indebted on the researchful industry of the learned counsel.

I will not replicate counsels submissions on account of brevity but I assure all the parties that I have factored in all the relevant guidelines in deciding whether to grant or deny the injunction as it will be demonstrated in the ruling.

Faced with the interlocutory application for an injunction, I visited the case of ***Hondling Xing Xing Building Company Limited v. Zamcapital Enterprises Limited***¹ where his Lordship Dr. Matibini, SCJ (as he then was) after forensic preview of judicial precedence tapped from within and outside jurisdiction forensically laid down guidelines to consider when dealing with such applications.

I propose to restate the holdings one by one and simultaneously apply the facts of the case in casu.

"Holding No. 1 *It is a settled fundamental principle of injunction law that interlocutory injunction should only be granted where the right to relief is clear and where it is necessary to protect a plaintiff against irreparable injury, mere inconvenience is not enough"*

(1) **RIGHT TO RELIEF**

The affidavit evidence by the plaintiff is he bought the property and submitted all the documents to the 3rd Defendant to effect change of ownership in 2003. He admits in paragraph 6 of his supporting affidavit that he has not been issued with a certificate of title.

A clear right to relief has therefore not been demonstrated under this limb. On the other hand, the 1st Defendant has provided evidence of ownership as evidenced by a certificate of title issued to him on 19th October, 2004.

It is trite law that a certificate of title is conclusive evidence of ownership against anyone in the world unless it can be shown that it was obtained by fraud. This correct statement of law was well enunciated in the case of ***Honorius Maurice Chilufya v. Kangunda***².

At this stage, the 1st Defendant being in possession of the certificate of title no injunction can lie against a holder of a certificate of title. This position was made clear by the Supreme Court in the case of

Msanzya Paul Zulu and another v. Annah C. Mwape and another ³.

Allegations of fraud have been made by the Plaintiff. In my view, in the face of the certificate of title the issue of fraud cannot be dealt with and resolved on conflicting affidavit evidence. The issue will be navigated and interrogated only at trial stage. The plaintiffs' right to relief can thence only be determined at that stage.

(2) PROTECTION OF PLAINTIFF AGAINST IRREPARABLE INJURY

Under this limb, the plaintiff's claim is in respect of land. It is trite law that a claim of land is a special claim and one need not prove quantifiable pecuniary loss. I therefore find that under this limb has been proved by the Plaintiff.

“Holding No. 2 *An injunction will not be granted where damages would be an alternative and adequate remedy to the injury complained of if the applicant succeeded in the main action”*

I have already in the immediate preceding paragraph discussed that in respect of claims in land, the consideration whether damages would be an alternative and adequate remedy to the injury complained of if the applicant succeeded in the main action is not a factor. This limb has been satisfied.

“Holding No. 3 *In an application for an injunction, the overriding requirement is that the applicant*

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

2016/HP/1021

BETWEEN:

ANOLD BANDA LIMAMU

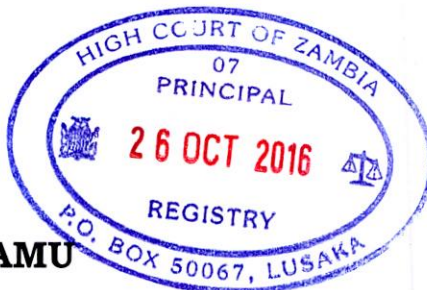
AND

CHARLIE BUTTS

MONZE DISTRICT COUNCIL

COMMISSIONER OF LANDS

ATTORNEY GENERAL



PLAINTIFF

1ST DEFENDANT

2ND DEFENDANT

3RD DEFENDANT

4TH DEFENDANT

CORAM: HONOURABLE JUSTICE MR. MWILA CHITABO, SC

For the Plaintiff:

*Mr. A. Tembo of Messrs Tembo Ngulube &
Associates*

For the 1st Defendant:

*Mr. K. Kaunda with Mr. M. Bwalya of
Messrs Ellis & Company*

R U L I N G

Cases referred to:

- 1. Hondling Xing Xing Building Company Limited v. Zamcapital Enterprises Limited (2010) ZR 30*

2. *Honorius Maurice Chilufya v. Kangunda* (1999) ZR

3. *Msanzya Paul Zulu and another v. Annah C. Mwape and another* Appeal No. 25/2007 (SCZ) unreported

The legend of this case in so far as it relates to the application for an interim injunction pending the determination of the dispute is that on 24th May, 2016 the Plaintiff launched proceedings against the 4 defendants seeking the following reliefs:-

- (i) *An order that the plaintiff is the legal rightful and beneficial owner of plot No. MONZ/189 having purchased the same from clinic of Hope in 2003.*
- (ii) *An order that the 1st Defendant is not the legal or rightful owner of plot No. MONZ/189 as at no time did the Plaintiff sell the said property to the 1st Defendant.*
- (iii) *An order that the alleged contract of sale or any instrument that conveyed the said plot to the 1st Defendant is illegal, null and void.*
- (iv) *An order that the 2nd and 3rd Defendants offer an account on how plot No. MONZ/189 Monze was conveyed to the 1st Defendant and the Plaintiff be compensated by the 2nd and 3rd Defendant for having granted the land to the Defendant when the land was owned by the Plaintiff.*
- (v) *An order of injunction restraining the 1st Defendant by himself, servants, agents, his lessee relating to plot no. MONZ/189 Monze or otherwise from entering building upon or selling off or indeed doing anything on or with plot No. MONZ/189 Monze.*

title from the Ministry of Lands, however the 3rd Defendant never issued a certificate of title to him. It was his disposition that the plaintiff started developing the plot and erected a concrete slab with the intention of putting up office spaces to let out. He however suspended the construction at the plot to arrange for finances to continue to build.

In 2008, the 1st Defendant started building on the property notwithstanding notice to him that the property belonged to the plaintiff.

It was his further deposition that the 1st Defendant leased the property to a third party by the name of **Laurent** who has continued to build on the plot.

He therefore sought for an interim injunction to restrain the 1st Defendant by himself, servants, agents, lessee to the property or otherwise from entering, building upon or selling of the property. He finally deposed that unless restrained his action will be an academic exercise if he succeeded at trial.

The 1st Defendant countered the allegation by filing an opposing affidavit. The gravamen of which is that he is the registered lessee of the "property" by virtue of a certificate of title No. 25544 issued on 19th October, 2004 which he produced as exhibit "CB1".

He deposed that he purchased the said property from one **Phillimon Chibwanga Hambizyi** who was then the registered

lessee as evidenced by a contract of sale and assignment marked as exhibits "CB2" and "CB3" respectively.

The 1st Defendant exhibited a computer printout from the Lands and Deeds Registry as at 20th July, 2016 showing that he is the legal owner of the property.

It was his affidavit testimony that on or about the 22nd October, 2015 he entered into an agreement with a **Mr. Tubane Laurent** to complete the construction of the structure on the property as evidenced by exhibit "CB5" being a copy of the said construction agreement.

The said structures are complete and Mr. Tubane Laurent is ready to commence business, but has not been able to do so due to the interim injunction granted on 2nd June, 2016.

He finally deposed that the Plaintiff has not exhibited any document to tend to prove ownership of the property and therefore the application lacks merit.

The Plaintiff filed in an affidavit in reply. In a nutshell it was deposed that the 1st Defendant's certificate of title was fraudulently obtained.

The Plaintiff then exhibited the following documents:

- (i) Letter dated 29th June, 2000 from the 2nd Defendant to the Commissioner of Lands recommending repossession of land vide elect exhibit "ALB 1".

- (ii) Offer from 3rd Defendant to Henen Clinic of Hope being exhibit "ALB 2".
- (iii) A document styled change of ownership dated 16th January, 2003 being exhibit "ALB 3".
- (iv) Letter marked exhibits "ALB 4 – ALB 6" being correspondence alluding to the dispute over ownership.

Both learned counsel on behalf of their respective clients filed written submissions and made reference to relevant judicial precedence within and outside jurisdiction. I am indebted on the researchful industry of the learned counsel.

I will not replicate counsels submissions on account of brevity but I assure all the parties that I have factored in all the relevant guidelines in deciding whether to grant or deny the injunction as it will be demonstrated in the ruling.

Faced with the interlocutory application for an injunction, I visited the case of ***Hondling Xing Xing Building Company Limited v. Zamcapital Enterprises Limited***¹ where his Lordship Dr. Matibini, SCJ (as he then was) after forensic preview of judicial precedence tapped from within and outside jurisdiction forensically laid down guidelines to consider when dealing with such applications.

I propose to restate the holdings one by one and simultaneously apply the facts of the case in casu.

“Holding No. 1 It is a settled fundamental principle of injunction law that interlocutory injunction should only be granted where the right to relief is clear and where it is necessary to protect a plaintiff against irreparable injury, mere inconvenience is not enough”

(1) RIGHT TO RELIEF

The affidavit evidence by the plaintiff is he bought the property and submitted all the documents to the 3rd Defendant to effect change of ownership in 2003. He admits in paragraph 6 of his supporting affidavit that he has not been issued with a certificate of title.

A clear right to relief has therefore not been demonstrated under this limb. On the other hand, the 1st Defendant has provided evidence of ownership as evidenced by a certificate of title issued to him on 19th October, 2004.

It is trite law that a certificate of title is conclusive evidence of ownership against anyone in the world unless it can be shown that it was obtained by fraud. This correct statement of law was well enunciated in the case of ***Honorius Maurice Chilufya v. Kangunda***².

At this stage, the 1st Defendant being in possession of the certificate of title no injunction can lie against a holder of a certificate of title. This position was made clear by the Supreme Court in the case of

Msanzya Paul Zulu and another v. Annah C. Mwape and another³.

Allegations of fraud have been made by the Plaintiff. In my view, in the face of the certificate of title the issue of fraud cannot be dealt with and resolved on conflicting affidavit evidence. The issue will be navigated and interrogated only at trial stage. The plaintiffs' right to relief can thence only be determined at that stage.

(2) PROTECTION OF PLAINTIFF AGAINST IRREPARABLE INJURY

Under this limb, the plaintiff's claim is in respect of land. It is trite law that a claim of land is a special claim and one need not prove quantifiable pecuniary loss. I therefore find that under this limb has been proved by the Plaintiff.

“Holding No. 2 *An injunction will not be granted where damages would be an alternative and adequate remedy to the injury complained of if the applicant succeeded in the main action”*

I have already in the immediate preceding paragraph discussed that in respect of claims in land, the consideration whether damages would be an alternative and adequate remedy to the injury complained of if the applicant succeeded in the main action is not a factor. This limb has been satisfied.

“Holding No. 3 *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"

The Plaintiff in this matter seeks for a declaratory order that he is the rightful and beneficial owner of the "property". I have discussed under paragraph 1 of Holding No. 1 that the right to relief cannot be determined at this interlocutory stage. Equally in the face of the Defendant being in possession of certificate of title, the issue of a clear or cause of action in law entitling the Plaintiff to relief can only be established at trial.

I will therefore hold that this limb has not been proved.

"Holding No. 4 In deciding whether or not an interim injunction should be granted, the first or primary issue is that there must be a serious question to be tried"

The Plaintiff in some of his reliefs seeks for a declaratory order that he is the beneficial owner of the property and for an order that the instrument of conveyance of the property to the 1st Defendant is null and void.

I have no difficulty to hold that the issues raised in the sought reliefs raise serious questions to be tried. This limb therefore has been proved.

"Holding No. 5 An injunction will be refused to a claimant who has no real prospects of succeeding in his claim for a permanent injunction at the trial

The prospects of succeeding or lack of it cannot be wholistically determined at interlocutory hearing. The same can only be adequately dealt with after receiving all the evidence; evaluating the evidence making findings of fact and drawing legal and factual conclusions.

This limb is therefore evenly balanced.

“Holding No. 6 The question of balance of convenience is considered in three stages. First, the governing principle is that the claimant would be adequately compensated by an award succeeding at the trial, and the defendant would be able to pay for them, no injunction should be granted however strong the claimants case”

There is no evidence as to the means of the Defendant that is the capacity or incapacity to pay if at the end of the day the Plaintiff succeeds if the Defendant will be able to pay the award to be given.

In my view, this limb is evenly balanced too.

“Holding No. 7 If the claim survives the previous head, the Court must consider whether if an interim injunction is granted, but the defendant succeeds at trial, the defendant would be adequately compensated in damages which then would have to be paid by the claimant and

whether the claimant would be able to pay those damages if such damages would be an adequate remedy and the claimant would be in a position to pay them, the defendant's prospects of success at the trial would be no bar to grant the injunction

Like I observed in the immediate preceding paragraph, there is no evidence of the means of the Plaintiff to determine whether the Plaintiff has or has no capacity to compensate the Defendant if he succeeded at trial. The only evidence pointing to the financial disposition of the Plaintiff is contained in paragraph 12 of his supporting affidavit where he avers as follows:-

"In the meantime, the Plaintiff started developing the plot and erected a concrete slab with the intention of putting up office spaces to let out. The Plaintiff however suspended the development as he arranged for finances to continue with the building"

This piece of affidavit evidence tends to suggest that the Plaintiff had no means to develop his acclaimed property and militates against him of his capacity to meet any such awards as might be ordered in the event that the Defendant succeeded at trial. The balance of convenience under the limb under consideration tilts in favor of the Defendant.

"Holding No. 8 *If there is doubt as to the adequacy of the respective remedies in damages available to*

either party or to both, the Court must consider the wide range of matters which go to make up the general balance of convenience. These include the status quo, relative strength and special factors

(1) SPECIAL FACTORS

The affidavit evidence on record in paragraph 13 of the supporting affidavit is that the Plaintiff became aware in 2008 of the Defendants activity of building on the property. There is no explanation why he did not launch the protective and pre-emptive Court proceedings then or soon thereafter until 24th May, 2016 that is 8 years down the line from the time he became aware of the Plaintiffs transgressions on his acclaimed property.

The legal maxim that “*equity assists the vigilant and not the indolent*” aptly applies to the case in casu. The Plaintiff quite frankly overslept on his rights. In my view, there is no urgency in the matter requiring an emergent grant of an interlocutory injunction taking into account the Plaintiffs lax mode adopted in protecting his perceived rights or interests.

“Holding No. 9 As regards the status quo where other factors appear to be evenly balanced, it is counsel of prudence to take such measures as are calculated to preserve the status quo”

The affidavit evidence in paragraph 16 and 17 of the Plaintiff discloses that as at 7th March, 2016 the Plaintiffs lessee was still building and had continued building.

This is harmonized and confirmed by paragraph 8 of the 1st Defendants affidavit in opposition which reveals that

“The structure is now complete and Mr. Tubane Laurent is ready to commence business, but has been unable to do so due to the interim injunction”

The status quo prior to the launching of the proceedings was that the 1st Defendant who is the certified beneficial and registered owner was in physical occupation of the property and making unexhausted improvements which have been completed. The status quo therefore is that the 1st Defendant should continue to be in occupation and quite enjoyment of his property until the Court pronounces itself of the main action at the conclusion of trial.

“Holding No. 10 *In relation to the relative strength of cases, it is laid down that the Court should not embark on anything resembling a trial of the action on conflicting affidavit evidence”*

In the preceding paragraphs, I have traversed the guidelines to be factored into in deciding whether to grant or not grant an affidavit cautious not to embark on anything resembling a trial on conflicting affidavit evidence.

“Holding No. 11 The principles established in the American Cyanamid Company v. Ethicon Limited [1975] AC 396 case are of general application and must not be treated as statutory definition. The Court must grant or refuse an interlocutory injunction without applying the Cyanamid guidelines, if the action is concerned with for instance a simple question of construction of statute, a document or a point of law”

I respectfully agree with the holding above and only wish to add that the grant or refusal of an interlocutory injunction is a discretionary remedy of the preserve of the Court. In granting or refusing to grant an injunction, the Court has to preview the affidavit evidence factoring the various composite guidelines to make judicious inquiry and finally make a judicious pronouncement.

“Holding No. 12 The remedy for specific performance presupposes the existence of an agreement in the absence of an agreement, the remedy of specific performance is not available”

The last holding is not applicable to the case in casu.

In conclusion, having traversed the guidelines to be factored in determining whether to grant or not grant an interlocutory injunction, I have formed a very firm view that this is not a fit and

proper case to grant an interlocutory injunction. The application fails.

It follows therefore that ex parte interim injunction which I granted on 2nd June, 2016 is hereby discharged and vacated with attending costs as undertaken in the within discharged order.

For purposes of clarity, the costs are for the 1st Defendant to be paid by the Plaintiff which costs are to be taxed in default of agreement.

Leave to appeal to the Court of Appeal is granted.

Dated this 28th day of October, 2016



Mwila Chitabo, SC
Judge