2015/HP/2224

IN THE HIGH COURT OF ZAMBIA

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)

B E T W E E N :

PROGRESS CHUMBWE	**1st PLAINTIFF**
PEGGY KAUTA	**2nd PLAINTIFF**
MORGAN MALOZA	**3rd PLAINTIFF**

AND

CHARLES CHIPALO SIMUTAMI	**1st DEFENDANT**
EUPHRASIA CHILONGOSHI	**2nd DEFENDANT**
JENNY CHILSEHE	**3rd DEFENDANT**
CHILANGA DISTRICT COUNCIL	**4th DEFENDANT**
ATTORNEY GENERAL	**5th DEFENDANT**

BEFORE HON MRS JUSTICE S. KAUNDA NEWA IN CHAMBERS THIS 19th DAY OF DECEMBER, 2016

For the Plaintiffs : *Mr W. Muhanga, AKM Legal Practitioners*
For the Defendants : *Mr M. Khunga, Barnaby and Chitundu Advocates*

RULING

CASES REFERRED TO:

1. *Shell & BP Zambia Limited V Connidaris & Others 1975*
2. *American Cynamid Company V Ethicon 1975 AC 396*
3. *Turnkey Properties V Lusaka West Development Company Limited, B.S.K Chiti (Sued as Receiver) and Zambia State Insurance Corporation 1984 ZR 85*
4. *Zambia State Insurance Corporation Limited V Dennis Muliokela 1990 ZR 18*
5. *Jane Mwenya and Another V Paul Kapinga 1998 ZR 17*
6. *Wesley Mulungushi V Catherine Bwale Mizi Chomba 2004 ZR 96*

LEGISLATION REFERRED TO:

1. *The High Court Rules, Chapter 27 of the Laws of Zambia*

This is a ruling on an application made by the Plaintiffs for an order of interim injunction, pursuant to Order 27 Rules 1 and 3 of the High Court Rules, Chapter 27 of the Laws of Zambia. Counsel relied on the statement of claim filed on 20th November, 2015, the affidavit in support of the application of even date, and the skeleton arguments and list of authorities, dated 19th January 2016.

Counsel stated that in the skeleton arguments they had cited the cases of ***WESLEY MULUNGUSHI V CATHERINE BWALE MIZI CHOMBA 2004 ZR 96*** and ***JANE MWENYA AND ANOTHER V PAUL KAPINGA 1998 ZR 17*** where the Supreme Court was of the view that damages cannot adequately compensate a Plaintiff in land matters. On that basis he prayed that the ex-parte order of injunction be confirmed.

Counsel for the Defendant in response opposed the application, and relied on the defence filed on 13th December, 2015, as well as the affidavit in opposition filed on 22nd January, 2016, and deposed to by the 1st Defendant. Counsel stated that they agreed with the principles set out in the authorities cited by Counsel for the Plaintiffs in the skeleton arguments, but disagreed that the said principles apply to this matter.

It was stated that to start with paragraphs 8 and 9 of the Plaintiff's affidavit in support of the application clearly indicates that the Plaintiffs' land relates to a block of flats whose description is on

Stand No 270 Chilanga. Exhibits 'MM2c-d' clearly indicate the plot numbers of the properties that the Plaintiffs bought from the government. The evidence on record on the other hand shows that the Defendant's properties are different.

He stated that paragraphs 15 and 17 of the Plaintiffs' affidavit shows that the Plaintiffs' engaged their own surveyor David Mubanga after they dismissed the 1st Defendant as their surveyor. That the said David Mubanga and the 3rd Plaintiff prepared the site plan which was exhibited as 'MM5' on the affidavit in support of the application, and which document depicts the Plaintiff's property as Stand No 270.

Further that the said 'MM5' clearly shows that the Plaintiffs' property has a road on each side of the property, and the Defendant's property is not within the Plaintiffs' property. Therefore the Plaintiffs and Defendants properties are different, and are separated by a road. It was also submitted that the toilets allegedly built by the Plaintiffs are outside their property, and are wrongly or illegally built on the Defendant's property without planning permission being exhibited.

Counsel's further submission was that the Plaintiffs had not exhibited documents showing that they owned the Defendants property, but rather, had exhibited documents showing that they own properties on Stand No 270 Chilanga. It was Counsel's view that in light of this, the Plaintiffs have not shown that there is clear right to relief, contrary to the authorities that they had relied on.

Additionally that there was no serious issue to be tried at the main hearing with regard to the Defendants property, and that it was their view that the Plaintiffs were not entitled to obtain the interlocutory injunction in the absence of a legal right or interest to the piece of land pursuant to which they seek the injunction. Counsel's prayer was that the injunction be discharged with costs to the 1st, 2nd, and 3rd Defendants.

In reply it was submitted that all the documents relied on by the Plaintiffs should be read in totality, in order to appreciate the facts of the case. Counsel stated that without going into the merits of the case the evidence on record shows that the parties have a dispute wherein the Plaintiffs questions how the 1st and 2nd Defendant acquired land in the midst of allegations of fraud relating to the assignment of the property.

Therefore there are serious issues to be tried, and it would be in the interests of justice that the property be preserved. Further that no party would not be prejudiced in granting the said order, but by doing so, the course of justice would be advanced.

I have considered the application. Order 27 Rule 1 of the High Court Rules, Chapter 27 of the Laws of Zambia provides that;

> ***"(1) In any suit in which it shall be shown, to the satisfaction of the Court or a Judge, that any property which is in dispute in the suit is in danger of being wasted, damaged or alienated by any party***

to the suit, it shall be lawful for the Court or a Judge to issue an injunction to such party, commanding him to refrain from doing the particular act complained of, or to give such order, for the purpose of staying and preventing him from wasting, damaging or alienating the property, as to the Court or a Judge may seem meet, and, in all cases in which it may appear to the Court or a Judge to be necessary for the preservation or the better management or custody of any property which is in dispute in a suit, it shall be lawful for the Court or a Judge to appoint a receiver or manager of such property, and, if need be, to remove the person in whose possession or custody the property may be from the possession or custody thereof, and to commit the same to the custody of such receiver or manager, and to grant to such receiver or manager all such powers for the management or the preservation and improvement of the property, and the collection of the rents and profits thereof, and the application and disposal of such rents and profits, as to the Court or a Judge may seem proper".

The gist of the facts giving rise to the application as outlined in the affidavit in support of the application are that the Plaintiffs were sitting tenants of institutional houses known as CHILA/270 being a block of flats in Chilanga district. They were offered the flats they

occupied following government's policy to sell houses to the sitting tenants.

That prior to the offer letters being issued, the then Ministry of Agriculture had written to the Permanent Secretary of the Ministry of Works and Supply to consider dividing the block of flats into individual plots housing the individual flats. However Messrs J.G Nyangulu and Associates who were appointed as the surveyors did not do the subdivision, as evidenced on the letter exhibited as 'MM3' on the affidavit in support of the application.
It is deposed in the affidavit in support of the application that the Plaintiffs discovered that a site plan had been released that did not indicate that the block of flats that they had been offered, as formally subdivided. This prompted the sitting tenants to set up a resident committee to spearhead the issuance of title deeds, and the 1st Plaintiff became Chairperson of that Committee.

In paragraphs 12 and 13 of the affidavit in support it is averred that the Committee liaised with the Ministry of Lands, and the 1st Defendant who was an employee of the said ministry, was engaged to survey the land and issue the necessary diagrams and maps to the Plaintiffs. That the 1st Defendant visited the site several times, and the Committee made contributions towards his logistics and lunches, but he stopped responding to the Committee's phone calls after sometime.

That is how the Plaintiffs engaged another Surveyor named David Mubanga, also an employee of the Ministry of Lands, who in 2006

produced a site plan, exhibited as 'MM5' showing a demarcation of the flats into numbered individual properties from CL/1 to CL/10, and that the said site plan was used to generate letters of offer from the government.

It is also deposed in the affidavit that the Plaintiffs fully paid for the houses they were offered, as shown on the letters exhibited as 'MM6', and the Ministry of Finance wrote to the Commissioner of Lands stating that the government had no further claims to the properties, and that the said office should issue title deeds for the properties.

In paragraph 20 the Plaintiffs state that unfortunately the Ministry of Lands advised that the title deeds could not be issued until the subdivided individual and single properties had approved survey diagrams. Thereafter in the year 2007 some persons known and unknown began to invade the land among them Mr. Phiri a driver from the Ministry of Lands who would go there with the 1st Defendant, when the 1st Defendant was carrying out the survey works. This erupted into a land dispute and the Committee complained to various authorities over the issue.

In paragraph 24 of the affidavit the Plaintiffs depose that they were surprised in July 2014 when the 3rd Defendant approached them saying that she had bought the land in question which forms part of their flats from the 1st Defendant. The Plaintiffs state that they later discovered that the 1st Defendant had title to part of their land, which he was assigned to survey, together with the 2nd Defendant,

which title the Plaintiffs believe was fraudulently obtained. It is on that basis that they pray that the application be granted.

The 1st, 2nd and 3rd Defendants in paragraph 7 of the affidavit in opposition state that the Plaintiffs offer letters relate to individual flats from a block of flats, and not the land adjacent to the said flats. The 1st Defendant admits having been privately engaged by the Plaintiffs to survey the flats, but that such engagement was not in his capacity as an employee of the Ministry of Lands. He denied that the Plaintiffs had liaised with the Ministry of Lands to engage him as the Surveyor of the property.

He denied having been paid by the Plaintiffs to undertake the survey, and that he did not do so as the Plaintiffs had not obtained the site plan for the block of flats from the Ministry of Works and Supply, and as such no survey works could be done. He denied having stopped answering the Plaintiffs' calls, and he averred that he had out rightly told them that he would not undertake the survey due to the fact that the site plan for the flats in issue was not numbered at the material time.

In paragraph 11 of the affidavit in opposition, the 1st Defendant states that the Plaintiffs were offered the flats to purchase as seen from the site plan exhibited as 'MM5' on their affidavit, and that the said land is not subject of this suit. That the said exhibit is the site plan for Game Fisheries Department in Chilanga District, and does not include the land that he was allocated by Kafue District Council.

He denied having interfered with the Plaintiffs land averring that the land in issue was neither offered nor sold to the Plaintiffs by the government, and that it does not form part of the block of flats that were sold by the government to the Plaintiffs. His averment is that the Ministry of Lands offered him and the 2nd Defendant being his wife the said land, after they had successfully for it, as shown on the exhibits marked 'CCS1' collectively on the affidavit in opposition.

The 1st Defendant in paragraphs 16 and 17 of the affidavit in opposition states that he sold the said land to the 3rd Defendant who had approached him to buy the same, as her land which was adjacent to his was small. That after the transaction where he was paid K30, 000.00 as consideration, a certificate of title was issued to the 3rd Defendant, which was exhibited as 'CCS4'. When the 3rd Defendant moved onto the property to develop it, she found that the Plaintiffs had constructed pit latrines there, without her approval.
It is also the 1st Defendant's averment in paragraph 20 of the affidavit in opposition that the 3rd Defendant had informed him of the construction of the said toilets on her land, and he had written to Chilanga District Council informing it of the same, as shown on exhibit 'CCS5'. The Council advised that law enforcement officers should be engaged to resolve the issue, as the property was on title. That is how cause number 2015/HP/0371 was instituted but the same was dismissed on account of irregularities. The ruling dismissing the matter was exhibited as 'CCS7'.

The 1st Defendant denied having acquired the land fraudulently, and in abuse of his office, stating that he applied for the said land, in 2002 before he knew the Plaintiffs. On that premise he prays that the injunction be discharged.

The Plaintiffs in the skeleton arguments rely on the case of ***TURNKEY PROPERTIES V LUSAKA WEST DEVELOPMENT COMPANY LIMITED, B.S.K CHITI (Sued as Receiver) AND ZAMBIA STATE INSURANCE CORPORATION 1984 ZR 85*** where it was held that:

> ***"an interlocutory injunction is appropriate for the preservation or restoration of a particular situation pending trial.***

Reliance is also placed on the cases of ***SHELL & BP ZAMBIA LIMITED V CONNIDARIS & OTHERS 1975 ZR 174*** and ***ZAMBIA STATE INSURANCE CORPORATION LIMITED V DENNIS MULIOKELA 1990 ZR 18*** which cases held that a Court will not grant an interlocutory injunction unless the right to relief is clear, and unless the injunction is necessary to protect the Plaintiff from irreparable injury. That mere inconvenience is not enough, irreparable injury being that which cannot be remedied or atoned for by damages.

I entirely agree with the authorities relied on by the Plaintiffs. The principles elucidated in those cases were laid down in ***AMERICAN CYNAMID COMPANY V ETHICON 1975 AC 396*** case as follows;

i. *There must be a serious to be tried*

ii. *If the Plaintiff were to succeed at trial, would damages be an adequate remedy?*

iii. *Where does the balance of convenience lie, having regard to the prudence of preserving the status quo, if the matter is still in doubt,*

iv *What is the relative strength of each of the partys' case, as disclosed on the affidavit evidence at this stage?*

Thus the first issue to be considered is whether there is a serious issue to be tried in this matter. Counsel for the 1st, 2nd and 3rd Defendants argued that because the land that the Plaintiffs claim was not offered to them, there is no right to relief, hence there is no serious issue to be tried. The Plaintiffs argument on the other hand is that there is a serious issue to be tried, as there is a dispute as to how the 1st and 2nd Defendants acquired title to the land in dispute amidst the dispute.

While I do agree with the Defendant that on the face of it the land which the Plaintiffs claim cannot be said to be theirs, as they have exhibited documents showing ownership of their land, and the 1st, 2nd, and 3rd Defendants have also exhibited documents evidencing ownership of their land, the Plaintiffs contend that the land that the said Defendants own, forms part their land.

It is therefore my view that there is a serious issue to be tried, as the extent of the parties land is in dispute. This brings me to the next requirement, being would damages adequately compensate the Plaintiffs if the injunction were not granted? As I have already stated, the Plaintiffs claim that the Defendants claim ownership to

part of their land, and that there are toilets which they constructed on this said piece of land.

In my view if the Plaintiffs were to succeed in this matter, damages would be an adequate, remedy as the extent of development on the land can be quantified. However looking at the balance of convenience, it would be just to maintain the status quo, looking at the use of the land which is in dispute, has been employed. It is therefore my view that this is a proper case where an injunction should be granted, and I accordingly confirm the ex-parte order of injunction that was granted on 2nd December, 2015, pending determination of the main matter.

This matter having delayed on account of the parties trying to settle it excuria, which efforts have failed, and the Defendants having filed their defences, I direct that the Plaintiffs in this matter proceed to take out the application to apply for orders for directions, within the next fourteen days. Costs shall be in the cause and leave to appeal is granted.

DATED THE 19th DAY OF DECEMBER, 2016

Skaunda

S. KAUNDA NEWA
JUDGE