

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



2016/HP/2257

B E T W E E N :

FRANCIS KASONGO MILAMBO

PLAINTIFF

AND

PETER CHIMBALA AND OTHERS UNKNOWN

DEFENDANT

Before Honorable Mrs. Justice M. Mapani-Kawimbe in Chambers on 22nd March, 2017

For the Plaintiff : Ms. N. Sameta, Messrs Mambwe, Siwila & Lisimba Advocates

For the Defendant : Mrs. K. Mbewe, Messrs CKM Advocates

R U L I N G

Case Authorities Referred To:

1. *Shell & BP v Conidaris (1975) Z.L.R at 174*
2. *Zambia Revenue authority v Makeni Gardens Limited SCZ Appeal No. 69 of 1995*
3. *Jane Mwenya and Jason Randee v Paul Kapinga Appeal No. 82 of 1996*
4. *Gideon Mudanda v Timothy Mulwani and 2 Others (1987) ZR 29 (SC)*
5. *American Cynamid Co. v Ethicon Limited (1975) A.C. 316*
6. *Ndove v National Education Company Limited (1980) ZR 184 (H.C)*

Legislation Referred To:

1. *Rules of the Supreme Court 1999 Edition*

This is the Plaintiff's application for an Order of interim injunction. It is filed pursuant to Order 29 Rule 1 of the Rules of the Supreme Court and is supported by an Affidavit. By this application, the Plaintiff seeks to restrain the 1st Defendant from selling his property, known as Plot No. L/32477/M situated in Kafue District.

The Plaintiff relies on his Affidavit in Support and Skeleton Arguments. In the Affidavit the deponent, **Francis Kasongo Milambo** states that he bought Plot No. L/32477/M from the 1st Defendant on 17th June, 2016, at K85,000.00. The deponent also states that he paid the 1st Defendant a deposit of K35,000.00 which he acknowledged receipt of as shown in the exhibit marked "**FKM1**".

The deponent avers that he later paid the 1st Defendant the sum of K40,000.00 leaving a balance of K10,000.00, which was to be settled on the execution of the contract of sale. The deponent further avers that after he paid the 1st Defendant K75,000.00, a letter of offer was issued in his name by the Kafue District Council.

The property was subsequently transferred into his name as shown in exhibit marked “**FKM2**”.

The deponent states that sometime in November, 2016, he went to inspect his land and discovered that the 1st Defendant had sold it to unknown persons without his consent. His efforts to settle the matter with the 1st Defendant proved futile as the other persons started developing his land. The deponent further states that if the Defendants’ illegal actions are not stopped, he will be greatly disadvantaged and will as a result suffer irreparable damages.

In the skeleton Arguments, Learned Counsel for the Plaintiff submitted that the Plaintiff met the principles enunciated in the case of **Shell & BP v Conidaris**¹, by establishing the following:

- a) *A clear right to relief*
- b) *Irreparable damage and injury that cannot be atoned for by damages.*
- c) *A tilt of the balance of convenience in the Plaintiff’s favour.*

Citing the case of **Zambia Revenue Authority v Mabeni Gardens Limited**², Counsel relied on the legal principle stated by the Supreme Court therein as follows:

“All the court needs to do at the interlocutory stage is to be satisfied that there is a serious question to be tried at the hearing and that the Court ought to interfere to preserve property without waiting for the right to be finally established at trial”.

Counsel went on to submit that the facts in issue showed that there was a serious issue to be tried as the Court was required to determine the rightful owner of the disputed property.

On irreparable damage and injury, Counsel submitted that the Plaintiff's loss could not be atoned by an award of damages and induced me to the case of **Jane Mwenya and Jason Randee v Paul Kapinga**³, where the Supreme Court quoting the decision in *Tito v Waddel (No. 2) (1977) Ch 106 at 322* stated thus:

“... the question is not simply whether damages are “adequate” remedy but that specific performance will do more perfect and complete justice than an award of damages. This is particularly so in all cases dealing with a unique subject matter such as land.”

Counsel further indulged me to the case of **Gideon Mudanda v Tomothy Mulwani and 2 Others**⁴ where the Supreme Court stated that:

“damages cannot be an adequate compensation when one is dealing with an interest in a particular piece of land”.

Counsel argued that if the order of interim injunction is not granted, the Plaintiff is likely to suffer irreparable injury which could not be adequately toned for by an award for damages. Further, the 1st Defendant's offer of an alternative piece of land was unjust because the Plaintiff would be removed from the land he is satisfied with.

Counsel submitted that the balance of convenience, weighed in the Plaintiff's favour and if the 2nd Defendant was to continue building; and in the event that the Court found in favour of the Plaintiff, then it would be impractical for the Plaintiff to enjoy the fruits of his judgment. The Plaintiff's land would no longer be in its original state and he would have to incur expenses on demolition and other costs in reinstating the land. Counsel concluded with a prayer to the Court to grant the Plaintiff the order of interim injunction.

The 2nd Defendant **Melchizedek Mwiya** filed an Affidavit in opposition where he deposes that he lawfully acquired Plot No. 32477/M from the 1st Defendant, sometime in March, 2016, as

shown in the exhibit marked "**MM1**". He also deposes that he paid K75,000.00 as the full purchase price to the 1st Defendant, and thereafter began to build a slab on the land.

He avers that whilst building the slab, the Plaintiff without regard and permission destroyed it, dug ferrous and used his building materials worth K18,640.00. The deponent further avers that upon discovering the Plaintiff's activities, he reported the matter to the 1st Defendant who told him that he had withdrawn his offer to the Plaintiff.

The deponent states that the 1st Defendant also told him that he instructed the Kafue District Council to withdraw the transfer of ownership from the Plaintiff as shown in the exhibit marked "**MM2**".

The deponent further states that the 1st Defendant's request and instructions to transfer ownership of the property into his name was approved by the Council's Plans, Development and Social Services Committee as shown in the exhibit marked "**MM3**". In addition, the recommendation of the Committee was adopted and approved by the full meeting of the Kafue District Council held on 22nd December, 2016 as shown in the exhibit marked "**MM4**".

The deponent avers that he has begun the process of acquiring title deeds from the Ministry of Lands. Further, the Surveyor General has surveyed and numbered the plot as shown in the exhibits marked “**MM5**” and “**MM6**” respectively.

In the Skeleton Arguments, Learned Counsel for the 2nd Defendant submitted that on the basis of **American Cynamid Co v Ethicon Limited**⁵, the Plaintiff was required to show that:

- (i) *he has a good arguable claim and a clear right to relief; and*
- (ii) *damages are not an adequate remedy and as a result, is likely to suffer irreparable injury.*

Counsel submitted that the Plaintiff had not established a clear right to relief and an arguable claim. Further, on irreparable injury and inadequacy of damages, Counsel submitted that the Plaintiff only paid the 1st Defendant a partial payment of K35,000.00 as opposed to the 2nd Defendant who paid the full purchase price. She argued that the 1st Defendant had already undertaken to refund the Plaintiff his money or to find him an alternative piece of land. As a result, the Plaintiff is unlikely to suffer irreparable injury.

On the balance of convenience, Counsel submitted that if the ex-parte injunction was not set aside, the 2nd Defendant would lose out on his land because the Kafue District Council would re-enter the property for lack of development thereby disadvantaging the 2nd Defendant. She prayed to the Court to discharge the ex-parte order of interim injunction.

I am grateful to both Learned Counsels for their submissions.

I have considered the principles laid down in the case of **American Cynamid and Shell BP**. The underlying purpose of the principles in those cases is to give guidelines to Courts on assessing claims for injunctive relief.

In casu, the Plaintiff's substantive claims are for:

- a. *An order for interim injunction restraining the 1st Defendant either by himself, servants, agents or whosoever from continuing selling out my piece of land being Plot No. L/32477/M situate at Kafue District.*
- b. *An order that the said buyer be restrained from carrying out any developments and or trespassing on the said piece of land till final determination of the whole matter by the Court.*
- c. *An order that the Plaintiff herein is the legal owner of Plot No. L/32477/M, Kafue and a further order that any*

transaction made between the 1st Defendant and any other persons unknown be made null and void.

The Affidavit evidence adduced by the parties discloses that the Plaintiff and the 2nd Defendant both bought land from the 1st Defendant. Exhibit "**FKM2**" in the Plaintiff's Affidavit and exhibit "**MM5**" in the Defendant's Affidavit both bear letters from the Kafue District Council offering the property in dispute, No. L/32477/M to both the Plaintiff and 2nd Defendant on 30th June, 2016 and 23rd December, 2016, respectively. The evidence shows that the Plaintiff paid the 1st Defendant K35,000.00 on 17th June, 2016 as shown in the exhibit marked "**FKM1**", in his Affidavit.

On the other hand, the 2nd Defendant's exhibit marked "**MM1**" confirms that he paid the 1st Defendant K35,000.00. The balance was settled by the transfer of a motor vehicle, registration No. ALF 355 from the 2nd Defendant to the 1st Defendant. The exhibit marked "**MM2**" in the 2nd Defendant's Affidavit shows that the 1st Defendant withdrew his offer to the Plaintiff in a letter dated 29th October, 2016 addressed to the Council Secretary, Kafue District Council.

The exhibit marked "**MM3**" in the 2nd Defendant's Affidavit shows that the Kafue District Council changed ownership of the property in dispute from the 1st Defendant to the 2nd Defendant.

In the case of **Ndove v National Education Company Limited**, Chirwa J, as he then was held that:

"...in an application for an interlocutory injunction, though the Court is not called upon to decide finally on the rights of the parties, it is necessary that the Court should be satisfied that there is a serious question to be tried at the hearing, and that on the facts before it there is a probability that the applicant is entitled to relief..."

From the facts of this case, it is clear that the Plaintiff and 2nd Defendant have shown letters of offer from the Kafue District Council, which in my view are confusing, but anchor the serious dispute between the parties. As a result, I find that it naturally occurs that there is a serious question to be tried on the merits at trial.

The second test to consider on the basis of **Shell & BP** is whether the Plaintiff is likely to be adequately compensated by an award for damages at trial.

After carefully analyzing the arguments posited by the parties, I have come to the conclusion that the Plaintiff's evidence shows that he only paid the 1st Defendant K35,000.00 towards the purchase of the property. Further, he has not taken any steps to develop the land. Granted the circumstances, I am inclined to find that if the Plaintiff does succeed at trial, then an award of damages will be an adequate remedy. In consequence, the question of balance of convenience does not arise.

I accordingly discharge the ex-parte order of interim injunction granted on 1st December, 2016. I award costs to the 2nd Defendant to be taxed in default of agreement.

Leave to appeal is granted.

Dated this 22nd day of March, 2017


M. Mapani-Kawimbe
HIGH COURT JUDGE