IN THE COURT OF APPEAL FOR ZAMBIA **Appeal No. 63/2017**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

ELIAS MUMENO AND 43 OTHERS	**APPELLANT**
AND	
ESSAU PHIRI	**1ST RESPONDENT**
JACOB PHIRI	**2ND RESPONDENT**
AND UNKNOWN OTHERS	**3RD RESPONDENT**

Coram: MCHENGA, DJP; MULONGOTI AND SICHINGA, JJA
On the 26th day of October, 2017

For the Appellant:	**In person**
For the Respondents:	**Mr. G.D Chibangula of Messrs GDC Chambers**

JUDGMENT

Sichinga, JA, delivered the Judgment of the Court

Cases referred to:

1. **Shell & B. P. Zambia Limited v Conidaris and others (1975) Z.R. 174 (S.C)**

2. American Cyanamid Co. v Ethicon Ltd [1975] 2 WLR 316
3. Communications Authority v Vodacom Zambia Ltd SCZ No.21 of 2009
4. Turnkey Properties v Lusaka West Development Company Limited and others (1984) Z.R. 85 (S.C.)
5. Nora Mwaanga Kayoba and another v Eunice Kumwenda Ngulube and another SCZ Appeal No. 19 of 2003
6. Tito v Waddel 2 [1997] Ch. 106
7. Teklememicicael Mengstab and Semhar Transport and Mechanical Ltd v Ubuchinga Investments Ltd Appeal No. 218 of 2013
8. Twampane Mining Cooperative Society v E & M Storti Mining Ltd Appeal No. 20 of 2011
9. Harton Ndovi v National Education Publishing Company (Z) Ltd (1980) ZR 184
10. Bernard Kutalika v Dainess Kalunga, SCZ Appeal No. 73 of 2013
11. Hillary Bernard Mukosa v Michael Ronaldson (1993-1994) ZR 26
12. David Nzooma Lumanyenda and another v Chief Chamuka and others, (1998-1999) ZR 194
13. Joseph Mataka v Mathew Kangwa and others 2012/HP/1077 (unreported)

14. Raphael Ackim Namang'andu v Lusaka City Council (1978) ZR 358
15. Mususu Kalenga Building Ltd and another v Richmans Money Lenders Enterprises, SCZ Appeal No. 4 of 1999
16. Tawela Akapelwa (sued as Induna Inete) and others v Josiah Mubukwanu Nyumbu (suing as Chief Chienge), SCZ Appeal No. 4 of 2015
17. Richard Mofya v Stalyon Employment and Investment Limited SCZ Judgment No. 37 of 2014
18. Ahmed Abad v Turning and Metals Limited (1987) ZR 174
19. Mothercare Ltd v Robson Books Ltd [1979] FSR 466
20. Alfred Dunhill Ltd v Sunoptic SA [1979] FSR 337
21. Letang v Cooper (1965) 1 QB 232
22. Wakefield v Duke of Buccleugh (18650 12 LT 628
23. Mundanda v Mulwani (1987) ZR 29
24. Hubbard v Vosper [1972] 2 QB 84
25. Buchman v The Attorney-General ZR (1993-1994) 131

Texts referred to:

1. Court of Appeal Rules, Act No. 7 of 2016, S.I No. 65 of 2016, Order 9(2)
2. Rules of the Supreme Court, Chapter 25, of the Laws of Zambia
3. Phipson on Evidence, Seventh Edition
4. Halsbury's Laws of England, Fifth Edition, Volume 11

This is an appeal against the High Court's Ruling of the 14th day of February, 2017, dismissing an application for an injunction sought by the appellants against the respondents to restrain them whether by themselves or through their authorized agents and servants, from harassing and or interfering with the appellants' quiet enjoyment and or possession of the properties known as Stands Number 4656/M, 4657/M and 4659/M, Lusaka pending the final determination of the matter.

In this appeal we shall refer to the appellants as the plaintiffs and the respondents as the defendants as this is what the parties are in the main action in the court below.

According to the Statement of Claim, the plaintiffs seek an order that the defendants are imposters and have no lawful claim to the aforementioned properties and have no authority to claim any money as consideration in respect of the land; a refund of a total of K84,100=00, money illegally collected by the defendants from the plaintiffs; an injunction restraining the defendants from harassing and/or interfering with the plaintiffs' quiet enjoyment and/or possession of the disputed properties; a declaration that the plaintiffs are the bona fide owners of the disputed properties by virtue of having occupied the same in excess of five years; damages for unlawful demolition of structures; and interest and costs. The

injunctive order was initially granted ex-parte on the 17th day of August, 2016 and subsequently discharged on the 4th day of February, 2017, after inter parte hearing.

The affidavit evidence in support of the injunction application before the lower court, deposed to by one Elias Mumeno and dated 17th December 2016, was to the effect that the plaintiffs bought pieces of the disputed properties situate in Chilanga District from MMD cadres. Thereafter, the plaintiffs began the process of legitimizing their ownership by engaging surveyors to draw up site maps for onward submission to the Ministry of Lands. The plaintiffs aver that the defendants, in the company of police officers, without lawful justification, demolished some structures on the disputed pieces of land. That they engaged the defendants and paid them a consideration of K84,100=00 for their respective pieces of land. The deponent further stated that they conducted an investigation at the Ministry of Lands and discovered that the three pieces of land belonged to one Daniel Tembo, one Lillian Munkombwe, and one unknown person. The plaintiffs allege that the defendants are not the bona fide owners of the disputed land.

In opposing the application for the interim injunction, the second defendant deposed in his affidavit in opposition, that in 2010, before the creation of Chilanga District, the defendants, as sitting tenants, applied to Kafue District Counsel for allocation of pieces of land on Farm 15a. They paid the requisite fees for the

application. Later, in April, 2011, after the local authority considered the matter, they approved the allocation to the deponent. Based on that approval the second defendant applied to the Ministry of Lands for numbering of the allocated piece of land. That the land occupied by the plaintiffs namely Stands 4656/M, 4657/M and 4659/M are located away from the defendants' allocated land and registered in the names of Daniel Tembo, Kaulu Lillian Munkombwe, and Lukonga Inutu respectively. The deponent states that the plaintiffs, as squatters, illegally acquired their pieces of land from cadres. The second defendant denies that the defendants demolished the plaintiffs' structures. However, that the same were demolished by police officers acting on the instructions of the Task Force dealing with illegal land grabbing. The second defendant further denies that the defendants entered into an agreement for the sale of land or that they collected the sum claimed by the plaintiffs. He further states that the defendants are beneficial owners of the land allocated to them as they are in the process of obtaining title deeds from the Ministry of Lands.

The court below in its ruling considered the applicable principles in relation to the grant of injunctions as enunciated in the cases of **Shell and BP v Connidaris and others**[1] and **American Cyanamid v Ethicon Limited**[2]. Upon a consideration of the affidavit evidence before it, the court came to the view that there was no

serious question to be determined at trial given the manner in which the plaintiffs occupied the land. The court also considered the issue of damages, and noted that the plaintiffs had pleaded damages. That the same would suffice if the plaintiffs succeeded at trial. The court was guided in its position by the case of **Communications Authority v Vodacom (Z) Limited**[3] in which the Supreme Court accepted that damages were an alternative remedy within the principle enunciated in **Shell and BP Zambia Limited** *(supra)*. The court found that the balance of convenience *in casu* was in favour of the defendants as the plaintiffs were mere squatters. The court was guided by the case of **Turnkey Properties Limited v Lusaka West Development Company Limited**[4]. Ultimately, the court considered that the plaintiffs had not come to equity with clean hands given that they did not have the approval of the relevant authorities to be on the land. The court then accordingly dismissed the application and discharged the *ex-parte* order granted on the 17th day of August, 2016.

Dissatisfied with the lower court's Ruling, the plaintiffs appealed against the decision of the lower court, advancing the following grounds:

GROUND ONE

The Learned Judge in the court below erred in law and fact when she held that the appellants were squatters and therefore, had no clear right to the

relief being sought when in fact the same was an issue for determination at the hearing of the substantive matter.

GROUND TWO

The Lower Court erred in law and fact when it held that the plaintiffs had not come to equity with clean hands when the respondents have not demonstrated their license to the land.

GROUND THREE

The Lower Court erred in law and fact when it stated in its ruling that the registered owners of Stand numbers 4656/M, 4657/M, and 4659/M were not party to the action when the said registered owners have not interfered with the plaintiffs' quiet enjoyment of the land.

GROUND FOUR

The Lower Court erred in law and fact when it insisted and solely made a finding to the effect that since the appellants acquired the said land through political cadres, there was no way that they could be owners of the land.

GROUND FIVE

The Court below erred in law and fact when it held that the remedies herein would be atoned for by way of damages when in fact there is no evidence on record suggesting that the respondents were capable of atoning for over 43 houses in the event that they were demolished.

GROUND SIX

The Court below erred in law and fact when it held that the demolition by the respondents may have been conducted by the Task Force personnel when in fact there is a letter from the Task Force written to Matero Police Station distancing the Task Force from the respondents' maneuvers.

At the hearing of the appeal, both parties relied on their filed heads of argument, and orally augmented theirs submissions.

With regards to the first ground of appeal, the plaintiffs contend that the lower court erred in holding that they were squatters and had no clear right to relief. The plaintiffs concede that they bought pieces of land on block 15A or 255A from cadres. They also concede that they may still be squatters based on the fact that they repurchased the same pieces of land or plots from the defendants and later discovered that there are a number of irregularities with regard to the sale by the

defendants. It is submitted that on the 10th and 11th December, 2015, the defendants purporting to be registered owners of the disputed land, demolished some houses built by the plaintiffs. That the condition given to the plaintiffs to retain their houses was for them to repurchase the plots from the defendants at a consideration of ZMW15,000=00 per plot. Some plaintiffs agreed to this condition, whilst others, not present, had their structures demolished. The plaintiffs contend that they entered into agreements with the defendants for the purchase of lots on the disputed land.

The plaintiffs stated that they have been victims of harassment at the hands of the defendants who have been dispossessing, repossessing, evicting and reselling the lots of land they occupy. They say the harassment worsened when the plaintiffs began investigating the ownership of the land in dispute. They submitted that the land does not belong to the defendants but to other individuals. The plaintiffs also alleged, in their submissions, that Chilanga District Council has not approved the defendants' application. However, that the defendants were referred to the Ministry of Lands by the local authority. The plaintiffs submit that they commenced this suit to ascertain the defendants' interest in the land as they feared becoming victims of a fraudulent misrepresentation in dealing with the defendants over the land. They referred us to the case of **Nora Mwaanga Kayoba and Alizani Banda v Eunice**

Kumwenda Ngulube and another[5] in which the Supreme Court said that in purchasing real properties parties are expected to approach such transactions with much more serious inquires to establish whether or not the property in question has encumbrances.

The plaintiffs submitted that they have a clear right to relief as they seek to protect their interests on the basis of agreements entered into with the defendants. They contended that they are asking the court to determine whether the land sold to them by the defendants belongs to the latter. They reiterated that they seek an injunction to restrain the defendants from harassing them.

As regards ground two, the plaintiffs argue that the lower court erred in law and fact in holding that they had not come to equity with clean hands. They argue that they sought equity after they had purchased their pieces of land from the defendants. They contend that the defendants fraudulently misrepresented their interest in the land, and as such, the defendants came to equity with dirty hands as they purported to be owners of the land when in fact they were not.

In the third ground of appeal, it is argued that the court below erred when it held that there was need to include the registered owners of the land to the suit. The plaintiffs contend that they did not enter into any agreement with the registered

owners of the land but did so with the defendants. They refer to the case of **American Cyanamid Company v Ethicon Limited** *(supra)*, in which it was stated that it was not part of the court's function at that interlocutory stage of litigation to try and resolve conflict of evidence on affidavits as to the facts on which the claims by either parties may automatically depend to decide difficult questions of law which call for detailed argument and mature consideration. They submit that in view of that principle they did not produce all the evidence of all the people with interest in the disputed land.

In the fourth ground of appeal, the plaintiffs' argue that the court below erred when it made a finding to the effect that since the plaintiffs acquired the said land through political cadres, they could not be the owners of the land. The plaintiffs submitted that they gave full disclosure of the facts surrounding the properties in question and how they came to be in occupation. They argue that they did so in order to legitimize their continued stay on the land.

In ground five, the plaintiffs argued that there was no evidence on record, for the court to conclude that damages would be sufficient as a remedy or that the defendants were capable of meeting the cost of demolition. They contended that their claim for damages was based on the damages that had already occurred and not the damage that would occur in the future. They argued that an injunction must

be granted where the right to relief is clear and the injunction is necessary to protect the applicant from irreparable injury. The cases of **Shell and BP Zambia Limited v Conidaris and others** *(supra)*, and **American Cynamid v Ethicon Limited** *(supra)* were referred to. The plaintiffs submitted that they are likely to suffer irreparable injury if the defendants demolish their structures, evict them from the land or sell the land to third parties. They rely on the case of **Tito v Waddel**[6].

In the sixth ground, the plaintiffs argue that the court below erred when it held that the demolition by the defendants may have been conducted by the Task Force personnel when in fact there is a letter from the Task Force written to Matero Police Station distancing the Task Force from the defendants' manoeuvers. It is submitted that the Task Force in the letter to Matero Police Station, denied knowing the defendants. The plaintiffs urged us to set aside the Ruling of the court below and that an injunction be granted to restrain the defendants as claimed.

At the hearing of the appeal, Mr Mumeno submitted orally on his own behalf and on behalf of all the plaintiffs. He argued grounds 1,2,3,4, and 6 together and ground 5 separately. In his brief submissions he contended that the court below discharged the injunction based on issues for determination in the main matter

which it ought not to have done. He relied on the case of **American Cyanamid v. Ethicon Limited** *(supra).*

As regards ground 5, Mr. Mumeno stated that the defendants were on the ground demolishing and selling property. He submitted that the selling of the property could not be atoned for by damages. That if the defendants were left to continue their illegal activities, the plaintiffs would suffer irreparable injury.

The defendants did equally file heads of argument. Grounds one, two, four and five have been argued together. Grounds three and six are equally argued in concert. However, before addressing the grounds of appeal, the defendants submit that all six grounds of appeal should fail as they are in grave violation or contravention of the strict rules of the court.

They argued that the grounds of appeal contain arguments and factual conclusions and are therefore not in conformity with Order X Rule 9(2) of the Court of Appeal Rules which provides that:

> *"A memorandum of appeal shall be set forth concisely and under distinct heads, without argument or narrative, the grounds of the objection to the judgment appealed against, and shall specify the points of law or fact which*

are alleged to have been wrongly decided, such grounds to be numbered consequently."

It is submitted that this rule is modelled on Order 58(2) of the Supreme Court Rules, Chapter 25 of the Laws of Zambia which the Supreme Court has pronounced itself on in the case of **Teklememicicael Mengstab and Semhar Transport and Mechanical Limited v Ubuchinga Investments limited**[7] that the wording of Order 58(2) was couched in mandatory terms. The court went on to state that:

"*A rambling memorandum of appeal has no place in our rules and only serves to cloud the issues in dispute. Litigants and practitioners should desist from this practice and comply with this rule.*"

It is submitted that all six grounds ought to be quashed for being in violation of the strict rules of this court as they contain testimony or evidence that is not before the lower court. The defendants argue that the failure to adhere or abide by this court's rules is fatal and warrants this appeal to be dismissed forthwith with costs to the defendants. The case of **Twampane Mining Cooperative Society v E & M Storti Mining Limited**[8] was referred to.

In the alternative, the defendants have presented arguments in response to the grounds of appeal. With regard to grounds one, two, four and five, it is argued that it is settled law that a judge or court considering an application for an injunction ought, as a matter of practice, to be guided by the principles which were set out in the case of **American Cynamid Company Limited v Ethicon Limited** *(supra)*, namely:

(i) Whether there is a serious question to be tried;

(ii) Whether damages would be adequate to compensate the plaintiff;

(iii) Whether the balance of convenience tilts in favour of granting the injunction to the plaintiff; and

(iv) Whether the plaintiff has come to court with clean hands.

It is submitted that the court below closely examined the parties' pleadings, in particular, the Statement of Claim. That the court also looked at the affidavit evidence before it and found that the plaintiffs were squatters on the subject property and, as such, had no clear right to relief. The cases of **Harton Ndovi v National Education Publishing Company Zambia Limited**[9], **Bernard Kutalika v Dainess Kalunga**[10], **Hilary Bernard Mukosa v Michael Ronaldson**[11], **David Nzooma Lumanyenda and another v Chief Chamuka and others**[12] and **Joseph**

Mataka v Mathew Kangwa and others[13] were referred to. It is submitted that the plaintiffs have no cause of action in law that would entitle them to relief.

As regards ground two on the question of whether or not the plaintiffs came to court with clean hands, it is submitted that it is trite law that he who comes to equity must do so with clean hands. The defendants contend that the plaintiffs have failed to satisfy the requirement or the ingredient that they came to court with clean hands when, as squatters they had their hands soiled.

With respect to ground five, *vis-à-vis* the second requirement as to whether damages would be an adequate remedy to compensate the plaintiffs, it is submitted that the court below did not err in law and fact when it held that the remedies herein would be atoned for by way of damages. The defendants argue that as squatters the plaintiffs are not entitled to damages for any demolition as they have built at their own peril. For this submission, we were referred to the case of **Raphael Ackim Namang'andu v Lusaka City Council**[14].

The defendants further argue that the issues sought to be raised in ground five were never raised by the plaintiffs in the court below.

The plaintiffs are therefore precluded from raising the defendants' capacity to pay for damages now, when they did not do so earlier. The case of **Mususu Kalenga**

Building Limited, Winnie Kalenga v Richmans Money Lenders Enterprises[15] was referred to as authority. It is submitted that the requirement relating to damages was for the plaintiffs to satisfy the court below that the loss they were likely to incur would be irreparable and would not be an adequate remedy.

The case of **Tawela Akapelwa (sued as Induna Inete) v others v Josiah Mubukwanu Litiya Nyumbu (suing as Chief Chiyenge)**[16] was cited as authority.

As regards the requirement to demonstrate where the balance of convenience lies, it is submitted that the plaintiffs failed to even address this requirement in their heads of argument. According to the defendants the balance of convenience does not tilt in favour of the plaintiffs on account of the fact that they were squatters on the subject land. The defendants' assertion is that the plaintiffs have failed to satisfy any of the laid down legal requirements or ingredients for the grant of an injunction, and as such grounds one, two, four and five ought to fail.

The defendants' arguments with respect to grounds three and six are that the plaintiffs admitted in their affidavit in support of interim injunction that the land in dispute belongs to third parties, namely, Daniel Tembo, Lillian Munkombwe, and another unknown person. The fact that the subject property belongs to the said third parties and the plaintiffs having acquired the same through cadres is

confirmation and express admission that the plaintiffs are not in any way or at all the owners of the property but are claiming ownership by way of adverse possession which is untenable at law or at all. The defendants rely on the cases of **Joseph Mataka v Mathew Kangwa and others** *(supra)* and **David Nzooma Lumanyenda** *(supra)* as authority. The defendants reiterate that the plaintiffs have not addressed the legal requirements for the grant of an injunction as enunciated in **American Cyanamid** *(supra)*.

They argued that the plaintiffs' grounds of appeal serve no useful purpose and should be dismissed forthwith with costs.

To buttress the written heads of argument, Mr Chibangula, counsel for the defendants, placed emphasis on the fact that the plaintiffs admit in their pleadings that they got the land from MMD cadres. He submitted that the plaintiffs have no clear right to relief. Further, that the law of adverse possession is clear. One cannot acquire land by adverse possession. He submitted that all land alienation in Zambia is done through the Commissioner of Lands on behalf of the President.

In his brief response, Mr Mumeno accepted that the plaintiffs bought their pieces of land from MMD cadres, then repurchased the same lots from the defendants.

A quick perusal of the grounds of appeal reveals that they are interrelated. As we see it, there is essentially one ground of appeal. The issues raised in all the grounds are dealing with the applicable principles in the grant of an injunction. We will therefore deal with the grounds as one. In considering the appeal, we shall examine the principles that a court ought to consider when deciding whether or not to grant an injunction as laid out in various case authorities, most of which have been cited by the parties. Suffice to say that the principles of law that govern a party's entitlement to injunctive relief have long been settled in this jurisdiction.

In the case of **Richard Mofya v Stalyon Employment and Investment Limited**[17] the Supreme Court guided that the two primary issues to be addressed or considered at the outset are **whether the claimant has demonstrated** (emphasis ours) that:

1. *His right to relief is clear; and*
2. *Irreparable damage will be occasioned to the claimant if the injunction was not granted.*

This was in line with its decision in the case of **Shell & B. P. Zambia Limited v Conidaris and others** *(supra)* wherein the Supreme Court held that:

"A Court will not generally grant an interlocutory injunction unless the right to relief is clear and unless the injunction is necessary to protect the plaintiff from irreparable injury; mere inconvenience is not enough. Irreparable injury means "injury which is substantial and can never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired."

The Supreme Court further stated that if the court is of the view that there is a serious question to be tried, it should proceed to consider whether or not a claimant could be adequately compensated by an award of damages if successful at trial.

In this regard, the Supreme Court held in the case of **Ahmed Abad v Turning and Metals Limited**[18] that where damages would be an adequate remedy, the award of injunction is inappropriate.

As regards the plaintiff's demonstration of a clear right to relief, the lower court considered the affidavit evidence and noted that the plaintiffs in their affidavit in support had averred that they purchased the land from MMD cadres. The court found that the plaintiffs, as squatters, had no legal right against the owners of the land.

In the case of **American Cyanamid Company v. Ethicon Ltd** *(supra)* Lord Diplock said at page 407:

> *"It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavits as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature consideration."*

Therefore, the court needs to be satisfied only that there is a serious question to be tried on the merits of the case before it. This means that the court is required to investigate the merits to a limited extent only to ascertain if there is a serious question to be tried. What needs to be shown is that the applicant's case or cause of action has substance based on the facts. Beyond that, it does not matter if the applicant's chance is 90 percent or 20 percent.

The cases of **American Cyanamid[2], Mothercare Ltd v Robson Books Ltd[19]** and **Alfred Dunhill Ltd v Sunoptic SA[20]** refer. If there is no serious question to be tried on the substantive claim, the application for an injunction should fail. In the circumstances, we deem it necessary to define the term *'cause of action'*. In this regard, we are guided by the case of **Letang v Cooper[21]** in which Lord Diplock L.J defined it as meaning, *"simply the facts, the existence of which entitles one person*

to obtain from the court a remedy against another person." Further, the learned authors of **Halsbury's Laws of England, fifth edition, volume 11** state at paragraph 115 that;

> "*The phrase has been held from the earliest time to include every fact which is necessary to be proved to entitle the claimant to succeed, and every fact which the defendant would have a right to dispute.*"

Given the manner in which the plaintiffs acquired the land, the court below came to the conclusion that the plaintiffs did not have a good and arguable claim to the right they sought to protect. We cannot fault the court below for coming to the conclusions that it did since at law the plaintiffs have no propriety rights to the land to protect because they are squatters. Thus, there is no serious question to be tried. If there is no serious question to be tried on the substantive claim, the injunction must be refused. There was therefore no need for the trial court to consider the question of adequacy of damages and the balance of convenience. However, we have addressed them as they form part of the grounds of appeal.

The next hurdle to jump according to the guidelines in **American Cyanamid** *(supra)* is the issue of the adequacy of damages to the applicant. If there is a serious question to be tried on the merits of the substantive claim, the court should

then consider whether the applicant will be adequately compensated by an award of damages at trial.

The test was stated in the following terms in **American Cyanamid** *(supra)* per Lord Diplock:

> *"If damages in the measure recoverable at common law would be an adequate remedy and the defendant would be in a financial position to pay them, no interim injunction should normally be granted"*

Further, in the case of **Shell and BP Zambia Ltd v Connidaris and others** *(supra)*, the Supreme Court held inter alia that:

> *"A court will not generally grant an interlocutory injunction unless the right to relief is clear and unless the injunction is necessary to protect the plaintiff from irreparable injury, mere inconvenience is not enough. Irreparable injury means injury, which is substantial and can never be adequately or atoned for by damages, not injury which cannot possibly be repaired."*

The law on the issue of damages in the grant of injunctive relief is well settled. Where an applicant fails to show a serious question to be tried on the merits, and if damages would be an adequate remedy upon trial of the matter, then that is it, the application for an injunction should be refused. *In casu,* the court below was

persuaded by the defendants' counsel's argument that the plaintiffs have endorsed damages on their writ and statement of claim. We note that the reliefs claimed by the plaintiffs in their pleadings include damages for unlawful demolition of structures. We further note from the affidavit in support and *ex-parte* order granted that the plaintiffs did not make any undertaking in damages to the defendants or any other person that would be served with the order for any loss that would be caused by the injunction if it later appeared that it was wrongly granted. The purpose of this is to safeguard a defendant or other third party who may be unjustifiably prevented from doing something it was entitled to do. The case of **Wakefield v Duke of Buccleugh**[22] refers. Further, in matters dealing with disputes of land, damages are usually considered inadequate as a remedy to compensate an aggrieved party. The case of **Mundanda v Mulwani**[23] refers. In *casu,* there is no serious question to be tried as the appellants are squatters and have not demonstrated a clear right to relief. In short, we are inclined to uphold the position that the lower court took in this regard.

The court below also considered the question of the balance of convenience in its Ruling. If the undertaking made by the plaintiff does not adequately protect the defendant, although that is a reason for refusing the injunction, then ordinarily the court will go on to consider the balance of convenience.

In **American Cyanamid Company** *(supra)* Diplock LJ said:

> *"It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises."*

In the case of **Shell and BP Zambia Ltd v Connidaris** *(supra)*, the Supreme Court held inter alia that:

> *"...where any doubt exists as to the plaintiff's rights to relief or if the violation of an admitted right is denied, the court takes into consideration the balance of convenience to the parties. The burden of showing the greater inconvenience is on the plaintiffs."*

In casu, the court below found that the plaintiffs had not discharged the burden to show that they would suffer the greater inconvenience on the basis that they were squatters and had no legal interest to protect in the land. The court was of the view that in the circumstances of this case, granting an injunction would create conditions which would only be favourable to the plaintiffs. The case of **Turnkey Properties Ltd v Lusaka West Development Company Ltd** *(supra)* refers. Given the admission of their status on the land as squatters, we cannot fault the lower court for coming to the conclusion that it did.

As regards the holding by the court below that the plaintiffs had not come to equity with clean hands, the plaintiffs' argument appears to be that the defendants misrepresented themselves to the plaintiffs as the registered owners of the disputed land when, in fact, they were not. According to their affidavit evidence, a search at the Ministry of Lands revealed that the land was actually registered in the name of other persons and not the defendants. On the other hand, the defendants' counsel argues that the plaintiffs did not approach the court below with clean hands due to the fact that they acquired the land from MMD cadres. The court below found that since the plaintiffs were squatters who did not have the approval of the relevant authorities to be on the land, they had not come to equity with clean hands. In our view, the defence of unclean hands will apply where there is a link between the applicant's wrongful act and the rights he seeks to enforce. Inequitable conduct by an applicant is usually a bar to equitable relief. The case of **Hubbard v Vosper**[24] refers. The burden to show that they had no blemishes fell on the plaintiffs. The learned authors of **Phipson on Evidence, Seventh Edition**, state as follows:

> *"So far as the persuasive burden is concerned, the burden of proof lies upon the party who substantially asserts the affirmative of the issues. If, when all the evidence is adduced by all the parties, the party who has this burden has not discharged it, the decision must be against him. It is an*

ancient rule founded on consideration of good sense and should not be departed from without reasons."

It is clear from the above passage, and it is indeed trite law, that he who alleges must prove. Effectively, it was the plaintiffs' duty to establish its entitlement to injunctive relief by meeting the basic principles that govern injunctive relief, which we have addressed. Given the manner in which the plaintiffs acquired the land, we take the view that the court below was entitled to hold as it did.

For the reasons given above, we find no merit in grounds one, two, four and five.

We now move to consider grounds three and six.

At the core of ground three, so far as we can decipher from the lower court's Ruling, is the reference to the fact that '*the owners of the land were not made party to the action.*' The plaintiffs argue that the court below ought not to have made reference to the owners of the land as they had no dispute with them.

The argument with respect to ground six is that the court below erred in law and fact when it held that the demolition by the defendants may have been conducted by the Task Force personnel when in fact there was evidence in form of a letter written by the Task Force to the Police distancing the Task Force from the defendants' maneuvers.

Mr. Chibangula, learned counsel for the defendants submits that grounds three and six do not in any way address the legal requirements or ingredients for the grant of an injunction.

The considerations for a court to take into account are those enunciated in **American Cyanamid** *(supra).* He contends that the grounds serve no useful purpose for the grant of an injunction.

We agree. With respect to ground three the court merely stated in *obiter* that the owners of the land had not been made a party to the action. That observation had no basis upon its finding not to grant injunctive relief.

As regards ground six, a perusal of the Ruling reveals that there is no finding nor reference, by the court below, that the demolitions by the defendants may have been conducted by the Task Force personnel. The facts relating to the said Task Force were not raised by the plaintiffs in their affidavit in support of an order for interim injunction. Neither were they raised in their affidavit in reply. Equally the defendants did not refer to the activities of the said Task Force in their affidavit in opposition to an order for an interim injunction. This was not for consideration before the court below and should not have been raised before this court.

In the case of **Buchman v The Attorney-General**[25], the Supreme Court stated that:

> *"...a matter not raised in the lower court cannot be raised in a higher court as a ground of appeal."*

The same position was restated in the **Mususu Kalenga Building Limited and another v Richman's Money Lenders Enterprises** *(supra)* cited by the defendants' counsel. Grounds three and six must fail.

We therefore uphold the Ruling of the court below for the reasons stated above. All the grounds of appeal herein fail. This appeal has no merit and it is so dismissed, with costs to the defendants to be taxed in default of agreement.

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C.R.F. MCHENGA
DEPUTY JUDGE PRESIDENT

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J.Z. MULONGOTI
COURT OF APPEAL JUDGE

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D.Y. SICHINGA
COURT OF APPEAL JUDGE