

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

**2017/HP/1661**

**BETWEEN:**

**BERNARD CHISANGA AND 26 OTHERS**

**PLAINTIFF**

**AND**

**KABWE MUNICIPAL COUNCIL**

**DEFENDANT**



*Before Hon. Mr. Justice Mathew L. Zulu, the .....day of October, 2017*

*For the Plaintiff: Hon. T. S. Ngulube, Messrs Tutwa Ngulube & Co.  
For the Defendant: Mr. J. M. Swale, Mrs. B. B. Kearns In-House  
Counsel, Kabwe Municipal Council and Lusaka  
City Council.*

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**RULING**

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**List of Authorities referred to:**

- 1. Order 29 Rule 1 of the Supreme Court, 1999, (White Book).**
- 2. Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia.**

**Cases referred to:**

- 1. American Cynamid Company v. Ethiocon Limited (1975) AC at page 408.**
- 2. Shell and BP v. Conidoris and Others (1975) ZR, 174.**
- 3. London and Blackwall Roy v Cross (1886) 31. C.D. 345.**
- 4. Hilary Benard Mukosa v. Michael Ronaldson (1993) SJ, 25 (SC).**

The Plaintiffs commenced this action against the Defendant by way of Writ of Summons dated 27<sup>th</sup> September, 2017, claiming the reliefs below:

- a) An Order that the proposed re-entry of the said 26 Plots by the Defendants without following the laid down procedure is illegal null and void;**
- b) Damages for unlawful occupation and development of their Plots at Tushane Complex opposite the New Shopping Mall along Great North Road in Kabwe;**
- c) An Order that the 26 Commercial Plots the Defendants intend to turn into a Transit Bus Station belong to the Plaintiffs;**
- d) An Order for Interim Injunction Restraining the 1<sup>st</sup> Defendant's servants and agent from commenting on the subject matter or issuing verbal and misleading statements in the media of and concerning the said Plots until final determination of the matter;**
- e) Damages for trespass to land;**
- f) An Order that the Defendants Process Certificates of Title for the Plaintiffs;**
- g) An Order that the deprivation of the said plots violates Articles 16 of the Republican Constitution and that the Plaintiffs are entitled to possession, occupation and development of their Plots;**
- h) An Order or Interim Injunction restraining the Defendants from clearing, developing, leasing advertising, subdividing or selling of the Plaintiff's plots until final determination of the matter;**

- i) Interest at the current bank lending rate;**
- j) Further or other relief that the Court May deem fit; and**
- k) Costs.**

The Plaintiffs also on the same day applied for an Order of Interim Injunction, exparte, which was granted on 4<sup>th</sup> October, 2017 and Inter parte scheduled for 9<sup>th</sup> October, 2017, but was rescheduled to 12<sup>th</sup> October, 2017.

The Application is supported by an Affidavit. The deponent **Bernard Mulenga Chisanga** on behalf of the Applicants states that in February, 2015, he and others were offered commercial plots at Tushane and paid all the requisite fees for acceptance of the said plots.

The Deponent states that their plots were reported in the Reports for the Plans, Works and Development and Real Estates Committees held in February, 2015 as shown in Exhibit marked **"BMC 1-4"**.

The Affidavit evidence states that the Plaintiffs paid K 900 and the council confirmed the offers as evidenced by Minute book marked **"BMC6"**.

The Deponent however, in his Affidavit states that the Defendant has started developing on their plots on pretext of creating a Transit Bus Station and that the plots had been repossessed through a Re-entry.



The Deponent further states that all efforts to challenge the said decision have failed as the Council's decision was final as reported in the Town Clerk's report to the Council meeting of 19<sup>th</sup> April, 2017, marked "**BMC7**".

The Deponent adds that none of the Plaintiff's gave written consent or surrendered their plots to the Council, nor have they been given any alternative plots.

The Deponent avers that the decision by the Defendant to demolish the structures that were under construction and to use graders to clean the building materials from the said plots is a clear indication that the Plaintiffs will not have any other recourse to their plots.

The Deponent also stated that the land is a unique subject matter and that damages may not be adequate to compensate them for the loss of the said land.

The Defendant filed an Affidavit in Opposition dated 9<sup>th</sup> October, 2017, deposed by **Mwandwe Mwamba** who states that the mandate to plan, replan and monitor development within Kabwe Town is the obligation of the Defendant.

The Deponent's Affidavit in evidence was that contrary to the Plaintiff's claims, not all paid the amount demanded as per condition on demand notice rendering the offers null and void.

The Deponent states that the Defendant did not at any given time authorize any development on the plots in issue and that the said plot 2037, is under the leasehold of Kabwe Municipal Council and not State land, and that they did offer alternative market stands to pave way for the construction of the Transit Bus Station. The Defendant avows that preliminary works have already started and the developer paid the initial amount, and that any delay will affect the initial budget for construction.

The Defendant further states that granting the Plaintiffs the Injunction restraining the Defendant to proceed with the works at stand 2037, opposite the new Mall will affect the agenda for development of Kabwe Town by the Local Government.

The Plaintiff filed written submissions, for which I am grateful in support of the application for Injunction.

Learned Counsel for the Plaintiff citing the celebrated case of **American Cynamid**<sup>1</sup> case submitted that the Defendant should have followed the repossession procedure as opposed to commencing development. He stated that the Affidavit in Opposition has not shown or refuted the

assertions alleged by the Plaintiffs that they were not compensated or offered alternative plots.

The Plaintiff's counsel adds that the rules of Natural Justice were not applied by the Defendant before taking over the entire place. The Plaintiff's contend that issues raised relating to budgeting and inconvenience are irrelevant and irregular as the land in question does not belong to them having already alienated the same to them. Citing a number of authorities, the Plaintiff's Counsel submits that procedural fairness is required whenever the exercise of a power adversely affects an individual's rights protected by common law or created by statute. Further, he contended that although the Defendant has the power to re-plan and re-develop bus stations, they believe the Defendant has a duty to act judiciously and with procedural fairness.

The Plaintiff have submitted that they have established a good arguable case and have shown that they are entitled to the relief as they were not consulted or compensated before their plots were repossessed.

I have seriously considered the Plaintiff's and Defendant's Affidavits and submissions of the parties.

At the core of this application is the determination of whether this is a proper case where I can exercise my discretionary power to grant the Plaintiffs the Order for Interim Injunction.

There are numerous authorities on the principles of injunctive relief being sought some of which have already been cited by counsel for the Plaintiff and Defendant.

In the celebrated case of **American Cynamid Company v. Ethiocon Limited**, and our own authority of **Shell and BP v. Conidoris<sup>2</sup>**, the Supreme Court held that a party seeking injunctive relief must demonstrate 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.**

The issue I wish to address myself first is whether on the available evidence, there is a serious question to be tried and that the Plaintiff has shown a clear right to the said relief. The dispute at hand emanates from the fact that the Plaintiff's are claiming to have been offered pieces of land by the Defendant. However, before the process of ownership could be completed, the Defendant has repossessed the said plots and proceeded



to start building on the same plots. The Plaintiffs among other reliefs is seeking a declaration that the purported re-entry by the Defendants without following the laid down procedure is illegal null and void. This in my view, is an issue that can be determined at trial. Thus, while there may be some serious issue to be tried, the main point at this juncture is looking at the Interim relief, the Plaintiff is seeking of Interim Injunction therefore will not delve into the merits or demerits of the claim.

The second issue I wish to address is whether the Plaintiff is likely to suffer irreparable damage, which cannot be atoned by an award of damages. The Plaintiffs contend that they were offered the plots by the Defendant. Some Plaintiffs proceeded to dig foundations and heaped some building materials on site ready to start the construction of their shops.

Upon consideration of the evidence on record, it is clear that the Defendant acting as the Agency of the Ministry of Lands did offer the plots in dispute to the Plaintiffs and possibly made recommendations to the Ministry of Lands so that the Plaintiffs could be granted Certificate of Title to the plots they were offered. It is clear from the evidence on record that the process was not completed, before the Defendant repossessed the disputed plots and started developing the same area with the intention of putting up a Transit Bus Station.



What is clear in my mind is the fact that the Plaintiffs have no title to the disputed plots, except for the fact that they were offered by the Defendant. It is not also clear at this stage whether the Defendant proceeded to recommend the Plaintiffs to the Ministry of Lands for the grant of Title Deeds by the Commissioner of Lands.

Even if the Defendant made the recommendation to the Commissioner of Lands that the Plaintiffs be granted the Certificates title to the disputed plots. It is not in dispute that the Commissioner of Lands enjoys wide discretion in allocating land on behalf of the President.

The Commissioner of Lands was and is not obliged to accept the recommendation of the Defendant in favour of the Plaintiffs.

Consequently, even if the Plaintiffs were offered the said disputed plots, they cannot at this stage claim to be owners of their respective plots in terms of **Section 33 of the Lands and Deeds Registry Act**, which serve as conclusive proof of ownership.

On the evidence on record, I do not see the irreparable damage that the Plaintiff would suffer as any loss, if any, properly quantified can be atoned for in damages. The Defendant in the Affidavit in Opposition has shown willingness to address the issue of alternative plots.

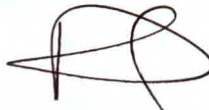
The Plaintiffs would clearly be atoned for in damages should they prove their claim. It is my view that actions which result in the award of damages, as the case under consideration cannot be considered to be one in which Plaintiff can suffer irreparable Injury. As was stated in **London and Blackwall Roy v Cross, Lindley, LJ**, held:

***“That the very first principle of Injunction law is that you do not obtain Injunctions to restrain actionable wrongs for which damages are a proper remedy”.***

For the above reasons, it would serve no practical purpose to consider the question of irreparable damage and the tilt of the balance of convenience.

Accordingly, the Order of Interim Injunction, granted on 4<sup>th</sup> October, 2017 is vacated and discharged, as it lacks merit. Costs shall abide the event to be taxed in default of agreement.

Dated the ..... *goh* day of ..... *Dec* ..... 2017



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**M. L. ZULU  
HIGH COURT JUDGE**