

**IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA**

*(Civil Jurisdiction)*

**2017/HP/1131**

**BETWEEN:**



**SIMON DIN BUTT** (*Suing as Attorney of Philomena  
Rosemary Butt*)

**PLAINTIFF**

**AND**

**JACK MWALE AND OTHERS SQUATTERS  
KAFUE DISTRICT COUNCIL**

**1<sup>ST</sup> DEFENDANTS  
2<sup>ND</sup> DEFENDANT**

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**R U L I N G**

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**Legislation referred to:**

1. *Supreme Court Rules of England (1999) Edition, white Book*
2. *Limitation Act of England, 1939*

**Cases referred to:**

1. *Tommy Mwandalema v. Zambia Railways Board (1978) ZR 65*
2. *BP Zambia v. Interland Motors Limited (2001) ZR 37*

This is an application for injunction.

The genesis of this matter is that on 13<sup>th</sup> July, 2017 the Plaintiff launched proceedings by mode of writ of summons and statement of claim against the defendants claiming for the following:

- (i) A declaration that the Plaintiff is the rightful and legal owner of the properties known as Lots 15178/m and 15179/m situated in the Kafue District of the Lusaka Province of Zambia.
- (ii) An order of the eviction of the 1<sup>st</sup> Defendant or any other squatters and for the plaintiff to remain in possession and in occupation of the said properties.
- (iii) An order for demolition of illegal structures built upon the said land.
- (iv) An order for interim injunction to prevent the first defendant and or any squatter /trespassers by themselves, servants or agents from entering, building, selling or in any way dealing with the properties known as Lots 15178/m and 15179/m aforesaid.
- (v) Costs of and incidental to these proceedings, and
- (vi) Any other relief as the Court may deem fit.

The Plaintiff then applied exparte for the sought injunction.

It was supported by an affidavit deposed to by the Plaintiff himself. The gravamen of which was that **Philomena Rosemary Butt** together with the late **Shajuadin Butt** purchased the properties Lots 15178/m and 15179/m named herein from Kafue District Council and were subsequently issued with Title Deeds numbered L2743 and L2744 respectively.

Despite having title to the properties, the owners have faced persistent problems from the 1<sup>st</sup> Defendant who have been trying to create illegal settlements.

By letter dated 8<sup>th</sup> March, 2015 the Director of Legal Services for Kafue district Council the 1<sup>st</sup> Defendant together with other individuals were reallocated Lot L/18787/m as compensation and replacement for his claims on the plaintiffs properties as disclosed in exhibit "SDH1".

That in 2004, an action was commenced in the Lands Tribunal under Cause No. LAT/16/2004 involving the plaintiff, 2<sup>nd</sup> defendant and 2 other parties and a consent order was sealed on 8<sup>th</sup> October, 2004 which declared that the property under dispute was rightfully owned by **Philomena Rosemary Butt** and **Shajuadin Butt** vide exhibit "SDB2".

It was deposed that despite the said consent order the 1<sup>st</sup> Defendant and other unknown persons continued to claim ownership of certain portions of the plaintiffs land.

That an action was commenced in the High Court under cause number 2004/HP/1112 which was withdrawn on 21<sup>st</sup> December, 2016.

That on 28<sup>th</sup> December, 2016, the plaintiff erroneously issued a writ of possession in the High Court to prevent the 1<sup>st</sup> defendant from entering upon the premises but by Ruling dated 1<sup>st</sup> June, 2017 and the same was set aside by the Learned Deputy Registrar.

That prior to the said Ruling, the plaintiff took a writ of possession in the Lands Tribunal which was never challenged and was executed by the Sheriff of Zambia granting possession to the plaintiff as evidenced by exhibit "SDB3".

That due to continued illegal claims by the 1<sup>st</sup> defendants and other persons, it has become necessary to obtain from this Court a declaratory order to finally settle the dispute.

That the plaintiff is in occupation of the said property and it would be undesirable to allow the 1<sup>st</sup> defendants to enter upon the said land and allocate themselves plots because the majority of the 1<sup>st</sup> defendants are unknown opportunists and cadres who are simply trying to take advantage of the situation.

That unless restrained, the plaintiff will suffer irreparable damage as some of the 1<sup>st</sup> defendants are political cadres.

He thus entreated the Court to grant the exparte interim order of injunction.

On 17<sup>th</sup> July, 2017, I granted the injunction exparte and made it returnable on 18<sup>th</sup> July, 2017 at 08:30 hours for interparte hearing.

On 12<sup>th</sup> September, 2017 the 1<sup>st</sup> defendants Advocates launched their own motion to discharge the exparte order earlier granted. It was supported by an affidavit deposed to by one Jack Mwale, the 1<sup>st</sup> defendant. The essence of which was that the plaintiff **Philomena Rosemary Butt** and the plaintiffs had commenced an action in the

High Court in cause number 2004/HP/1125 in which they sought among other things vacant possession of Lot No. 15178/m and Lot 15179/m vide exhibit "JM1".

It was deposed that a favorable Judgment was entered by the High Court but the same was reversed by the Supreme Court in its Judgment marked as exhibit "JM2" and "JM3" being the order of the Supreme Court allowing appeal and ordering rehearing before another High Court Judge.

That on 6<sup>th</sup> April, 2015 the Defendants filed notice of intention to proceed as matter had been inactive for too long. That in December, 2016 the plaintiff filed a notice of discontinuance. Yet on 28<sup>th</sup> December, 2016 the plaintiff issued a writ of possession as evidenced by exhibit JM5.

The writ of possession was set aside by the Learned Deputy Registrar on 1<sup>st</sup> June, 2016 exhibited as "JM6". That on 10<sup>th</sup> July, 2017 following interparte hearing the Learned Deputy Registrar discharged the stay of execution and granted the plaintiffs parents leave to appeal as per exhibit "JM7".

That instead of appealing, the plaintiffs mother commenced these proceedings through the plaintiff as her Attorney based on the same discontinued cause No. 2004/HP/1125.

That the process before the District Registrar together with the process in the Lands Tribunal No. Lat/16/2004 and marked "SDB2" and "SDB3" in the plaintiffs affidavit all confirm that the 1<sup>st</sup>

defendants and I were not party to the Lands Tribunal proceedings and as such the same has no effect on the defendants.

That in any event, the Lands Tribunal Consent order dated 8<sup>th</sup> October, 2004, 2016 being a period of after 12 years. That further the Lands Tribunal Consent Order has not been enforced.

That the defendants believe that the writ of possession dated 12<sup>th</sup> April, 2017 filed in the Lands Tribunal and marked as "SDB3" in the plaintiff's affidavit is irregular.

It was further deposed that Lot 15178/m was cancelled by the Ministry of Lands as it was in the forest reserve as evidenced by letter marked as "JM8a" and "JM8b".

That Lot 15179/m was infact cancelled as confirmed by entry No. 7 of the Lands and Deeds Registry printout exhibited as "JM9". The defendants therefore prayed for the discharge of the exparte interim injunction granted on 17<sup>th</sup> July, 2017.

In support of its application to discharge the interim order aforesaid, the defendants Advocates filed in skeleton arguments.

**(i) Injunction an equitable remedy**

It was submitted that an injunction is an equitable remedy and "he who comes to equity must do so with clean hands" and a party seeking such relief must make full and frank disclosure to the Court.

(a) Discontinued proceedings

That plaintiffs mother and her late husband commenced a court action No. 2004/HP/1125 (exhibit JM1) which was discontinued in 2017 after over 13 years.

(ii) **Failure to appeal Ruling**

That despite being granted leave to appeal, the Plaintiff opted not to do so but instead to commence fresh proceedings when parties and facts are the same. (See exhibit JM7)

(iii) **Reissuing fifa after obtaining exparte interim action before this Court**

It was pointed out that the plaintiff after securing the exparte interim injunction herein proceeded to reissue a writ of possession in the Lands Tribunal on 9<sup>th</sup> November, 2017 exhibited as "JM10" of 1<sup>st</sup> Defendants affidavit relating to same properties No. 15178/m and 15179/m.

(iv) **Concealment of matters before another Court**

It was pointed out that there is an existing matter before Judge Yangailo in Cause No. 2015/HP/0282 in respect of the same subject matter as conceded in paragraph 17 and 18 of the affidavit in opposition which alludes to dispute on true extent of boundaries. It was submitted that the properties claimed by the plaintiff in the forest Reserves have since been cancelled vide exhibits "JM8a", "JM8b" and "JM9".

In support of concealment of facts Counsel placed reliance on the explanatory notes under Order 29/1A/24 and 33 of the Rules of the Supreme Court<sup>1</sup>.

Further reliance was placed on Order 29/1A/33 which gives jurisdiction to the Court to discharge exparte an exparte order of injunction granted

*“if it appears that the interim order was irregularly obtained by suppression of facts”*

To buttress that legal position Counsel referred to the case of ***Tommy Mwendalema v. Zambia Railways Board***<sup>1</sup>.

(v) **Judicial Notice**

The defendant invited the Court to take judicial notice of proceedings in case No. 2015/HP/0282.

(vi) **Multiplicity and Duplicity**

It was submitted that infact there are three matters involving the same properties in the Lands Tribunal before Madam Justice Yangailo and before this Court.

It was submitted further that Judge Yangailo stayed proceedings pending the determination of boundaries and that commencing this action is an antic to circumvent Justice Yangailo's order to stay proceedings.

(vii) **Abuse of Court Process**

It was submitted that the Court has jurisdiction and power under Order 18 Rule 19 (1) (d) of the Rules of the Supreme Court at any stage to strike out or amend any pleadings on the ground that

*“(d) it is otherwise an abuse of the process of the Court”.*

Reference was then made to the case of ***BP Zambia v. Interland Motors Limited***<sup>2</sup> in which the apex Court disapproved of multiplicity of action which may have the consequence of Courts giving conflicting Judgments on the same subject matter and thus bring disrepute in the administration of justice. And that it is desirable that all issues in respect of the same subject matter are dealt with by one Court to avoid “window shopping”.

(viii) **Action being statute barred**

Under this head, it was submitted that exhibit “JM1” confirms that in 2004 the plaintiffs’ mother (on behalf of whom he is suing) and her late husband commenced an action against the defendants under cause no. 2004/HP/1125 which is over 13 years ago before the action in casu was commenced, the plaintiff having discontinued his action in cause no. 2004/HP/1125.

Counsel called in aid Section 4 (3) of the Limitation Act<sup>3</sup> which restricts commencement of actions in respect of recovery of land proceeding with 12 years.

The plaintiff countered the application by filing an affidavit in opposition the gist of which was that:-

- (i) The Plaintiff conceded that indeed a writ of possession was filed albeit erroneously in 2016 or 2017 but was not acted upon by the Sheriff of Zambia. It was deposed that subsequently a proper writ of possession was issued by the Lands Tribunal on 12<sup>th</sup> April, 2017.
- (ii) That the Ruling of the Learned Deputy Registrar dated 1<sup>st</sup> June, 2016 did not set aside the writ of fifa issued by the Lands Tribunal.
- (iii) That it is on account of the confusion and deliberate refusal by the 1<sup>st</sup> defendants to abide by the Lands Tribunal Order that the plaintiff has been forced to commence this action so that the Court can determine all issues between the parties with finality.
- (iv) That the Consent Order applies to the defendants notwithstanding that the defendants are not party to the said consent order.
- (v) That Consent Order of the Lands Tribunal remain in force until the same is set aside.

(vi) That there has been non compliance with the Lands Tribunal writ of possession of 12<sup>th</sup> April, 2017 by the defendants thus occasioning of this action.

(vii) That indeed there is a matter before Judge Yangailo in cause no. 2015/HP/0282 and is pending determination awaiting determination of extent of Forest Reserve.

Finally the plaintiff denied suppressing any material information in his application for the sought injunction.

The defendants filed in skeleton arguments in reply which merely reiterated the requirement of non suppression of facts in injunction application and that there cannot be a waiver to a statute of limitation.

On 19<sup>th</sup> April, 2018 the plaintiff launched summons for leave to file affidavit in reply. It was supported by an affidavit the gist of which was that the plaintiff has just been furnished with a boundary verification report by the Lusaka Regional Survey officer on 21<sup>st</sup> February, 2018 and had availed the documents to his Advocates.

The application was opposed. The essence of the affidavit in opposition is that the documents sought to be produced does not report on whether or not Lot 23607/m is a Forest Reserve or not.

I will summarily deal with the application for leave to file further affidavits. Accosted with that application, I visited the case of **Chief Mwanatete and Innocent Munyikwa Lushato**<sup>3</sup> where my brother

pronounced himself on the subject matter to; he put this way at pages R3 – R5:-

*“Indeed the application before me, being an interlocutory injunction, was to be supported by at least one statutory affidavit. Further, and as of right, the defendants were entitled to put in at least the one statutory affidavit they are entitled to. However, thereafter, a party had to apply for leave to file a further affidavit, the rationale for this is simply that a party putting in a first affidavit ought to frame it in such a way that it takes into account and covers all the facts relevant to the case. He ought not to anticipate being given a second opportunity to advance his case, except possibly for arguments on the evidence before the Court.*

*Equally a respondent ought to do likewise to his affidavit in opposition. The practice is similar to that in the exchange of pleadings where a party serves his statement of claim on the opponent who in response serves the defence and counterclaim, if any. Under normal circumstances, the claimant will not be required to file any reply to the defence unless such defence raises issues which could not have been reasonably anticipated by the plaintiff.*

*In this case before me, the plaintiff filed the affidavit in reply without first having sought leave of the Court. And Counsel for the defendant had taken issue with that affidavit. In my view, I can only admit that affidavit on two grounds, one, that the facts*

or issues raised in the opposing affidavit could not have been reasonably anticipated by the plaintiff at the time he settled his affidavit in support of his application, and two, that the issues and matters raised in the affidavit in reply are critical to a determination whether or not to grant the interlocutory injunction". (Underlining mine for emphasis)

I have perused the three affidavits filed in that matter and I find that the issues or matters raised in the opposing affidavit could have been easily anticipated by the plaintiff so as to cover them in his supporting affidavit.

In his affidavit in reply, the plaintiff has raised new matters to which the defendants will not have opportunity to respond. Further, I do not think that the affidavit in reply will be necessary in assisting me to move fairly to determine the interlocutory application.

Lastly, and although Counsel for the defendants did not raise the issue, I find the affidavit in reply particularly paragraph 9, 15 and 17 to offend the provisions of Order 5 Rule 15 of the High Court Rules Chapter 27 of the Laws of Zambia which provides thus:-

"An affidavit shall not contain extraneous matter by way of objection or prayer or legal arguments or conclusions"

*For the foregoing reasons, the defendants Counsel's objection to the affidavit in reply is upheld. The affidavit will accordingly be expunged from the record. Leave to appeal granted"*

Although his Lordship was addressing the admissibility of an affidavit purportedly filed without leave of the Court, I am of the view that the grounds upon which the Court can grant leave for filing an affidavit in reply aptly applies even when the Court is considering whether to admit an affidavit in reply or not.

In the case in casu, the Plaintiff contends that he only got into possessions of the documents by the 21<sup>st</sup> of February, 2018 after the Defendants had filed their motion to discharge exparte Order on 12<sup>th</sup> September, 2017.

I agree on the guideline that the evidence sought to be admitted in reply could not have been accessed through diligent search has been satisfied.

That however does not end the matter. The other limb to be considered is that the evidence in reply to be admitted must be critical in the consideration of the injunction application. In the case in casu, the issues are anchored on firstly the multiplicity and duplicity of actions and secondly on the statute of limitation. The documents sought to be addressed in respect of verification of reserve boundaries vis-a-vis the property subject to this litigation are not critical in addressing the issues to be adjudicated on.

Further, having to painfully hear such an application will serve no useful purpose other than delaying the speedy determination of the substantive application.

On the foregoing, I follow the path taken by Chali, J and decline leave to admit the affidavit in reply sought to be admitted by the plaintiff.

(i) **POWER OF COURT TO GRANT INJUNCTIONS**

It was submitted that the Court has power under Order XXVII Rule 4 of the High Court Rules and also under Order 29 Rule 1 of the Supreme Court Rules of England.

I will summarily deal with this limb. It is not in dispute that the Court is seized of authority to grant, discharge or deny injunctions. The issue to be addressed is whether this is a proper case to discharge the exparte interim injunction earlier granted to the plaintiff (on permissible grounds of law).

Interrogating the Courts power and authority is wasteful as the law is trite on the courts discretionary powers in injunction law.

(ii) **COURTS POWER TO INVOKE ORDER 3 RULE 2 OF THE HIGH COURT RULES IN GRANTING INJUNCTIONS**

I will also summarily deal with submission. The said Order states:-

“Subject to any particular rules, the Court or a Judge may in all cases and matters make any interlocutory order which it or he considers necessary for doing justice whether such order has been expressly asked and by the person entitled to the benefit of the order or not”

This order is very straight forward; it is a default order which only kicks into place in situations where there is no particular order or rule to deal with a particular situation or order.

In the case in casu, there are specific orders in Order XXVII of the High Court Rules and also Order 29 of the Supreme Court Rules of England that adequately deal with injunction. It is therefore incompetent to seek refuge under Order 3 Rule 2 of the High Court Rules.

(iii) **CONSIDERATIONS WHEN TO GRANT OR NOT GRANT AN INJUNCTION**

I will again summarily deal with this limb. The preliminary issue launched by the defendant is that the exparte injunction ought to be discharged exparte since it offends the law of injunction namely that it was obtained without full disclosure of material facts, multiplicity of actions, abuse of process and lastly on account of statute of limitation.

The defendant's complaint is that by suppressing the material facts as regards for example non disclosure of another matter before Justice Yangailo in cause no. 2015/HP/0282; dwelling on the guidelines as to when an injunction ought to be granted or not like irreparable damage, status quo – prospects of successful litigation take back stage.

It has been demonstrated and also admitted by the plaintiffs that there are 3 cases running side by side in the Lands Tribunal, before Judge Yangailo (2015/HP/0282) another before this Court (2017/HP/1131) and one cause no. 2004/HP/1125 which was discontinued in December, 2016.

I have no difficulty in reaching upon the only irresistible conclusion that the plaintiff has propensity of moving from one Court to another. This is multiplicity and duplicity of actions which the Courts frown upon and is an abuse of Court process.

Such procedures have the undesired effect of setting a stage for Courts to issue conflicting Judgments which will inevitably bring into disrepute the integrity of the Courts and undermine the smooth administration and dispensation of justice.

The authorities in respect of the above pronouncements abound and well anchored in the authorities cited in the submissions in support of the application.

It is not in dispute that the legal contest hinges on the property over which both parties are laying claim to.

It is trite law that there is only one High Court and all issues relating to the same subject matter at the same point in time and space ought to be dealt with wholistically and conclusively by one Court of Competent jurisdiction.

### **JUDICIAL NOTICE**

I have indeed taken judicial notice of the proceedings in cause no. 2015/HP/0282 and I have noted that the dispute in that case relates to the same piece of land.

### **CONSENT JUDGMENT**

I do not accept the plaintiff's contention that the Consent Order in the Lands tribunal affected the defendants. The 1<sup>st</sup> defendants clearly are not party to the said order. The plaintiff opted not to join them to the proceedings notwithstanding his knowledge or that of the predecessor of the conspicuous physical preserve of the defendants on the property subject to these proceedings.

I have already observed in one of the preceding paragraphs that the plaintiff is guilty of gross abuse of Court process by launching of multiplicity of actions and roaming from one Court to another hauling the defendants in different Courts over the same piece of land.

In conclusion, I refuse to be complicit in aiding the plaintiff in forum shopping and encouraging multiplicity of actions which as the mischief of placing courts in situations where one or more courts will render conflicting Judgments. This will bring disrepute in the integrity of the judiciary and also adversely affect the smooth and dignified administration of justice.

I will therefore allow the defendants application to discharge the exparte interim order granted on 17<sup>th</sup> July, 2017.

### **STATUTE OF LIMITATION**

The uncontroverted affidavit evidence in exhibit JM1 reveals that the plaintiff's mother (on whose behalf the plaintiff is suing) and her late husband commenced an action against the defendants under cause no. 2004/HP/1125.

A Judgment by the High Court before my brother Musonda, J (as he then was) which was in favor of the plaintiff was reversed by the Apex Court and ordered a rehearing before another High Court Judge. It is this action which the plaintiff discontinued after 12 years and thereafter purported to resurrect in the present action launched on 13<sup>th</sup> July, 2017.

Section 4 (3) of the Limitations Act<sup>3</sup> provides as follows

*"No actions shall be brought by any other persons to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or, if it first accrued to some persons through whom he claims to that person"*

This legislative proviso is binding on me. My hands are shackled. The case in casu before me is clearly statute barred. Even taking a liberal view that the plaintiff and his predecessors in title or on whose behalf he brings this action only became aware in the year 2004. Having properly launched the proceedings the plaintiff's in

their own wisdom they discontinued the proceedings and decided to launch fresh proceedings thereafter thus running in a statute of limitation.

The predicament in which the plaintiffs find themselves in is in my view self inflicting.

On my part I have no jurisdiction to adjudicate on a matter which is statute barred. I cannot put something on nothing and expect it to stand, it will collapse

The proceedings herein are beyond redemption. They have no leg to stand on. I accordingly dismiss the entire action for lack of jurisdiction. The costs will follow the event.

Leave to appeal to the superior Court of Appeal is granted.

**Delivered under my hand and seal this <sup>28<sup>th</sup></sup> day of May, 2018**

  
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**Mwila Chitabo, SC**  
**Judge**