

IN THE COURT OF APPEAL OF ZAMBIA

CAZ/08/260/2020

HOLDEN AT LUSAKA

APPLICATION NO. 76/2020

(Civil Jurisdiction)



BETWEEN:

CHANSA SIMFUKWE

APPLICANT

AND

REVEREND MARTIN CHAMA *(Sued as Trustee
of African Methodist Episcopal Church)*

RESPONDENT

CORAM: CHASHI, SICHINGA, NGULUBE, JJA.
On 8th April, 2021 and 23rd April, 2021.

For the Applicant : *L. Mumba, Messrs Ferd Jere and Company*

For the Respondent : *C. Mwambazi, Messrs Central Chambers*

R U L I N G

NGULUBE, JA, delivered the ruling of the Court

Cases referred to:

1. *American Cyanamid vs Ethicon (1975) A.C. 396*
2. *Ubuchunga Investment Limited vs Teklemical Menstab and Semhar Transport and Mechanical Limited Appeal Number 392 of 2012*

Legislation referred to:

1. *The Court of Appeal Rules, Statutory Instrument Number 65 of 2016*

INTRODUCTION

1. This is the applicant's renewed application for an order of injunction pursuant to ***Order VIII Rule 1 and 2 of the Court of Appeal Rules¹***.
2. It is accompanied by an affidavit in support sworn by the applicant who avers that he is the son and administrator of the estate of his late father, Reverend David Kosamu Simfukwe who occupied the disputed house as he was the Reverend at Ebenezer Church. He goes on to aver that the church acquired two plots, these being 8153 and 8154, Lusaka, with his father's involvement.
3. The applicant avers that the construction of the house that his father built on stand number 8154 was mainly from contributions that were made by Dr Philip Simfukwe and Faith Namfukwe, the applicant's siblings who live in the United States of America.
4. The applicant's father died on 10th October, 2011, leaving the applicant in the disputed house and that the Board of Trustees

that was constituted after his father's passing gave the applicant up to 31st January, 2020 to vacate the house, thus necessitating the application for an interim injunction. He avers that if he is evicted from the house in issue, he will be deprived of the property that his late father built and that this will in effect send the children of his father into destitution as they will have no alternative accommodation.

5. The respondent filed an affidavit in opposition sworn by the respondent who averred that the late Reverend David Kosamu Simfukwe bought the pieces of land in issue as trustee of the African Methodist and Episcopal Church using the church's funds which were allocated to the project, and were not his personal funds.
6. The respondent further avers that the house in issue was built to accommodate the principal of Ebenezer Secondary School. It is further averred that the two children of the late Reverend Simfukwe, these being Dr Philip Simfukwe and Faith Namfukwe could not have contributed to the construction of the house as they were very young at the time it was built.

7. The respondent avers that the late Reverend Simfukwe's family including the widow now live in the United States of America, except for the applicant who does not stay at the house in issue as he now lives in Bauleni Compound, Lusaka.
8. The respondent avers that the present circumstances do not warrant the grant of an injunction as the action sought to be enjoined has been overtaken by events. The respondent's advocates filed skeleton arguments in support of the renewed application for interim injunction.
9. At the hearing of the application, Mr Mumba on behalf of the applicant submitted that he would rely on the record filed while the respondent's counsel submitted that he would rely on the affidavit in opposition and the skeleton arguments filed. He also requested that the court considers paragraphs 23 to 26 of the single Judge's Ruling.

OUR DECISION

10. We have considered the record filed, the affidavit in opposition and the skeleton arguments in this matter. In the case of *American Cyanamid vs Ethicon*¹, the court stated that-

“So unless the material available to the court at the hearing of the application for interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.”

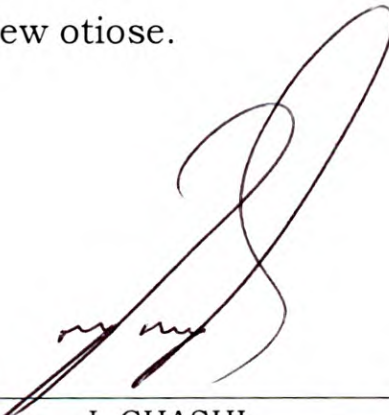
11. Further, in the case of ***Ubuchunga Investment Limited vs Teklemical Menstab and Semhar Transport and Mechanical Limited²***, the Supreme Court stated that-

“We have revisited our decision in Trevor Limpic vs Rachel Mawere and others and still approve of it. To us, the principle we pronounced in this case presents a clear arguable case or claim in satisfaction of the serious question test.”

We also note and agree with other authorities that the serious question test takes precedence over the balance of convenience test. In fact, the learned authors of ***Mc Gill Law Journal*** state as follows-


“The best test to adjudicate on an application for an interlocutory injunction is always whether the right the applicant seeks to protect does indeed seem to exist; the balance of convenience test is merely second test.”

12. Having considered the affidavit evidence and the skeleton arguments before us, without going into the merits of the case, we note that the applicant has since moved out of the house in issue and now lives in Bauleni Compound. It therefore follows that the applicant's application has since been overtaken by events as there is nothing to injunct. We accordingly dismiss this application with costs to the respondent, to be taxed in default of agreement. Further, the applicant's application that the court considers the issue of the introduction of fresh evidence is in our view otiose.



J. CHASHI
COURT OF APPEAL JUDGE

D.L.Y. SICHINGA
COURT OF APPEAL JUDGE



P.C.M. NGULUBE
COURT OF APPEAL JUDGE