

**IN THE COURT OF APPEAL OF ZAMBIA**

**APPEAL NO.19 OF 2021**

**HOLDEN AT LUSAKA**

*(Civil Jurisdiction)*

**BETWEEN:**

**TERRA CONSTRUCTION LIMITED**

**AND**

**MWANGALA MWENDA LETHBRIDGE**

**ROBERT ADAM BALFOUR LETHBRIDGE**

**COMMISSIONER OF LANDS**

**ATTORNEY GENERAL**

**APPELLANT**

**1<sup>ST</sup> RESPONDENT**

**2<sup>ND</sup> RESPONDENT**

**3<sup>RD</sup> RESPONDENT**

**4<sup>TH</sup> RESPONDENT**

**CORAM: Chashi, Ngulube and Siavwapa, JJA**

**ON: 19<sup>th</sup> October 2021 and 9<sup>th</sup> December 2021**

*For the Appellant:*

*N. Mbunyi (Ms) Messrs Paul  
Norah Advocates*

*For the 1<sup>st</sup> and 2<sup>nd</sup> Respondents:*

*C.P. Jere (Mrs) Messrs Kaumbu  
Mwondela, Legal Practitioners*

*For the 3<sup>rd</sup> and 4<sup>th</sup> Respondents:*

*N/A*

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## **J U D G M E N T**

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**CHASHI JA, delivered the Judgment of the Court.**

**Cases referred to:**

**1. Gideon Mundandi v. Mulyani and Others (1987) Z.R. 29**

2. **Anti-Corruption Commission v Barnet Development Corporation Limited (2008) Z.R. 69**
3. **Musanzya Zulu and Another v Anna Mwape and Lusaka City Council – SCZ Appeal No. 25 of 2007**
4. **Shell & BP Zambia Limited v Conidaris and Others (1975) Z.R 174.**
5. **Turnkey Properties Limited v Lusaka West Development Company Limited and Others - SCZ Judgment No. 3 of 1984**
6. **American Cynamid Co. v Ethicon Limited (1975) AC, 396**

**Legislation referred to:**

1. **The Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia**

**Other authorities referred to:**

1. **Chitty on Contracts, 35<sup>th</sup> Edition, para 1764**

## **1.0 INTRODUCTION**

1.1 This appeal emanates from the Ruling of Honourable Mrs. Justice C. Chinyanwa Zulu, learned Judge of the High Court, delivered on 24<sup>th</sup> March 2020.

1.2 In the said Ruling, the learned Judge granted the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, who were the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs in the court below, an interim injunction, restraining the Appellant from interfering with the 1<sup>st</sup> and 2<sup>nd</sup>

Respondents' quiet enjoyment of S/D E of Stand No. 1149, Siavonga (the land) pending determination of the matter.

## **2.0 BACKGROUND**

- 2.1 The land in issue, according to the lands register, was initially allocated to Kariba Marine Limited, who in the year 2000 assigned it to Sarah Randee. In turn Sarah Randee sold the land to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents for US\$50,000.00 in the year 2011 and a certificate of title was issued as shown at pages 37 - 42 of the record of appeal (the record).
- 2.2 Unknown to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, the Commissioner of Lands had in 2018 issued a notice of intention to re enter, which culminated in the issuance of a certificate of re entry in 2019 and granting of a state lease to David Bezzi. In the same year, David Bezzi sold the land to the Appellant for K100,000.00. The Appellant was then issued with certificate of title no. 62281 which appears at page 69 of the record.
- 2.3 In the same year, when the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, through their advocates attempted to file a deed of release,

they discovered that the Commissioner of Lands had re entered the land. That prompted the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to commence proceedings by way of writ of summons, challenging the re entry. Attendant to that, they sought an order for an interim injunction.

### **3.0 DECISION OF THE COURT BELOW**

3.1 At the hearing of the application for an order for an interim injunction, the learned Judge after considering the affidavit evidence and the arguments, found that, there was a serious question to be tried. Further that there was probability that the applicants were entitled to the relief being sought.

3.2 According to the learned Judge, the Applicants claim showed a clear right to the relief being sought. In addition, the learned Judge referred to the case of **Gideon Mundandi v. Mulyani and Others**<sup>1</sup> where the Supreme Court held that loss of an interest in a particular piece of land or a house, no matter how ordinary, cannot be adequately compensated by damages.

3.3 The learned Judge also considered the balance of convenience and found that it was evenly balanced and that the question of re entry and bona fide purchaser for value were issues to be considered at the trial.

#### **4.0 THE APPEAL**

4.1 Dissatisfied with the Ruling, the Appellant has appealed to this Court advancing two grounds of appeal couched as follows:

(i) The learned trial Judge erred in law and fact when she ruled that the Appellant should be restrained from interfering or dealing with the land in the face of evidence that the appellant is the legal owner and current title holder for the land whilst the 1<sup>st</sup> and 2<sup>nd</sup> Respondents certificate of title has ever since been cancelled by the 4<sup>th</sup> Respondent.

(ii) That the learned Judge erred in law and fact when she literally glossed over the settled principles of law which provides that no injunction can be sustained against the legal owner of a property who holds a certificate of title for the property in **casu**.

## **5.0 ARGUMENTS IN SUPPORT OF THE APPEAL**

- 5.1 At the hearing of the appeal Ms Mbunyi, Counsel for the Appellant relied on the Appellant's heads of argument filed into Court on 26<sup>th</sup> January 2021.
- 5.2 Both grounds of appeal were argued together. Counsel drew our attention to Sections 33, 34 and 35 of **The Lands and Deeds Registry Act**<sup>1</sup> and submitted that arising from the said provisions of law, the rights of a registered owner of property are very clear, as he cannot be deprived of the possession of his property or his rights by way of adverse possession unless under special circumstances listed under Section 34. According to Counsel, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have not shown or demonstrated in any way that the Appellant obtained his certificate of title through any fraudulent means as provided under section 34 or any other unlawful means which may invalidate or cause the Appellants certificate of title to be cancelled.
- 5.3 Counsel contended that for all intents and purposes, the Appellant, having obtained a certificate of title for the land, it is conclusive evidence of ownership as was stated in the

case of **Anti- Corruption Commission v Barnet Development Corporation Limited**<sup>2</sup>

- 5.4 Further reliance was placed on the case of **Musanzya Zulu and Another v Anna Mwape and Lusaka City Council**<sup>3</sup> where the Supreme Court stated that an injunction cannot be issued against the Respondent because the certificate of title had already been issued.
- 5.5 Counsel further submitted that, the Appellant is a bona fide purchase for value. That being an innocent party, the Appellant cannot be made to suffer for the actions or omissions of other parties in this action by depriving them the freedom of access to their property by an injunction.
- 5.6 Our attention was drawn to the case of **Shell & BP Zambia Limited v Conidaris and Others**<sup>4</sup> where the Court held that a party had to prove that they would suffer irreparable injuries in order for an injunction to be granted and further that the injury cannot be atoned by an award of damages.
- 5.7 It was submitted that according to the evidence, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents purchased the property at

US\$50,000.00. That therefore the quantum of damages can be ascertained and as such it cannot be said that they will suffer irreparable injury, should the court below after the trial, rule in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

5.8 On the balance of convenience, it was submitted that it lies in favour of the Appellant as they are likely to suffer more injury than any other party in this case.

## **6.0 ARGUMENTS BY THE 1<sup>ST</sup> AND 2<sup>ND</sup> RESPONDENTS IN OPPOSING THE APPEAL**

6.1 In opposing the appeal, Mrs Jere, Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents relied on the heads of argument filed into Court on 19<sup>th</sup> February 2021.

6.2 Counsel, indicated that she was at pains in arguing the grounds of appeal advanced by the Appellant as they border on the issues in the case in the court below which are yet to be determined. Counsel drew our attention to the case of **Turnkey Properties v Lusaka West Development Company Limited and Others**<sup>5</sup> where the Supreme Court guided as follows:



*“The court in deciding whether to grant an injunction or not, should in no way pre-empt the decision of the issue which are to be decided on the merits and the evidence at the trial of the action.”*

- 6.3 Counsel was of the view that the appeal has the potential to pre-empt the decision of the High Court.
- 6.4 Counsel submitted that in granting the injunction, the Court below was guided by the settled principles in the established case of **American Cynamid Co. v Ethicon Limited**<sup>6</sup> and the affidavit evidence. The court below was of the view that there was a serious question to be tried and that damages will not be adequate to compensate for any irreparable damages.
- 6.5 According to Counsel, the appeal has no merit and therefore the injunction should be affirmed and the appeal dismissed with costs.

## **7.0 THE COURTS CONSIDERATIONS AND DECISIONS**

- 7.1 We have considered the arguments by the parties and the Ruling being impugned. We shall in the same vein as the

parties have done, address both grounds of appeal together as they are entwined.

7.2 The two grounds of appeal attack the learned Judge for granting an interim injunction to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, when according to the Appellant it was a bona fide purchaser for value and holder of a certificate of title. According to the Appellant, the certificate of title is conclusive evidence of ownership and therefore any injunction cannot lie against the Appellant as the legal owner of the land.

7.3 In response to the two grounds of appeal the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' contention is that the grounds of appeal are raising issues which are yet to be determined on merit in the court below and as such have the potential of pre-empting the decisions.

7.4 We note that in granting the interim injunction, the learned Judge in the court below, took into consideration the principles set out in **American Cyanamid Co**<sup>6</sup> case and made a finding that there was a serious question to be

tried and that there was a probability that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were entitled to the relief being sought. According to the learned Judge the Respondents had showed a clear right to the relief being sought.

7.5 The learned Judge elaborately and exhaustively considered the requisite principles for granting of an interim injunction as laid out in the **American Cynamid Co<sup>6</sup>** case and other related cases decided in our jurisdiction, which she applied to the facts of the case in arriving at her decision.

7.6 In view of the aforesaid, we see no basis to fault the court below. As earlier alluded to, the learned Judge also relied on the case of **Gideon Mundandi<sup>1</sup>** where in dealing with the law concerning specific performance of contracts relating to or the sale of land, the Supreme Court referred to the learned authors of **Chitty on Contracts<sup>1</sup>**, at paragraph 1764 which reads in part as follows:

*“...The law takes the view that damages cannot adequately compensate a party for breach of a*

*contract for the sale of an interest in a particular piece of land or of a particular house (however ordinary).”*

7.7 Although the **Gideon Mundandi**<sup>1</sup> case was not specifically dealing with an application for an interim injunction, but specific performance, the principle laid out on the adequacy of damages has of late become accepted and is regularly applied in our jurisdiction in relation to interim injunctions in determining whether damages would be adequate to compensate a party. The position of the Courts in our jurisdiction is that where land is involved, the Courts will generally grant an interim injunction.

7.8 On the issues of being a legal owner of the land and a bona fide purchaser for value, without notice, the court below warned itself of the danger of deciding finally on the rights of the parties. This is what the court below had to say:

*“On my analysis of the facts at present, I find that there is a serious question to be tried in the present case and that there is a probability that the plaintiffs*

*are entitled to the relief sought. The Court has to determine who is the rightful owner of the property in issue, that is the subdivision E of stand No. 1149 situate in Siavonga.*

*The Court will be able to do so after considering the legality of the re entry, that is whether or not the re entry by the 3<sup>rd</sup> defendant was done according to the law. Furthermore, the Court will also have to determine whether or not the 1<sup>st</sup> defendant is the bona fide purchaser of the property for value without notice.”*

7.9 We agree with Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents that the issues the Appellants are bringing out in the two grounds of appeal, are issues on which the court below has to make a determination on as rightly observed by the court below. In the **American Cynamid Co<sup>6</sup>** case, two of the key principles derived from the speech of Lord Diplock in granting of an application in determining whether there is a serious question to be tried were as follows:

- “ 1. The evidence available to the court at the hearing of an application for an interlocutory application is incomplete. It is given on affidavit evidence and has not been tested by oral cross examination.*
  
- 2. It is not part of the courts function at this stage of the litigation to try and resolve conflicts of evidence on affidavits as to facts on which the claims of either part may ultimately depend, not to decide difficult questions of law which call for detailed arguments and mature considerations. These are matters to be dealt with at trial.”*

7.10 Therefore, at the stage of making an interlocutory application for an injunction, it is not the duty of the court to dwell so much on the facts of the case as regards the merits except where it is necessary and unavoidable to do so. In other words, it is not the duty of the Court at that stage to pronounce orders that will determine any of the

reliefs being sought except the relief in respect to the interim injunction.

7.11 In view of the aforestated, the issues being advanced by the Appellant in relation to the provisions of **The Lands and Deeds Registry Act**<sup>1</sup> and being bona fide purchaser for value without notice are issues to be determined at the trial and not at the stage of considering an application for an interim injunction.

7.12 We note that the interim injunction granted by the learned Judge in the court below was ambidextrous in nature, as it was to the benefit and meant to protect both the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and the Appellant in the maintenance of the **status quo**. Whilst restraining the Appellant, the learned Judge also restrained the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from carrying out any construction on the land. We therefore are at pains to see the difficulty the Appellant has with the interim injunction.

## 8.0 CONCLUSION

8.1 In the view, that we have taken, the two grounds of appeal have failed and the appeal is therefore accordingly dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to be paid forthwith. Same are to be taxed in default of agreement.



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**J. CHASHI**  
**COURT OF APPEAL JUDGE**



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**P.C.M. NGULUBE**  
**COURT OF APPEAL JUDGE**



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**M.J. SIAVWAPA**  
**COURT OF APPEAL JUDGE**