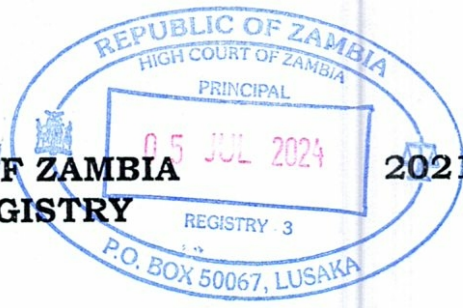


I.T



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

2021/HP/0643

**IN THE MATTER OF: ORDER 113 OF THE RULES OF THE
SUPREME COURT OF ENGLAND
(WHITE BOOK) 1999 EDITION
VOLUME 1.**

AND

**IN THE MATTER OF: AN APPLICATION FOR SUMMARY
POSSESSION OF PROPERTY KNOWN
AS LOT NO. 28962/M, SITUATE AT
CHIRUNDU IN THE CHIRUNDU
DISTRICT OF LUSAKA PROVINCE OF
THE REPUBLIC OF ZAMBIA.**

**BEFORE THE HONOURABLE MR. JUSTICE I. M
MABBOLOBOLO IN CHAMBERS ON THE 5TH DAY OF JULY,
2024.**

BETWEEN:

KENNETH HACHINDA
AND
PETER CHOONGA
ALL UNKNOWN OCCUPANTS
OF LOT No. 28962/M

APPLICANT
1ST RESPONDENT
2ND RESPONDENT

For the Applicant: Mr. B. J. Mulenga Barnaby, Chitundu &
Khunga Advocates

Mr. J. Musuku – Messrs Barnaby,
Chitundu & Khunga Advocates

For the 1st Respondent: Mr. M. Mutemwa – Messrs Mutemwa
Chambers

For the 2nd Respondent: Not Applicable

RULING

A. CASES REFERRED TO:

1. American Cyanamid Company v Ethicon Limited (1975) A.C
396

2. *Turnkey Properties v Lusaka West Development Limited, B.S.K Chiti (sued as Receiver) and Zambia State Insurance Corporation Limited (1984) Z.R. 85*
3. *Shell and BP Zambia Limited v Corridaris and Others (1975) ZR 174*
4. *Harton Ndove v National Educational Company of Zambia Limited (1980) ZR*
5. *Mutuwila Farms Limited v Joham Nortje ((2010) ZR Vol.3 388.*
6. *Ubuchinga Investments Limited v Tecklemicheal Menstab and Another Judgment No. 25 of 2014 (unreported)*

B. LEGISLATION REFERRED TO:

1. *High Court Act Chapter 27 of the Laws of Zambia*
2. *Rules of the Supreme Court of England, 1999*

1.0 INTRODUCTION

- 1.1. This is the Applicant's Application for an Interlocutory Injunction filed on 10th November, 2021. The Application is supported by an Affidavit and Skeleton Arguments.
- 1.2. The 1st Respondent apposed the Application by filing an Affidavit in Opposition on 17th December, 2021.

2.0. BACKGROUND

- 2.1. This Matter was commenced on 7th June, 2021, by way of Originating Summons for Summary Possession of Lot No. 28962/M situate at Chirundu in the Chirundu District of Lusaka Province of the Republic of Zambia pursuant to Order 113 Rule 1 of the Rules of the Supreme Court of England, 1999.
- 2.2. The Originating Summons was accompanied by an Affidavit in Support of even date and a further Affidavit filed on 17th December, 2021.

2.3. The 1st Respondent filed his Affidavit his Opposition to Affidavit in Support of Originating Summons for Summary Possession on 10th January, 2022.

3.0. AFFIDAVIT EVIDENCE

3.1. The Affidavit in Support of Summons for an Order of Interim Injunction was sworn by Kenneth Hachiinda, the Applicant. The gist of the same is that he acquired a parcel of customary land within Chirundu Area under his Royal Highness Chief Sikoongo which he proceeded to convert to state land with the approval of both the said Chief and Sikoongo District Council as confirmed by documents collectively marked **"KH1."**

3.2. Further that after complying with the due process of conversion of title from customary to lease hold tenure, the Ministry of Lands and Natural Resources, issued a certificate of Title No. 48219 in respect of Lot No. 28962/M, Chirundu in the Applicant's favour.

3.3. The Deponent averred that in about November, 2020, he went to the subject property with the intention of constructing a wall fence around the subject property at which point he was approached by a group of people led by the 1st Respondent Headman Peter Choonga of Choonga Village claiming that the subject land belonged to him. That the Deponent reported the matter to Chirundu Police Station whose Officers called the Respondents to attempt settling the matter but to no avail as the Respondents forcefully took occupation of the subject property and started constructing a foundation block for a

building and started using part of the Applicant's property as truck parking space at a fee of ZMW 30.00 per day

- 3.4. It is the Deponent's further evidence that unknown occupants have gained occupation of his property and began construction works on Lot No. 28962/M Chirundu. That he has never leased, offered for sale or sold the subject property and therefore the Respondents have no legal interest in the property.
- 3.5. The Deponent averred that he is desirous that an Order of Interim Injunction be issued against the Respondents or any other persons to restrain them from disposing of the subject property to third parties or engaging in any illegal developments or dealing with the property in any manner detrimental to the Applicant failing which the Applicant will suffer irreparable injury.
- 3.6. The 1st Respondent swore in his Affidavit in Opposition to Summons for an Order of Interim Injunction, the gist of which is that it is not possible for his Royal Highness Chief Sikoongo to have given land to the Applicant without the consent of his Headman and his people as allocation of land in the Chiefdom has a system, procedure and process which must be followed as follows:
 - 3.6.1. *The land to any investor starts with the village committee, which upon approval, the investor will be recommended to the Chief as shown in the Land Application Form from Choonga Village marked "PC1"*

- 3.6.2. *Thereafter the Chief will then sign a Form 2 which not only legally gives authority by the Chief to alienate land but also that all persons affected have been consulted and have consented to have their land alienated.*
- 3.7. According to the 1st Respondent, the purported letter from the Chief which the Applicant has exhibited is questionable and therefore null and void for the following reasons:
- 3.7.1. *It has no official date stamp and bears a wrong signature for His Royal Highness Chief Sikoongo as can be seen from "PC2" which is a correct and authentic Offer Letter from his Royal Highness Chief Sikoongo bearing the official date stamp and signature.*
- 3.7.2. *Land alienation becomes official and complete with the signing of Form 2 of the conversion of customary tenure into leasehold tenure by the Chief and that the Applicant has failed to produce this Form.*
- 3.7.3. *The Applicant's documents exhibited as "KH1" being a site plan bears a signature which is completely different from that on the Offer Letter from His Royal Highness Chief Sikoongo.*
- 3.8. The 1st Respondent depones that he denies the claim that the Applicant followed the right procedure because he did not obtain consent from the Respondents and as such the process was incomplete. He avers that the Applicant was not chased by him but by the community who are the owners of the land

and cleared it with a view of making a community market as may be seen from exhibit **"PC3"** which are minutes of the meeting by the community, **"PC4"** a homestead and **"PC5"** an erected building.

3.9. It was averred that the allegations that he forcefully took occupation of the subject property and using part of it as a truck parking lot is not correct, but that the correct position is that the truck space is his own land and it is away from the disputed land. Further that he disagrees that he started building a foundation on the disputed land maintaining that the ongoing constructions are for the community market and occupants which constructions started way back before the purported Certificate of Title was issued.

3.10. The 1st Respondent concluded by stating that he has never leased out any land to the Applicant and from as far back as he can recall, his late father and himself have been administering land in Choonga village including the land being claimed by the Applicant which is land under customary tenure.

3.11 In the Affidavit in Reply, the Applicant reiterated that he was given the subject parcel of land by Chief Sikoongo, then Mr. Penias Chilimbwa as confirmed by **"KH1"**.

3.12. The Applicant deponed that the Respondent's exhibit marked **"PC2"** is questionable as it is not on the letterhead used by the Chief for official documents and bears a signature different from the one signed by Chief Sikoongo as

shown in exhibit marked “KH1” in the Affidavit in Support of Originating Summons dated 7th June, 2021.

3.13. The Applicant reiterated that the subject land belongs to him as title holder and not the community and that the structure on his property has been constructed under the unlawful authority of the 1st Respondent as Headman of Choongo village without his permission or consent. Further that the 1st Respondent is using part of the land in question as truck parking and he has subdivided the other part to create a community market without his consent, permission or approval.

4.0. SKELETON ARGUMENTS

4.1. The Applicant’s Application is brought pursuant to **Order 27 (1) of the High Court Rules** which has reposed Jurisdiction in the High Court to grant Interim Orders of Injunction. **Order 29 (1) Rules of the Supreme Court 1999** was also relied upon by the Applicant.

4.2. Submitting further, the Applicant drew my attention on the cardinal factors that must be satisfied to attract an Order of Court for an Interim Injunction as laid down in the case of **American Cyanamid Company v Ethicon Limited**¹ and reaffirmed in the Zambian cases of **Turnkey Properties v Lusaka West Development Limited, B.S.K Chiti** (sued as Receiver), **Zambia State Insurance Corporation Limited**², **Shell and BP Zambia Limited v Conidaris and Others**³ and **Harton Ndove v National Educational Company of Zambia Limited**⁴. The principles in these cases are that

there is a serious question to be determined at trial of the main matter; the Plaintiff has a clear right to relief; and that the Plaintiff is likely to suffer irreparable injury which cannot be atoned for in damages if the Injunction is not granted and that an Injunction is necessary to protect him from suffering such irreparable injury.

- 4.3. The Applicant also called in aid the cases of **Mutuwila Farms Limited v Joham Nortje⁵** and **Ubuchinga Investments Limited v Tecklemicheal Menstab and Another⁶** to buttress the point.

5.0. THE HEARING

- 5.1. At the hearing held on 14th May, 2024, both parties agreed that the Court proceeds to determine the Application for an Interim Injunction based on the documents filed respectively.

6.0. CONSIDERATION AND DECISION OF THE COURT

- 6.1. I have seriously addressed my mind and given consideration to the Applicant's Application for an Interim Injunction including the Affidavit Evidence, Skeleton Arguments and the Authorities cited. I am grateful for the submissions by Counsel.
- 6.2. It is settled that the Court is reposed with Jurisdiction under **Order XXVII (1) of the High Court Act** to grant Interim Orders of Injunction in the following terms:

"In any suit in which it shall be shown to the satisfaction of the Court or a Judge, that any

property which is in dispute in the suit is in danger of being wasted, damaged or alienated by any party to the suit, it shall be lawful for the Court or Judge to issue an Injunction to such a party, commanding him to refrain from doing the particular act complained of, or to give such orders for the purpose of staying and preventing him from wasting, damaging or alienating the property, as to Court or a Judge may seem meet, and, in all cases in which it may appear to the Court or a Judge to be necessary for the preservation or the better management or custody of any property which is in dispute in a suit, it shall be lawful for the Court or Judge to appoint a receiver or manager of such property, and if need be to remove the person in whose possession or custody of the property may be from the possession or custody thereof, and to commit the same to the custody of such receiver or manager, and to grant such receiver or manager all such powers for the management or the preservation and improvement of the property and the collection of rents and profits thereof and the application and disposal of such rents and profits as to the Court or a Judge may seem proper”.

6.3. Similarly, by **Order 29 (1) of the Rules of the Supreme Court, 1999**

“An application for the grant of an Injunction may be made by any party to a cause or matter before or at trial of the cause or matter, whether or not a claim for the Injunction was included in that party’s Writ or Originating Summons, Counterclaim or Third-party Notice as the case may be”.

6.4. It must be stated from the outset that it is trite that the remedy of an Injunction is a discretionary one which is not granted as a matter of right. Further, enticing as it may be given the arguments and submissions by the parties, it is not for me to delve into the merits or otherwise of the main matter at this stage, because those matters must be determined at trial.

6.5. Regarding the essential elements for grant of an Injunction as laid down in the case of **American Cynamid v Etrhicon**¹ and followed in numerous other cases thereafter, both within and without this jurisdiction, the view I take is that these logically flow into each other and are mutually inclusive. When a right to relief is established, it is ineluctable to consider adequacy or inadequacy of damages. And when the right to relief and irreparable injury are established, the balance of convenience would be the next logical consideration.

6.6. In the case of **Shell and BP Zambia Limited v Conidaris and Others**⁴ cited by the Applicant the Supreme Court stated that:

“A Court will not generally grant an Interlocutory Injunction 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.”

- 6.7. The Supreme Court in **Turnkey Properties v Lusaka West Development Company Limited²**, **B.S.K. Chiti** (sued as Receiver) and **Zambia State Insurance Corporation Limited⁴** reaffirmed its decision to the fact that:

“An Interlocutory Injunction is appropriate for the preservation or restoration of a particular situation pending trial..... In order to succeed, the Appellant should have demonstrated that not only was their right to relief sought clear, but above all, that the Injunction is necessary to protect them from irreparable injury”

- 6.8. It is evident to me upon gleaning the Affidavit evidence that the rights of the parties are in contention and their resolution are far from being clear at this stage. The Applicant's position is that he is the registered owner of the property in question while the 1st Respondent contends that the title referred to by the Applicant was obtained without following procedure on land which has, over the years, been held as customary land and where construction has been

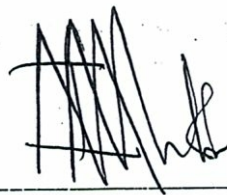
taking place way before the certificate of title was issued to the Applicant. This in my view indicates that these are triable issues that can only be resolved at the conclusion of the trial.

6.9. The question which I must answer, therefore, is whether the Interlocutory Injunction sought should be granted as submitted by the Applicant in order to preserve the status quo to ensure that, ultimately the best type of justice has been done to all parties.

6.10. The general view that Courts take in matters involving land is that damages may not be an adequate recompense. I am satisfied that having found that there are triable issues, what will best serve the interest of justice in the circumstances of the case is to maintain the status quo.

6.11. Accordingly, I confirm the *Ex-Parte* Order of Interim Injunction granted by the Court on 10th November, 2021 until final determination of this Matter.

SIGNED, SEALED AND DELIVERED AT LUSAKA THIS 5TH DAY OF JULY, 2024.



I. M. MABBOLOBOLO

HIGH COURT JUDGE.

