

IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
(CIVIL APPEALS JURISDICTION)  
LUSAKA

2023/HPA/034



**BETWEEN:**

**VANESSA CHIBOOLA HOPE-LEWIS**

**APPELLANT**

**AND**

**MATTHEWS MALUFU**

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

**PATSON MALUFU**

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

**Before the Hon. Mrs. Justice R. Chibbabbuka on the 4<sup>th</sup> day of May, 2024**

For the Appellant: Mrs. M.K Kombe, Legal Aid Counsel, Legal Aid Board

For the Respondents: In person

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## **JUDGMENT**

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### **Cases referred to:**

1. *American Cynamid Vs Ethicon Limited* (1975) A.C 396
2. *Shell and B.P Zambia Limited Vs Conidaris & Others* (1975) Z.R 174
3. *Gideon Mundanda Vs Mulyani & Two Others* (1987) Z.R 29
4. *Kajimanga Vs Chilemya Appeal No. 50/2014 ZMSC 189*
5. *Elias Tembo Vs Elias Roy Mwale and Lusaka City Council* 2018/HP/2098
6. *Ndovi Vs National Education Council of Zambia Limited* (1980) Z.R 184
7. *ZIMCO Properties Ltd Vs LAPCO Lt* (1988-89) Z.R 92
8. *Tawela Akapelwa and others vs Josiah Mubukwanu Nyumbu Appeal Case No. 004 2015 SCZ*
9. *City Express Service Limited Vs Southern Cross Motor Limited* (2007) Z.R 263, 265

10. *Donovan v Gwentoy's Limited* [1990] 1 WLR 472

11. *Smith Vs Clay* (1767) 3 Bro. Ch. Ca 639

**Legislation referred to:**

*The High Court Act, Chapter 27 of the Laws of Zambia*

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

**Other works referred to:**

*Atkins Forms, 2<sup>nd</sup> Edition, Volume 22 at page 70*

*Chitty on Contract, 26<sup>th</sup> Edition at paragraph 1949*

*Zambian Civil Procedure Commentary and Cases Volume 1, LexisNexis, 2017, Patrick Matibini*

## **1.0 Introduction**

This is an appeal by the appellant, Vanessa Chiboola Hope-Lewis, against the granting of an injunction by the Lands Tribunal in its Ruling dated 17<sup>th</sup> May, 2023.

### **1.1 Background**

**1.1.1** The respondents, who are complainants in the Lands Tribunal filed a complaint before the Lands Tribunal on the 24<sup>th</sup> March, 2022 against Emmy Moonga (sued in his capacity as Chief Simamba), the 1<sup>st</sup> respondent therein, and Vanessa Chiboola Hope Lewis, the 2<sup>nd</sup> respondent therein who is the appellant in this matter. The respondents in their complaint claim for the following reliefs:

- i) A declaration that the complainants are the rightful and legal owners of the 140 hectares of land situate in Chilongo Village in Simamba Chiefdom, Siavonga, southern province;
- ii) An order directing the 1<sup>st</sup> respondent to give consent to the complainants herein in order for them to process title deeds and all other documents for the 140 hectares of land situated in Chilongo

Village in Simamba Chiefdom, Siavonga Southern province in the name of the complainants herein;

- iii) An order directing the 2<sup>nd</sup> respondent to vacate the disputed land in Chilongo Village in Simamba Chiefdom, Siavonga Southern Province;
- iv) An order of injunction restraining the respondents, their agents, servants or whosoever from entering upon, interfering, selling or carrying out any developmental activities on the 140 hectares of land situated in Chilongo Village in Simamba Chiefdom, Siavonga in southern province until final determination from this honourable court.

**1.1.2** The complainants in the court below filed an application for an injunction before the Lands Tribunal on the 24<sup>th</sup> March, 2022, wherein their affidavit in support they aver that the 1<sup>st</sup> respondent *inter alia* chased them from the disputed land and has persisted in stopping the complainants from carrying out developmental activities on the said land. Meanwhile, the 2<sup>nd</sup> respondent is carrying out activities and benefitting from them and should be restrained from the use of part of the said land which was allocated to her by the 1<sup>st</sup> respondent as it is traditional land.

**1.1.3** The complainants being administrators of the estate of their late father, a subject of Chief Simamba and having acquired the subject land in 1978, at the time of his demise was in the process of having the said land converted to leasehold. The complainants first encountered the 2<sup>nd</sup> respondent on the subject land between 2005 and 2006 and they thought that the 2<sup>nd</sup> respondent was a fish trader who responded that she was. The 2<sup>nd</sup> respondent subsequently erected a lodge and other structures on the subject land.

**1.1.4** The 2<sup>nd</sup> respondent, in opposing the injunction application, argued that the subject land did not belong to the complainants but that she legally acquired the same from the 1<sup>st</sup> respondent in 2005. That the subject land is

statutory land and the complainants were aware that she was building a lodge in 2005 as such the complainants' claim is statute barred.

**1.1.5** Counsel for the 2<sup>nd</sup> respondent also argued that 2<sup>nd</sup> respondent's land is not part of the complainants' land. The 2<sup>nd</sup> respondent's land is 20 hectares only in extent and is statutory land and not customary land. Further, that the complainants had not come with clean hands because they were aware that the 2<sup>nd</sup> respondent settled on the piece of land since 2005 but the matter was never litigated nor was the 2<sup>nd</sup> respondent informed that the subject land was the complainants' land and was required to vacate. Instead, the complainants 21 years later brought this claim when the 2<sup>nd</sup> respondent is fully settled and her livelihood depends on the lodge which the 2<sup>nd</sup> respondent invested in.

**1.1.6** The Lands Tribunal found that the complainants had demonstrated a clear right to relief as, there were serious issues to be determined at the hearing of the complaint which had a real prospect of succeeding as guided in the cases of **American Cynamid Vs Ethicon Limited**<sup>1</sup> and **Shell and B.P Zambia Limited Vs Conidaris & Others**<sup>2</sup>. The Lands Tribunal also found that in relation to irreparable injury, damages cannot adequately compensate a party for the loss of land or an interest in a particular piece of land as was held in the case of **Gideon Mundanda Vs Mulyani & Two Others**<sup>3</sup>. Further, that on this basis, the balance of convenience lies in favour of the complainants.

**1.1.7** In relation to whether the matter was statute barred, the Lands Tribunal assessed the complainants' statements in their complaint which were that initially, they saw the 2<sup>nd</sup> respondent between 2005 and 2006 on the subject property and when they approached her, she told them that she was a fish trader. That after some time they noticed the 2<sup>nd</sup> respondent putting up structures on the subject land. The Lands Tribunal opined that as the dates as to when the latter took place were not stated by the complainants, while the 2<sup>nd</sup> respondent alleged that the complainants were aware that she built the lodge in 2005 was, in their view, an issue which needed to be determined at the

hearing of the complaint by the parties leading evidence. That there was nothing to show that the complainants had not come to equity with clean hands and that the injunction was necessary.

**1.1.8** On the basis of the aforesaid reasons, the Lands Tribunal confirmed the ex parte order of an interim injunction it had granted on the 24<sup>th</sup> March, 2022.

## **2.0 The grounds of appeal**

The appellant has raised four grounds of appeal as follows:

1. The Lands Tribunal erred in law and in fact when in granting the interim injunction against the appellant held that “as to irreparable injury, it is trite law that damages cannot adequately compensate a party for the loss or an interest in a particular piece of land....in the premises we find that the balance of convenience also lies in favour of the complainant” despite the evidence and arguments presented that the appellant has possessed the said piece of land since 2005.
2. The Lands Tribunal fell into grave error when it granted the respondents herein an interim injunction thereby restraining the appellant from her residential place and place of business without recourse to the effect on the appellant who has occupied the said piece of land since 2005.
3. The Lands Tribunal fell into grave error when it literally glossed over the settled principles of law which provide that no injunction can be substantial against a legal owner of a property who has shown evidence of legal ownership of a property and who has shown ownership of the 20 hectares of land.
4. The Lands Tribunal misdirected itself by stating that the issue as to whether the matter was statute barred was a matter to be determined at trial when in fact the tribunal had already considered certain pieces of evidence favourably to the respondents herein which should have been left to be determined at trial.

## 2.1 The Appellant's Heads of Arguments

The appellant filed into Court supporting heads of arguments on the 6<sup>th</sup> March, 2024.

**2.2** Counsel argued grounds one and two together. It was counsel's contention that the Lands Tribunal fell into grave error when it granted the respondents an interim injunction thereby restraining the appellant from her residential place and place of business without recourse to the effect on the appellant who had occupied the said piece of land since 2005. Counsel contended that the appellant did demonstrate, in paragraphs 6 and 9 in her affidavit in opposition to the affidavit in support of the injunction, that she settled on 20 hectares of land given to her by Chief Simamba in 2005 and the lodge was built in the same year, further that there have been no other developments. That the object of an interim injunction is to prevent a litigant who must not necessarily suffer the court's delay, from losing by the delay of the fruit of his litigation. That irreparable injury or damage means that money obtained at trial cannot compensate the litigant.

**2.3** Counsel argued that it is undisputed that the appellant has been in possession of the property for 18 years and the respondents cannot suffer any irreparable injury which cannot be atoned for by damages. For this argument, reference was made to the learned authors of **Atkins Forms, 2<sup>nd</sup> Edition, Volume 22 at page 70** where it is stated that:

*"It is now settled as a good working rule that, if the injury to the plaintiff's legal right is small, is capable of being estimated in money and is one which can be adequately compensated by a small money payment, and the case is one which to grant an injunction would be oppressive to the defendant, damages may be awarded in substitution for an injunction."*

It was counsel's considered view that the respondents' claim to the 20 hectares which they allege is part of the 140 hectares valued in monetary terms, can be deemed as a minimum legal right as compared to the appellant's development on the said piece of land.

**2.4** Reference was made to the case of **Shell & B.P Zambia Limited Vs Conidaris & Others** where the Supreme Court held:

*"i. A court will not generally grant an interlocutory injunction unless the right to relief is clear and unless the injunction is necessary to protect the plaintiff from irreparable injury, mere inconvenience is not enough.*

*ii. Irreparable injury means injury which is substantial and can never be adequately remedied or atoned for by damages, not injury which cannot be possibly be repaired.*

*iii. Where any doubts exist as to the plaintiff's rights or if the violation of an admitted right is denied, the court takes into consideration the balance of convenience to the plaintiff. The burden of showing the greater inconvenience is on the plaintiff.*

**2.5** From the foregoing authority, counsel argued that the respondents did not demonstrate the right to relief neither did they show the need to be protected was necessary. Counsel argued further that the Lands Tribunal in addressing the complainants, who are the respondents herein, would suffer irreparable injury in this matter in the absence of granting the injunction, overlooked the position of the appellant who has since been restrained from her property of business and residence. It was counsel's further argument that in granting the injunction, the Tribunal found that the balance of convenience lies in favour of the respondents. However, it was counsel's considered view that the court should have satisfied itself that the comparative mischief, hardship or inconvenience, which is likely to be caused to the respondents by refusing to grant an injunction, will be greater than that which is likely to be caused to the

appellant by granting it. Flowing from this argument, counsel submitted that the irreparable damage that will be caused to the appellant herein is more than that of the respondents who did not demonstrate what irreparable damage they would suffer, taking into account all the facts of the matter. Counsel was of the considered view that an injunction cannot be claimed as a matter of right and urged this court to set aside the injunction.

**2.6** Counsel argued ground three and substantiated ground four in respect of the undisputed fact of when the appellant settled on the said piece of land. In relation to ground three, counsel argued that it is on record that the appellant was given 20 hectares of land by Chief Simamba and she later on commenced the conversion process of customary tenure into a statutory lease. Reference was made to *sections 33, 39 (i) and 35 of the Lands and Deeds Registry Act Chapter 185 of the Laws of Zambia* for the argument that any title holder is regarded as the conclusive owner to a parcel of land. The court was also referred to the cases of **Kajimanga Vs Chilemya**<sup>4</sup> and **Elias Tembo Vs Elias Roy Mwale and Lusaka City Council**<sup>5</sup>. It was counsel's contention that the Tribunal did not address the legal rights of the appellant herein who provided evidence of the same dated as far back as 2006. On this basis, counsel submitted that the injunction be set aside.

**2.7** In arguing ground four, counsel cited a portion of the Ruling of the Tribunal as follows:

*“as to whether or not the matter is statute barred, having perused the complaint, we note that the complainants allege in paragraphs 16 to 18 of the affidavit in support of the complaint that they first saw the 2<sup>nd</sup> respondent on the subject property between 2005 to 2006. According to the complainants, they thought the 1<sup>st</sup> respondent was a fish trader and she responded positively. That after some time, the complainants noticed that the 2<sup>nd</sup> respondent was putting up structures on the subject land. The dates as to when*

*the latter took place are not stated while the 2<sup>nd</sup> respondent alleges the complainants were aware she built the lodge in 2005. In our view this issue falls to be determined at the hearing of the complaint.....there is nothing to show that the conduct of the complainant is such that he has not come to equity with clean hands”*

**2.8** Counsel argued that based on the foregoing citation, the undisputed facts in respect of when the respondents knew about the existence of the appellant on the said piece of land was sufficient to demonstrate that the respondents did not come to equity with clean hands. It was counsel’s fortified submission that the Tribunal’s decision to grant the respondents’ application in the Ruling dated 17<sup>th</sup> May, 2023 be set aside.

### **3.0 The Respondent’s Heads of Argument**

The respondents filed their supporting heads of arguments on the 24<sup>th</sup> April, 2024.

**3.1** In grounds one and two, the respondents argued that the appellant’s argument is essentially that the Lands Tribunal should not have granted the interim injunction because the appellant had given arguments and evidence to the effect that she has possessed the land in issue since 2005. The respondents argued that when granting an interim injunction, the court or tribunal is to be guided by certain established principles; that there is a serious question to be tried and that that there is a possibility that the claimant is entitled to what they are seeking. Reference was made to the case of **Ndovi Vs National Education Council of Zambia Limited**<sup>6</sup>. It was argued that the averments made by the respondents in the affidavit in support of the complaint and the response thereto by the appellant in her affidavit in opposition clearly suggest that there is a land dispute between the parties. That as such, there is a serious issue to be determined between the parties.

**3.2** With regard to whether there was a likelihood that the respondents herein would have been entitled to the reliefs they were claiming, a perusal of the affidavits in support of the complaint and order of interim injunction show that the complainants outlined their entitlement to the land in issue. The assertions that their late father was allocated 140 hectares by the late Chief Simamba in 1978 in Chilongo village were not challenged at the time of the hearing of the interim injunction by the current Chief Simamba, who is also a party to the proceedings before the Lands Tribunal.

**3.3** The respondents went on to argue that the appellant tried to assail these assertions by merely putting across her position that she and her late husband were allocated 20 hectares of land by the current Chief Simamba in 2005. That in support of this claim, the appellant exhibited a document known as a council approval form which presumably made reference to this land that was allocated to her and her late husband. The respondents contended that what was clear from a perusal of this document however is that the 20 hectares that the appellant is claiming is located in Mpango area and not Chilongo village. That as such, it is possible that the 140 hectares that the respondents are claiming is different from the 20 hectares that the appellant is claiming since they appear to be in different locations. It was the respondent's considered view that the one who is supposed to provide clarity on this position is the current Chief Simamba since he was also sued as a party before the Lands Tribunal.

**3.4** It was the respondents' contention that since Chief Simamba did not challenge what was deposed to by the respondents in their affidavit at the time of the hearing of the interim injunction, despite being given enough time to do so, hence the Lands Tribunal placed reliance on the affidavits of the appellant and the respondents to determine the likelihood of success of the claim. As such, the respondents were of the view that the Lands Tribunal was on firm ground when it adopted the position that the claimants were entitled to the reliefs they were claiming since the averments before it clearly suggested that

the initial criteria for the grant of an injunction was satisfied before the Lands Tribunal.

**3.5** The respondents argued that the **Ndovi** case has provided guidance that the court is not supposed to delve into the merits and demerits of a particular matter, before it can grant an interim injunction. As such, the appellant's argument herein that she has had possession of the land in dispute since 2005 is one that has to be established by leading evidence to that effect. That for the Lands Tribunal to have arrived at any position concerning who had possession of the land in dispute since 2005, would have required it to delve into the merits of the case as the respondents have equally challenged the appellants possession. The respondents in traversing this point showed that their late father had been allocated 140 hectares in Chilongo Village by the late Chief Simamba in 1978 which was subdivided in 1990 and surveyed by the Siavonga District Council in 2001. That what the appellant is claiming is 20 hectares which, according to the Council approval document which the appellant is relying on before the Lands Tribunal, shows that the same land is in Mpango area.

**3.6** It was the respondents' argument that these two conflicting positions can only be resolved once evidence has been led in detail by all parties concerned and that it is only then that the Lands Tribunal would be able to adopt a position on who has been in possession of the land in dispute since 2005. The respondents were of the considered view that the appellants challenge of the grant of an interim injunction on the basis that the appellant has allegedly been in possession of the land in dispute since 2005 and that she has been restrained from her residential place and place of business is baseless because it is based on assertions that can only be proved by leading evidence at trial.

**3.7** The respondents contended that after the Tribunal established that there was a serious question to be tried between the parties and that there was a likelihood that the claimants were entitled to the reliefs sought, it was then

supposed to proceed to other follow up considerations. That one of these considerations is whether the claimant in the matter would be adequately compensated by an award of damages should he succeed in the trial or, in other words whether he will suffer irreparable injury or loss should the injunction not be granted. The court was referred to the case of **Shell BP Zambia Limited Vs Conidaris and Another** for this principle. That our jurisprudence has established that an interest in land cannot be adequately compensated for by damages and as such the Lands Tribunal was on firm ground when, after finding that there was a possibility that the respondents herein were entitled to the reliefs sought in their claim to land, it further held to that effect.

**3.8** It was contended that the final part of the argument canvassed under grounds one and two relates to the balance of convenience. That this consideration entails weighing which is more just between granting the injunction or refusing to grant it and the Lands Tribunal had to consider whether it was more just to secure the interests of those claiming 140 hectares of land or the interest of one claiming 20 hectares which seems to be located elsewhere. The respondents were of the considered view that the Lands Tribunal was on firm ground when it held that the balance of convenience lay in favour of the respondents. For this argument, the court was referred to the case of **ZIMCO Properties Ltd Vs LAPCO Lt**<sup>7</sup>. As such grounds one and two should fail.

**3.9** In response to ground three, the respondents argued that although the appellant has argued that she has shown legal evidence of ownership of the land in issue, she had only provided a council approval form to signify that she commenced the process for conversion of her land from customary tenure to leasehold. That the location of the land on the form appears as Mpango area and not Chilongo village and if the appellant is arguing that her 20 hectares is correctly located within the 140 hectares that the respondents are also

claiming then why were the two pieces of land in two different locations? The respondents argued that it is misleading for the appellant to argue that she has provided evidence of legal ownership of the land she is claiming, when the only document that she had produced raised more questions than answers. The respondents went on to argue that it is equally possible, in considering what was presented before the Tribunal, that the appellant and her late husband could have legitimately been allocated 20 hectares in Mpango area but because they did not like the land, they decided to go and encroach on the 140 hectares in Chilongo village that rightfully belongs to the respondents and their family.

**3.9** The respondents contended that the Lands Tribunal was not presented with any document that conclusively proves the legal ownership of the land in dispute. It was the respondent's considered view that the land in dispute was correctly taken to be customary land meaning that *Sections 33, 39(i) and 35 of the Lands and Deeds and Registry Act*, which the appellant is relying on, are not applicable in this case because those *Sections* talk about statutory land and not customary land. That for customary land, the authority that has to be considered is the traditional authority which is Chief Simamba in this case. In the absence of a clear position from Chief Simamba on who was entitled to the land, the Lands Tribunal was supposed to determine the balance of convenience based on the arguments from the appellant and respondents herein. As such, the Lands Tribunal was on firm ground when it granted the interim injunction and as such ground three must also fail.

**3.10** With regard to ground four on the argument that the Lands Tribunal should have considered the appellant's argument that the cause of action is statute barred, the respondents argued that the Lands Tribunal in its Ruling recognized that the respondents herein stated that they initially saw the appellant on their land sometime in 2005 or 2006 and took her to be a fish trader. That later on, they noticed that the appellant had started to put up structures on the land and that the appellant averred that she built the lodge

in 2005. The respondents questioned whether the Lands Tribunal was supposed to conclude that the cause of action arose in 2005 but that it could not as that would have meant it drawing an inference that was not clearly and conclusively established. As such, it was necessary for the Tribunal to receive further information on this point during the main matter before it could make a finding on the same. The respondents contended that they agreed with the Lands Tribunal that the question of the matter being statute barred is one that could only be determined at the main hearing. Further, that the fact that the respondents even acknowledged that they first saw the appellant sometime in 2005 or 2006 suggests that they are not intent on misleading the court as the Tribunal rightly pointed out. That on this basis, ground four is equally without merit and the entire appeal should be dismissed.

#### **4.0 The Hearing**

**4.1** At the hearing of the matter on the 30<sup>th</sup> April, 2024, counsel for the appellant indicated that she would be relying on the heads of argument and the Record of Appeal which they filed on the 6<sup>th</sup> March, 2024.

**4.2** The respondents indicated that they would also rely on their heads of argument which they filed on the 24<sup>th</sup> April, 2024.

#### **5.0 The Decision of the Court**

**5.1** The crux of this matter is; firstly, whether the Lands Tribunal should have granted an injunction against the 2<sup>nd</sup> respondent restraining her from her residential place and place of business and secondly; whether the cause of action is statute barred.

**5.2** In grounds one and two, the appellant has argued that the Lands Tribunal fell into grave error firstly when it held; that the balance of convenience lies in favour of the complainants as the irreparable injury suffered by the respondents cannot be atoned for by damages and or cannot adequately

compensate them for the loss or interest in the particular piece of land and secondly when it granted the respondents an interim injunction thereby restraining the appellant from her residential place and place of business which she had occupied since 2005.

**5.2.1** Counsel for the appellant argued that the respondents cannot suffer any irreparable injury for the loss or interest in the particular piece of land which has been occupied by the appellant. That it was not in dispute that the appellant has been in possession of the property on the said land for 18 years. Further that the respondents' claim to the 20 hectares which they allege is part of the 140 hectares, valued in monetary terms can be deemed as a minimum legal right as compared to the appellants' development on the said piece of land.

**5.2.2** It was counsel's contention that the respondents had not demonstrated the right to relief and neither had they shown the need to be protected as was guided in the case of **Shell & B.P Zambia Limited**. Conversely, the appellant had demonstrated that she had settled on the 20 hectares of land given to her by Chief Simamba in 2005 and the lodge was built in the same year. That by the Lands Tribunal holding that the respondents would suffer irreparable injury in this matter, it overlooked the position of the appellant who has since been restrained from her property of business and residence.

**5.2.3** In opposing this position in grounds one and two, the respondents argued that the appellant in her averments has shown that there was a land dispute between the parties and as such there is a serious issue to be determined between the parties. Additionally, that the respondents had shown that there was a possibility that they were entitled to the reliefs that they were seeking as was held in the **Ndovi** case. For this position, the respondents contended that their assertions that their late father was allocated 140 hectares by the late Chief Simamba in 1978, in Chilongo village were not challenged by the current Chief Simamba at the time of the hearing of the

interim injunction. That although the appellant tried to assail their averments by asserting that she and her late husband were allocated 20 hectares of land by the current Chief Simamba and in so doing exhibited a form from the Council, the said document made reference to land located in Mpango area and not Chilongo village.

**5.2.4** The respondents went on to argue that the **Ndovi** case provided guidance that the court is not supposed to delve into the merits or demerits of a particular matter before it can grant an interim injunction. As such, the appellant's position that she has been in possession of the land in dispute since 2005 was one that needed to be established by the leading of evidence. That in traversing the appellant's claim, the respondents had shown that their late father was allocated 140 hectares in Chilongo village by the late Chief Simamba in 1978 which was subdivided in 1990 and surveyed by the Siavonga District Council in 2001. Further that what the appellant is claiming is 20 hectares, which according to the Council approval documents shows that the same land is in Mpango area and for these two conflicting positions to be resolved, evidence had to be led.

**5.2.5** The respondents also argued that it is trite that an interest in land cannot be adequately compensated for in damages and that the Lands Tribunal correctly found that the respondents would suffer irreparable injury which could not be compensated for by damages as was guided in the **Shell B.P Zambia Limited** case. Lastly, that the Lands Tribunal was on firm ground when it held that the balance of convenience lay in favour of the respondents in balancing whether it was more just to secure the interests of those claiming 140 hectares of land or the interest of one claiming 20 hectares which seems to be located elsewhere.

**5.3** In addressing grounds one and two, guidance is sought from the case of **Tawela Akapelwa and others vs Josiah Mubukwanu Nyumbu**<sup>8</sup> in which the Supreme Court outlined the principles that a court should take into

consideration on whether or not to grant an injunction. Justice Malila at pages 20 to 21 of the said judgment aptly stated as follows:

*“It is settled that a judge considering an application for an interim injunction ought, as a matter of practice, to be guided by the principles which were so clearly set out in the **American Cynamid Company Ltd. v. Ethicon Limited** cited by learned counsel. It is clear to us that both learned counsel are fully alive to those principles to guide the court in considering whether or not to grant an injunction, namely;*

- (1) whether there is a serious question to be tried;*
- (2) whether damages would be adequate to compensate the plaintiff (respondent in this case);*
- (3) whether the balance of convenience tilts in favour of granting the injunction to the plaintiff (respondent);*  
*and*
- (4) whether the plaintiff (respondent) has come to court with clean hands.*

*These considerations should be foremost in the mind of any judge considering whether or not to grant an injunction.”*

**5.3.1** These guiding principles are for the preserve of the court to assess as to their existence when determining whether to grant an injunction or not. The parties at best can only attempt to persuade the court as to their existence or non-existence. The Lands Tribunal rightly found that there is a serious question to be tried as undoubtedly the issue of who owns the 20 hectares is a matter that needed to have been determined at trial or by way of a hearing.

**5.3.2** In relation to damages however, and consequent to this upon whom the balance of convenience tilts, even though the subject matter involves a parcel of land, the Lands Tribunal should have addressed its mind to the 2<sup>nd</sup>

respondent's (appellant's) assertion that she not only lives on the said piece of land but also earns her income from there. This is as against the complainants (respondents) position at paragraphs 22, 23 and 24 of their complaint wherein they averred that they were chased from the land by the 1<sup>st</sup> respondent which they had since left save for Maxwell Mulafu and that the rest of them had since relocated to Lusaka, Mazabuka and others to other places.

**5.3.3** On a proper assessment of these assertions firstly, although the complainants claim to have an interest in the land in question, the same has not been on the face of it established as the requisite evidence be it customary or statutory was not furnished before the court for it to irrefutably find so. As such, an award of damages would be suitable in this to the complainants should it be found that the land in dispute, this being the 20 hectares, actually belongs to the complainants which damages the complainants did not show that the 2<sup>nd</sup> respondent could not pay. Whereas they did not show the Lands Tribunal that in the event that it is discovered that the land in dispute actually belongs to the 2<sup>nd</sup> respondent, there were in a position to pay her damages in the event that the Lands Tribunal should not have granted an injunction. Flowing from this therefore, the balance of convenience tilts in the appellant's favour as it is clear that the irreparable injury will be suffered by her as she who was living on the land as opposed to the complainants who had since relocated.

**5.3.4** In relation to coming to court with clean hands, a perusal of the complaint itself reveals at paragraphs 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27 as follows:

*"15. That between 2005 and 2006 Vanessa Chiboola, 2<sup>nd</sup> respondent herein was seen in our land and we took it that she was just one of the traders who come to Siavonga to buy fish and that was her response when she was asked what she was doing on our land.*

16. That after some time, we noticed the 2<sup>nd</sup> respondent building and putting up structures on the disputed land.

17. That when she was approached she could not answer our questions and was very rude and acted busy.

18. That the 2<sup>nd</sup> respondent managed to build up and put up a lodge.

19. That the lodge started running and people would come from as far as America and Europe.

20. That we tried to have audience with the Chief so that we can find the way forward but to no avail.

21. That the 1<sup>st</sup> respondent told us not to be surprised if we see someone else coming to settle on the land and advised us to leave before it gets to that.

22. That the 1<sup>st</sup> respondent, who was our mother's brother, chased us from the disputed land including our mother who was his sister.

23. That we all left the land except our brother Maxwell Malufu who refused to leave and is staying on the land.

24. That we relocated to Lusaka, others to Mazabuka and other places.

25. That our Mother fell sick in 2015 and in 2017 she died.

26. That the 1<sup>st</sup> respondent was present at the funeral house.

27. That we told him we have information that people are coming on our land and we wanted to hear his position.

28. That in his response he asked if we had title deeds for the land and he mentioned that some people had shown interest in the disputed.

29. That we told him that we had documents for the land but he said that the land in dispute is traditional land.”

**5.3.5** In assessing these averments, it is evident that the complainants were aware that the 2<sup>nd</sup> respondent had built a lodge on land that they claim

belongs to them. The averments revealed that they took steps to approach the 2<sup>nd</sup> respondent over the same who they allege was rude and did not provide any answers so they instead went to seek redress from the Chief but to no avail. Instead that the Chief told them that they should not be surprised to see someone else coming to settle on the land and advised them to leave before it came to that. It can be gleaned that the complainants knew that the 2<sup>nd</sup> respondent was in occupation of the land that they claim is theirs for which they wanted redress and the period in question was before they were chased from the land by the 1<sup>st</sup> respondent according to the sequence of events narrated in their complaint.

**5.3.6** To fortify this position, the complainants aver from paragraphs 30 to 38 how they were called in 2008 by Oscar Chilanga, a worker at Siavonga Municipal Council who informed them that their late father had started processing documentation for the 140 hectares of land situated in Chilongo Village and that the only thing that was remaining was to obtain title deeds. That the said Oscar advised them to hurry as documents had started going missing from the said file and when they went to the Siavonga District Council, they only found two documents on their fathers' file. Further that when they saw the District Planning Officer at the Siavonga Municipal Council, he told them that he could not get involved in the issue as he too had personal issues with the 1<sup>st</sup> respondent. From these assertions, it can be gleaned that the complainants personal issues with the 1<sup>st</sup> respondent were in relation to the land from which they had been chased by the 1<sup>st</sup> respondent, after witnessing the 2<sup>nd</sup> respondent build and begin to operate her lodge on a portion of the said land. The timelines therefore indicate that the complainants had knowledge of these events between 2005 and 2008.

**5.3.7** Therefore, the finding by the Lands Tribunal that the complainants came to court with clean hands was erroneous, as clearly the complainants were well aware of the presence of the 2<sup>nd</sup> respondent on the land that they claimed to be

theirs between the period 2005 and 2008 and the developments that the said 2<sup>nd</sup> respondent had made to the said land. The import of this will be discussed in detail under grounds three and four.

**5.3.7** From the foregoing assessment, grounds one and two of the appellant's grounds of appeal succeed.

**5.4** With regard to ground three, counsel for the appellant argued that the Lands Tribunal fell into grave error when it glossed over the settled principles of law that no injunction can be granted against a legal owner of a property who has shown evidence of legal ownership of the 20 hectares of land. In assessing this ground of appeal, a review of the evidence on the record reveals that there was no substantive proof for the Lands Tribunal to arrive at this conclusion and as rightly observed, this was a matter that needed to be determined at trial as there was conflicting evidence from the parties. Accordingly, in agreeing with the position of the Lands Tribunal, this ground fails.

**5.5** In relation to ground four, counsel for the appellant argued that the Lands Tribunal misdirected itself by stating that the issue as to whether the matter was statute barred was a matter to be determined at trial when in fact the tribunal had already considered certain pieces of evidence favourable to the respondents, which should have been left to be determined at trial. It is trite that limitation of an action is a point of law which when raised must be considered. In the case of **City Express Service Limited Vs Southern Cross Motor Limited**<sup>9</sup> it was held as follows:

*"It is clear from Zambian decided cases that the issue of the limitation period was considered in those cases as a point of law which can be raised and considered at any stage of the proceedings. In some of the cases, limitation period was not pleaded, but the*

*courts considered the objection based on the statute of limitation as a point of law and considered it on that basis.”*

The learned author of **Zambian Civil Procedure Commentary and Cases Volume 1, LexisNexis, 2017, Patrick Matibini** explains at page 160 that:

*“Regarding the limitation law, Lord Griffiths, in **Donovan v Gwentys Limited**<sup>10</sup>, said:*

*‘The primary purpose of the limitation period is to protect a defendant from the injustice of having to face a stale claim with which he never expected to deal.’*

**5.6** As highlighted above, the respondents in this matter were well aware of the appellants occupation and development of 20 hectares of the land which they claim is part of the 140 hectares between the period 2005 to 2008. The respondents herein as such were required to have commenced an action there and then. *Section 6 Subsection (3) of the Limitation Act, 1939* provides as follows:

*“No action shall be brought by any other person 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 person through whom he claims, to that person:”*

The import of this provision is unequivocally clear as to the time frame within which one can commence an action for the recovery of any land, it being no later than 12 years. To buttress this argument *Section 16 Subsection (4) of the Limitation Act, 1939* provides that:

*“...At the expiration of the period prescribed by the Act for any person to bring an action to recover land... the title of that person to the land shall be extinguished.”*

**5.7** From the foregoing provisions, it is evident that the respondents cannot bring this cause of action against the appellant as it is now well over twelve years from the time that they became aware of the appellants occupation, development and possession of the 20 hectares of land which they claim to be theirs. It is also evident that the Lands Tribunal's holding that they could only make a determination of whether the matter was statute barred was erroneous as the sequence of events asserted by the respondents in their complaint clearly indicates that they were aware of the presence of the appellant between 2005 and 2008 as they took steps to challenge her presence on the said 20 hectares of land with the Chief before they were chased from their land by the said Chief.

**5.8** To allow the respondents to sue the appellant over this land now is not only an injustice as they slept on their rights and are thus precluded from commencing this cause of action as was held in the case of **Smith Vs Clay**<sup>11</sup> but it is also contrary to public policy as was guided in the case of **Donovan Vs Gwentoy** and where it was held that:

*"The primary purpose of the limitation period is to protect a defendant from injustice of having to face a stale claim that is a claim which he never expected to deal.*

*If it is brought a long time after the event in question, the likelihood is that the evidence which may have been available may have been lost and the memories of witnesses who may still be available will inevitably have faded or become confused.*

*Further, it is contrary to general policy to keep perpetually at risk."*

**5.9** Additionally, **Chitty on Contract, 26<sup>th</sup> Edition at paragraph 1949** states that

*"The general rule is that once time has started to run, it continues to do so until proceedings are commenced or the claim is barred. The*

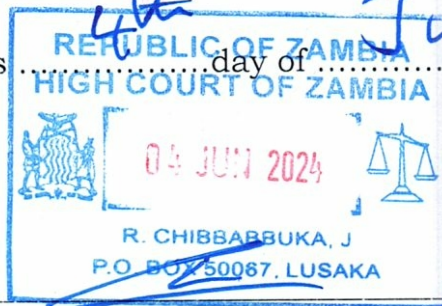
*principle is that a plaintiff who is in a position to commence proceedings and neglects to so accepts the risk that some unexpected subsequent event will prevent him from doing so within the statutory period."*

The consequence of the respondents' neglect is that the cause of action against the appellant is statute barred and that being the case the Lands Tribunal has no jurisdiction to entertain the cause of action as against the appellant. As such, the grant of the injunction as against the appellant by the Lands Tribunal was irregular. Therefore ground four succeeds.

The upshot of the matter is that three of the grounds having been successful, the appeal succeeds and the injunction as against the appellant herein is discharged forthwith. Costs are awarded to the appellant to be taxed in default of agreement.

Leave to appeal is hereby granted.

Dated at Lusaka this ..... day of ..... 2024



**RUTH CHIBBABBUKA  
HIGH COURT JUDGE**