

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

2024/HP/0253

BETWEEN:

PHILIP MKANDAWIRE & 106 OTHERS

PLAINTIFF

AND

KADDOURA CONSTRUCTION LIMITED

1ST DEFENDANT

LUSAKA CITY COUNCIL

2ND DEFENDANT

BEFORE HON. MRS. JUSTICE G.C. CHAWATAMA
ON 12TH JUNE, 2024 - IN CHAMBERS

For the Plaintiff : *Mr. S. Nyirongo* from Messers. Chilao Nyirongo
Mwiinde Legal Practitioners
For the 1st Defendant : *Mr. M. Moono* from Messers. LJ Micheals Legal
Practitioners
For the 2nd Defendant : *Mr. N. Mukungu* and *Miss W. V Mwelwa*- In house
Legal Counsel-Lusaka City Council

RULING

CASES REFERRED TO:

1. *American Cyanamid Co v Ethicon Co Ltd* (1974) A.C 396
2. *Shell and BP Zambia limited v Conidaris and Others* (1975) Z.R 174
3. *Turnkey Properties v Lusaka West Development Limited and other* (1984) Z.R 85
4. *Tawela Akapelwa and Others v Josiah Mubukwanu Litiya Nyumbu* (Appeal No. 004/2015)
5. *Whidden Kanugwe v Zambia Sugar PLC*
6. *Shelly v London County Council* (1949) 2 ALLER 848

LEGISLATION AND OTHER WORKS REFERRED TO:

1. *The Constitution of Zambia Act No 2 of 2016*
2. *The High Court Act Chapter 27 of the Laws of Zambia*
3. *The Rules of the Supreme Court (Whitebook) 1999 edition*
4. *Market and Bus Stations Act No. 7 of 2007*
5. *Urban and Regional Planning Act No. 3 of 2015*

1.0 INTRODUCTION

1.1 This is a Ruling on an application by the Plaintiffs for an order of interim injunction. The application is made pursuant to **Order 27 Rule 1-4 of the High Court Rules and 29 Rule 1 of the Supreme Court Rules (Whitebook)**. The said Order provides that:

Order 27 rule 1-4

1. *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 a Judge to issue an injunction to such party, commanding him to refrain from doing the particular act complained of, or to give such order, for the purpose of staying and preventing him from wasting, damaging or alienating the property, as to the 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 a Judge to appoint a receiver or manager of such property, and, if need be, to remove the person in whose possession or custody 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 to such receiver or manager all such powers for the management or the preservation and improvement of the property, and the collection of the rents and profits thereof, and the application and disposal of such rents*

and profits, as to the Court or a Judge may seem proper.

2. It shall be lawful for the Court or a Judge, on the application of any party to a suit, to make any order for the sale by any person named in such order, and in such manner and on such terms as to the Court or a Judge may seem desirable, of any goods, wares or merchandise, the right to which is in dispute in the suit, which may be of a perishable nature, or likely to depreciate from keeping, or which, for any other just and sufficient reason, it may be desirable to have sold at once.
3. It shall be lawful for the Court or a Judge, upon the application of any party to a suit, and upon such terms as may seem just, to make any order for the detention, preservation or inspection of any property being the subject of such suit, and, for all or any of the purposes aforesaid, to authorise any person or persons to enter upon or into any land or building in the possession of any party to such suit; and, for all or any of the purposes aforesaid, to authorise any samples to be taken, or any observations to be made or experiments to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence.
4. In any suit for restraining the defendant from the committal of any breach of contract or other injury, and whether the same be accompanied by any claim for damages or not, it shall be lawful for the plaintiff, at any time after the commencement of the suit, and whether before or after judgment, to apply to the Court or a Judge for an injunction to restrain the defendant

from the repetition or the continuance of the breach of contract or wrongful act complained of, or the committal of any breach of contract or injury of a like kind arising out of the same contract, or relating to the same property or right, and such injunction may be granted by the Court or a Judge on such terms as to the duration of the injunction, keeping an account, giving security or otherwise, as to the Court or a Judge shall seem reasonable and just:

Provided that any order for an injunction may be discharged, varied or set aside by the Court or a Judge, on application made thereto by any party dissatisfied with such order.

Order 29 rule 1 *“An application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter, whether or not a claim for the injunction was included in that parties Writ, Originating Summons, Counter-Claim or third-party notice, as the case may be”*

2.0 HISTORICAL BACKGROUND

2.1 A brief historical background leading to this application is that the Plaintiffs on the 15th August, 2024 by way of writ of summons accompanied by a statement of claim, commenced this action claiming among others, an order of interim injunction restraining the defendants from entering and or developing the Plaintiffs’ trading site or trespassing on the Plaintiff’s subject trading property.

3.0 **AFFIDAVIT EVIDENCE**

3.1 The affidavit in support of the ex-parte summons for an order of interim injunction was sworn by Philip Mkandawire, a representative of the 106 Plaintiffs. He deposed that himself and others have been conducting business at the trading site called Munyaule Market from 2006 to date after they were legally re-allocated from Chachacha road by the 2nd Defendant. That they were lawfully, legally and rightfully placed permanently at Munyaule Market after normal procedure were followed by the 2nd Defendant. A copy of the notice confirming permanent trading site was exhibited and marked "PM1". That he was advised and whose advise he believes to be true that the notice confirming permanent trading site is still validly subsisting and has to his knowledge and belief never been lawfully cancelled or revoked by any authority.

3.2 It was the deponent further averment that he was advised and believe the same to be true that they sought the consent and approval of the 2nd Defendant that they were to be permanently settled when they rejected temporal trading settlement site. A copy of the minutes dated 20th December 2006 showing that temporal settlement was rejected was exhibited and marked "PM2". That he has noted with shock and disbelief that the 1st Defendant is actively preparing and has gone on the Plaintiffs' trading site for purposes of demolishing and

developing of the trading site of the Plaintiffs to the benefit of the Defendants without the approval and consent of the Plaintiffs. Pictures showing the barricade of the trading site was exhibited and marked "PM3".

3.3 That he was advised and believed the same to be true that after legal relocation and acquisition of the trading site on a permanent basis, the Plaintiffs proceeded to lawfully acquire and/or obtain offer letters and take responsibility of their various shops. Copies of the offer letters was exhibited and marked "PM4". That the Plaintiffs' trading at Munyaule market are engaged in various kinds of business and there are; and have never been proper designated trading places where they can go if removed from the trading site where they are currently and that their families will suffer. That the 2nd Defendant has proceeded to issue a notice that they vacate the premises which is prejudicial to their lives and trading as the same has not been done in good faith and honestly. A copy of the notice was exhibited and marked "PM5". That the actions of the Defendants are prejudicial and an affront to social justice and peace as they have barricaded the trading site beforehand and later issued a notice and that the same has led to the loss of business.

3.4 Furthermore, that he recently came to learn that the 1st Defendant is actively preparing to take construction equipment to the Plaintiffs' trading site for purposes of

commencing construction activities and developments thereon without any consent, permission or acquiescence of the Plaintiffs, the lawful owner of the permanent trading site, hence the decision to commence these proceedings. That the Plaintiffs have done a lot of other activities required by law in relation to the maintenance and trading activities.

3.5 That on the 23rd January, 2024 the Plaintiffs' advocate wrote a letter to the 2nd Defendant seeking an explanation and demanding to immediately halt any planned developments on the Plaintiffs' trading site but that 2nd Defendant has given no response. A copy of the letter was exhibited and marked "PM6". That the team from the 1st Defendant did have prior knowledge that the trading site they were targeting already belonged to the Plaintiffs as all official records at the 2nd Defendant clearly reflects but that the 1st Defendant is adamant and proceeded to bring construction materials and barricaded the trading premises for the Plaintiffs. That the Defendant have grabbed the Plaintiffs trading site arbitrarily and without any legal justification and without affording the Plaintiffs any opportunity to be heard.

3.4 AFFIDAVIT IN OPPOSITION

3.5 In opposing the interim injunction, the 1st Defendant filed an affidavit in opposition. It was averred that in the year 2021, Kaddoura Markets Limited, entered into a lease agreement

with the 2nd Defendant for re-development and operation of a market at the corner of Lumumba and Mumbwa roads (Munyaule Market site) in Lusaka and made all necessary payments for the consideration demanded under the lease to the 2nd Defendant. A copy of the lease was exhibited as “HMBK1”. That the Plaintiffs have sued a wrong company as it is Kaddoura Markets Limited that has a lease with the 2nd Defendant and is preparing to move on to the market site.

3.6 It was also averred that following the execution of the lease, there has been delay to Kaddoura Markets use of the trade site to enforce the terms of the lease due to the 2nd Defendant’s need to secure a new trading site for the Plaintiffs. That in particular the 2nd Defendant indicated awaiting the completion of Simon Mwewa Lane Market in the letter dated 3rd September, 2021 for the relocation of the affected Munyaule Market traders. Copies of the letter of correspondence and receipt of lease fees between the Defendants were exhibited and market “HMBK2”.

3.7 That the delay in the use of the trading site for the aforementioned reasons, has greatly inconvenienced Kaddoura Markets as it has delayed the execution of its planned projects. Further that following the notice of eviction issued to the Plaintiffs on the 17th February, 2024, Kaddoura Markets began its preparatory works on the trading site.

- 3.8 It was averred that the Plaintiff have wrongly instituted this matter as a claim challenging the exercise of the 2nd Defendant's statutory authority can only be made by way of judicial review that as such this court lacks jurisdiction.
- 3.9 That Kaddoura Markets has legal authority for its entry and preparatory works on the market site in form of the lease and in addition, the Plaintiffs are subject to the exercise of statutory authority by the 2nd Defendant regarding use of the market site.
- 3.10 Further that the decision by the 2nd Defendant to move the Plaintiffs is neither unconscionable nor illegal but is in fact for the re-development of the market, a matter that goes to public interest and the development of the city of Lusaka in general.
- 3.11 That the Plaintiffs through their Market Committee have been engaged on multiple occasions over time and therefore cannot claim to have been uninformed or to have never been engaged or consulted on this matter. A copy of a letter from the Munyaule Market Chairman dated the 8th of January, 2020 was exhibited and marked "HMBK3". That the Plaintiffs in their demand letter dated 30th January, 2024 admitted receipt of an eviction notice to vacate from the trading site in view of their re-location to another designated market and are legally obliged to do the same.

3.12 It was averred that the 1st Defendant was advised by his counsel that no documentation can confer permanent settlement in a market as the council has statutory authority to manage markets and or abolish them. Moreover, no tenure for any fixed duration was ever conferred on the Plaintiffs and as such the 2nd Defendant retains the inherent right to terminate their occupancy at any time pursuant to the Market and Bus Stations Act No. 7 of 2007. That in addition, the local authority maintains the statutory authority to demolish, reconstruct, abolish, move or close any market within its jurisdiction as per the Market and Bus Stations Act.

3.13 That the 1st Defendant was advised by his counsel that Kaddoura Markets Limited has authority from the 2nd Defendant for its entry on the trading site in the form of a lease agreement entered into with Kaddoura Markets Limited in 2021 to act on their behalf in exercise of their powers under sections 4, 5 and 8 of the Markets and Bus Stations Act No. 7 of 2007 which includes demolishing and reconstructing the trading site.

3.14 It was finally averred that the 1st Defendant was advised by his counsel that this matter is not a proper case for the grant of an interim injunction to the Plaintiff as there is no threat of irreparable harm being done to the Plaintiffs and the Plaintiffs do not have a clear right to relief.

3.15 The sum total of the affidavit in opposition filed by the 2nd Defendant was that on the 20th December, 2006 the 2nd Defendant held a stakeholders meeting with representatives of all the affected street vendors at which it was resolved that the Plaintiffs were to be relocated to freedom market otherwise known as Munyaule market. A copy of the minutes for the stakeholders meeting was exhibited and marked "SB1".

3.16 That the 2nd Defendant relocated the Plaintiffs from Chiparamba road, chachacha road and freedom way road in the central business district of Lusaka city to Munyaule market at the corner of Lumumba and Mumbwa roads in an effort to avert the public nuisance of street vending. Furthermore, that prior to 2006 and eventual establishment of Munyaule market, the subject property used to be the 2nd Defendant's car park. That due to the urgent need to provide an alternative trading site for street vendors, the 2nd Defendant, by virtue of being a Planning authority, exercised its statutory power to re-plan the area and turned it into a market. That the 2nd Defendant's decision at the time to have declared Munyaule market as a permanent trading site meant it was a designated market the Plaintiffs were to conduct their trading activities as opposed to street vending. That the designation did not imply the Plaintiffs had legally become owners of the 2nd Defendant's property because only the 2nd Defendant is legally mandated to manage markets.

3.17 It was averred that in 2019, the 2nd Defendant through the Plaintiffs elected representatives passed a council resolution to enable the 2nd Defendant enter into a lease agreement with the 1st Defendant for the lease and redevelopment of Munyaule market for the ultimate benefit of the Plaintiff. The council resolution and lease agreement were exhibited and marked “SB2”. That from as far back as November 2023, the 2nd Defendant, through the Plaintiffs elected representative, has had a series of engagements over plans to relocate the Plaintiffs to alternative trading sites and markets. Exhibit “SB3” copies of picture images were produced in evidence.

3.18 That on 17th January, 2024 the 2nd Defendant gave all the traders at Munyaule market public notice to relocate to allocated designated alternative markets and or trading sites by 29th February, 2024. A copy of the notice was exhibited and marked “SB4”. That about 145 traders have since been relocated to the frontage of city market and Lumumba market whereas the rest of the traders are to be taken to other trading sites and or markets the 2nd Defendant in conjunction with the 1st Defendant has prepared. Exhibit marked “SB5” copies of the list of traders already relocated and picture images of different trading sites and markets the 2nd Defendant has prepared to relocate the Plaintiffs were produced as evidence.

3.19 That following the relocation of 145 traders, the 1st Defendant has barricaded a portion of Munyaule market in readiness to

commence construction works of a modern market. A copy of a picture image was exhibited and marked "SB6". That despite being given notice to relocate to designated trading sites and or markets, the Plaintiffs have refused to comply with the directive which situation is intended to impeded the 2nd Defendant from executing its statutory exclusive functions and to foster development of the city of Lusaka.

3.20 That due procedure was followed of giving public notice to the Plaintiffs over the 2nd Defendant's plans to redevelop Munyaule market into a modern market and that the 2nd Defendant did not require to obtain consent whatsoever from the Plaintiffs prior to embarking on the redevelopment of its own property. That an injunction is an equitable remedy and that he who comes to court seeking an equitable remedy ought to do so with clean hands.

4.0 **SKELETON ARGUMENTS**

4.1 In the Skeleton Arguments filed, the Plaintiffs began by referring this Court to Order 27 rule 1 of the High Court Rules reproduced above. Counsel the referred to the case of ***American Cyanamid Co v Ethicon***¹ and ***Shell and BP Zambia Limited v Conidaries and others***² which case provides for the principles of granting an injunction which are:

- a) ***Is there a serious question to be tried;***
- b) ***Where does the balance of convenience lie;***

c) *The right to relief and;*

d) *Whether damages be an adequate remedy for the party.*

It was then submitted that there are serious questions to be tried in this matter, the balance of inconvenience lies in favour of granting the order of interim injunction, the 1st Plaintiffs has the right to relief and that damages shall not be an adequate remedy for the Plaintiffs. That unless the Court grants the Plaintiffs an order of injunction, the Plaintiffs shall suffer irreparable damage/ that the injury that the Plaintiff shall suffer, if the Defendant are allowed to continue trespassing, demolishing and developing the site thereby evicting the lawful owners, cannot be atoned by an award of damages. Counsel then urged this Court to grant the Plaintiffs the interim injunction sought and that the same to remain in force until the main action is disposed of or until further order of the Court.

4.2 The 1st Defendant's skeleton arguments were to the effect that any question arising out of a challenge of the exercise of the statutory authority by a public body is only properly instituted by way of judicial review under administrative law. Counsel then argued as the Markets and Bust Stations Act does not prescribe a mode of commencement. That in case any party is aggrieved by the exercise of authority, judicial review is the correct *modus operandi*. It was submitted that the 2nd Defendant's authority to move the Plaintiffs, demolish and reconstruct the trading site is purely pursuant to the exercise of

its statutory authority enshrined in **Article 147, 152 of the Constitution Act No 2 of 2016 and sections 4, 5 and 8 of the Markets and Bus Stations Act No. 7 of 2007.** That the said section provides that:

- 4** (1) *The Minister or a local authority with the approval of the Minister, may establish markets and bus stations.*
- (2) *The Minister may prescribe different categories of markets and bus stations to be established under this Act.*
- (3) *A local authority may enter into public private partnerships, with the prior approval of the Minister given in writing.*
- (4) *Any public private partnership entered into shall not be a period longer than fourteen years.*
- (5) *The Town and Country Planning Act, the Public Health Act and any other relevant written law shall apply to the planning, sitting and construction of markets and bus stations.*
- 5** (1) *All markets and bus stations shall be under the control of a local authority having jurisdiction in the area in which they are situated.*
- (2) *A market and bus station shall be managed by*
- (a) *A local authority in that area or*
- (b) *A management board.*
- (3) *A market and a bus station shall be managed and operated in accordance with the Food and Drug Act, the Public Health Act and the Weights and Measures Act.*
- 8** (1) *A local authority in consultation with the Minister may demolish, reconstruct, abolish, close or move a market or a bus station.*
- (2) *Notwithstanding subsection (1) shall before demolishing, reconstructing, abolishing and closing or moving a market or bus station, notify in writing, any person who is managing the market or bus station.*

- (3) *Where a local authority closes a market or bus station, a lessee or any agent of the lessee shall not keep the market or the bus station open or permit the market or bus station to be open.*
- (4) *Any person who contravenes subsection (3) commits an offense and is liable, upon conviction to a fine not exceeding fifty thousand penalty units or in default of payment to imprisonment for a period not exceeding six months.*

4.3 It was then submitted that the action by the 2nd Defendant to engage Kaddoura Markets and thereafter intend to remove the traders constituted a decision by a public body in the exercise of its statutory authority. That the action of the Plaintiffs is in essence to curtail the 2nd Defendant's statutory authority contained in the preceding sections cited. That it, therefore, follows that as the 2nd Defendant was acting through the 1st Defendant in the exercise of its statutorily conferred powers, this court lacks the jurisdiction to make any declarations for relief as claimed by the Plaintiffs in an action brought other than by judicial review under **Order 53 of the Rules of the Supreme Court of England.**

4.4 As regards the right to relief, it was submitted that the Plaintiff's claim to the continual and permanent use of the trading site is the offer letters in their position. That the 2nd Defendant posits that at best the offer letters grant a license to the use of the trading site. Counsel argued that the **Oxford dictionary of Law 5th edition** defines a license in land law as **a "permission to enter or occupy a person's land for an agreed purpose... a**

license does not usually confer a right to exclusive possession of the land nor any estate or interest in it.. it is a personal, arrangement between the licensor and the licensee". It was then argued that in terms for retaining possession to the trading site may or may not have been fulfilled by statutory compliance but as the offer letters do not contain a date of termination or expiry by the very nature of the inherent powers conferred upon the 2nd Defendant by the Market and Bus Stations Act. That the 2nd Defendants retain the right to terminate the Plaintiff's right to use and occupation over the trading site. That it would be inconceivable to think that the offer letters bestowed ownership over the said land to the Plaintiffs to be enjoyed in perpetuity as envisaged by the Plaintiffs in their use of the word "permanent". That the 2nd Defendant as a local authority reserves the right to move the Plaintiffs upon notice in writing to the person managing the markets.

- 4.5 Counsel then referred to the cases on injunction of ***Turnkey Properties v Lusaka West Development Company Limited³, Shell and B.P Zambia Limited v Conidaries and others***. It was then argued that pursuant to section 8 of the Markets and Bus Station Act, the 2nd Defendant is at liberty to cause a market to be moved as in the current state. That as compliance for the removal and bearing in mind the lease agreement held by the 1st Defendant, the 1st Defendant are within their right to order the affairs of area. Further that the Plaintiffs have failed to adequately and clearly show any right to relief in that the Plaintiffs cannot vitiate the exercise of statutory authority of the 2nd Defendant

under this mode of commencement. Counsel further argued that the 1st Defendant having been granted a lease in 2021 over the trading site and not being allowed access to it until 2024 in a bid to allow the 2nd Defendant to find alternative premises for the Plaintiffs has caused great inconvenience to the 1st Defendant.

- 4.6 The kernel of the 2nd Defendant's skeleton argument was that Munyaule market is the 2nd Defendant's property by virtue of the constitutional and statutory mandate conferred on the 2nd Defendant to manage. The 2nd Defendant cited article 147 of the Constitution and section 5 (1) of the Markets and Bus Stations Act No.7 of 2007 reproduced above. The 2nd Defendant referred this court to section 13 (2) of the Urban and Regional Planning Act No. 3 of 2015 of the laws of Zambia which mandates the 2nd Defendant as planning authority to undertake planning and control of development on land falling within its jurisdiction. The 2nd defendant also cited the cases on the injunction of *American Cyanamid v Ethicon Limited*¹, *Shell and BP Zambia Limited*². It was then argued that the balance of convenience tilts in favour of the 2nd Defendant to execute its legal mandate as prescribed in the constitution and other legislations.

5.0 ANALYSIS AND THE DECISION OF THIS COURT

- 5.1 I have carefully considered the application before me and the affidavit in support, opposition and skeleton arguments filed. The central question for determination in this application is whether or not this a proper case for this Court to grant an order of interim injunction restricting the Defendants from entering or developing the alleged Plaintiff's trading site or to restrain the Defendants from trespassing on the Plaintiffs alleged trading site as prayed by the Plaintiffs.
- 5.2 I wish to state at the outset that the 1st Defendant affidavit and written skeleton argument relied on by counsel for the 1st Defendant, Mr. Moono at the hearing of this matter averred and included submissions to the effect that this matter was wrongly commenced; and ought to have commenced by way of judicial review challenging the decision of the 2nd Defendant. I decline the 1st Defendant's invitation to interrogate the mode of commencement. The 1st Defendant is at liberty to challenge the mode of commencement of this action by filing the appropriate application. I will in this ruling confine myself on the application before me which is the application for an injunction and consider the sole question for determination posed above.
- 5.3 In determining the question posed in this matter, it is imperative that I first consider relevant principles that relates to the grant of an order of injunction. These principles are found in the celebrated case cited by all the parties of **American**

*Cyanamid Company v Ethicon Limited*¹ which was cited with approval in our jurisdiction in the case of *Shell and BP Zambia v Conidaris and Others*². The Supreme Court opined in that case that in resolving whether the grant of an injunction is necessary or not, the Court has to consider the three basic principles summarized as follows:

1. *That there must be a serious action to be tried at the hearing.*
2. *That there is a clear right of relief and that the Applicant has a good arguable claim to the interest he seeks to protect and*
3. *That the Applicant would suffer irreparable harm or injury that cannot be atoned for by payment of damages.*

5.4 Furthermore, I am mindful that this Court has discretionary power under Order 27 of the High Court Rules to grant an injunction. However, this power should be exercised judiciously, with care, caution and proper sense of responsibility. In the case of *Towela Akapelwa (Suing as Induna Ineta) and three others v Josiah Mubukwanu Litiya Nyumbu*⁴, the Supreme Court guided that: *“Judicial discretion is itself a power which inheres in a judge. It is an armour which a judge should employ judiciously to arrive at a just decision. The same should not be left out to the whims and caprices of a party to the action”*.

5.5 Therefore, the grant of an injunction ought not to be issued unless there are circumstances that call for their grant. The Supreme Court aptly opined in the case of *Turkey Properties v Lusaka West Development Company*³ that: *“An injunction should not be*

used to the advantage of one party but to keep the status quo until the matter is decided at trial without prejudicing either party's right".

5.6 Furthermore, the Supreme Court in the case of ***Whidden Kanugwe v Zambia Sugar PLC***⁵ guided that:

"The Applicant must establish a prima facie legal right to be protected by the injunction. He must also, after establishing the right, show that the balance of convenience is in his favour and that failure to give him an injunction will cause irreparable damage that cannot be atoned by damages".

5.7 In the current matter, I have perused the pleadings and all the affidavits evidence on record. I am mindful, at this stage, that I am restraint in an interlocutory injunction application to delve into the merits of the case and that I must not consider conflicting evidence on merit and assign liability or decide the rights of the parties. These matters are reserved for the main trial. I note, however, in order for this Court to consider whether or not there is a serious question to be tried at the hearing of this matter, it is necessary that I consider the relation between the Plaintiffs and the 2nd Defendant in this matter.

5.8 It is clear from the affidavit evidence and exhibit marked "PM1" that the Plaintiffs right of claim over the disputed trading site Munyaule markets stems from the letter addressed to the Commanding officer of Lusaka division, informing the addressee that the 2nd Defendant has secured a trading site

opposite City Market, the middle premises along Mumbwa road which range from City market to Mumbwa road junction which premises shall be used as “permanent trading site” for the chachaha marketers trading along the road side. Furthermore, a critical examination of the affidavit evidence marked “PM4” which is an offer of a trading place addressed to Maggie Nonde reveals that the conditions of the offer among others was limited to construction of the stalls inconformity with the design approved by the 2nd Defendant; abide by all council regulations and that dormant slots or stall to be repossessed after three months without notice. It is my firm view that, it is clear from the critical examination of the contents of the evidence “PM1 and PM4” that the 2nd Defendant was in effect giving the Plaintiffs “licensee” an authority to use Munyaule trading site which authority prevented the Plaintiffs from being treated as trespassers. To me, this authority granted to the Plaintiffs to trade in Munyaule market did not imply any grant of any interest in the land other than the Plaintiffs trading in Munyaule markets. I therefore, come to the conclusion that the true nature of the relationship between the Plaintiffs and the 2nd Defendant was that of licensor and licensee. Meaning that without the 2nd Defendant’s authority granting the Plaintiffs a license to trade at Munyaule market, the Plaintiffs would be trespassers. I am mindful that at this stage of the proceedings, I am precluded to consider the merit of the case, as the same

must be interrogated at trial where the burden and standard of proof will play a central role.

5.9 I shall begin by considering the question whether, the Plaintiff has established a prima facie legal right to be protected by the injunction. The 2nd Defendant have vehemently argued that the 2nd Defendant is constitutionally under Article 147 of the Constitution as amended and the Markets and Bus Station Act to manage and operate, own all markets and bus station within their jurisdiction. From the evidence on record, it is a fact that the 2nd Defendant is constitutionally and statutory mandated to manage and operate markets within their jurisdiction. In fact, section 8 of the Market and Bus Station Act provides that the 2nd Defendant in consultation with the Minister may demolish, reconstruct, abolish, close or move a market or a bus station and before demolishing, reconstructing, abolishing and closing or moving a market or bus station, notify in writing, any person who is managing the market or bus station. Where a local authority closes a market or bus station, a lessee or any agent of the lessee shall not keep the market or the bus station open or permit the market or bus station to be open.

5.10 Though of persuasive value, the House of Lords in the case of *Shelly v London County Council*⁶ in discussing the effect of the words “general management, regulation and control of houses” provided by a local authority held that:

“Management must in my view include a right to terminate the tenancy so far as the general law allows, i.e. after due notice. It is to my mind one of the important duties of management that the local body shall be able to pick and choose their tenants at will. It is true that an ordinary private landlord cannot do so, but local authorities who have wider duties laid on them may well be expected to exercise their powers with discretion and in any case the wording of the Act seems to me necessitate such construction”.

5.11 I am satisfied that the 2nd Defendant under the Market and Bus Station Act, the 2nd Defendant with the approval of the Minister, may establish markets and bus stations. Also, that the 2nd Defendant may enter into public private partnerships, with the prior approval of the Minister given in writing not longer than a period of fourteen years. Furthermore, the Urban and Regional Planning Act, the Public Health Act and any other relevant written law apply to the planning, sitting and construction of markets and bus stations. I therefore, agree with the Defendants that the 2nd Defendant can terminate a licensee by resolution. In this matter, am also satisfied that the 2nd Defendant exercised their powers in accordance with the Markets and Bus Station Act and with principles of natural justice by informing the Plaintiffs sufficient time to relocate Munyaule trading site to pave way for re-development.

5.12 It is my considered view that the 2nd Defendant is by statutory powers mandated to manage and operate markets within their jurisdiction. Also, that Munyaule markets is managed and

operated by the 2nd Defendant. I am also convinced by the pictorial evidence of the Plaintiff marked "PM5" showing the notice to vacate and exhibit marked "PM3" showing the barricaded Munyaule Market which shows that the injunction sought and intended to prevent by the Plaintiffs had already occurred. This to me, clearly shows that there is no status quo to prevent in the first place when the interim injunction was sought and it is at this stage unrealistic to restrain the 2nd Defendant from re-developing Munyaule Market as the 2nd Defendant is by statute mandated to manage and control all markets in Lusaka. The Defendant cannot be regarded as a trespasser who have no rights of occupation to Munyaule Market. Thus, cannot be said to have encroached or trespassed upon the Plaintiffs alleged trading site.

5.13 Not prejudicing the Plaintiffs success at trial of this matter, it is therefore, my firm view that the Plaintiffs affidavit evidence on record does not satisfactory demonstrate that the Plaintiff's right to relief sought is clear, nor does it show on the "face of it" a strong likelihood of success at trial. The net effect of this is that I shall not proceed to the next stage and consider the balance of convenience. It is a fact from the evidence on record that the 1st Defendant has a 14 years lease with the 2nd defendant for modernize or redevelopment of Munyaule Market. This evidence to me, is satisfactory to form a decision that the risk of injustice if the injunction is granted to the Plaintiffs outweighs the risks of injustice if the injunction is

denied. Hardship or inconvenience to the Defendants which damages cannot compensate is likely to be caused to the Defendant by granting the injunction to the Plaintiff.

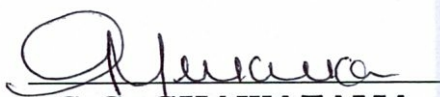
5.14 As stated above, I reiterate the point that Interim injunction should only be granted where the right to relief is clear and it is necessary to protect a Plaintiff against irreparable injury. Irreparable injury is injury that cannot be atoned for by an award of damages and cannot possibly be repaired. In the current matter, it is my considered view that the Plaintiffs are not exposed to irreparable injury.

5.15 It is my considered view that the application for interim injunction is devoid and destitute of any merit. I have no hesitation in forming a firm opinion that this matter is not a fit and proper case to grant an order of interim injunction.

5.16 I further order that costs of this application shall be in the cause.

5.17 Leave to appeal to the Court of Appeal is hereby granted.

DELIVERED AT LUSAKA THIS 12TH DAY OF JUNE, 2024.


G.C. CHAWATAMA
HIGH COURT JUDGE