

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY**

2024/HP/0949

HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

**AGNESS ZULU
ROSY ZULU**

AND

**SHADRECK CHILUFYA
THERESA CHIBWE
ATTORNEY GENERAL**



**1ST PLAINTIFF
2ND PLAINTIFF**

**1ST DEFENDANT
2ND DEFENDANT
3RD DEFENDANT**

Before the Honourable Mrs. Justice R. Chibbabbuka on the 5th day of February, 2025

For the Plaintiffs: Messrs Chonta, Musaila & Pindani Advocates

For the 1st & 2nd Defendants: Messrs Arnold Kaluba & Associates

RULING

Cases referred to:

1. *Shepherd Homes Limited v Sandham* (1971) Ch.340
2. *Msanzya Paul and another vs Mrs Annah C. Mwape and Another SCZ Appeal No. 25/2007,*
3. *David Nzooma Lumanyenda and another vs chief Chamuka and Kabwe Rural District Council and Zambia Consolidated Copper Mines Limited* (1989-89) ZR 194
4. *Mwenya and Randee V Kapinga* (1998) S.J.12 (S.C)
5. *Hina Furnishing Lusaka Limited Vs Mwaiseni properties limited* (1983) ZR 40
6. *American Cyanamid Co vs Ethicon* (1975) A.C 396
7. *Shell and BP (Z) Ltd vs Conidaris and Others* (1975) ZR 174
8. *Hongling Xing Xing Building Company Limited vs Zamcapital Enterprises Limited* (2010) ZR 30
9. *Communications Authority vs Vodacom Zambia SCZ Judgment No. 21 of 2009*
10. *Tommy Mwandalema vs Railway Board* (1978) Z.R 65
11. *Zimco Properties Limited vs LAPCO Limited* (1988-1989) ZR 92
12. *Preston vs Luck* (1884) 27ChD 497
13. *Turnkey Properties vs Lusaka West Development Company Ltd, BSK Chiti (sued as receiver) & Zambia State Insurance Corporation Limited* (1984) ZR 85

14. case of *Doctor J.W Billingsley vs J.A Mundi Mundi* (1982) ZR 11
15. *Gideon Mundanda vs. Timothy Mulwani and Others* (1987) ZR 29

Legislation referred to:

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

The Rules of the Supreme Court of England, 1999 edition.

1.0 Introduction

This ruling pertains to the plaintiffs' application for an interim order of injunction, which was filed on 4th July, 2024, by summons made pursuant to *Order 27 of the High Court Rules, Chapter 27 of the Laws of Zambia*, as read together with *Order 29 Rule 2 of the Rules of the Supreme Court of England, 1999 edition.*

2.0 The Plaintiffs' Affidavit in Support

The plaintiffs jointly deposed to an affidavit filed on even date as the summons. They deposed that in or around 1993, their biological father, Patson Zulu, now deceased, and then employed as Director of works and deployed at Chongwe District Council was offered property namely Lot No. 8522/M/ off Ngwerere Road, Ngwerere, Lusaka for agricultural use, which offer he accepted. Around August, 1995, the deceased applied to the Lusaka Province Planning Authority for permission to develop the said property. The deceased planted different fruit trees, dug a well and built a two (2) roomed house on the said property. He further put caretakers to look after the farm. The deceased and the plaintiffs used to conduct different agricultural activities on the property over the years.

Around 2000, the deceased died intestate leaving behind the plaintiffs among others as beneficiaries of his estate which included the property in question. The plaintiffs' sibling, Emmanuel Zulu, went to reside on farm Lot No. 8522/M and remained there for many years during which he was conducting seasonal farming activities and extended the house built by the deceased from two (2) to four (4) rooms. He resided on the property between 2001 to 2008 during which

time he says the 2nd defendant used to go and buy cassava leaves at the farm from him. There were no adverse claims over the property by anyone else. After Emmanuel Zulu moved out of the property, he rented it out to a bricklayer working in the surrounding farms. After the said tenant moved out, the property became vacant prompting the plaintiffs' siblings, Blessington and Emmanuel Zulu to engage the 1st defendant, who is the 2nd defendant's husband, as caretaker of the property. The 1st defendant was being paid a monthly allowance by the plaintiff's family as caretaker of the property. In 2016 the plaintiffs' siblings and Administrators of their father's estate Elisha and Patricia Zulu notified the Commissioner of Lands' office of their desire to have the certificate of title for Lot No. 8522/M issued in the plaintiffs' names.

The Commissioner of Lands generated a new offer letter dated 13th August, 2018 to the plaintiffs Agness Zulu and Rosy Zulu, which they accepted. Survey diagrams were processed by the office of the Surveyor General, a Lease agreement was also typed and signed by the plaintiffs and they continued pursuing the issuance of a certificate title for Lot No. 8522/M. The portion of land in issue was developed and ground rent was always being paid by the plaintiffs and the Administrators of Patson Zulu's estate. The Ministry of Lands wrote a letter dated 9th October, 2020 to the 1st and 2nd defendant informing them that the Ministry of Lands had created a problem over the plaintiffs' property by erroneously creating Lot No. 8607/M on the already existing Lot No. 8522/M which issue was only recently resolved when the Ministry of Lands cancelled Lot No. 8607/M.

In 2020, the plaintiffs demanded that the 1st and 2nd defendants vacate Lot No. 8522/M which the said defendants refused. The 1 and 2nd defendants claimed ownership of the property and fraudulently started processing a certificate of title. The 1st and 2nd defendant through misrepresentation to the Ministry of Lands that the property was unallocated and vacant caused Lot No. 8522/M to be re-numbered as Lot No. 8607/M, which act is illegal and an encroachment

on Lot No. 8522/M. The plaintiffs complained to the Ministry of Lands upon learning of the 1st and 2nd defendants maneuvers and the 3rd defendant's action of re-numbering their property as Lot No. 8607/M. In contradiction to the letter of 9th October, 2020, the Commissioner of Lands, who was newly appointed, issued an invitation to treat to the 1st and 2nd defendants for the already cancelled Lot No. 8607/M. The plaintiffs discovered, in February, 2024, that the defendants acting in collusion generated an offer letter again for the already cancelled Lot No. 8607/M in favour of the 1st and 2nd defendants, and the 3rd defendant, through the newly appointed Legal Officer, who wrote a letter dated 12th June, 2023 to the plaintiffs giving them 30 days to show cause why property Lot No. 8522/M should not be repossessed for failure to develop. The aforesaid letter was never delivered to the plaintiffs who only learnt of its existence on 26th September, 2023. The plaintiffs instructed their lawyers to respond which they did but have not received a response from the Legal Officer.

Lot No. 8522/M was already developed but furthers developments could not be made as the 1st and 2nd defendants had illegally occupied it. The 1st and 2nd defendants have continued to make adverse claims to the property and also started building a bigger house engulfing the 4 rooms already built by the plaintiffs' deceased father and siblings. The 1st and 2nd defendants further started digging and selling gravel to the public for financial gain thereby defacing the land.

The defendants' actions are illegal, amount to trespass and an infringement of the plaintiffs' right to ownership of property and quiet possession. The plaintiffs have suffered loss and damage and unless the 1st and 2nd defendants are restrained, they will continue with illegalities to the plaintiffs' detriment.

2.1 The Plaintiffs' Skeleton Arguments

In support of the affidavit in opposition, the plaintiffs filed supporting arguments wherein counsel relied on the provisions of *Order 27 rule 1* of the *High Court Rules, Chapter 27 of the Laws of Zambia* and *Order 29/L/1* and *Order 29/1A/2* of the *Rules of the Supreme Court of England, 1999*.

Counsel further referred to the case of **Shepherd Homes Limited v Sandham**¹ wherein Megarry J stated that the general guidelines for the determination of an application for the mandatory interlocutory injunction being;

- a) The applicant's case has to be unusually strong and clear before a mandatory injunction will be granted.
- b) In a normal case, the court must inter alia feel a higher degree of assurance that at the trial, it will appear that the injunction was rightly granted. The court stressed that the required degree of assurance was a higher standard than was required for a prohibitory injunction i.e. higher than the prima facie case which applied before the American Cyanamid case.
- c) The balance of convenience on the need to balance the risk of doing an injustice.

Counsel further referred this court to the case of **Msanzya Paul and another V Mrs Annah C. Mwape and another**² wherein the Supreme Court held that;

"The Learned trial Judge pointed out that after all, the 2nd Respondent had already issued a certificate of title and that no claim of misrepresentation, fraud or mistake was made by the Appellants. Although the learned trial Judge went beyond the consideration for injunction, we agree that an injunction cannot issue against the 2nd Respondent because the certificate had already been issued. An injunction is intended to maintain the status quo not to change."

That in the case of **David Nzooma Lumanyenda and another vs Chief Chamuka and Kabwe Rural District Council and Zambia Consolidated Copper Mines Limited**³ the court held that no right by adverse possession can be acquired once land becomes the subject of a certificate or provisional certificate of title. Counsel relied on the case of **Mwenya and Randee vs Kapinga**⁴ for the argument that an award of damages cannot adequately compensate a party for breach of the contract for sale of an interest in a particular piece of land or of a particular house however ordinary. That in the case of **Hina Furnishing Lusaka Limited Vs Mwaiseni properties limited**⁵ an injunction was held to be an equitable remedy to be granted only in the court's discretion. The plaintiffs' case as indicated in the supporting affidavit meets all the requirements for the grant of an injunction. That no amount of damages can ameliorate the plaintiffs for the loss of their portion of land. The plaintiffs urged the court to grant their application as against the 1st and 2nd Defendants with costs.

3.0 The 1st and 2nd Defendant's Affidavit

In opposing the application, the 1st and 2nd Defendants filed an affidavit in opposition on 17th October, 2024. The 2nd defendant deposed that she is the niece of one Kennedy Chimfwembe who went missing sometime in 2010, and was by a judgment dated 23rd April, 2021 declared to be presumed dead. She was appointed administrator of the said deceased Kennedy Chimfwembe's estate on 14th May, 2021, which estate comprised the property known as Lot No. 8607. In 2008, 2 years prior to her uncle's disappearance, he had requested her to take occupation of his property as he was always travelling, unmarried and without children. Over the years, her and the 1st defendant have enjoyed quiet possession of the property known as Lot No. 8607/M until sometime in 2019 when trespassers started going onto the property. Upon the advice of their neighbours, her and the 1st defendant sought to secure their ownership of the property by applying to the Ministry of Lands that they be offered the land as beneficiaries of

Kennedy Chifwembe's estate. That she was prompted to obtain letters of administration for the foregoing purpose.

By a letter dated 19th May, 2022, the Ministry of Lands informed her that after verification with the survey department, it was discovered that L/8607/M was created on the same geographical location as L/8522/M, and that Lot 8607/M does not exist and would be cancelled from the system. She wrote letters to the Commissioner of Lands and Minister of Lands as a way of appeal. As far as she is aware, the Surveyor General was prompted to investigate the matter further at the direction of the Commissioner of Lands and the Minister. After the investigation, she and the 1st defendant were then issued with an offer letter for Lot No. 8607 which they accepted and satisfied all conditions precedent contained in the offer letter.

She and the 1st defendant refused to vacate the property as they legally occupy it as beneficiaries of the estate of Kennedy Chifwembe, and they have not fraudulently caused the renumbering of Lot No. 8522/M as alleged. It is not true that she used to go to Lot Not 8522 to purchase cassava leaves. Further she and the 1st defendant have never been caretakers of Lot No. 8522/M as alleged. She and the 1st defendant do not know Emmanuel and Blessington Zulu. That she and the 1st defendant started building a bigger house to comply with the requirement in the offer letter that they were obliged to develop the property within 30 days of acceptance of the offer letter. The building was done with the approval of the relevant authorities. The quarrying activities were largely undertaken with the view of levelling the land in order to make the cost of developing the property less expensive.

3.1 The 1st and 2nd Defendant's Skeleton Arguments

The 1st and 2nd defendants filed skeleton arguments wherein counsel argued that the **American Cyanamid Co vs Ethicon**⁶ case lays down the principles that must be considered by the court when faced with an application for an injunction, and that the case before this court does not fit the criteria as the

plaintiff seeks to make a claim to Lot No. 8607/M which was lawfully issued to the 1st and 2nd defendants. That to be entitled to an injunctive remedy, it must be shown that there is a serious issue to be tried as espoused in a plethora of cases such as the cases of **Shell and BP (Z) Ltd vs Conidaris and Others**⁷, and **Hongling Xing Xing Building Company Limited vs Zamcapital Enterprises Limited**⁸. That an applicant must also show that he or she will suffer injury which is irreparable. Counsel relied on the cases of **Communications Authority vs Vodacom Zambia Limited**⁹ and **Shell BP Zambia Limited** for the argument.

Counsel further referred to the case of **Tommy Mwandalema vs Railway Board**¹⁰ in which the Supreme Court held that:

“The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his rights for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at trial.”

Counsel further argued that the court will look at where the balance of convenience lies when it finds that a party is likely to suffer an injury which cannot be atoned for by an award of damages. Counsel referred this court to the case of **Zimco Properties Limited vs LAPCO Limited**¹¹. That in granting an injunctive relief, the court’s objective is to maintain the status quo as espoused in the cases of **Preston vs Luck**¹² and **Turnkey Properties vs Lusaka West Development Company Ltd, BSK Chiti (sued as receiver) & Zambia State Insurance Corporation Limited**¹³. Counsel prayed that the order sought not be granted.

4.0 At the Hearing

At the hearing of the application on 11th October, 2024, counsel for the 1st and 2nd defendant applied for time within which to file opposing documents to the application which application was not objected to by counsel for the plaintiffs.

This court so granted the application for time and it was agreed that the court would proceed to make a determination based on the filed documents.

5.0 Decision of the Court

I am indebted to counsel for the arguments which I have taken into consideration.

It is well established that an order of interim injunction is a discretionary remedy that the court affords to a claimant to prevent irreparable injury pending the determination of the main matter. An injunctive order is not awarded as a matter of right but is awarded judiciously having regard to all the facts and circumstances of each and every case. Before I delve into examination of the facts to establish whether or not an award of an injunctive remedy is necessary, I must point out that the contents of both the affidavit in support and in opposition consist largely of issues that relate to the main matter. It is important for the parties and counsel to be reminded that injunction applications should not be used as a convenient opportunity for the summary determination in finality of an entire suit. The Supreme Court in the case of **Doctor J.W Billingsley vs J.A Mundi**¹⁴ held that:

“The application for an injunction should be treated as such and should not be taken as a convenient opportunity for the summary determination in finality of an entire suit....the purported final determination of all the issues at that stage was premature and incompetent and accordingly a complete nullity.”

The parties will do well to limit their facts and arguments to issues that ought to be determined at an interlocutory stage. Having stated the foregoing, I will now consider whether the application has merit or not. The **American Cyanamid Company vs. Ethicon** case sets out the tests that the court must apply when faced with an injunction application, the first being whether the facts raise a serious question to be tried. The dispute in this matter relates to property

ownership, particularly whether the land the plaintiffs allege to own, known as Lot No 8522/M is the same land that the 1st and 2nd defendant are in possession of and claim was offered to them by Ministry of Lands as Lot No. 8607/M. This is a serious matter that can only be resolved following presentation of evidence at a trial. The plaintiffs have further made grave allegations of fraud in their pleadings. I opine therefore that the facts of this matter reveal a serious question to be tried.

The next test to be considered is if damages would be an adequate remedy in the event of success in the matter. In the **Shell and BP. Zambia Limited** case, the Supreme Court defined irreparable injury to mean:

“injury which is substantial and can never be adequately remedied or atoned for by damages not injury which cannot possibly be repaired”.

If therefore, the plaintiffs herein can be adequately compensated by an award of damages and the 1st and 2nd defendants would be in a position to pay the damages, then an injunction should not be granted irrespective of how strong the plaintiffs’ case may appear to be. As I pointed out above, the subject matter before the court is land, and in matters which border on an interest in land, the law clearly establishes that damages cannot adequately compensate a loss of interest in a particular piece of land. This is the position of the law in a plethora of cases such as the case of **Gideon Mundanda vs. Timothy Mulwani and Others.**¹⁵

The plaintiffs allege that the 1st and 2nd defendants are building a bigger house engulfing the 4 rooms allegedly already built by the plaintiffs’ deceased father and siblings, and that the 1st and 2nd defendants are also digging and selling gravel to the public for financial gain thereby defacing the land. The 1st and 2nd defendants have admitted to building a house and to carrying out quarry activities on the land they claim to be Lot No. 8607/M. What should be determined by this court is whether the 1st and 2nd defendants’ actions are likely

to cause the plaintiffs harm which cannot be atoned for in damages. As it stands, it is uncertain whether the property in the 1st and 2nd defendant's occupation and possession is Lot No. 8607M or is Lot No. 8522/M. This ambiguity can only be resolved at trial. In light of the ambiguity, this court cannot afford not to grant the injunction because should it not grant one, the 1st and 2nd defendants may proceed with construction and quarry activities on land, and should it be established at trial that the property is Lot No. 8522, the plaintiffs may be prejudiced by the 1st and 2nd defendant's acts. The balance of convenience lies in granting the injunction. It is important for the court to maintain the status quo pending the determination of the main matter. In the English case of **Preston vs Luck**, the court stated as follows:

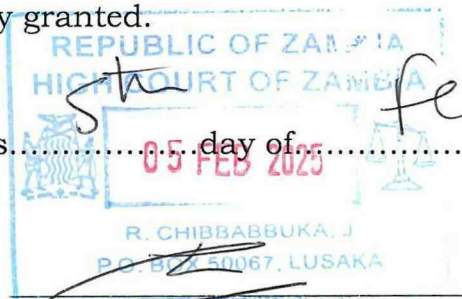
"The object of an interlocutory injunction is to keep things in status quo, so that if at the trial the plaintiffs obtain a judgment in their favour, the defendants will have been prevented from dealing in the meantime with the property in such a way as to make the judgment ineffectual."

The upshot of this application is that it succeeds. The 1st and 2nd defendants are ordered to not undertake any further construction or quarrying activities on the land they believe to be Lot No. 8706/M. The 1st and 2nd defendants are further stopped from alienating any piece of the said land until final determination of this matter.

Costs of this application are in the cause.

Leave to appeal is hereby granted.

Dated at Lusaka this..... day of.....2025



R.H Chibbabbuka

HIGH COURT JUDGE