

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

2025/HP/0058

BETWEEN:

BENVIC TRANSPORT LIMITED

AND

TENDAI CHIKWANDA



PLAINTIFF

DEFENDANT

Before the Hon. Mrs. Justice R. Chibbabbuka on the 10th day of February, 2025.

For the Plaintiff: Lennard Lane Partners

RULING

Cases referred to:

1. *Bernard Kutalika vs Dainess Kalunga*
2. *American Cyanamid Company vs Ethicon Limited (1975) A.C 396*
3. *Kekelwa Samuel Kongwa vs David Nkhata Appeal No. 102 of 2013*

Legislation referred to:

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

Other works referred to:

Atkin's Court Forms, 2nd edition, Volume 22 (1), 1996 issue

1.0 Introduction

This ruling pertains to the plaintiff's ex-parte application for an interim injunction, which was filed on 20th January, 2025, by summons made pursuant to *Order 27* of the *High Court Rules, Chapter 27* of the *Laws of Zambia* and *Order 29* of the *Rules of the Supreme Court of England, 1999 edition*.

3.0 The Plaintiff's Affidavit in Support

The plaintiff's application is supported by an affidavit deposed to by one Thomas Nkhoma, a Director in the plaintiff company. He deposed that sometime in November, 2024, the plaintiff showed interest in buying the property known as Farm 387A Salama Park, Lusaka. A due diligence was done at Ministry of Lands which revealed that Mrs. Rozita Katongo was the registered owner of the said property. The caretaker of the property when interviewed confirmed that Mrs. Rozita Katongo was the bonafide owner of the property. The parties executed a contract of sale and the plaintiff paid the said Rozita Katongo a total of K520,000.00 leaving a balance of K280,000.00 which she duly acknowledged.

The plaintiff obtained the certificate of title from Rozita Katongo, which certificate is in the plaintiff's custody. The parties proceeded to obtain state consent which was granted. That without any lawful justification, the defendant, through their advocates, wrote a demand letter wherein they directed the plaintiff to return the said property to the defendant purporting that she is the lawful administratrix of the estate of Chiti Mulenga who they claimed is the title holder yet the lands register printout indicates that the said property moved from the said Chiti Mulenga to Rosita Katongo sometime in August, 2024. The defendant is now trespassing on said the property.

2.1 The Plaintiff's Skeleton Arguments

In support of the application, the plaintiff filed skeleton arguments wherein counsel referred the court to the provisions of *Order 27* of the *High Court Rules* and *Order 29* of the *Rules of the Supreme Court of England (White book) 1999 edition*, as the law relied on to make the application. That the prime objection of an injunction is to retain the status quo and to ensure that the final decision of the court is not academic.

Counsel argued that an applicant seeking an order of injunction must show the following;

(a) Clear right to relief

The applicant has to demonstrate that they have a clear right to relief worth proceeding to trial. In *casu* the plaintiff is claiming to be a bonafide purchaser for value without adverse notice and submits is a clear right to relief.

(b) Whether Damages can suffice if the injunction is not granted

The case herein hinges on land and in a plethora of authorities, the Court has stated that loss of land can never be atoned for by way of damages, it is therefore necessary to grant the injunction to avoid loss of land.

(c) Balance of convenience

In this regard, the applicant ought to demonstrate that the balance of convenience tilts in their favour.

The caretaker has denied ever knowing the defendant, but only Rozita Katongo from whom Plaintiff bought the land.

From the foregoing, it is clear that the balance of convenience favours the plaintiff.

(d) Status Quo

The status quo has been that since paying 90% of the consideration, possession was passed from Rozita Katongo to the Plaintiff. The defendant clearly has never had possession of the property.

Counsel argued that on the foregoing the plaintiff has met the criterion required to be granted for an Interim Order of Injunction.

3.0 The Hearing

Pursuant to *Order 30 Rule 6A of the High Court (Amendment) Rules, 2020*, the hearing of this application was dispensed with.

4.0 The Decision of the Court

I have carefully considered the arguments advanced by the plaintiff herein. The plaintiff seeks an injunctive order which will require the defendant to refrain from doing specified acts pending the determination of the parties' rights. An order of injunction is discretionary and not awarded as a matter of right. The court in the case of **Bernard Kutalika vs Dainess Kalunga**¹ stated that the court's discretionary power to grant an injunction must be exercised judiciously, having regard to all the facts and circumstances of each and every case.

There are relevant principles and tests to be applied when a court is faced with deciding whether or not to grant an interim injunction which were set out in the **American Cyanamid Company vs Ethicon Limited**² case. Notably, that the court should address the question of whether or not on the facts raised there is a serious question to be determined at trial; whether damages would be an adequate remedy and the defendant is in a position to pay; and lastly where the balance of convenience lies. In *casu*, there is a serious question of

who the bonafide owner of the property in question is, which question can only be determined at trial. I therefore find that there is indeed a serious question to be tried.

Having found that there is a serious question to be tried, the next question is whether an award of damages can adequately compensate the plaintiff should the injunction not be granted and whether the defendant is in a position to pay. The authors of **Atkin's Court Forms, 2nd edition, Volume 22 (1), 1996 issue**, state at page 59 that:

“An interlocutory or interim injunction, whether granted unconditionally or on such terms as the court thinks just, may be granted if it appears to the court to be just and convenient to do so in order to safeguard the position of one of the parties until his rights can be finally determined at the trial of the action, and in particular to restrain any alleged wrongful act which, if not so restrained until the hearing, could not then be effectively remedied by the grant of an injunction or damages.” [Underling for court's emphasis]

An injunctive order will be granted where it is shown to the court that an award of damages will not effectively remedy the wrong that would be occasioned to the claimant. In the **American Cyanamid** case, Lord Diplock stated that:

“If damages in the measure recoverable at common law would be an adequate remedy and the defendant would be in a financial position to pay them, then no interim injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage.”

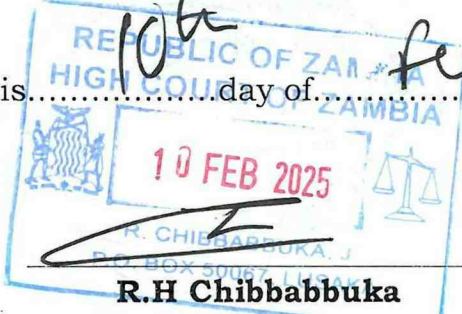
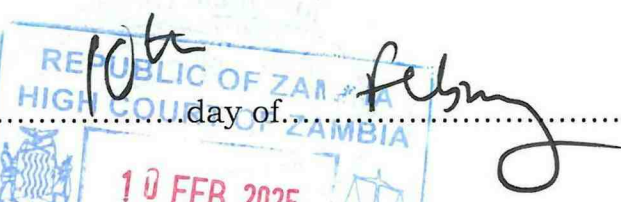
A careful perusal of the pleadings reveals that the plaintiff has claimed an award of general damages in his writ of summons. The question then is, what effect a claim of damages has on an application for an order of injunction? The

Supreme Court addressed this question in the case of **Kekelwa Samuel Kongwa vs David Nkhata**³ when it directed that where in a statement of claim the plaintiff acknowledges that damages would adequately compensate him for any loss of the use of the property in question, the burden was on the plaintiff to establish that the defendant has no financial capacity to pay the damages. The plaintiff in this matter having acknowledged in its statement of claim that general damages would suffice as compensation for the trespass, and having not established that the defendant is not in a position to pay the said claimed damages, it cannot be granted an injunctive remedy. I accordingly dismiss the injunction application.

The plaintiff will bear its own costs for the application

Leave to appeal is granted.

Dated at Lusaka this 10th day of February 2025



REPUBLIC OF ZAMBIA
HIGH COURT OF ZAMBIA
10 FEB 2025
R. CHIBBABBUKA, J.
PO BOX 50487, LUSAKA

R.H Chibbabbuka
HIGH COURT JUDGE