

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

2025/HP/0252

BETWEEN:

DAVIES KABUSWE

FRANK TAYALI

EZEKIEL SEKELE

CHILUFYA MUSOSHA

HAMALALA H. CHIYOTA

MWENYA KAPASA

EDNA CHIRWA

MONICA KAPASA

THERESA MWANSA

MANYAKI YAMBI

AND

NATIONAL PENSIONS SCHEME AUTHORITY

STAFF PENSION SCHEME TRUST REGISTERED TRUSTEES

1ST PLAINTIFF

2ND PLAINTIFF

3RD PLAINTIFF

4TH PLAINTIFF

5TH PLAINTIFF

6TH PLAINTIFF

7TH PLAINTIFF

8TH PLAINTIFF

9TH PLAINTIFF

10TH PLAINTIFF

DEFENDANT

Before the Honourable Mrs Justice Ruth Chibbabbuka on the 30th day
of December, 2025

For the Plaintiffs:

Mr V.K Luswili, Messrs Leonard Tembo Legal
Practitioners

For the Defendant:

Mr L. Mwamba & Mr B. Stephen, Messrs
Mwamba Milan Advocates

RULING

Cases referred to:

1. *Timothy Mwendalema Vs Zambia Railways Board* (1978) Z.R 65
2. *Furnishing Lusaka Limited Vs Mwaiseni Properties Limited* (1983) Z.R 40
3. *Zambian National Commercial Bank Plc & Others Vs Courtyard Hotel Limited* (Appeal No. 141 of 2015)



4. *MM Integrated Steels Mills Limited VS African Tasing Limited and Others Appeal No. 47/2018*
5. *Kekelwa Samuel Kongwa Vs David Nkhata Appeal No. 102 of 2013*

Legislation referred to:

Rules of the Supreme Court (White Book) 1999 Edition
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

1.1 This is a ruling pertaining to an application to discharge an order of an interim injunction, that was granted *ex parte* on the 21st February, 2025. The application was filed on 18th March, 2025, by summons made pursuant to *Order 29 Rule 1A/33 of the Rules of the Supreme Court of England, 1999 Edition (White Book)* as read together with *Order 27 Rule 4 of the High Court Rules, Chapter 27 of the Laws of Zambia*.

2.0 The defendant's affidavit in support

2.1 In the affidavit in support of even date, Isaiah Zimba the Operations Manager for the defendant avers as follows: The defendant is the owner of the premises known as Plot F377a/15/B/2 and it entered into individual lease agreements for the respective flats on these premises with each of the plaintiffs in this action. In September, 2024 the defendant advertised the said property for sale as a single unit.

2.2 On the 21st February, 2025 the plaintiffs commenced this action seeking inter-alia an order for specific performance. The plaintiffs obtained an *ex parte* order of injunction restraining the defendant from selling the said property. When the defendant received the said process, it decided to review the rental status of each plaintiff and discovered that the plaintiffs have rental arrears for each of their respective properties as evidenced in the Rent Collection Report marked "IZ1" exhibited in the said affidavit in support. The

plaintiffs did not disclose in their application for an order for an interlocutory injunction the fact that they owe rental arrears to the defendant.

3.0 The defendant's skeleton arguments

3.1 In support of this application the defendant filed skeleton arguments of even date wherein it made reference to *Order 27 Rule 4* of the *High Court Rules* in the *High Court Act, Chapter 27* of the *Laws of Zambia* and *Order 29 Rule 1A/33* of the *Rules of the Supreme Court* for the jurisdiction of this court to discharge the *ex parte* order. *Order 29 Rule 1A/33* of the *Rules of the Supreme Court* states that:

“Discharge of injunction

An injunction granted ex parte may on sufficiently cogent grounds be discharged or waived on an application itself made ex parte.

If on hearing of a motion by a plaintiff for an injunction, or, injunction in the alternative, to continue an interim injunction already obtained ex parte, it appears that the interim order was irregularly obtained by suppression of facts, the Court may discharge the ex parte order without any cross notice of motion for that purpose by the defendant; though it may grant the injunction asked for;”

3.2 Counsel argued that the plaintiffs obtained an *ex parte* order of injunction by the suppression of facts and their non-disclosure is a cogent ground for discharging the said *ex parte* order of injunction. Reference was also made to the case of **Timothy Mwendalema Vs Zambia Railways Board**¹ where it was held that where there is non-disclosure of material facts at the time of obtaining an *ex parte* injunction, the same would be discharged.

3.3 It was counsel's considered view that the rationale for this position is that an injunction is an equitable remedy and thus he who seeks it must come with clean hands and a failure to disclose material facts means that the applicant has come with soiled hands. Counsel also referred to the case of **Furnishing Lusaka Limited Vs Mwaiseni Properties Limited**² where it was held that a tenant who is in breach of his obligations is not entitled to an injunctive relief. Reference was also made to the case of **Zambian National**

Commercial Bank Plc & Others Vs Courtyard Hotel Limited³ for the argument that a party cannot be entitled to an equitable relief when that party is in breach of their obligations.

3.4 On the basis of the foregoing arguments, counsel prayed that this Court discharge the said *ex parte* order of injunction.

4.0 The plaintiff's affidavit in opposition

4.1 The plaintiff's filed an affidavit in opposition on the 30th April, 2025 deposed to by Davies Kabuswe on behalf of the plaintiffs. The gist of that affidavit is that the plaintiffs commenced this action to prevent the defendant from bidding and selling the property and not about rental arrears. That some of the said rental arrears claimed were not due before the 21st February, 2025 when the action commenced. The plaintiffs have been sitting tenants for more than 20 years.

5.0 The plaintiff's skeleton arguments

5.1 In their skeleton arguments counsel for the plaintiffs argued that there is no connection between the purported outstanding rentals arrears and their claim to be entitled to have to be given the right of first refusal. To buttress this arguments reference was made to the case of **MM Integrated Steels Mills Limited VS African Tasing Limited and Others⁴** where the Court held that:

"we have considered whether the Court ought to have granted the injunction notwithstanding the non-disclosure of material facts. The issue is whether the appellant's right to relief is clear or there are serious questions to be tried."

5.2 Counsel argued that the plaintiffs have demonstrated that they are entitled to the relief sought and that they also disclosed all material facts relating to the matter in the cause of action. That the defendants were advancing a claim that is irrelevant to this matter and not subject of contention. It was counsel's considered view that the plaintiffs were as such entitled to the injunctive relief as there was a serious question to be tried, that the balance of convenience lay in favour of granting the plaintiffs the said

injunction and that damages would not be an adequate remedy as the plaintiffs have been occupants of the properties for over twenty years.

5.3 On the basis of the foregoing arguments, counsel prayed that this Court maintains the order for an injunction.

6.0 The hearing

6.1 At the hearing counsel for the plaintiffs and the defendant both placed reliance on the affidavits filed and skeleton arguments. They both more or less reiterated their arguments as advanced in their skeleton arguments so I will not reproduce the same.

5.0 The decision of the Court

5.1 I have carefully considered the arguments advanced by the plaintiffs and the defendant herein. The main argument advanced by the defendant is that the plaintiffs having sought an equitable remedy from this Court by way of an injunction, did not come to Court with clean hands. This is because the plaintiffs did not disclose that they were in rental arrears in the properties which they want this Court to find that they have the right of first refusal as the defendant has gone ahead to advertise the said properties as a unit for sale. The plaintiffs on the other hand have argued that the issue of rental arrears is not in contention and is irrelevant to the matter at hand. That for purposes of the injunctive relief what is of importance is that they have a clear right to relief.

5.2 In considering the foregoing arguments, I agree that the non-disclosure of material facts in relation to the non-payment of rental arrears is critical to the granting of an injunction in this matter. While the plaintiffs have attempted to show that they have a clear right to relief which I agree with, it is imperative that parties must come to Court with clean hands. It is trite that an injunction is an equitable remedy and in seeking an equitable relief it is imperative that the maxims of equity must be observed. In the case of **Furnishing Luska Limited VS Mwaiseni Properties Limited** it was held as follows:

"In the case of an interlocutory injunction or for that matter any injunction, one of the matters that the Court has to consider is the

conduct of the parties. A plaintiff who complains of the defendant's breach of contract will not obtain an injunction if he too is in breach. Equally, he who comes into equity must come with clean hands. Thus, a contracting party who fails to perform his part cannot obtain an injunction to restrain a breach of covenant by the other party.

In this case it is evident that the plaintiff having failed to pay the agreed rent in time had breached one of the principal covenants of the agreement for lease; and therefore, he himself was in breach of the contract when evicted. Equally up to the time of hearing this application, the plaintiff has obviously not settled the arrears of rent, which is a substantial amount...In view of the above, I cannot see how I could be justified in finding that the plaintiff, in seeking equity, has come to this Court with clean hands. The maxims "He who comes to equity must come with clean hands," and "He who comes to equity must do equity", in my considered view, cannot be interpreted very flexibly..."

5.3 In adopting the aforementioned position, equally in *casu*, I find that the plaintiffs have not come to Court with clean hands and neither have they done equity while seeking for equity from this Court. As such I do not accept the curious arguments advanced by counsel for the plaintiffs that the issue relating to the non-payment of rent is not material to these proceedings. Without going into the main merits of the matter that is to be determined at trial, the non-payment of rent by the plaintiffs, will be one of the essential elements that will be considered by the Court in determining the right of first refusal that the plaintiffs claim to have as against the defendant. As such I find that the non-disclosure of this material particular is fatal to the plaintiffs claim to an injunctive relief.

5.4 Additionally in relation to the argument that an award of damages would not be adequate to compensate the plaintiffs, a perusal of the plaintiff's claims reveals that the plaintiff is claiming damages for breach of contract. The Supreme Court in the case of **Kekelwa Samuel Kongwa Vs David Nkhata**⁵ held that where in a statement of claim the plaintiff acknowledges that

damages would adequately compensate him for any loss or inconvenience, then an injunction should not be granted. The Supreme Court also went on to hold in the **Kekelwa Samuel Kongwa** case that the burden was on the plaintiff to show that the defendant had no financial capacity to pay the damages.

5.5 Similarly in the **American Cynamid** 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.”

5.6 With the foregoing authorities in mind it is clear that an injunction cannot be granted in this case as the plaintiffs have acknowledged that damages will suffice for whatever loss or inconvenience, they may suffer by making a claim for damages as against the defendant in their writ of summons and statement of claim. Further, the plaintiffs have not shown this Court that the defendant is not in a financial position to pay the said damages. Accordingly, the balance of convenience does not tilt in favour of the plaintiffs.

5.7 The upshot of the matter is that the defendant’s application succeeds and the *ex parte* order of injunction granted on the 28th February, 2025 is forthwith vacated and the injunction application is accordingly dismissed. Costs for this application are for the defendant to be taxed in default of agreement. An order for directions shall now ensue.

Leave to appeal is granted.

Dated the..... day of 2025

