

Librall-1

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

2023/HP/1284

BETWEEN:

ALD PLANT AND FLEET MANAGEMENT LIMITED

EVANS NG'AMBI AND 28 OTHERS

AND

ROSEMARY PHILOMENA BUTT

THE ATTORNEY GENERAL

KAFUE TOWN COUNCIL



1ST PLAINTIFF

2ND PLAINTIFF

1ST DEFENDANT

2ND DEFENDANT

3RD DEFENDANT

**BEFORE HON. MRS. JUSTICE G.C. CHAWATAMA
ON 19TH DECEMBER, 2023 - IN CHAMBERS**

For the Plaintiff : Mr. M.C Sitali & Ms. K. Phrshotam both of
Messrs. K. P Martin Legal Practitioners
For the 1st Defendant : Mr. B.B Mulenga & Daka & M. B. J Mulenga
of - Messrs. Barnaby Chitundu & Kunga Advocates
For the 3rd Defendant : Ms. Mwatwa - In-House Counsel

RULING

CASES REFERRED TO:

1. Chief Mwanatete and Innocent Munyikwa Lushato (2014/HP/1043)
2. Turnkey Properties v Lusaka West Development Limited and other (1984) Z.R 85
3. Finsbury Investments Limited and Others v Antonio Ventriglia SCZ No. 17 of 2013
4. Mwenya and Rande v Kapinga (1998) S.J. 12 (S.C.)

LEGISLATION AND OTHER WORKS REFERRED TO:

1. Order 27 rule 1 of the High Court Rules and Order 29 rule 1 of the Rules of the Supreme Court (White Book) 1999 edition.
2. The High Court Act Chapter 27 of the Laws of Zambia.
3. Halsbury's Laws of England 4th edition, volume 24

1.0 INTRODUCTION

1.1 This is a Ruling on an application by the Plaintiffs for an order of interim injunction to restrain the Defendants by themselves, servants, agents or otherwise whomsoever from evicting, ejecting, harassing, interfering, selling, alienating, deposing off any portion of Lot No. L/23607/M Kafue or taking any further developments Lot No. L/23607 Kafue until final determination of this matter.

2.0 BACKGROUND

2.1 The brief background of this matter, in so far as it is relevant to this application was that the Plaintiffs on 25th July, 2023 by way of writ of summons commenced this action seeking among others the following reliefs:

- i. A declaration that certificate of Title No. CT_134991 relating to Lot No.23607/M was fraudulently obtained by the 1st Defendant;*
- ii. An order directing the chief Registrar of Lands and Deeds Registry to cancel certificate of Title No. CT_134991 relating to Lot. L/23607/M Kafue on the grounds that the said Lot was adjudged in the High Court Judgement of 4th August 2021 under clause No. 2015/HP/0282 to be situated within Forest Reserve 69 of Kafue.*

- iii. **An Order directing the Commissioner of Lands to withdraw any and all offers relating to Lot No.23607/M of Kafue;**
- iv. **Damages for illegal ejectment and harassment from their respective farms and mine.**
- v. **Punitive and exemplary damages.**

3.0 THE APPLICATION

3.1 The Plaintiffs on the 4th August 2023 filed ex-parte summons for an order of interim injunction pursuant to **Order 27 rule 1 of the High Court Rules and Order 29 rule 1 of the Rules of the Supreme Court (White Book) 1999 edition. The Order 27 rule 1 of the High Court Rules** provides that:

“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.”

Whereas **Order 29 rule of the White Book** states that:

“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”

3.2 The Ex-parte summons was accompanied by an affidavit in Support and Skeleton arguments.

4.0 **AFFIDAVIT EVIDENCE**

4.1 The lengthy affidavit in support of the ex-parte summons for an order of interim injunction was sworn by David Mwale, a Director of the 1st Plaintiff. He deposed that on 6th December, 2012, the Ministry of Mines under the Mines Safety Department authorized the 1st Plaintiff to commence works on its quarry mine situated in Forest Reserve 69. As proof thereof, a copy of a letter from the Mines Safety Department was exhibited and marked **“DM1”**. That following the said confirmation of commencement of works, the 1st Plaintiff purchased mining equipment at a collective sum of USD 3,400,000 and has since proceeded to further develop the mine with an additional capital injection of about USD 600,00 bringing the total investment into the mine to USD 4,000,000. Photographs of the mining

equipment and development on the mine was exhibited and marked "**DM2**". Further that on the 18th January, 2019, the 1st Plaintiff obtained a small-scale exploration licence No 23390-HQ-SEL. A copy of the small-scale exploration licence was exhibited and marked "**DM4**".

4.2 It was the deponent further averment that in addition to the 1st Plaintiff, forest reserve 69 is inhabited by the 2nd Plaintiffs who have been farming in the area since the year 1975. Exhibit marked "**DM5**" a copy of a letter from the Kafue District Forest Office dated 27th November 2000 and receipts of payments made to the Forest Department was produced. That on the 12th October, 2016, the Commissioner of Lands offered Lot No. L/23607/M, Kafue to the 1st Defendant and on the 4th November, 2016, the Commissioner of Lands cancelled the offer letter of 12th October, 2016 relating to Lot No. L/23607/M on the basis that the said property was situated within Forest Reserve 69 and that it was illegal for the said land to be offered to the 1st Defendant. As evidence of the cancellation, a copy of a letter from the Commissioner of Lands dated 4th November, 2016 was exhibited.

4.3 It was averred that on the 21st April, 2017, the Commissioner of Lands advised the 1st Plaintiff's previous Advocates that Lot No. L/23607/M is situated within Forest Reserve 69 of Kafue. A copy of the letter from the Commissioner of Lands dated 21st April, 2017 was exhibited and marked "**DM8**".

- 4.4 Furthermore, that by copy of a letter from the Director of Forestry dated 14th June, 2007 exhibited and marked **“DM9”** Kafue Forest Reserve 69 has never been degazetted or excised.
- 4.5 The deponent averred that on the 25th February, 2015, the 1st Defendant commenced an action against the 1st Plaintiff in the High Court of Zambia under cause 2015/HP/282 for damages for trespass on the purported Lot No.23607/M. The basis of her claim was that by engaging in its mining activities situated within Forest Reserve 69, the 1st Plaintiff had trespassed on her land, thereby causing her damages. That at trial, the 1st Plaintiff defended the action and, on the 4th August, 2021, the High Court adjudged in favour of the 1st Plaintiff. Also, that the said Judgement has never been appealed against nor vacated by this Court. A copy of the Judgement was exhibited and marked **“DM10”**.
- 4.6 Furthermore that on the 12th October, 2016, the Commissioner of Lands offered Lot No. L/23607/M, Kafue to the 1st Defendant and on the 4th November, 2016, the Commissioner of Lands cancelled the offer letter of 12th October, 2016 relating to Lot No. L/23607/M on the basis that the said property was situated within Forest Reserve 69 and that it was illegal for the said land to be offered to the 1st Defendant and 3rd Defendant, the 1st Defendant has commenced selling portions of the purported Lot No. L/23607/M Kafue to third parties. Copies of the 3rd Defendant’s Council minutes indicating the names of the

purchasers of the parcels of land and invitation to treaty was exhibited and marked “**DM11**” and “**DM12**”. Also, that the 3rd Defendant has been interfering with the 2nd Plaintiff farming activities by ordering them to stop farming on the land. A stop order notice issued by the 3rd Defendant was exhibited and marked “**DM13**”.

- 4.7 That the deponent verily believes that unless an injunction is granted, the 1st and 3rd Defendants will likely sell and transfer all portions of Lot No. L/23607/M to third parties thereby causing the Plaintiffs loss and hardship. Also, that the 1st Plaintiff’s investment of over USD 4,000,000 is at risk of going to waste unless the Defendants are enjoined from selling and developing on the land.
- 4.7 Further that the status quo of the land should be preserved by way of an order of interim injunction so as not to render the proceedings nugatory in the event that the Defendants sell any portion of the land.
- 4.8 I granted the Plaintiffs an ex-parte interim injunction order on the 15th August 2023. The said order was granted pending the inter-parties hearing of injunction application.

4.8.1 AFFIDAVIT IN OPPOSITION

4.9 In opposing the interim injunction, the 1st Defendant filed an affidavit in opposition deposed by Simon Butt, a beneficiary of the estate of Rosemary Philomena Butt. The sum total of his affidavit was to the effect that Lot No. 23607/M Kafue is a private property issued with a certificate of Title No. 134991 and does not fall within Forest Reserve 69. Further that the Plaintiffs have encroached onto Lot No. 23607/M Kafue by conducting mining activities within the titled property. That the Plaintiffs claim that the property falls within the forest Reserve 69 when in fact not. Copies of the survey report of 2018 and 2022 confirming that Lot No.23607/M Kafue does not fall within forest Reserve 69 and that the Plaintiff have encroached on the 1st Defendant's property was exhibited and marked "**SB1**". Furthermore, the deponent averred that the purported authorization by the Ministry of Mines does not relate to the 1st Defendant's property Lot No.23607/M, Kafue.

4.10 It was also averred that the Plaintiffs are trespassers and illegal squatters who were once evicted but keep coming back. Exhibit marked "**SB2**" copies of writ of possession was executed but that the Plaintiff's stubbornness kept coming back.

4.11 That Lot No.23607/M, Kafue, was acquired as far back as 2001 at which time it was Lot No. 15178/M Kafue but was resurveyed to hive off the portion which was falling within Forest Reserve

69 and renumbered as Lot No.23607/M Kafue in 2015/2016. That following the discovering that a portion of Lot No. 15178/M Kafue fell within the Forest Reserve 69, the Commissioner of Lands called for the certificate of title relating to Lot No. 15178/M Kafue for cancellation and subsequent re-planning and renumbering, and issuance of a new certificate of Title to Lot No. 23607/M Kafue in favour of the 1st Defendant. Copies of the letters from the Commissioner of Lands were exhibited and marked **“SB3”**.

4.12 It was averred that the letter dated 4th November, 2016 and its attachments has never been shared with the 1st Defendant and that in any case exhibit marked **“SB1”** contains the true position to which a certificate of title No. 134991 dated 27th September 2022 was issued. The said certificate of title was exhibited and marked **“SB4”**. Furthermore, the letter of 4th November, 2016 was issued on an improper and ill basis as the attached copy does not confirm the alleged contents of the letter which made no reference to any survey report done by authorized personnel as it was not based on the Surveyor Generals report but the opinions of the author.

4.13 Furthermore, the deponent deposed that initially the 1st Defendant had only an offer letter in her names and the action under cause No. 2015/HP/282 failed for want of surveyor's report and survey diagrams to speak to the boundaries of Lot No.23607/M Kafue as their procession delayed and were only

availed in 2018 and 2022. Also, that the findings of the court were made in absence of crucial evidence of the surveyor's report on boundary verification of Lot No. 23607/M Kafue. Furthermore, that the offer letter of 12th October, 2016 has never been withdrawn from the 1st Defendant who has even been paying ground rent and that it is the basis on which the issuance of certificate of title No.134991 dated 27th September, 2022 in respect of Lot No. 23607/M, Kafue.

4.14 It deposed that a consent Order/Judgement can only be set aside by commencing a fresh action and that failure to appeal is inconsequential to this case and in any case the parties are not the same in this case. Also, that the judgment of 4th August, 2021 under cause No. 2015/HP/252 does not give the Plaintiff any right to conduct mining activities in Lot No.23607/M, Kafue and the failure to appeal is inconsequential.

4.15 Furthermore that 1st Defendant is a title holder of Lot No. 23607/M, Kafue and the Plaintiffs are strangers to the agreement between the 1st Defendant and the 3rd defendant to sell a portion of Lot No. 23607/M, Kafue as the Plaintiffs are trespassers and mere illegal squatters on Lot No.23607/M, Kafue.

4.16 It was averred that granting an injunction on the entire Lot No.23607/M Kafue will not only gravely prejudice the 1st

defendant but also all the innocent purchasers of portions of land.

4.16 **AFFIDAVIT IN REPLY**

4.17 The Plaintiffs filed an affidavit in reply on the 22nd September, 2023. The same was filed without leave of court. Although, the Defendants have not taken issue with the affidavit in reply, I shall not consider the same considering the fact that the facts relied upon in the affidavit in opposition have been raised before under cause No. 2017/HP/1131 and 2015/HP/0282 on the subject property. The Plaintiffs could easily anticipate and furnish the same in their affidavit in support. Though of persuasive value, in the case of *Chief Mwanatete and Innocent Munyikwa Lushato*¹, Chali J pronounced on the need to apply for leave to file an affidavit in reply at pages R3-R5 that:

“The application before me being an interlocutory injunction, was to be supported by at least one statutory affidavit. Further and as of right, the defendants were entitled to put in at least the one statutory affidavit they are entitled to. However, thereafter, a party had to apply for leave to file a further affidavit, the rationale for this is simply that a party putting in a first affidavit ought to frame it in such a way that it takes into account and covers all the facts relevant to the case. He ought not to anticipate being given a second opportunity to advance his case, except possibly for arguments on the evidence before the court.

Equally a respondent ought to do likewise to his affidavit in opposition. The practice is similar to that in the exchange of

pleadings where a party serves his statement of claim on the opponent who in response serves the defence and counter claim, if any. Under normal circumstances, the claimant will not be required to file any reply to the defence unless such defence raises issues which could not have been reasonably anticipated by the plaintiff.

In this case before me, the plaintiff filed the affidavit in reply without first having sought leave of the court. And counsel for the defendant had taken issue with that affidavit. In my view, I can only admit that affidavit on two grounds, one, that the facts or issues raised in the opposing affidavit could not have been reasonably anticipated by the plaintiff at the time he settled his affidavit in support of his application and two, that the issues and matters raised in the affidavit in reply are critical to a determination whether or not to grant the interlocutory injunction”.

5.0 SKELETON ARGUMENTS

5.1 Both Parties filed List of Authorities and Skeleton Arguments whose contents I shall not reproduce here but will take the same into consideration as I determine this application.

6.0 ANALYSIS AND THE DECISION OF THIS COURT

6.1 I have examined the record and the evidence adduced in this application. I have also given thoughtful consideration of the arguments by counsel for the parties, together with the authorities they cited.

6.2 From the onset, I note that the Plaintiffs and the 1st Defendant in this application delve much into issues relating to the main

matter. In this Ruling, I have declined the invitation to delve into the main matter and I have therefore restricted myself to consider the question whether or not to grant the application before me, so as to maintain the status quo of the parties.

6.3 I must also state that as observed by the Supreme Court in the case of *Turkey Properties v Lusaka West Development Corporation Limited and Others*² that:

“An injunction should not be used to advantage of one party, therefore, when an ex parte injunction is granted, the other party must be afforded an opportunity to be heard”.

It is for these reason that at the inter-parte hearing of this matter, I directed the Defendants to file the necessary response to this matter. I however note from the record that only the 1st Defendant filed his response.

6.4 In my view, the question for determination in this matter is whether or not this court should confirm the interim injunction granted to the Plaintiff. It is trite law that an ex parte injunction is a temporary order which is given subject to inter-partes hearing. The learned authors of *Halsbury’s Laws of England, paragraph 963* states that:

“An injunction will not usually be granted without notice, but if the court is satisfied that the delay caused by proceedings in the ordinary way might entail irreparable or serious mischief it may make a temporary order ex parte upon such terms as it thinks just”

Citing *paragraph 963 of the Halsbury's Laws of England*, the Supreme Court in the case of *Finsbury Investments Limited and Others v Antonio Ventriglia*³ simply put it that:

“An ex parte injunction is a temporary order and the Judge, who grants it, retains the discretion to dissolve it if, after hearing the opposing side, it becomes obvious that it should never have been granted at the ex-parte stage or that its continuation is no longer necessary.”

6.5 In the current matter, as rightly canvassed by both learned counsel in their respective skeleton arguments, in an application for an injunction there are two main issues to be considered. These are irreparable injury and the right to relief. The Supreme Court in *Turnkey Properties v Lusaka West Development Limited*, precisely summarized these two elements in the following words:

“In order to succeed, the appellants should have demonstrated that, not only was their right to relief clear, but above all that the injunction is necessary to protect them from irreparable injury”.

6.6 It can thus be seen that irreparable injury is the first and primary element. Irreparable injury was defined in the *Turnkey Properties* case as injury which is substantial and can never be adequately remedied or atoned for by damages. Also, that it is injury which cannot be possibly repaired.

6.7 The thrust of the Plaintiffs affidavit evidence under paragraphs 5 and 21 was to the effect that the 1st Plaintiff purchased mining equipment at a collective sum of USD 3,400,000 and developed the mine with an additional capital injection of about USD 600,000 bringing the total investment to USD 4,000,000. The 1st Plaintiff averred that the USD 4,000,000 is at risk of going to waste unless the defendant are enjoined from selling and developing on the land. On the strength of the case of **Turnkey Properties** cited above, it is my considered view that the 1st Plaintiff's investment of USD 4,000,000 is loss which can be adequately remedied or atoned for by damages. It is injury which can be possibly repaired and not irreparable. Furthermore, I am fortified by the Supreme Court case of **Shell and BP (Z) Limited v Conidaris** where the Supreme Court pronounced itself that an injunction will not be granted where damages would be an alternative adequate remedy to the injury complained of if the applicant later succeeds in the main action.

I am also mindful that in cases relating to land, the Supreme Court in the case of **Mwenya and Randee v Kapinga**⁴ guided that:

“The law takes the view that 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.”

However, in the current case, the Plaintiffs interest in the subject land is not premised on a breach of contract of sale. I

note from the affidavit evidence that Plaintiffs other than exhibiting the Small-Scale Mining licence, Investment Licence and claiming that the land in dispute falls under the Kafue Forest Reserve 69 has not produced any evidence whatsoever authorizing their occupation on the said land. Whereas, the 1st Defendant has a certificate of title relating to the disputed land. The law in **section 33 of the Lands and Deeds Registry Act** provides that:

A Certificate of Title shall be conclusive as from the date of its issue and upon and after the issue thereof, notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the President or otherwise, which but for Parts III to VII might be held to be paramount or to have priority; the Registered Proprietor of the land comprised in such Certificate shall, except in case of fraud, hold the same subject only to such encumbrances, liens, estates or interests as may be shown by such Certificate of Title and any encumbrances, liens, estates or interests created after the issue of such Certificate as may be notified on the folium of the Register relating to such land but absolutely free from all other encumbrances, liens, estates or interests whatsoever:

- (a) Except the estate or interest of a proprietor claiming the same land under a current prior Certificate of Title issued under the provisions of Parts III to VII; and*
- (b) Except so far as regards the omission or misdescription of any right of way or other easement created in or existing upon any land; and*
- (c) Except so far as regards any portion of land that may be erroneously included in the Certificate of Title, evidencing the title of such Registered Proprietor by wrong description of parcels or of boundaries.*

6.6 It is my firm view that although the Plaintiffs are seeking a declaration that the certificate of title No.-134991 relating to Lot No. 23607/M was fraudulent obtained by the 1st Defendant and also an order directing the Chief Registrar of Lands and Deeds Registry to cancel certificate of Title No. CT-134991 relating to Lot No. L23607/M Kafue on the grounds that the said Lot was adjudged in the High Court Judgement under cause No. 2015/HP/0282 does not in any way warrant this Court to exercise its discretion to grant an injunction to the Plaintiffs. I have taken judicial notice of the judgment of my learned sister Wanjelani J. in cause No 2015/HP/0282 where she made findings at page J14 and J15 that:

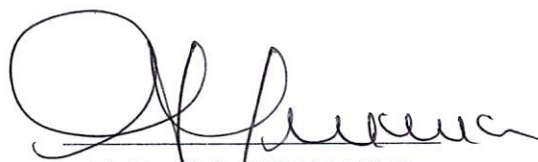
“The Commissioner of Lands, who is responsible for granting offers and certificate of title to land, has expressly stated that he cannot grant title to the subject property as it is in the forest reserve, in addition, the fact that land cannot be alienated and a certificate of title cannot be granted with respect to land in a forest reserve is acknowledged by the Plaintiff through Counsel as alluded to when surrendering the certificate of title in a letter dated 5th March, 2010..... presently, there is nothing on record to show if any further steps were taken by the Plaintiff and the Commissioner of Lands to resolve the issue as indicated in the letter dated 4th November, 2012.”

6.7 As stated above, in the current matter, the 1st Defendant has produced a certificate of title dated 27th September, 2022. To me, this appears to suggest that the misgivings surrounding correspondence of the 5th March, 2010 and 4th November, 2012 was resolved. Therefore, I do not see the prospects of successful litigation by the Plaintiff in this matter. This is more so that the subject property on similar facts involving the 1st Defendant has been subject of litigation before the High Court under cause no 2015/HP/0282 and 2017/HP/1131. It is my considered view that there is no serious question to be tried on the facts of this case.

6.8 My firm view is therefore that, it is not necessary in this matter to protect the Plaintiffs from irreparable damage. I accordingly refuse to confirm the ex-parte injunction granted on the 15th August, 2023.

6.9 Costs of this application shall be in the cause.

DELIVERED AT LUSAKA THIS 19TH DAY OF DECEMBER, 2023.



**G.C. CHAWATAMA
HIGH COURT JUDGE**