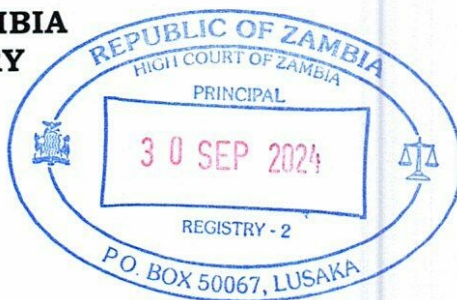


**IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2024/HP/0922



BETWEEN:

KENNEDY SIMBEYE**PLAINTIFF**

AND

RICHARD MULUSA**DEFENDANT**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA IN CHAMBERS THIS 30th
DAY OF SEPTEMBER, 2024**

For the Plaintiff : Mr. M.J. Katolo, Messrs Milner and Paul Legal Practitioners
For the Defendant : Mr. K. Wishimanga, Messrs AMW Legal Practitioners

R U L I N G

CASES REFERRED TO:

1. *Preston v Luck* 1884 27 CH D 497
2. *Shell & BP Zambia Limited v Conidaris and others* 1975 ZR 174
3. *American Cyanamid v Ethicon Limited* 1975 1 ALL ER 504
4. *Harton Ndove v National Educational Company of Zambia Limited* 1980 ZR 184
5. *Garden Cottage Foods Limited v Milk Marketing Board* 1984 AC 130
6. *Ahmed Abed v Turning and Metal Limited* 1987 ZR 86
7. *Zambia State Insurance Corporation Limited v Dennis Mulope Mulikelela* 1990-1992 ZR 18
8. *Hillary Bernard Mukosa v Ronaldson* 1993-1994 ZR 85
9. *VDF Property Management Limited v Vlaanderen ZMSC* 198 (24 August, 2016)

LEGISLATION REFERRED TO:

1. *The High Court Rules, Chapter 27 of the Laws of Zambia*
2. *The Rules of the Supreme Court of England, 1965, 1999 Edition.*

1. INTRODUCTION

- 1.1 In this application, the Plaintiff, Kennedy Simbeye seeks an Order of injunction restraining the Defendant, Richard Mulusa, whether by himself, his servants, agents or whomsoever from interfering with his property, known as L/SOLWE/10409074 pending determination of the matter or until further Order of the Court.
- 1.2 The application which was filed ex-parte on 27th June, 2024, was made pursuant to **Order 27 Rule 4 of the High Court Rules, Chapter 27 of the Laws of Zambia**, as read with together with **Order 29 of the Rules of the Supreme Court of England, 1965, 1999 Edition**, and was supported by an affidavit and a List of Authorities and Skeleton Arguments. I directed that the application be heard inter-partes.
- 1.3 When the application came up for hearing on 25th July, 2024, I adjourned the application to enable Richard Mulusa to file documents in opposition to the application. In that regard, Richard Mulusa was directed to file the documents in opposition by 12th August, 2024, while a reply would be filed by 19th August, 2024.
- 1.4 The affidavit in opposition was filed on 12th August, 2024, while the affidavit in reply and List of Authorities and Skeleton Arguments in reply were filed on 19th August, 2024.

2. BACKGROUND

- 2.1 Kennedy Simbeye commenced this action on 27th June, 2024 by Writ of Summons, which was accompanied by a

statement of claim and the other requisite documents claiming:

- i. An Order for the possession of the land otherwise known as property No L/SOLWE/10409070;*
- ii. A declaration that Richard Mulusa is not entitled to enter, cross, or build anything on Kennedy Simbeye's land, otherwise known as property No L/SOLWE/10409070;*
- iii. An Order of injunction restraining Richard Mulusa whether by himself, his servants, agents or whomsoever from interfering with Kennedy Simbeye's quiet enjoyment of the said land and from constructing, entering and doing anything on the said land pending determination of the matter or until further Order of the Court;*
- iv. Damages for trespass to land;*
- v. An Order that Richard Mulusa do forthwith pull down and remove any structures or buildings which have been erected on the property No L/SOLWE/10409070;*
- vi. Any further or other relief that the Court may deem fit;*
- vii. Interest;*
- viii. Costs.*

3. AFFIDAVIT IN SUPPORT OF THE APPLICATION

3.1 In deposing to the affidavit, Kennedy Simbeye averred that he is the legal registered owner of the property known as L/SOLWE/10409074, which is situated in Solwezi, and which land is held under certificate of title number No

CT7522/3-2024. Exhibited as 'KS1' was a copy of the said certificate of title. He deposed that the said land was acquired initially under customary tenure from the Lamba Royal Establishment of his Royal Highness Chief Kibuye Mulonga after he applied for land in Tetamukwana on 14th September, 2013, whose copy was exhibited as 'KS2'.

- 3.2 Then by a letter dated 4th October, 2013, His Royal Highness Chief Mulonga wrote to Kennedy Simbeye offering him 3.2 hectares of traditional land for agricultural purposes. It was also stated that in the said letter, Kennedy Simbeye was advised to go to the Agricultural Department for demarcation. Exhibited as 'KS3' was a copy of the said letter from the Chief.
- 3.3 Further in averment, Kennedy Simbeye deposed that following the offer of the land from the Chiefdom, on 31st October, 2023, he applied to convert the said land from customary tenure into statutory tenure, as shown on exhibit 'KS4'. Then thereafter, as evidenced by exhibit 'KS5', the Solwezi Municipal Council duly approved the application. Further, at a meeting which was held on 24th December, 2013, the Solwezi Municipal Council had approved all farm plots in Chief Mulonga's area in Tetamukwana.
- 3.4 Exhibited as 'KS6' was a copy of the minutes of the said meeting. Then as shown on exhibit 'KS7', Kennedy Simbeye was issued with a site plan for the property L/SOLWE/10409074. It was deposed that Kennedy Simbeye paid for the survey of the land by a company known as

Starline Survey, which produced the survey diagram No ZSD-901/2023. The receipt for the payment was exhibited as 'KS8', and the survey diagram as 'KS9'.

- 3.5 Then from there, Kennedy Simbule was issued with an invitation to treat, which was exhibited as 'KS10' from the Ministry of Lands, pursuant to which he was required to pay ZMW10, 764.60 for Ground Rent, Consideration Fees, Registration Fees and Preparation Fees. He deposed that he paid the said fees as shown on the receipt which was exhibited as 'KS11'.
- 3.6 Kennedy Simbeye stated that thereafter, he was issued with a lease which was executed between himself and the President on 5th March, 2023, which was exhibited as 'KS12'. He deposed that on the same date, he was issued a digital certificate of title which was exhibited as 'KS13'.
- 3.7 Averment was made, that in December, 2023, Richard Mulusa without lawful authority or at all, moved onto the property, and he started digging a foundation and erecting a structure thereon. That was how Kennedy Simbeye made a report of trespass to his land, and officials from the Council went to the land, and they verbally told Richard Mulusa to stop any construction on the land.
- 3.8 However, Richard Mulusa had completely ignored that directive, and the Council issued Richard Mulusa with a call out to appear there and take documents to support his claims to the land. It was stated that there, Kennedy Simbeye produced documents to show that he is the legal owner of

the land, while Richard Mulusa did not present any documents.

- 3.9 Assertion was made that Richard Mulusa does not have any approved drawings or plans for the development that he is doing on Kennedy Simbeye's land, and he has materially affected the land contrary to the planned development on the land.

4. LIST OF AUTHORITIES AND SKELETON ARGUMENTS IN SUPPORT

- 4.1 In the List of Authorities and Skeleton Arguments in support, the law which was relied on in making the application was cited. The cases of ***American Cyanamid v Ethicon Limited*** ⁽³⁾ and ***Harton Ndove v National Educational Company of Zambia Limited*** ⁽⁴⁾ were relied on, as having listed the considerations that apply when granting Orders of injunction.

- 4.2 These were stated as:

- i. Whether there is a serious question to be tried?*
- ii. Whether damages would be adequate to compensate the Plaintiff?*
- iii. Whether the balance of convenience tilts in favour of granting the Order of injunction to the Plaintiff?*
- iv. Whether the Plaintiff has come with clean hands.*

- 4.3 Further authority was sought from the case of ***Shell & BP Zambia Limited v Conidaris and others*** ⁽²⁾, stating that it was held in that case, that:

“A Court will not generally grant an interlocutory injunction unless the right to relief is clear and unless the injunction is necessary to protect the Plaintiff from irreparable injury; mere inconvenience is not enough. Irreparable injury means "injury which is substantial and can never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired".”

4.4 Other authorities which were cited in support were the cases of **Hillary Bernard Mukosa v Ronaldson** ⁽⁸⁾, **Ahmed Abed v Turning and Metal Limited** ⁽⁶⁾ and **Zambia State Insurance Corporation Limited v Dennis Mulope Mulikelela** ⁽⁷⁾.

4.5 The argument was that Kennedy Simbeye would suffer unquantifiable damage by reason that Richard Mulusa is determined to get his land through adverse possession, and he would continue to develop the property in issue contrary to Kennedy Simbeye’s plans.

5. AFFIDAVIT IN OPPOSITION

5.1 In the affidavit in opposition, Richard Mulusa deposed that he denied that the property Stand No L/SOLWE/10409074 belongs to Kennedy Simbeye. He alleged that Kennedy Simbeye obtained the property fraudulently and or illegally or irregularly. It was further his contention, that the property belongs to Chikopela Sikazwe who acquired it through the Kapijimpanga chiefdom on following the laid down

procedure, as shown on the letter which was exhibited as 'RM1' from the Kapijimpanga Royal Establishment.

- 5.2 It was further denied that the property in issue falls within the Chief Kabuye Mulonga chiefdom, contention being made that it falls within the Kapijimpanga Royal Establishment, as shown on exhibit 'RM2', a copy of the Chiefs boundary map and recreated site plan, which showed the location of the property.
- 5.3 Further denial was made that Kennedy Simbeye's application to convert the land from customary tenure into statutory tenure was approved with Richard Mulusa, the averment being that the said application was deferred, and had never been considered again.
- 5.4 It was also alleged that Kennedy Simbeye did not follow the mandatory procedures for him to obtain a certificate of title for the property, as it would be noted from his own application, that it was not stamped by the Solwezi Municipal Council, and there was no recommendation letter evidencing approval.
- 5.5 The averment was further that there were no minutes of any meeting with that date, but rather that the minutes of the meeting of that date, showed that all applications to convert land in the Tetamukanwa area were deferred until the map for the area was cleared, which were exhibited as 'RM3', and were dated 25th September, 2013.
- 5.6 It was stated that no further meeting was ever held after the deferment, and the averments relating to the minutes of the

meeting dated 24th December, 2013 were not correct. The minutes of that meeting were exhibited as 'RM4'. It was deposed that the site plan did not relate to any approval that was given by the Solwezi Municipal Council, and it was contended that no approval was given.

- 5.7 The allegation that Kennedy Simbeye obtained the certificate of title fraudulently was reiterated, on the basis that he did not obtain the property from Chief Kapijimpanga, and he did not follow the mandatory procedures for obtaining land under customary tenure. Further, that no approval was obtained to convert the land from customary into statutory tenure.
- 5.8 Richard Mulusa deposed that he had the authority of the owner of the property, Chikopela Sikazwe to be there, and that as shown by exhibit 'RM5', the letter from Chief Kapijimpanga, Chikopela Sikazwe had a right to be on the property.
- 5.9 The averment was that Richard Mulusa produced the documents that allowed him to be in occupation of the property at the Solwezi Municipal Council.

6. AFFIDAVIT IN REPLY

- 6.1 In the affidavit in reply, Kennedy Simbeye reiterated that he is the legally registered owner of the property L/SOLWE/1040974, as shown by the certificate of title which was exhibited as 'KS1' to the affidavit which was filed in support of the application. He averred that the said property belonged to His Royal Highness Chief Kibuye

Mulonga from the year 1958, and that it was only recently when the boundary for Chief Kapijimpanga was extended into the Mulonga Chiefdom.

- 6.2 He added that this extension of the boundary occurred after he had made the application to acquire the property L/SOLWE/1040974 on 14th September, 2013, with reference being made to the documents exhibited as 'KS2' and 'KS3' to the affidavit in support.
- 6.3 He denied the contention that he acquired the property fraudulently, illegally and/or irregularly, stating that this was after approval was obtained to convert the land from customary tenure into statutory tenure, with exhibit 'KS5' being stated as the approval that the Town Clerk gave.
- 6.4 It was reiterated that approval to convert the land from customary into statutory tenure and the site plan was followed, as averred in the affidavit which was filed in support of the application, and which was exhibited as 'KS7' was approved by the Solwezi Municipal Council.
- 6.5 The contention was that Richard Mulusa had not exhibited any documents to show that Kennedy Mulusa fraudulently acquired the property. He stated that His Royal Highness Chief Chibuye Mulonga wrote a letter to the Royal Establishment Committee of Chief Kapijimpanga which was exhibited as 'KS1', to show that he was offered the land by the Royal Establishment of Chief Mulonga in 2014.
- 6.6 Kennedy Simbeye deposed that the Order of injunction should be granted on the following terms:

- i. That the status quo of the property be maintained pending final Order of the Court;
- ii. That himself as title owner of the property be in possession of the property and that he be responsible for any maintenance of the property;
- iii. That no further development be undertaken on the property.

7. LIST OF AUTHORITIES AND SKELETON ARGUMENTS IN REPLY

7.1 In the arguments in reply, it was opposed that both parties in this matter have a right and interest in the property. **Sections 33 and 54 of the Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia** were cited to argue that those provisions of the law, provide that a certificate of title is conclusive evidence of ownership of land. Argument was made that Richard Mulusa had not exhibited any certificate of title to prove his interest in the land, and neither had he exhibited any documents to support his claim.

7.2 The case of **VDF Property Management Limited v Vlaanderen** ⁽⁸⁾ was relied on as having referred to the case of **Garden Cottage Foods Limited v Milk Marketing Board** ⁽⁵⁾, in which Lord Diplock defined status quo as:

"...In my opinion the relevant status quo to which a reference is made in American Cyanamid is the state of affairs existing in the period immediately preceding the issue of the writ claiming permanent injunction or, if there be unreasonable delay

between the issue of the writ and the motion for an interlocutory injunction, the period immediately preceding the motion. The duration of that period since the state of affairs last changed must be more than minimal having regard to the total length of the relationship between the parties in respect of which the injunction is granted; otherwise the state of affairs before last change would be the relevant status quo."

7.3 The argument was that applying the above principle, Kennedy Simbeye should remain the owner of the land, and by virtue of having title to the said land, he should remain in possession of it until the matter is finally determined.

7.4 Reliance was placed on the case of ***Preston v Luck*** ⁽¹⁾ stating that the Court in that matter held that:

"Of course, to entitle the Plaintiffs to an interlocutory injunction, though the court is not called upon to decide finally on the right of the parties, it is necessary that the Court should be satisfied that there is a serious question to be tried at the hearing, and that on the facts before it there is a probability that the Plaintiffs are entitled to relief."

7.5 It was therefore prayed that the Order of injunction be granted as Kennedy Simbule would suffer irreparable injury.

8. DECISION OF THIS COURT

8.1 I have considered the application. It was made pursuant to **Order 27 Rule 4 of the High Court Rules**, as read with **Order 29 Rule 1 of the Rules of the Supreme Court of England, 1965, 1999 Edition**. **Order 27 Rule 4 of the High Court Rules** provides that:

***“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.*”**

8.2 **Order 29 Rule 1 of the Rules of the Supreme Court of England** states as follows:

“(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 party's writ, originating summons, counterclaim or third party notice, as the case may be.”

8.3 In this application, Kennedy Simbeye states that he should be granted the Order of injunction as he is the holder of a certificate of title for the property known as L/SOLWE/1040974. However, a defence and counterclaim have been filed in this matter, which reveal a serious dispute over ownership of the property. That raises a serious question to be tried.

8.4 Damages may not suffice as compensation, the subject matter being land. Thus, the balance of convenience lies in preserving the property until the rights of all the parties are determined.

9. CONCLUSION

9.1 I accordingly Order that both Kennedy Simbeye and Richard Mulusa, are restrained whether by themselves, their servants, agents or whomsoever, from constructing, developing or in any other way dealing with the property until the rights of the parties are determined. The matter shall come up on 14th October, 2024 at 09:00 hours for

Orders for Directions. Costs shall be in cause and leave to appeal is granted.

DATED AT LUSAKA THE 30th DAY OF SEPTEMBER, 2024

Saunders
**S. KAUNDA NEWA
HIGH COURT JUDGE**

