

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

**2017/HP/0421
2018/HPF/0073**



BETWEEN

SARAH NKOMBO MALAMBO

APPLICANT

AND

NGOZA BARBRA SINKOLONGO MALAMBO

1ST RESPONDENT

*(Sued as administrator of the estate of the
late Reeves Malambo)*

LEONARD MALAMBO

2ND RESPONDENT

*(Sued as administrator of the Estate of
the late Reeves Malambo)*

AUSTIN MALAMBO

3RD RESPONDENT

CHILEKWA MATSOSTSO

1ST INTERVENOR

JERRY MALAMBO

2ND INTERVENOR

KENNEDY MALAMBO

3RD INTERVENOR

AND

BETWEEN

JERRY MALAMBO

PLAINTIFF

AND

**THE REEVES MALAMBO FAMILY
REGISTERED TRUSTEES**

DEFENDANT

Before:

The Hon. Mr. Justice Charles Zulu.

For the Defendant:

Ms. J.R. Mutemi of Mesdames Theotis
Mutemi Legal Practitioners.

For the Plaintiff/2 Intervener:

Ms. R. Mwanguluka, of Messrs
Dzekedzeke & Company.

For the 1st Intervener:

Ms. N. N. Mbao of Nkusuwila Nachalwe
Advocates.

The others:

No Appearance.

R U L I N G

Cases referred to:

1. ***Turnkey Properties v Lusaka West Development and Others (1984) Z.R. 85 (S.C.)***
2. ***Shepherd Homes Ltd v Sadham (1970) 3 ALL E.R. 402***
3. ***Heinrich Hotels Limited v Kitwe City Council and Others (2011) Z.R. Vol1, 155***
4. ***Ahmed Abad v Turning and Metals Limited (1987) Z.R. 86***

Legislation referred to:

1. ***The High Court Rules (HCR) Chapter 27 of the Laws of Zambia***
2. ***The Rules of the Supreme Court of England and Wales 1965 (White Book 1999 Edition)***

1.0 INTRODUCTION

1.1 This ruling is in respect of an application dated October 26, 2018, at the instance of the Defendant, Reeves Malambo Family Registered Trustees (hereinafter called “the Trust”). The application was made pursuant to Order XXVII of the **High Court Rules (HCR), Chapter 27 of the Laws of Zambia**, as read with Order 29 rule 1 of the **Rules of the Supreme Court of England and Wales 1965 (White Book 1999 Edition)**.

2.0 BACKGROUND

2.1 On March 16, 2017, the Applicant, Sarah Nkombo Malambo, the daughter to the late Mr. Reeves Malambo, under cause no 2017/HP/421, took out an originating summons against the named Respondents, seeking the following reliefs:

- (i) an order that the deceased died testate and that the Will discovered in his safe on the 15th day of February 2017 is valid;**
- (ii) an order for the revocation of the letter of administration issued on the 1st day of March, 2017 appointing the Applicant and Respondents as Administrators of the estate of the Late Reeves Malambo;**
- (iii) an order appointing an Executor for the estate of the late Reeves Malambo;**
- (iv) an order that an interim Receiver be appointed to take custody of and preserve the estate of the late Reeves Malambo pending determination of this matter;**
- (v) an order directing that the Respondents give an account of what has been distributed from the deceased's estate to date;**
- (vi) an injunction to restrain the Respondents, their servant and/or agents from further dealing with the estate of the late Reeves Malambo pending further order of the this Court;**
- (vii) any other relief as the Court may deem fit; and**
- (viii) costs.**

2.2 The record was reallocated to me in April 2023, and the application was resurrected with the return date set for December 8, 2023.

2.3 By this application, the Trust is seeking for an interim mandatory injunction to direct and order the second Intervener/Plaintiff, Mr. Jerry Malambo to surrender over 200 certificates of title and other documents believed to belong to the Reeves Malambo Family Trust.

2.4 The application was filed post the apparent resolution of some matters via an amended mediation settlement order dated March

6, 2023, and eventual execution of the Reeves Malambo Family Trust, through an amended trust deed registered on March 28, 2018.

- 2.5 The application was made against the backdrop that the said Mr. Jerry Malambo was no longer a trustee/secretary of the trust following registration of the amended trust deed, and was alleged to have unjustifiably remained in possession of the certificates of title, and resisted the release of the certificates of title to the serving trustees/secretary of the Trust.

3.0 THE PARTIES' AFFIDAVIT EVIDENCE

- 3.1 An affidavit in support was deposed to by Sarah Bwanali Kamoto. She stated that she was a trustee and secretary of the trust under the amended Trust deed. She stated that following the death of Mr. Reeves Malambo, who was a director in Shaftex Limited, the Applicant, Sarah Nkombo Malambo as director of Shaftex Limited caused to be closed the said offices and handed over keys to Theotis Mataka & Sampa Legal Practitioners.
- 3.2 She added that, in December 2017, Mr. Jerry Malambo and another, broke into the office of Shaftex and stole over 200 certificates of title in the name of Reeves Malambo and handed them over to his advocates, Messrs Lungu Simwanza & Company. A copy of the inventory relating to the same was produced marked "SBK 3".
- 3.3 She explained that post registration of the amended deed of trust, the trustees of the Trust were on May 8, 2018, granted probate to administer the trust/estate of Reeves Malambo, and

that the deponent was appointed secretary of the Trust. She said effort to retrieve the certificates of title from Mr. Jerry Malambo was countered with resistance.

3.4 The pith and substance of the Applicant's complaint is that, following the removal of Mr. Jerry Malambo from the Trust, he had no authority to continue holding on to the documents. And that his legal attempts to challenge his removal as trustee/secretary from the Trust under cause number 2018/HPF/073 came to a nought.

3.5 An affidavit in opposition dated October 17, 2023, was deposed to by Mr. Jerry Malambo. He acknowledged that he was removed as trustee and secretary of the Trust via the consent settlement order dated March 6, 2018. He denied allegations that he burgled into the office to steal the certificates of title. He said he legally accessed the office, and the documents were handed over to his lawyers, and denied etching intentions to deprive the beneficiaries of the trust. And somewhat to his concession to release the certificates of title, in paragraph 12 of his affidavit, he said:

That the said documents are currently in the custody of my Lawyers and I have no intentions of depriving the beneficiaries access to those documents but on condition that they are handed over to the appointed custodian after thorough scrutiny of the said documents given that not all of them are in the late Reeves Malambo's names but third parties' names as well.

3.6 However, he said, the 'Applicant' referring to Sarah Bwanali Kamoto, was no longer the serving secretary of the Trust, and

had no mandate to be the custodian of the requested documents. According to him, the serving secretary, including other family members of Reeves Malambo Family Trust were not aware of the present application.

- 3.7 In reply, the deponent, Sarah Bwanali Kamoto maintained that she was still a trustee, but had ceased to serve as the secretary of the Trust. She explained that at the time of filing the application in 2018, she was the secretary of the Trust (Defendant). And that some titles are in the name of third parties because they were surrendered as collateral for loans obtained from the late Reeves Malambo.
- 3.8 She said if the certificates of title were not released by Mr. Jerry Malambo, the estate/trust would remain in perpetual danger of being sued by title borrowers who had since cleared the debt, or have made part payments. Some letters of demand by the alleged borrowers were exhibited.
- 3.9 She denied allegations that family members of the Trust were unaware of the present application. She made reference to an email marked "SBK1". She stated that the present action was instituted with the concurrence of other trust members. She also complained that the distribution of the estate was unfortunately delayed for 6 years by Mr. Jerry Malambo's resistance. And suggestions by Mr. Jerry Malambo to further resolve the matter through mediation were discredited, and was accused of intermeddling in the management of the estate/trust.

4.0 THE PARTIES' ARGUMENTS FOR AND AGAINST THE APPLICATION

- 4.1 The application having been filed prior to the enactment of S.I. No.58 of 2020, the parties through their respective counsel made *viva voce* submissions. Ms. Mutemi in her submission also recounted the facts as summarized by her client. She argued that not granting the injunction carried the greater risk of occasioning injustice to the trust/estate. It was recalled that the estate had suffered lawsuits by third parties, over certificates of title held by Mr. Jerry Malambo.
- 4.2 In response, Counsel for Mr. Jerry Malambo, Ms. Mwanguluka, submitted that it was her client's instruction that the matter be resolved through mediation. And she reiterated that, Mr. Jerry Malambo was ready to hand over the certificates of titles, but not to the 'Applicant' (Sarah Bwanali Kamoto).
- 4.3 Mrs. Mbao representing the first Intervener did not object to the application, and said her attendance was basically observatory, since they were not served with the application.
- 4.4 And in reply, Ms. Mutemi contended that suggestions to settle the matter through mediation were late in the day. According to her, if Mr. Jerry Malambo was desirous to resolve the matter through mediation, this would have been done in 2018. His probity to amicably resolve the matter was doubted. The Court was apprised that the current secretary of the Trust was the first Respondent, Ngoza Barbara Sinkolongo Malambo.

5.0 DETERMINATION

5.1 I have carefully considered the facts in issue and the arguments respectively tendered by counsel. The law on injunctive remedies is settled. In order for the Court to grant an interlocutory injunction, it is imperative to consider whether the applicant has a clear right to relief, and whether, if the injunction is not granted, the applicant will suffer irreparable harm. In **Turnkey Properties v Lusaka West Development and Others (1984) Z.R. 85 (S.C.)**, the Supreme Court *inter alia* stated as follows:

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

5.2 A clear right to relief should not only imply that there is a serious question to be tried at trial, but also whether, the facts relied on by the applicant, compellingly tilts the balance of justice in favour of granting the interlocutory injunction. In other words, without prejudice to the final determination of the whole case, the court must *prima facie* assess the facts as they appear, in terms of the applicant's real prospect of success at trial, and the prejudice to be suffered, if an injunction was not granted, and the applicant is success at the end of the matter.

5.3 And perhaps more direct to the issue is the case of **Shepherd Homes Ltd v Sadham (1970) 3 ALL E.R, 402**, wherein Megarry J, gave the following guidance:

Nevertheless, it is plain that in most circumstances a mandatory injunction is likely, other things being equal, to be more drastic in its effect than prohibitory

injunction. At the trial of the action, the court will, of course, grant such injunctions as the justice of the case requires; be at the interlocutory stage when the final result of the case cannot be known and the court has to do the best it can, I think that the case has to be unusually strong and clear before a mandatory injunction will be granted,...

5.4 The principle above was upheld in the case of **Heinrich Hotels Limited v Kitwe City Council and Others (2011) Z.R. Vol1, 155**, at p. 164 wherein Kaoma J, (as she then was) stated:

In conclusion, having weighed the balance of convenience, as it were, I believe that this is one exceptional case in which withholding a mandatory injunction would in fact carry a risk of greater injustice.

5.5 In the present case, the Trust has sufficiently proved that the balance of justice tilts in favour of granting the mandatory interlocutory injunction. Ordinarily, an interlocutory injunction is not grantable if it is used as a device by an applicant to attain, or create new conditions, only favourable to the applicant (see **Ahmed Abad v Turning and Metals Limited (1987) Z.R. 86**).

5.6 Clearly, in the present case, there is no ounce of facts pointing to the fact that the Trust intends to abuse the injunction to create new conditions only favourable to the Trust. As rightly stated by the trust's deponent, at present it is the Trust that is legally entitled to administer the estate of Reeves Malambo through the registered trustees of the Reeves Malambo Family Trust. And Mr. Jerry Malambo is at present neither a registered trustee or secretary of the trust.

5.7 The truth of the matter for now is that, if the application is not granted, the estate/beneficiaries of the late Reeves Malambo will continue to suffer irreparable damage, especially in the wave of demands against the Trust, relating to the certificate of titles. The application is equitably tenable albeit delayed, but necessary in terms of interlocutory relief by vesting the property of the estate or in possession of the estate in the Trust, presently administered through its trustees.

6.0 CONCLUSION

6.1 In the view of the foregoing, the application for an interlocutory mandatory injunction is granted as prayed. Mr. Jerry Malambo is hereby ordered and directed that all the certificates of title in the name of Reeves Malambo, or held by the estate as security for loans supposedly accruing to the estate presently under his possession, be surrendered to the trustees of the Trust within seven (7) days from the date of this order.

6.2 Costs incurred by the trust to be borne by Mr. Jerry Malambo.

6.3 Leave to appeal is granted.

DATED THIS 29TH DAY OF JANUARY 2024.



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THE HON. MR. JUSTICE CHARLES ZULU