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



BETWEEN:

**ALEX BWALYA (SUING IN HIS CAPACITY
AS ADMINISTRATOR OF THE ESTATE
OF THE LATE ALEX ACKSON BWALYA)**

PLAINTIFF

AND

**KELVIS SAKALA
KELVIS SAKALA'S WIFE**

**1ST DEFENDANT
2ND DEFENDANT**

BEFORE THE HONOURABLE MRS. JUSTICE M.C KOMBE

For the Plaintiff:

*Mr. P. Mayaka - Messrs. H.H. Ndhlovu and
Company.*

For the Defendants:

*Ms. Catherine Jere - Legal Officer- National
Legal Aid Clinic for Women*

R U L I N G

Cases referred to:

- 1. American Cyanamid Company v. Ethicon Company Limited
(1975) AC 396.**
- 2. Hilary Bernard Mukosa v. Michael Ronaldson (1993-1994)
ZR 26.**

- 3. Harton Ndove v. Zambia Educational Company Limited (1980) Z.R. 184.**
- 4. Shell and BP (Z) Limited v. Conidaris (1975) Z.R. 174.**
- 5. Wesley Mulungushi v. Catherine Bwale Mizi Chomba (2004) Z.R 96.**
- 6. Moonda Jane Mungaila-Mapiko and John Muchabi v. Victor Makaba Chaande (2010/HP/0690).**
- 7. Seventh Day Adventists Association Registered Trustees v. Amock Phiri (SCZ/15/2010).**

Legislation and materials referred to:

- 1. High Court Rules, Chapter 27 of the Laws of Zambia.**
- 2. Halsbury's Laws of England Volume 24, Fourth Edition**

1. INTRODUCTION

- 1.1 This ruling is in respect of an application made by the Plaintiff for an Order of interlocutory Injunction. The application is made pursuant to Order 27 of the High Court Rules, Chapter 27 of the Laws of Zambia.
- 1.2 A brief background is that the Plaintiff commenced this action by way of writ of summons and statement of claim dated 11th June, 2024, seeking the following substantive reliefs:

1. *Declaration that LUS/31279/CL/09 is limited to Unit 9 only and does not include the servant's cottage on Stand No. 31279/CL/CP, Lusaka;*
2. *Damages for trespass to land;*
3. *Damages for assault;*
4. *An order of injunction restraining the Defendant's from entering upon the Plaintiff's personal property;*
5. *An order of injunction restraining the Defendants from entering upon the cottage on Stand No. 31279/CL/CP, Lusaka without permission from the Plaintiff and from attempting to evict the servant from the servant's cottage and threatening violence with unknown accomplices;*
6. *Damages for mental anguish and torture;*
7. *Interest;*
8. *Costs; and*
9. *Any other relief the court may deem fit.*

2. PLAINTIFF'S AFFIDAVIT EVIDENCE

- 2.1 In relation to the application, the affidavit in support of the application for an Injunction was deposed by **ALEX BWALYA**, the Administrator of the estate of the late Alex Ackson Bwalya.
- 2.2 The Plaintiff produced a copy of Letters of Administration that were marked as "**AB1**". He deposed that the late Alex Ackson Bwalya left a number of properties that included Stand No. 31279/CL/CP. A copy of the Certificate of Title

relating to the same was marked as **“AB2”**. The late Alex Ackson Bwalya gifted each of his six children a house on Stand No. 32179/CL/CP.

2.3 The Plaintiff deposed that Stand No. LUS/31279/CL/09 was gifted to his sister Diana Bwalya by the late Ackson Alex Bwalya. The Plaintiff produced the survey diagram for the said property that was marked as **“AB3”**. The Plaintiff revealed that Stand No. LUS/31279/CL had been sold to the Defendants who claimed to have bought the servants cottage which stood on Stand No. 31279/CL/CP that was meant for the servant that serviced the entire Stand No. 31279/CL/CP.

2.4 The Plaintiff alleged that the Defendants were threatening to evict the servant that was currently occupying the servant’s cottage with his wife.

2.5 The Plaintiff professed that if the injunction was not granted, the Defendants would proceed with their planned move and end up altering the structure of the property before the matter was heard.

3. THE DEFENDANTS AFFIDAVIT IN OPPOSITION

- 3.1 I did not consider the application *ex parte* but directed that it would be heard *inter partes*.
- 3.2 The Defendants filed an affidavit in opposition which they deposed to and explained that the contract of sale between Diana Bwalya and the 2nd Defendant indicated in the particulars that what was sold to her included a shop which was a cottage being referred to. A copy of the contract of sale was exhibited.
- 3.3 The Defendants added that they informed the servant that the 2nd Defendant had purchased flat 9 which included the cottage that the servant was occupying. When the 1st Defendant called the Plaintiff, he started hurling insults at him and hence an amicable solution was not reached.
- 3.4 It was further deposed that when they contacted Diana, she assured them that she would assist them in evicting the servant who was in the cottage. That the 2nd Defendant bought the structure and it was within her right to alter the structure of the said property.

4. PLAINTIFF'S AFFIDAVIT IN REPLY

- 4.1 The Plaintiff filed a long affidavit in reply. He explained that if the Defendants had done due diligence, they would have found that the cottage was separate from Stand No. 31279/CL/09 which was owned by Diana. As such, what was owned by Diana was Stand No. 3129/CL/09 and not Stand No. 31279/Plot No. 31279 as cited in the contract of sale between the parties.
- 4.2 That since Diana was only gifted Stand No. 31279/CL/09, she did not have the power to sell the cottage and that the Defendants would have discovered this had they been more careful.
- 4.3 He also deposed that Stand No.31279 belonged to the estate of the late Alex Ackson Bwalya and the servant's cottage was on that property and not on Diana's.
- 4.4 The Plaintiff also denied that he had insulted the 1st Defendant as he never knew that the Defendants had bought his sister's flat. That it was in fact the 1st Defendant who had insulted him.

5. HEARING

5.1 At the hearing of the application, both counsel relied on the affidavits and skeleton arguments. They also made verbal submissions. I will not attempt to replicate the same for the sake of brevity. However, I have carefully considered the submissions and I shall be making reference to them as and when it is necessary in this ruling.

6. DECISION OF THE COURT

6.1 By this application, the Plaintiff seeks an order of injunction restraining the Defendants from entering upon the servant's cottage until final determination of this matter.

6.2 The test to be applied when considering whether or not an injunction should be granted remains that laid down by the House of Lords in the seminal case of **American Cyanamid Company v. Ethicon Limited** ⁽¹⁾. This case sets out a series of questions which should guide the court in making a determination. These are:

1. Is there a serious question to be tried?
2. Would damages be adequate?

3. Where does the balance of convenience lie?

6.3 However, I am mindful of the fact that the principles established in the ***American Cyanamid*** case are of general application and must not be treated as a statutory definition. This is because it is possible to grant or refuse an interim injunction without applying the ***American Cyanamid*** guidelines.

6.4 In following the ***American Cyanamid*** guidelines, the first question I should consider therefore is whether or not the Plaintiff has raised a serious question to be determined at trial. This proposition comes down to the requirement that the claim must not be frivolous or vexatious. This is in line with the holding by the Supreme Court in the case of **Hilary Bernard Mukosa v. Michael Ronaldson** ⁽²⁾ where it was held that:

“An injunction would only be granted to a plaintiff who established that he had a good and arguable claim to the right which he sought to protect.”

6.5 Further, in the High Court, Chirwa J, (as he then was) in the case of Harton Ndove v. Zambia Educational Company ⁽³⁾ held that:

“Before granting an interlocutory injunction it must be shown that there is a serious dispute between the parties and the plaintiff must show on the material before court that he has any real prospect of succeeding at trial.”

6.6 In view of the above principles, for the application to succeed, the Plaintiff must demonstrate that there is a serious question to be tried and he has a good and arguable claim to the right he seeks to protect.

6.7 The Plaintiff contends that there is a serious question to be tried. I shall therefore consider the endorsement on the writ as a starting point. The Plaintiff seeks *inter alia*:

1. Declaration that LUS/31279/CL/09 is limited to Unit 9 only and does not include the servant's cottage on Stand No. 31279/CL/CP, Lusaka;
2. Damages for trespass to land;
3. Damages for assault;
4. An order of injunction restraining the Defendant's from entering upon the Plaintiff's personal property;

5. *An order of injunction restraining the Defendants from entering upon the cottage on Stand No. 31279/CL/CP, Lusaka without permission from the Plaintiff and from attempting to evict the servant from the servant's cottage and threatening violence with unknown accomplices;*
6. *Damages for mental anguish and torture;*
7. *Interest;*
8. *Costs; and*
9. *Any other relief the court may deem fit.*

6.8 I have examined the above endorsement, the statement of claim and the affidavit evidence adduced by both parties together with the exhibits. The Plaintiff's contention is that the Defendants have occupied the servant's cottage that is situated on Stand No. 31279/CL/CP. The Defendants contend that they have a bona fide claim over LUS/31279/CL/09 which they purchased from the Plaintiff's sister Diana Bwalya who acquired the said land as a gift from her father the late Alex Ackson Bwalya. However, the Plaintiff contends that the purchase of the land did not include the servant's cottage. The Plaintiff is desirous of being granted an injunction to prevent the Defendants from entering the servant's cottage that is situated on Stand No. 31279/CL/CP.

- 6.9 The Defendant on the other hand contend that if the injunction is granted there will be an infringement on their peaceful and quiet enjoyment of the property. It is also contended that if the injunction is granted, the 2nd Defendant risks losing her livelihood as she obtained a loan from the Public Service Pension Fund and the money realized from the shop was meant to provide her with relief from the loan.
- 6.10 It is apparent that the dispute lies on whether the Defendants purchased the servant's cottage that is situated on 31279/CL/CP. A determination therefore whether the Plaintiff is entitled to the reliefs that he seeks can only be made after examining in a more detailed way the evidence and exhibits relied upon by both parties at the trial of this matter.
- 6.11 In view of the above, I find in line with the **Harton Ndove** case that there is a serious question to be tried by the Court.
- 6.12 Notwithstanding, the fact that there is a serious question to be tried, the Plaintiff must satisfy the court that an

injunction is necessary to protect him from irreparable damage. If the Plaintiff can be fully compensated by an award of damages, no injunction should be granted. This is in line with what was stated by Lord Diplock in the **American Cyanamid** case that:

“If damages in the measure recoverable at common law would be adequate remedy and the Defendant would be in the financial position to pay them, no interim injunction should normally be granted.”

6.13 Further paragraph 955 of the Halsbury’s Laws of England Volume 24, Fourth Edition provides that:

“The Plaintiff must also as a rule be able to show that an injunction until the hearing is necessary to protect him against irreparable injury; mere inconvenience is not enough.”

6.14 According to the **Shell and BP (Z) Limited v. Conidaris** ⁽⁴⁾ case irreparable injury was said to mean:

"Injury which is substantial and can never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired".

6.15 In the case of Wesley Mulungushi v. Catherine Bwale Mizi Chomba ⁽⁵⁾ the Supreme Court pronounced:

"Land is a very valuable commodity whose loss may not adequately be atoned in damages"

6.16 In this regard, the Court made it known that land could not be atoned for in damages. An injunction will therefore not be granted where damages would be an adequate remedy to the injury complained of in the event that the Plaintiff later succeeds in the main action.

6.17 On this question, it is contended that if the injunction is not granted the plaintiff will suffer irreparable damage that cannot be atoned for in damages. The operations of the servant and his family will be disturbed and the properties on Stand No. 31279/CL/CP will suffer from the lack of maintenance and care. The Plaintiff further fears that the cottage would be altered from its original state.

6.18 This dispute relates to land. I have every doubt that if the injunction is not granted, damages would be adequate. It is therefore imperative that I converse on the balance of convenience.

6.19 The balance of convenience only arises where there is a doubt as to adequacy of damages or if the harm done will be irreparable.

6.20 When considering the question of balance of convenience, Matibini J, in the case of **Moonda Jane Mungaila-Mapiko and John Muchabi v. Victor Makaba Chaande** ⁽⁶⁾ made reference to what was stated by Hon. Justice David Bean in his book entitled 'Injunctions'. He stated at page 36 that:

'That by definition, once the investigation has reached this stage, the decision of the court whether in favour of or against an injunction will inevitably involve some disadvantage to one or the other side which damages cannot compensate. Thus, the extent of this uncompensatable disadvantage either way is a significant factor in determining the balance of

convenience. In many cases, it has been the decisive factor."

6.21 Therefore, when considering this question of balance of convenience, the court is required to determine which of the two parties will suffer greater harm or disadvantage from granting or refusing to grant an injunction pending a decision on the merits.

6.22 The question then to be asked is: **'What should be taken into account when considering the balance of convenience?'** In the *American Cyanamid* case Lord Diplock stated that:

'It would be unwise even to attempt to list all the various matters which may need to be taken into consideration in deciding where the balance lies let alone to suggest the relative weight to be attached to them. These vary from case to case.'

6.23 Thus in the above case, three factors were expressly mentioned, that is status quo, relative strength of cases and special factors.

- 6.24 The Plaintiff contends in this case that the status quo should be maintained because there is a risk that if the injunction is not granted, the cottage may be altered from its original state.
- 6.25 The Defendants on the other hand contend that if the status quo is maintained, the Plaintiff will continue to demand that the cottage is his. That therefore, an injunction should not be regarded as a device by which an applicant can attain or create conditions favourable only to himself.
- 6.26 I have carefully considered this question. The view I hold is that if the injunction is not granted, the Plaintiff will suffer greater harm than the Defendants because it is clear from the affidavit in opposition at paragraph 12 that the 2nd Defendant is resolute that it is within her right to alter the structure of the said property which she purchased.
- 6.27 The Supreme Court in the case of **Seventh Day Adventists Association Registered Trustees v. Amock Phiri**⁽⁷⁾ stated that:

“If the injunction is not granted, the appellant will erect structures on the land and if the respondent’s action goes in his favour, then he will be left with structures for which he has no use. That injury in our view cannot be atoned for in damages.”

- 6.28 What was stated by the Supreme Court in this case fortifies the view I hold.
- 6.29 Since at this stage I am not determining the final rights of the parties, my duty is to consider making an order which will be appropriate pending the determination of the matter. The view that I take is that it would be inappropriate at this interlocutory stage to alter the prevailing situation before the dispute and actual ownership is determined.
- 6.30 For this reason, I find that the balance of convenience tilts in granting the injunction so as to preserve the status quo which existed before the Defendants and Diana entered into a contract of sale of property.
- 6.31 In this regard, I find based on the fundamental principles of injunctive law that the status quo should be maintained

so that nothing occurs pending the trial which will prejudice the rights of either party in the property.

6.32 The Defendants by themselves, agents, servants or whomsoever are therefore restrained from entering upon the servant's cottage until final determination of the matter or until further order of the Court.

6.33 I should however point out that by this Order, I have not determined at this stage the final rights of the parties. This will be determined at the trial of this matter. What the Order simply means is that, I am satisfied at this stage that justice will be done in this case if nothing more is done on the disputed property pending the determination of the matter which will prejudice the rights of either party.

6.34 I make no order as to costs.

DELIVERED AT LUSAKA THIS 30TH DAY OF SEPTEMBER, 2025



M.C. KOMBE
JUDGE

