

IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT NDOLA
(Civil Jurisdiction)

APPEAL No 89/2018

BETWEEN:

FELIX BRIAN MKUMBWANYAMA CHASHA

1ST APPELLANT

(Suing as Administrator of the estate of the
late DICKSON MWEENE CHASHA)

CHARLES CHASHA

2ND APPELLANT

MARGARET CHASHA

3RD APPELLANT

AND

ELIZABETH MULENJE

1ST RESPONDENT

(HRH Senior Chieftainess Nkomeshya
Mukamambo II)

THE ATTORNEY GENERAL

2ND RESPONDENT

CORAM: **Chashi, Lengalenga and Siavwapa, JJA**

On 22nd August, 2018 and 9th July, 2019

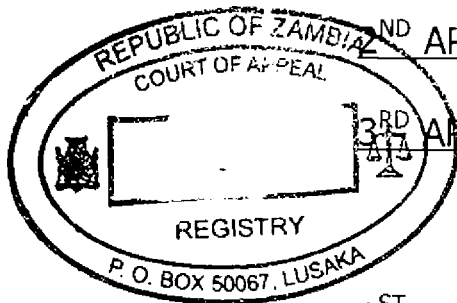
For the Appellants: Miss M. Mwinga – Messrs PNP Advocates

For the 1st Respondent: Miss M. Mwanawasa – Messrs Dove Chambers

For the 2nd Respondent: Miss Chibowa – Senior State Advocate

J U D G M E N T

LENGALENGA, JA delivered the Judgment of the Court.



Cases referred to:

1. **OWNERS OF CARGO LATELY LADEN ON BOARD THE VESSEL SISKINA & ORS DISTOS COMPANIA NAVIERA SA (SISKINA) (1977) 3 ALL ER 803; (1979) AC 210**
2. **HILLARY MUKOSA v MICHAEL RONALDSON (1993 – 94) ZR 26 (SC)**
3. **AMERICAN CYANIMID v ETHICON LIMITED (1975) 1 ALL ER 504**
4. **AKAPELWA & 3 ORS v JOSIAH MUBUKWANU LITIYA NYUMBU – SCZ APPEAL Nº 4 OF 2015**
5. **HINA FURNISHING LUSAKA LTD v MWAISENI PROPERTIES LTD (1983) ZR 40 (HC)**
6. **PRESTON v LUCK (1884) 27 CH D 497**
7. **TURNKEY PROPERTIES LTD v LUSAKA WEST DEVELOPMENT CO LTD (1984) ZR 85 at p. 88**
8. **HONDLING XING XING BUILDING CO LTD v ZAMCAPITOL ENTERPRISES LTD (2010) 1 ZR 30**
9. **SHELL & BP ZAMBIA LTD v CONIDARIS & ORS (1975) ZR 174 (SC)**
10. **MOBIL ZAMBIA LTD v MSISKA (1983) ZR 66**
11. **MARY KAMERA & ORS v LUFWENDO LISHOMWA – 2014/HP/833 (unreported)**
12. **SARGANT v READ (1876) 1 CH. D 600**
13. **MIFIBOSHE WALULYA v ATTORNEY GENERAL & HON F. M. CHOMBA (1980) ZR 327 (HC)**

Legislation referred to:

1. **THE HIGH COURT RULES, CHAPTER 27 OF THE LAWS OF ZAMBIA.**
2. **THE RULES OF THE SUPREME COURT, 1999 EDITION.**
3. **THE STATE PROCEEDINGS ACT, CHAPTER 71 OF THE LAWS OF ZAMBIA.**

Other works:

1. **ZAMBIAN CIVIL PROCEDURE: COMMENTARY AND CASES (Lexis Nexis, 2017).**

2. HALSBURY'S LAWS OF ENGLAND, Fourth Edition, Re-issue, Volume 24.

This is an appeal against the High Court's ruling dated 11th December, 2017, in which it granted an order of interim injunction to the 1st Respondent herein. The said injunction is directed at the Appellants herein and it is to restrain them from carrying out any construction works or any activity on the disputed piece of land, known as Farm 28, Chongwe until the final determination of the matter or until further order of the Court.

The brief background to the appeal is that on 15th March, 2016, the Appellants commenced an action against the 1st Respondent, claiming for the following reliefs:

- (1) A declaration that Farm 28, Chongwe, with its initial boundaries as agreed in 1957 belongs to the Appellants and all members of their family;**
- (2) A declaration that the 1st Respondent was not entitled to enter, use or build on the Appellants' Farm 28, Chongwe;**
- (3) An order for demolition of all or any structure built on the said Farm 28, Chongwe by the 1st Respondent or anyone at her direction;**

(4) An order of interim injunction to restrain the 1st Respondent from carrying out further construction works and/or interfering or in any way by trespassing on any portion of the said Farm 28, Chongwe.

The Appellants' application for an order of interim injunction was necessitated by the 1st Respondent's threats to evict the Appellants from the subject land. However, by a ruling dated 13th April, 2016 the Court below declined to grant the said injunction on the ground that the Appellants' right to relief was not clear. It further observed that the Appellants had done nothing in July 2014 when they noticed that the 1st Respondent had sunk a borehole on the subject land.

Thereafter, on or about 16th November, 2017, the 1st Respondent applied for an order of interim injunction to restrain the Appellants from carrying out any construction or activity on the disputed land.

By a ruling dated 11th December, 2017, the Court below granted the said injunction to the 1st Respondent.

Dissatisfied with the said ruling, the Appellants have now appealed to this Court and advanced three grounds as follows:

- 1. The Court below erred in both law and fact when it granted the 1st Respondent an interim injunction restraining the Appellants from carrying out any construction works or any activity on the disputed land**

without establishing whether or not the disputed land was in a burial shrine or not.

2. The Court below erred in both law and fact when it granted the 1st Respondent an interim injunction by purportedly maintaining the status quo when the 1st Respondent was not similarly stopped from continuing to construct on the disputed land or carrying out any activity on the disputed land until final determination of the matter.
3. The Court below erred in both law and fact when it granted the 1st Respondent an interim injunction when she had not given an undertaking as to damages.

The gist of the Appellants' submissions in support of ground one is that the Court below granted the injunction to the 1st Respondent even though she has no substantive cause of action, not even a counter-claim and that, therefore, the injunction granted has no legs to stand on. Miss M. Mwinga, the Appellants' Counsel relied on the case of **OWNERS OF CARGO LATELY LADEN ON BOARD THE VESSEL SISKINA & ORS v DISTOS COMPANIA NAVIERA SA (SISKINA)**¹ where Lord Diplock stated that:

"A right to obtain an (interim) injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an (interim)

injunction is merely ancillary and incidental to a pre-existing cause of action.”

It was further submitted that the 1st Respondent has not demonstrated what serious question needs to be tried. For this argument, reliance was placed on the case of **HILLARY MUKOSA v MICHAEL RONALDSON**², where it was held that an injunction will be granted only to a plaintiff who establishes that he has a good arguable claim to the right he seeks to protect.

It was further submitted that it is trite law that on an application for an interlocutory injunction, the Court must consider the respective situations of the opposing parties. Hence in the case of **AMERICAN CYANIMID v ETHICON LIMITED**³, the Court stated *inter alia* that:

“The Court must weigh one need against another and determine where the balance of convenience lies.”

In the present case, it was submitted on behalf of the Appellants, that the Court below arrived at the decision of granting the 1st Respondent an interlocutory injunction without evaluating the evidence before it.

It is also contended that the 1st Respondent did not approach the Court below with clean hands because she suppressed material facts and

actually misled the Court below on the question of location of the house that the Appellants were constructing. The alleged suppression of material facts according to the Appellants also relates to the proximity of the subject house to the alleged palace; and to whether or not the said house was being constructed in a burial shrine.

Miss M. Mwinga argued that if the Court below had made a cursory evaluation of the evidence before it, it would have noted the contradictions and the 1st Respondent's blatant lies. She submitted that on a proper evaluation of the evidence and judicious exercise of its discretion, the Court below would not have arrived at the decision that it did. She relied on the case of **AKAPELWA & 3 ORS v JOSIAH MUBUKWANU LITIYA NYUMBU**⁴ where the Supreme Court gave guidance to courts on the exercise of judicial discretion.

It was finally submitted that since the 1st Respondent had not come to court with clean hands, the said injunction must be discharged on the authority of the case of **HINA FURNISHING LUSAKA LTD v MWAISENI PROPERTIES LTD**⁵ where it was held *inter alia* that:

"..... he who comes to equity must come with clean hands. Thus a contracting party who fails to perform his part cannot obtain an injunction to restrain breach of covenant of the other party."

In concluding the arguments in support of ground one it was submitted that in light of the foregoing, ground one be upheld and the injunction granted to the 1st Respondent be discharged.

With regard to ground two, the Appellants took up issue with the portion of the ruling where the Court below referred to the importance of maintaining the *status quo*. It was submitted that the *status quo* that the Court below sought to maintain entailed that the 1st Respondent would continue construction of the alleged palace on the disputed land while the Appellants ceased undertaking any form of activity on their farm. It was further submitted that the contours of the law on *status quo* in injunctive relief were properly drawn in the case of **PRESTON v LUCK**⁶ by Cotton, L J, when he stated that the object of an interim injunction is:

“To keep things in *status quo*, so that if at the hearing, the plaintiffs obtain a judgment in their favour, the defendants will have been prevented from dealing in the meantime with the property in such a way as to make that judgment ineffectual.”

Based on the foregoing, it was submitted that the principle in the cited case is intended to prevent harm to the parties and reliance was placed on the case of **TURNKEY PROPERTIES LTD v LUSAKA WEST DEVELOPMENT CO LTD**⁷ where it was held *inter alia* that an injunction is

used to preserve or restore a particular situation pending trial, and that, however, it should not be used as a device by which a party should create new conditions favourable only to himself.

The Appellants also called in aid the case of **HONDLING XING XING BUILDING CO LTD v ZAMCAPITOL ENTERPRISES LTD**⁸ where it was stated that:

"As regards the *status quo*, where other factors appear to be evenly balance, it is counsel of prudence to take such measures as are calculated to preserve the *status quo*."

In relation to the present case, it was argued that the other factors in this case are not evenly balanced because the 1st Respondent is unrestrained in her quest to construct a palace whilst the Appellants have been restrained from further construction on the disputed land.

It was, therefore, submitted that this is an imbalanced manner of maintaining the *status quo*. It is the Appellants' contention that maintenance of the *status quo* would have entailed ordering cessation of all manner of construction on the disputed land.

It was, finally submitted that, for the reasons advanced by the Appellants, this Court should uphold this ground of appeal.

In support of ground three, it was submitted that the Appellants have been prejudiced in their position because the 1st Respondent procured injunctive relief from the Court below without an undertaking as to damages. Reliance was placed on Mr. Justice Dr. Patrick Matibini's

ZAMBIAN CIVIL PROCEDURE: COMMENTARY AND CASES, Volume

1 (Lexis Nexis, 2017) where the learned author canvassed the importance of an undertaking as to damages at page 779 when he stated that:

"It is important to note that the undertaking in damages is given to the court and not to the party enjoined. However, if it should be held at the trial that the plaintiff had not been entitled by interlocutory injunction to restrain the defendant from doing what he was threatening to do, or if it is established before trial that the injunction ought not to have been granted in the first place, the party enjoined may apply."

It was submitted that in the present case, since no undertaking was given by the 1st Respondent, there is nothing for the Appellants to fall back on for enforcement. The Appellants therefore, urged this Court to uphold this ground of appeal.

It was finally submitted that in light of the arguments advanced and cited cases, this Court should set aside the order of interim injunction

granted to the 1st Respondent by the Court below, with costs to the Appellants.

In response to ground one, Miss Mwanawasa submitted on behalf of the 1st Respondent, that when an application is made to a court by a party, it is up to the court to consider the application and exercise its discretion whether to grant or decline the application, depending on the circumstances of the case and evidence available.

She relied on the cases of **SHELL & BP ZAMBIA LTD v CONIDARIS & ORS**⁹ and **MOBIL ZAMBIA LTD v MSISKA**¹⁰ which brought out the principle that an interlocutory injunction should only be granted where damages cannot adequately remedy an injury or where irreparable injury would be caused if the injunction is not granted.

It was submitted that in this case, the 1st Respondent demonstrated in her affidavits that damages cannot be an adequate remedy, and that, therefore, the Court below was on firm ground to grant the subject injunction.

Miss Mwanawasa argued that the Appellants' application in the Court below to move the Court to the disputed land in order for it to establish whether or not the Appellants were constructing a house in the royal burial

shrine, lacked merit. She reasoned that, moving the Court to the site would have amounted to dealing with matters that ought to be resolved at the main trial. She further relied on the case of **MARY KAMERA & ORS v LUFWENDO LISHOMWA**¹¹, where the Court stated that:

"... the purpose of these proceedings is not to consider in any great detail the merits of the legal position of either party but to decide whether the conditions for the grant of an injunction have been met. It is necessary to consider whether the facts disclose a clear right to relief and whether there is a good possibility that the applicant will succeed. This can only be done by browsing the facts of the main claim."

With regard to the Appellants' argument that the injunction granted by the Court below has no legs to stand on, it was submitted that the argument lacks merit. Miss Mwanawasa argued that the 1st Respondent has a substantive cause of action as she is the legal custodian of all traditional land in the area and she had averred in her Defence that the disputed land belongs to the chiefdom and not any single individual or family. She submitted that the Court below was on firm ground in granting the subject injunction in favour of the 1st Respondent.

She further submitted that the 1st Respondent has raised very serious issues that need to be tried and is, therefore, entitled to the interlocutory injunction granted by the Court below. She also submitted that the

Appellants have no prospects of succeeding in this matter as they have lamentably failed to demonstrate their title or the boundaries to the disputed land.

With regard to the Appellants' claim that the injunction has induced hardship on them when they have a whole portion of the remaining extent for use, it was contended that it is not possible for the Appellants to experience hardship when they have the larger extent of the land they claim to own at their disposal, which they have been using.

In response to the Appellants' argument that the 1st Respondent did not come to court with clean hands, Miss Mwanawasa submitted that the argument is absurd and lacks merit as well as evidential support. She further submitted that there was no suppression of material facts on the 1st Respondent's part, as such ground one lacks merit.

The 1st Respondent's response to ground two is that the Court below considered all the evidence before arriving at its decision. She argued that the 1st Respondent's Defence and her affidavits clearly indicated that the 1st Respondent is not the one constructing the royal palace on the disputed land but the Government of the Republic of Zambia. She further argued that the Appellants' argument that the construction of the royal palace by

the government should have also been stopped lacks legal backing in this jurisdiction as no injunction can lie against the State. Reliance was placed on section 16(1) of the State Proceedings Act, chapter 71 of the Laws of Zambia.

Miss Mwanawasa submitted that the Court below was on firm ground in restraining the Appellants from any further construction on the disputed land as it helped to maintain the *status quo* and further restrained the Appellants from causing confusion on the said land.

With regard to the issue of the lack of undertaking as to damages from the 1st Respondent, it was argued that the undertaking was made in the *ex-parte* order that was meant to be executed by the Court but the Court below did not grant the *ex-parte* order. It was submitted that the Court, however, heard the matter *inter-partes*.

In conclusion, Miss Mwanawasa submitted that based on the arguments and cited authorities, the Appellants' appeal is misconceived and lacks merit, and that it should be dismissed with costs to the 1st Respondent.

We have considered the grounds of appeal, respective arguments by the parties, authorities and the ruling appealed against.

With regard to ground one, we have firstly considered the fact that the High Court has jurisdiction to grant interlocutory injunctions pursuant to Order 27, Rule 1 of the High Court Rules, Chapter 27 of the Laws of Zambia, and pursuant to Order 29, Rule 1(1) of the Rules of the Supreme Court, 1999 Edition.

The provision pertaining to the grant of an injunction entail that any party to a cause or matter, is not precluded from making an application for an injunction. In fact, a perusal of Order 29, Rule 1A, and specifically Order 29/1A/18 provides that an application for the grant of an injunction may be made by any party to the proceedings. The position of the defendant is clearly stated that:

"A defendant may, after giving notice of intention to defend, apply for an interlocutory injunction (SARGANT v READ (1876) 1 CH. D 600¹²)."

In the present case, from the evidence on record and the arguments it is clear that the 1st Respondent filed a Defence to the Statement of Claim.

We also had occasion to look at **HALSBURY'S LAWS OF ENGLAND, Fourth Edition, Re-issue, Volume 24** where the learned authors at paragraph 960 state that:

"A defendant may apply for an injunction before judgment, and he may do so even if the plaintiff has already served him

with notice of application for the same purpose. If the defendant's application is connected with the purpose of the plaintiff's action, he may apply for an injunction as soon as he has acknowledged the service, but if the relief which he seeks does not arise out of the relief sought by the plaintiff, he may not apply until he has served a counter-claim or issued a writ in a cross-action."

In view of the foregoing, we are satisfied that the 1st Respondent was at liberty to apply for the injunction as her application is connected with the purpose of the Appellants' action. Contrary to the Appellants' argument that she ought to have filed a counter-claim in order to apply for an injunction, she can ride on the Appellants' main cause of action as the application is linked to the said action.

In the circumstances, therefore, we find that the 1st Respondent's injunction has a tripod or legs to stand on, the same being the Appellants' action. We, accordingly, find that this limb of the Appellants' argument has no merit.

We turn to the other limb of the argument that the Court below granted the interlocutory injunction to the 1st Respondent without considering the facts or evidence before it, since it declined to visit the subject land.

We note from the arguments advanced by the Appellants, that the invitation to the Court to visit the disputed piece of land, was for the Court to ascertain whether or not, the construction is on or near the Soli royal burial shrine before deciding whether or not to grant the injunction. It was further contended by the Appellants that the 1st Respondent suppressed material facts and that, therefore, she did not come to court with clean hands.

With respect to the issue of the Court below having declined to visit the subject property, we are of the considered view that the Court properly directed itself as it was merely dealing with an interlocutory application. Our reasoning on this issue is that, had the Court accepted to visit the disputed piece of land, it may have pre-empted its decision of issues which were to be decided on evidence and merit at the trial of the matter. We find the position taken by the Supreme Court in the case of **TURNKEY PROPERTIES LTD v LUSAKA WEST DEVELOPMENT CO LTD** to be instructive on this matter. In that case it was held *inter alia* that:

“It is improper for a court hearing an interlocutory application to make comments which may have the effect of pre-empting the decision of the issues which are to be decided on the merits, at the trial.”

Therefore, in light of the foregoing, we are satisfied that even without the Court below visiting the area, it addressed itself to the pre-requisites to be considered before granting an injunction from the affidavit evidence before it. We find that it was from its evaluation of the evidence that it exercised its discretion to grant the injunction to the 1st Respondent despite the fact that it had earlier declined to grant the same injunctive remedy to the Appellants.

As for the allegation by the Appellants that the 1st Respondent suppressed material facts from the Court below, we have found no evidence of such suppression as the Appellants have not disclosed the nature of material facts suppressed.

For the reasons we have stated, we find that ground one is devoid of merit and we dismiss it.

We now turn to ground two where the Appellants attack the ruling of the Court below for referring to "**maintaining the *status quo***" when it granted the injunction to the 1st Respondent. It is evident from the Appellants that their main grievance is that they were restrained from further construction of works on the subject land whilst the building of the palace was allowed to continue.

According to the affidavit evidence by the 1st Respondent, the construction of the palace is being undertaken by the State, hence the inclusion of the 2nd Respondent as a party.

In view of the said contention by the 1st Respondent, we take judicial notice that the Government of the Republic of Zambia has been constructing palaces for traditional rulers within the country.

As such, we acknowledge that in terms of section 16 of the State Proceedings Act, Chapter 71 of the Laws of Zambia no order for an injunction can lie against the State (see **MIFIBOSHE WALULYA v ATTORNEY GENERAL & HON F. M. CHOMBA**¹³).

In the circumstances, we are of the view that since no injunction can lie against the State, the Court below was on firm ground to dismiss the application for an injunction against the 1st Respondent as the State has been named as being responsible for the construction of the palace.

Furthermore, in terms of the issue of irreparable damage or harm, we are of the view that if the Soli royal burial shrine is disecrated, the harm will not be atoned for by damages.

We, therefore, find no merit in ground two and we, accordingly dismiss it.

We finally turn to ground three where the Court below is faulted for having omitted to order the 1st Respondent to make an undertaking as to damages as is the usual practice in orders for injunction.

We note that the Appellants' Counsel cited **ZAMBIAN CIVIL PROCEDURE: COMMENTARY AND CASES** where the learned author, Mr. Justice Dr. P. Matibini, SC addressed the issue of undertaking as to damages at page 779.

We also had occasion to peruse the **HALSBURY'S LAWS OF ENGLAND, Fourth Edition, Re-issue** at paragraph 804 on interlocutory injunctions, where the learned authors state that:

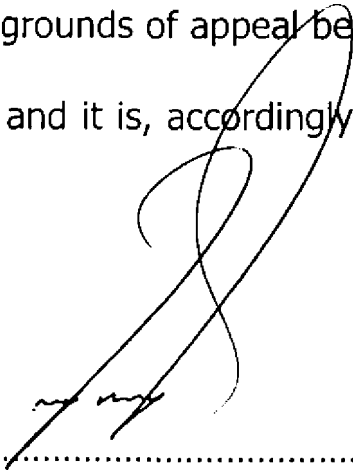
"The object of an interlocutory or interim injunction is to preserve matters pending the trial of matters in dispute, and an interim injunction may be granted *ex-parte* in an emergency. With limited exceptions, the person applying for an interlocutory injunction must always give an undertaking to pay damages in case it should turn out at the hearing that he is in the wrong."

In relation to the present case, we agree with the Appellants' argument that the Court below ought to have asked the 1st Respondent to make an undertaking as to damages but it did not do so.

We, however, acknowledge what is stated in the excerpt from the **HALSBURY'S LAWS OF ENGLAND** that we quoted, where the learned

authors state that an undertaking as to damages must always be given, with limited exceptions, which are later stated at paragraph 982, as matrimonial and children's matters. We are, however, of the considered view that the said omission is not fatal so as to render the injunction ineffective. In the circumstances, therefore, we find that ground three only succeeds in part, to the extent of emphasizing the principle that an undertaking as to damages ought to have been made. On the other part of having the injunction set aside due to the Court's omission, we find no merit in that limb.

In conclusion, all three grounds of appeal being unsuccessful, the net effect is that the appeal fails and it is, accordingly, dismissed with costs to the 1st Respondent.



J. Chashi

COURT OF APPEAL JUDGE



F. M. Lengalenga

COURT OF APPEAL JUDGE



M. J. Siavwapa

COURT OF APPEAL JUDGE