

**IN THE COURT OF APPEAL FOR ZAMBIA
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)**

CAZ/08/110/2020

BETWEEN:

**ASTRO HOLDINGS LIMITED
AND**

LUSAKA CITY COUNCIL

**ZAMBIA ELECTRICITY SUPPLY CORPORATION
LIMITED**

CHIKUTANKO NKOMA

VICTOR MWAPE

LIVONIA DEVELOPMENT TRUST



APPELLANT

1st RESPONDENT

2ND RESPONDENT

3RD RESPONDENT

4TH RESPONDENT

INTENDED 5TH RESPONDENT

CORAM: KONDOLO SC, D.L.Y SICHINGA SC, N.A. SHARPE-PHIRI

On 5th April, 2023 and 8th June, 2023

*For the Appellant: Mr. K. Sianga, Mr. C Nkhata & Mr. C Mubita of Messrs
Paul Norah Advocates*

For the 1st & 3rd Respondent: Ms. W Chirwa of Messrs J & M Advocates

*For the Intended 5th Respondent: Mr. M. Mwansa of Messrs Mukoloba
Mwansa Advocates*

R U L I N G

KONDOLO SC, JA delivered the ruling of the Court;

CASES REFERRED TO:

1. **Kelvin Hangandu & Company (A Firm) v Webby Mulubisha (2008) ZR 82 Vol. 2 SC**
2. **American Cynamid Company v Ethicon Limited (1975) AC 396**
3. **Beatrice Mnimui v Sylvia SCZ/50/2000 (unreported)**
4. **Mukumbuta Mukumbuta, Sam Mukamamba Kweleka, Mubita Mooto Mooto & Kandumba Munganga v Nkwilimba Choobana Lubinda Richard Mbikusita Munyinda Rosalyn Mukelabai & Mongu Meat Corporation Ltd SCZ/8/2003**

LEGISLATION REFERRED TO

1. **Order 29 Rule 1 of The Supreme Court Rules [Whitebook] 1999 Edition (RSC)**
2. **Order 7 Rule 1 and 2 of the Court of Appeal Rules**
3. **section 52 of the Legal Practitioners Act**

1. INTRODUCTION

1.1. This ruling is in respect of three applications, as follows;

1. The Appellant's application to join the intended 5th Respondent to the proceedings.
2. The Appellant's application for an interlocutory injunction; and
3. The Appellant's application for an order of reversal of transfer of title.

2. Application for Joinder

- 2.1. At the hearing, the intended 5th Respondent did not object to being joined to the action and we accordingly granted the application and ordered that the intended 5th Respondent is now a party to this action as the 5th Respondent.

3. Application for an Interlocutory Injunction

- 3.1. The Appellant filed summons for an interim injunction on 22nd February, 2023 pursuant to **Order 29 Rule 1 of The Supreme Court Practice (RSC)** as read with **Order 7 Rule 1 and 2 of the Court of Appeal Rules (CAR)**. On 20th March, 2023, the Appellant obtained an *ex parte* order restraining the Intended 5th Respondent from entering, building or any dealings that are prejudicial on stand No. 4518, Lusaka.
- 3.2. The Application was supported by an affidavit sworn by Sanmukh Ramanlal Patel in which he averred that the Appellant was granted an injunction by this Court restraining the 1st, 2nd 3rd and 4th Respondents from selling or transferring ownership of the subject property to a Third Party until further order of this Court.

- 3.3. The 1st to 4th Respondents were duly served with the order of injunction.
- 3.4. That there are currently proceedings in the High Court of Zambia under Cause No. 2021/HP/0296 regarding the sale or transfer of ownership wherein the 5th Intended Respondent is one of the parties.
- 3.5. That the Appellant applied to the High Court to be joined to those proceedings and that the proceedings be stayed pending determination of an appeal in this Court. That the High Court was duly informed of the injunction granted by this Court.
- 3.6. That the intended 5th Respondent opposed the Appellant's application for joinder in the High Court and was thus aware of the injunction granted by this court as it was exhibited in the Appellants application.
- 3.7. That despite being aware of the injunction, the intended 5th Respondent purchased the subject property from the 1st Respondent and commenced building works. This prompted the Appellant to commence contempt of court proceedings against the respondents.
- 3.8. It was further attested that the Applicant seeks an order to stop all construction works, reverse the transfer of title and order demolition of the works done in disregard of the order of injunction.

3.9. The Appellant also attested that it had made an application for an interim injunction before the High Court to stop the works but the application was yet to be heard on account of preliminary issues raised by the intended 5th Respondent, hence this application before this Court.

3.10. 5th Respondents opposition

3.11. The Intended 5th Respondent filed an affidavit in opposition sworn by its Managing Director, Kassem Safieffine.

3.12. He attested that the injunction granted by the Court on 14th June, 2021 and confirmed on 28th September, 2021 was not directed at the Intended 5th Respondent and that when the said injunction was granted, the 1st Respondent had already performed its contractual obligations in the sale of the subject property to the intended 5th Respondent.

3.13. In that regard, the Intended 5th Respondent produced exhibits showing that the letter of sale, contract of sale, payment for the property and registration of a caveat were all done before the said interim injunction was granted.

- 3.14. It was attested that this application amounts to a multiplicity of actions because there is an application for an injunction on similar grounds pending before the High Court.
- 3.15. That the Intended 5th Respondent has entered into a lease agreement for the property at a rental of US\$45,000 per month and is incurring losses as a result of the *ex parte* order of injunction granted by this court.
- 3.16. The Intended 5th Respondent filed skeleton arguments which in relation to the injunction emphasized that there was a similar application for an injunction in the High Court before Justice Bowa under Cause 2021/HP/096. That therefore, all matters to do with the cause of action in that matter should all be dealt with under Cause 2021/HP/096. The case of **Kelvin Hangandu & Company (A Firm) v Webby Mulubisha** ⁽¹⁾ was cited in support.
- 3.17. It was pointed out that the **Legal Practitioners Act** provides the Court with supervisory power over legal practitioners and that under **section 52 of the Legal Practitioners Act** this Court is empowered to admonish, suspend or cause an errant legal practitioner to be struck off the Roll pursuant to **section 28** of the cited Act. We were encouraged to exercise this power against counsel for the Appellant

who was accused of misleading this court into adjudicating over an application which had already been made in the High Court.

3.18. It was suggested that on account of such conduct, we order immediate payment of costs to the Intended 5th Respondent by the Appellant.

3.19. With regard to the relief sought by the Appellant, that the Certificate of Title granted to the Intended 5th Respondent be reversed, it was argued that this relief could only be sought under a fresh action because a certificate of title had already been issued.

3.20. On account of the position taken by the intended 5th Respondent at trial, we shall not recount the arguments in relation to the application for joinder.

4. HEARING

4.1. When the matter came up for hearing, the Intended 5th Respondent decided not to oppose the application for joinder.

4.2. We inquired from counsel for the Appellant as to why his client was seeking another injunction when this court had already granted an injunction in this matter. He replied saying that the injunction was granted against the 1st Respondent and was restraining the transfer of ownership of title whilst the new application was for the purpose

of restraining the Intended 5th Respondent from carrying out construction and any other works on the subject property.

- 4.3. Mr. Sianga on behalf of the Appellant stated that they were relying on the affidavit filed in support of the application.
- 4.4. Counsel for the 1st Respondent, Mr. Chirwa, informed the Court that his client had not filed an affidavit in opposition but would submit on points of law.
- 4.5. He noted that the Appellant had not filed skeleton arguments in support of the application and opined that an injunction could only be granted upon the applicant attaining the threshold set in the case of **American Cynamid Company v Ethicon Limited** ⁽²⁾. That the Appellant's skeleton arguments should have shown that the Appellant had attained the required threshold by showing that there was a serious case to be tried, that damages would be inadequate and that the balance of convenience favored granting the injunction.
- 4.6. Mr. Chirwa submitted that the above facts could only be determined by the High Court meaning that this Court lacks jurisdiction to hear this application.

- 4.7. Mr. Mwansa on behalf of the intended 5th Respondent relied on his client's affidavit in opposition and skeleton arguments. The main thrust of his argument was that the Appellant was forum shopping because a similar application was pending before the High Court in which the ruling had been reserved for 11th April, 2023.
- 4.8. In reply, when pressed Mr. Sianga admitted that one of the reliefs sought in the application for injunction before the High Court was to restrain the parties from constructing on the subject property and thus similar to the relief sought before this court.
- 4.9. According to him, the matters before the High Court and before this court were different and by his understanding, the principles surrounding multiplicity of actions only applied to commencement of matters.
- 4.10. He further stated that the Appellant rushed to this Court because the injunction was not granted *ex parte* and when they appeared for the *inter partes* hearing, the intended 5th Respondent raised a preliminary issue. He further insisted that the nature of the matters in the two courts were different and in the event that the High Court and this Court made conflicting decisions, the decision of this Court would prevail.

5. ANALYSIS AND DECISION

- 5.1. We have considered the process and the arguments filed and advanced by the parties and shall begin by addressing the application for joinder.
- 5.2. The intended 5th Respondent initially opposed the application for joinder but upon being asked by the Court whether he felt his client would not be affected by the outcome of the proceedings before this Court, counsel for the Intended 5th Respondent decided not to oppose the application. We consequently ordered that he be joined to the action.
- 5.3. The Applicant also seeks an Order for reversal of the transfer of Title to the Intended 5th Respondent on the ground that title was transferred in contravention of the order of interim injunction granted by this Court *ex parte* on 14th June, 2021 and confirmed on the 28th September, 2021.
- 5.4. The print out from the Lands and Deeds Registry does indeed show that the transfer of Title was made on 13th May 2022, several months after the injunction had been granted.
- 5.5. We also note that the Appellant has commenced proceedings for contempt of Court against the errant parties.

- 5.6. The Appellant did not file any skeleton arguments in relation to this claim and at the hearing, counsel did not advance any serious arguments on this claim.
- 5.7. The fact as to whether transfer of title was done in contempt of the order of injunction will be established during the contempt proceedings which have been commenced by the Appellant.
- 5.8. The outcome of the contempt proceedings will invariably inform the decision in the Applicant's claim for an order for reversal of the transfer of Title to the Intended 5th Respondent.
- 5.9. It is therefore premature for us to comment on this issue and this particular relief is consequently denied.
- 5.10. With regard to the injunction, it is quite obvious that the Appellant, through its counsel Mr. Sianga, engaged in forum shopping in a surprisingly blatant and brazen manner. Counsel admitted that in the application before the High Court they sought to restrain the parties from constructing on the subject property and that is the exact relief sought from this court.
- 5.11. It appears that the dispute over the subject property, Stand No. 4518, Lusaka has spawned all manner of litigation under at least 3 cause numbers in the High Court. The cause number under which

this particular application was made is an appeal before this Court from a final judgement of the High Court delivered by Madam Justice Wanjelani under Cause No. 2014/HP/1180.

5.12. The matter under which a duplicate application for injunction was made in the high Court is an active matter before Justice Bowa under Cause No 2021/HP/0296.

5.13. As we address the application for an injunction we must comment on the allegation of forum shopping against the Appellant. Forum shopping is an abuse of the court process and a most deprecated practice.

5.14. **Order 18 Rule 19 RSC**, provides that Courts must prevent the improper use of its machinery, a practice which we find quite intolerable. Errant parties are reminded that over and above the possibility of having one's matter dismissed, they can also be visited by a financial sanction in the form of costs.

5.15. Forum shopping is a form of abuse that can result in embarrassing the Courts because of the risk of different Courts making conflicting decisions over the same issue.

5.16. In the case of **Beatrice Muimui v Sylvia Chunda** ⁽³⁾ the Supreme Court said as follows;

"Once a matter is before court in whatever place, if the process is properly before it, that court should be the sole court to adjudicate all issues involved, all interested parties have an obligation to bring all issues in that matter before that particular court without resorting to forum shopping in other courts. This is abuse of process which should not be accepted"

5.17. In the later case of **Mukumbuta Mukumbuta & Others v Nkwilimba Choobana & Others** ⁽⁴⁾ the Supreme Court was quite enraged by the Respondents whose forum shopping resulted in bringing the High Court into ridicule by making three Judges give conflicting decisions on the same subject matter. The Supreme Court held as follows;

" it is not the respondents who should be punished in costs. They are not lawyers themselves. They may not have been following what was going on. On the other hand, their advocates, deliberately and consciously went forum shopping resulting in the parties twice being before this Court and before several High Court Judges. It is the advocates of the

respondents and not the respondents who should be punished in costs."

5.18. In casu, the Appellant is involved in litigation over different issues arising from the same subject matter i.e. Stand No. 4518, Lusaka. It is no fault of the Appellant that the matters are before different courts. However, in trying to protect its rights, the Appellant decided to seek the same injunctive relief before the High Court and before this Court, namely that the Parties to the action be restrained from carrying out construction works on the subject land.

5.19. We reject the feeble arguments advanced by counsel for the Appellant in trying to justify why he decided to take such an inadvisable course of action. We find no reason to entertain the application for an injunction especially that the intended 5th Respondent was granted a Certificate of Title, albeit, which is being challenged.

5.20. In the premises, the ex-parte order for an injunction granted on 20th March, 2023 is discharged with costs to the 1st and 2nd Respondents and to the intended 5th Respondent.

5.21. In order to reinforce our disdain for forum shopping and to discourage others from walking this path we order that the

costs for this application be borne personally by counsel for the Appellant.

5.22. We must state for the record that despite finding as we have, we did remind counsel for the intended 5th Respondent that building on property which is embroiled in litigation is a risky undertaking.



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M.M. KONDOLO, SC
COURT OF APPEAL JUDGE



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D.L.Y. SICHINGA, SC
COURT OF APPEAL JUDGE



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N.A. SHARPE-PHIRI
COURT OF APPEAL JUDGE