

**IN THE HIGH COURT FOR ZAMBIA**

**2006/HP/0973**

**HOLDEN AT LUSAKA**

(Civil Jurisdiction)

**BETWEEN:**

**SETH SHIBULO LOONGO**

**Plaintiff**

**and**

**PETER LOONGO**

**1<sup>st</sup> Defendant**

**SAM SHAFWAMBA**

**2<sup>nd</sup> Defendant**

**LUCKIAS SHAFWAMBA**

**3<sup>rd</sup> Defendant**

**ENOS SHAFWAMBA**

**4<sup>th</sup> Defendant**

Before the Hon. Madam Justice F. M. Lengalenga this 6<sup>th</sup> day of March 2012 in chambers at Lusaka.

For the plaintiff : Mr. M. Phiri – Messrs Mwansa Phiri  
and  
Partners

For the defendant : Mr. T.K Ndhlovu – Messrs Batoka  
Chambers

---

**RULING**

---

**Cases cited:**

- 1. LONDON AND BLACKWELL v CROSS (1886)3 Ch D 345**
- 2. SHELL AND BP (ZAMBIA) LTD v CONIDARIS & OTHERS (1975) ZR 174 at page 176**
- 3. TURNKEY PROPERTIES LTD v LUSAKA WEST DEVELOPMENT COMPANY LTD (1984) ZR 85**
- 4. GIDEON MUNDANDA v MULWANI & 2 OTHERS (1987) ZR 30**
- 5. ZIMCO PROPERTIES LTD v LAPCO LIMITED (1988/89) ZR 92**
- 6. JANE MWENYA & ANOTHER v PAUL KAPINGA (1998) ZR 17**
- 7. AMERICAN CYNAMID CO. v ETHICON LTD (1975) AC 396**
- 8. GRANADA GROUP LTD v FORD MOTOR COMPANY LTD (1972) FSR 103**

This is the plaintiff, Seth Shibulo Loongo's application for an order of interim injunction directed at the defendants herein to restrain them, whether by themselves, their agents or servants or whosoever from dealing with, visiting, trespassing, cultivating or farming on the said farm known as Lot No. 3507/M Shibuyunji in Mumbwa District or dealing with the property in anyway that would prejudice the plaintiff's claim herein until the final determination of this matter or until further order of the court. The plaintiff's application is supported by an affidavit filed into court on 2<sup>nd</sup> February 2012, which was sworn the plaintiff, Seth Shibulo Loongo who deposed that the defendants herein are trespassing and causing damage on Lot No. 3507/M Shibuyunji, Mumbwa as they are staying on it, cultivating and/or farming on the farm without permission. He deposed further that the 1<sup>st</sup>

defendant had contracted unknown people to cut down trees on his farm and caused damage to his cotton field. He further deposed that he is the title holder of Lot No. 3507/M Shibuyunji, Mumbwa and he exhibited "SSL 1" a copy of the said certificate of title. Seth Shibulo Loongo deposed that the dependants have illegally invaded his farm and are exhibiting hostile and violent behavior towards him and he stated that he needs peace and to cultivate his farm without being disturbed by the defendants. He stated that if the defendants are not restrained they would continue to trespass, cultivate, damage, and send strangers to his farm and to disturb him. The plaintiff deposed further that the defendants actions are likely to cause breach of peace in the area and that they have neither the right, permission nor authority from him to visit, cultivate, plough, trespass or damage his farm.

The defendants, on 21<sup>st</sup> February, 2012 filed into court an affidavit in opposition to the plaintiff's affidavit in support, and which affidavit in opposition was sworn by one Peter Loongo, the 1<sup>st</sup> defendant herein. This deponent deposed that he is the headman of Chikumbe village and that he had been a headman of the said village since 1980 and that he is a farmer by occupation. He deposed further that as headman of Chikumbe village he was not aware that the plaintiff applied and obtained a certificate of title encompassing a large part of his village and customary land. Peter Loongo further deposed that the plaintiff connived with some unscrupulous Mumbwa Council official to recommend to Ministry of Lands to be issued with a certificate of title for land in

his village. He added that neither he as village headman nor any member of his village were consulted before the recommendation and issuance of the title deed by the Ministry of Lands. The 1<sup>st</sup> defendant deposed that it was sometime after the plaintiff had obtained the obnoxious title deed that he made the pronouncement that the defendant were illegally squatting on his land alias, their village. He deposed further that the land for which the title deed was issued belonged to their late father and that they had lived on it even before the plaintiff was born. The deponent denied that they had invaded the land under Lot No. 3507/M Shibuyunji and he stated that they had lived there since 1935.

Peter Loongo deposed that even Senior Chief Shakumbila where the said piece of land is, had categorically denied knowledge of authorizing the plaintiff to obtain a title deed for the land in issue and he referred the court to exhibit "PL 1" a copy of the letter from the Senior Chief to the Commissioner of Lands. He deposed further that at a meeting held later between officials from the Lands Department, Mumbwa District Council, the defendants and other affected villages, it was resolved and agreed that if the plaintiff is given a title deed, the plaintiff's boundary would have to be re-adjusted so as to have minimum adverse effects on the other villagers' customary land as the current boundary encompasses the most arable land which includes a communal borehole that the rest of the villagers and

defendants rely on. The deponent stated that the villagers are affected and are ready to go to jail and even die for the land left to them by their forefathers if any attempt to forcibly remove them is made. He also denied that the defendants were threatening the plaintiff and he stated that to the contrary, it was the plaintiff who was chasing them from the land of their forefathers. The 1<sup>st</sup> defendant asked the court to dismiss the plaintiff's application with costs.

The plaintiff filed an affidavit in reply to the defendant's affidavit in opposition, on 1<sup>st</sup> March, 2012. In the said affidavit in reply, Seth Shibulo Loongo in paragraph 6 thereof stated that Peter Loongo's affidavit was full of falsehoods meant to mislead the court and to defeat the just ends of justice. He also stated that it is not true that Peter Loongo was the headman of Chikumbe village in 1980 or that he connived with, some unscrupulous Mumbwa Council officials to recommend him to obtain title deeds and he exhibited "SSL 1" a copy of an official document from Mumbwa District Council recommending his application. He further denied that he obtained an obnoxious title deed and he stated that he followed all the legal procedures in obtaining the title deeds and he exhibited "SSL 2", a copy of the Chief's authority. The plaintiff further denied that the defendants have lived on his titled land since they were born because the village and the farm are almost two kilometres apart and he deposed that at the time he was recommended to get title deeds,

all the defendants were not living on the said land as they only moved on his land in 2005, but only to farm there. He stated in paragraph 13 that the current Senior Chief Shakumbila who allegedly wrote a letter that his title was null and void, only ascended to the throne in 2008 and that the one who was there in 1982 who gave him authority to apply for the title deeds as indicated in exhibit "SSL 2". Earlier in paragraph 8, Seth Shibulo Loongo stated that there was no requirement in the now repealed Land Conversion of Titles Act, 1975, to involve the headman if one was applying for title deeds. He also denied that the entire Chikumbe village community reside, rely, cultivate or farm on Lot No. 3507/M and he stated that only fifteen of them invaded his farm in 2005 leaving their own pieces of land near the village. The plaintiff deposed that to-date none of the defendants nor the villagers squat or live on his farm, Lot No. 3507/M and that they only go there to cut trees and cultivate at his farm without authority. He further stated that the issue of how the title was obtained is a matter for the substantive case and should have no bearing on the application for an interim injunction.

On 1<sup>st</sup> March 2012, the plaintiff filed into court submissions which he relied on. In the said submissions it was submitted by Counsel for the plaintiff that it is trite law that one cannot obtain an injunction to restrain actionable wrongs for which damages are a proper remedy and he relied on the holding in the case of **LONDON AND BLACKWELL v CROSS**<sup>1</sup> and the case of **SHELL &**

**BP (ZAMBIA) LIMITED CONDARIS & OTHERS<sup>2</sup>** where it was held at the Supreme Court at page 176 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 substantial and can never be adequately remedied or atoned for by damages, not injury which can possibly be repaired”***

In the instant case, Counsel for the plaintiff’s contention is that since this case involves land, damages would be substantial and would not be remedied or atoned for by damages once that land is completely lost, disfigured or fully developed for a totally different use. Counsel for the plaintiff submitted that in this case, the property is farmland and the defendants are cutting down trees, ploughing and cultivating it in a manner that completely disadvantages the plaintiff.

He also referred the court to the case of **TURNKEY PROPERTIES v LUSAKA WEST DEVELOPMENT COMPANY LTD & OTHERS<sup>3</sup>** where the Supreme Court stated inter alia that:

***“The court in deciding whether to grant an injunction or not should in no way pre-empt the decision of the***

***issues which are to be decided on the merits and the evidence at the trial of the action.”***

In the instant case, Counsel for the plaintiff submitted that the plaintiff has exhibited his certificate of title showing that the land in question was acquired legally. He submitted further that the plaintiff's right to relief is clear as the defendants have not produced any document of ownership of the property in question. He further submitted that section 33 of the lands and Deeds Registry is instructive and that the defendants should be stopped from destroying the farmland by indiscriminately cutting trees. Mr. Phiri's contention is that since land is subject matter in this action, damages would not be sufficient remedy for loss of an interest in land as was held by the Supreme Court in the case of **GIDEON MUNDANDA v TIMOTHY MULWANI & OTHERS**<sup>4</sup>. He submitted that similarly, the learned author in **CHITTY ON CONTRACTS**, 25<sup>th</sup> edition in paragraph 1764 stated as follows:

***“Land; the law takes the view that damages cannot adequately compensate a party for breach of contract for the sale of an interest in a particular piece of land or of a particular house, however ordinary”***

The plaintiff also relies on the case of **ZIMCO PROPERTIES LTD v LAPCO LIMITED**<sup>5</sup> and it was submitted on his behalf that the harm and damage to the land would be irreparable and damages would not suffice to recompense the plaintiff. Counsel for the plaintiff submitted further that the plaintiff's right to relief is clear



in this case as he is the title holder while the defendants are trespassers. He further submitted that the proposition of the law in **CHITTY ON CONTRACTS** was later recited in the case of **JANE MWENYA & ANOTHER v PAUL KAPINGA**<sup>6</sup> wherein the Supreme Court held inter alia that:

***“The law takes the view that damages cannot adequately compensate a party for a breach of contract for the sale of an interest in a particular piece of land or of a particular house, however ordinary.”***

Mr. Phiri submitted that an injunction is therefore, necessary to protect the title holder’s interest in the land as damages are not a sufficient remedy as the subject matter is land. He prayed that the ex-parte order of injunction be confirmed with costs to the plaintiff.

Counsel for the defendants, Mr. T. K. Ndhlovu in his skeleton arguments filed into court on 9<sup>th</sup> March, 2012 on behalf of the defendants, submitted on the history of the case, restated the contents of the defendants’ affidavit in opposition with his own extraneous information which should only be presented at the main hearing and, therefore, I will disregard it as being irrelevant to this application which has its own guiding principles on what the court should consider before granting an interlocutory injunction.

Counsel for the defendants' contention is that their observation from the plaintiff's affidavit in reply and particularly exhibit "SSL 2" is that the plaintiff stated that he was given authority by Chief Shakumbila to settle as a farmer in Munyati area and that the area he wished to settle on comprised 40 hectares. However, he obtained a title deed for Chikumbe village where the defendants and other villagers reside and cultivate their fields and that although the land he was given was 40 hectares the plaintiff's exhibit "SSL 1" shows or indicates the extent of the area as 59.8098 hectares. It was also contended that the almost 20 hectares more the plaintiff was given encompasses much of the village land and further annexes the communal borehole from which the defendants and other villagers of Chikumbe village sourced their water.

Mr. Ndhlovu submitted further that the extracts of the minutes of the stakeholders meetings at which the Commissioner of Lands' representative, Mr. W. Sangulumbe was present, show that the land under the plaintiff's title deed encroached on other villagers' land and that the borehole was not the plaintiff's personal property as it was sunk using public funds and that, therefore, it should be excluded from the said piece of land that is on title of the plaintiff. He further submitted that it was recommended that the land be re-planned and the plaintiff's plot be re-designed by the Council and officers from the Ministry of Agriculture.

Counsel for the defendants argued that although the plaintiff attempted to rely on the **SHELL & BP** case and proposed that he would suffer irreparable damage if the injunction was not granted as the defendants would cut down trees, on the contrary it is the defendants and other villagers who would suffer irreparable injury as they would lose their arable land, source of water and fields. He submitted further that in relation to the Supreme Court's decision in the case of **JANE MWENYA & ANOTHER v PAUL KAPINGA**, the import of their statement that damages cannot adequately compensate a party for breach of contract for sale of an interest in a particular piece of land or of a particular house, however, ordinary is that once the defendants are chased from their houses and fields no amount of damages can repair their injury. He submitted that, therefore the injunction should not be entertained or upheld as it will render the defendants and their children internally displaced refugees with no where to go and thereby suffer irreparable injury.

I have carefully considered the plaintiff's application, all the affidavit evidence, submissions and skeleton arguments and even the exhibits which I found to be of great assistance to me in guiding me on the issue of the balance of convenience. In the **TURNKEY PROPERTIES LTD** case, the Supreme Court held inter alia that an interlocutory injunction is appropriate for the preservation of a particular situation pending trial and that such injunction should not be regarded as a device by which an

applicant can attain or create new conditions favourable only to himself. In the same

case, the Court also discussed the issue of the balance of convenience which should be considered by the court by determining where it lies or in whose favour the scale tilts and whether more harm would be done by granting or refusing to grant the injunction as it was held in the case of **AMERICAN CYNAMID CO. v ETHICON LTD**<sup>7</sup>. Further in **GRANADA GROUP LTD v FORD MOTOR CO. LTD**<sup>8</sup>, it was held that it would be wiser to delay a new activity rather than risk damaging one that is established. In relation to the present case, although the plaintiff is a title holder, in view of the issues raised in the affidavit evidence, exhibits, submissions and skeleton arguments, I am of the considered view that the defendants herein may also have an interest in the land which may also be worth protecting because of the allegations of encroachment and possible dubious means having been used by the plaintiff to obtain the title deed. Further, it may be possible that the plaintiff might be trying to use the injunction as a device by which he can create new conditions favourable only to himself. Therefore, I am of the considered view that the status quo should be maintained until the rights of the parties have been properly and finally determined by the court and that this can be done by this court not granting the order of interim injunction as I find that in line with the case of **GRANADA GROUP LTD v FORD MOTOR CO. LTD**, it would be

better to delay a new activity rather than risk damaging an established one. Further I find that the balance of convenience lies heavily in favour of my not granting the injunction sought. I, therefore, decline to grant the injunction sought and I, accordingly, discharge the order granted earlier by this court on 6<sup>th</sup> March, 2012 and dismiss the plaintiff's application with costs.

DATED this.....day of March, 2012 at Lusaka.

.....  
F. M. Lengalenga

**JUDGE**

- \_\_\_\_\_

-