

**IN THE HIGH COURT FOR ZAMBIA**

**2011/HP/1255**

**HOLDEN AT LUSAKA**

(Civil Jurisdiction)

BETWEEN:

**NIC JEMBUNATH MONEY**

**Plaintiff**

and

**HERSI OSMAN HUSSEN**

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

**Defendant**

**THE COMMISSIONER OF LANDS**

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

**Defendant**

Before the Hon. Madam Justice F. M. Lengalenga this 3<sup>rd</sup> day of April, 2012 in chambers at Lusaka.

For the plaintiff : Mr. E. Mwitwa - Messrs Musa Mwenye  
Advocates

For the 1<sup>st</sup> defendant : Mr. R. K. Malipenga - Messrs Robson  
Malipenga & Company

For the 2<sup>nd</sup> defendant : Nil

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**RULING**

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**Cases cited:**

- 1. AMERICAN CYANAMID COMPANY v ETHICON LTD (1975) AC 396**
- 2. SHELL & BP (ZAMBIA) LTD v CONIDARIS AND OTHERS (1975) ZR 174 at p. 176**
- 3. TURNKEY PROPERTIES LTD v LUSAKA WEST DEVELOPMENT CO. LTD (1984) ZR 85**
- 4. GIDEON MUNDANDA v MULWANI & 2 ORS (1987) ZR 30**
- 5. HILLARY BERNARD MUKOSA v MICHAEL RONALDSON (1993/94) ZR 26 (SC)**
- 6. ZIMCO PROPERTIES LIMITED v LAPCO LIMITED (1988/89) ZR 92 (SC)**
- 7. MOBIL (ZAMBIA) LTD v MSISKA (1983) ZR 86**
- 8. GRANADA GROUP LTD v FORD MOTOR COMPANY LTD (1972) FSR 103**

This is the plaintiff, Nic Jembunath Money's application for an order of interim injunction to restrain the 1<sup>st</sup> defendant whether by himself, servants, agents or whosoever from interfering with the plaintiff's occupation, possession and ownership of the demised property known as Stand No. 10492, Lusaka until further order of this court. The plaintiff's application which is made pursuant to Order 27, Rule 1 of the High Court Rules, Chapter 27 of the Laws of Zambia, is supported by an affidavit which was filed into court on 7<sup>th</sup> December 2011 and sworn by the plaintiff, Nic Jembunath Money. In the said affidavit, the plaintiff and deponent deposed that he is a British national who is resident in Zambia and that by a deed of gift dated 13<sup>th</sup> February, 2006, he was vested with ownership of the demised property known as Stand No. 10492, Lusaka and he exhibited a copy of the

certificate of title to that effect. He deposed that he submitted a provisional plan to the Lusaka City Council and while waiting for approval erected a wall fence in 2007 to secure the premises. He deposed further that after completion of the wall fence around the demised property, part of it was demolished by the Lusaka City Council on the premise that a portion of the said plot had been designated as a service road which during the period 2007 and 2008 was surfaced in the low lying area with soil and the ground was raised to build a road along the northern periphery of the demised property. Nic Money further deposed that he subsequently commenced reconstruction of the wall fence but he was stopped by his architects, Messrs Ndilila Associates who suggested that appropriate authority be sought from the Lusaka City Council but he added that authority had already been sought vide the submission of a revised set of drawings which had been registered by the Council. He stated that owing to the delays by the Council to confer the requisite authority to commence construction the 2<sup>nd</sup> defendant commenced the process of re-entry on the property citing failure to carry out the requisite developments. He stated further that on 31<sup>st</sup> October, 2008, Dr. F. M. Ndilila Associates authored a letter of appeal to the Commissioner of Lands to make the necessary representations against the intended re-entry and he exhibited "NM2", a copy of the said appeal letter. The plaintiff further deposed that further to that Dr. F. M. Ndilila authored an additional letter on 8<sup>th</sup> December, 2008 and attached documentary proof of the

application to develop that had been lodged with the Lusaka City Council and he exhibited "NM3", a copy of the said letter. He stated that despite providing all the documentary proof and showing that considerable expense had been incurred in the development of the property, the 2<sup>nd</sup> defendant by their letter dated 19<sup>th</sup> February 2009, refused to reverse their decision on the plaintiff's appeal against the re-entry and he exhibited "NM4" a copy of a letter from the Ministry of Lands to that effect. The deponent, Nic Money stated further that although the letter which was received as a registered article number C28548 was dated 19<sup>th</sup> February 2009, the actual date stamp of the Lands Department Records Despatch shows the date as 2<sup>nd</sup> July, 2009 and the Ridgeway Post Office stamp is dated 4<sup>th</sup> July, 2009 and he exhibited "NM5" collectively marked copies of the envelope and stamps. He stated that the date of letter as 19<sup>th</sup> February, 2009 and the date of receipt at the Ridgeway Post Office as 4<sup>th</sup> July, 2009 raised a lot of questions with regard to the procedure and validity of the entire re-entry process as it points to a premeditated manouvre to deprive him of the demised property. He further deposed that having expended a total cost in excess of two hundred million kwacha (K200 million) at the demised, he continued to make efforts to try and seek audience with the Ministry of Lands officials but he said efforts did not come to fruition and he exhibited "NM6" which indicates the expenses he incurred in respect of the demised premises. The plaintiff deposed that on 21<sup>st</sup> November 2009, the 1<sup>st</sup> defendant

trespassed on the said property and locked the gate and chased the security personnel from the property and which lock was forced to break to reintroduce security on account of the massive building materials on site. He deposed further that he then proceeded to carry out a search at the Ministry of Lands to establish the status quo and he discovered that the re-entry was made on 29<sup>th</sup> July, 2009 according to the register and he obtained a ground rent bill which reflected the names of the 1<sup>st</sup> defendant herein and he exhibited "NM7", copies of lands register printout and ground rent bill. Nic Money further deposed that following the purported re-entry, he paid numerous visits to the Ministry of Lands to see the Acting Legal Officer, Mr. Paul Kachimba who assured him that all was well and they would look into the issue but that despite those assurances the Ministry of Lands proceeded to offer the said plot to another person and he exhibited "NM8", copies of the follow up letters that he wrote to the Ministry of Lands. The plaintiff stated that the decision by the 2<sup>nd</sup> defendant to re-enter on the demised property was erroneous as it was done before the approval to build was given by the Lusaka City Council in 2010 and that despite the Ministry of Lands being aware of the pending approval from the Council which inhibited him from carrying out the craved developments by the Ministry of Lands aforesaid. He deposed further that on Sunday 4<sup>th</sup> December, 2011, the 1<sup>st</sup> defendant armed with a pistol went to the demised premises and threatened the plaintiff's workers who were on site and he retorted that he did not want to find anybody

at the said site. The plaintiff further deposed that the following day on 5<sup>th</sup> December, 2011, the defendant went back to the site and removed several items belonging to the plaintiff and he went away with them and he also broke the locks to the gate and replaced them with his own locks and he told the plaintiff's workers that he had bought the property and he told them all to vacate the premises. The deponent stated that in light of the foregoing, he was seeking an order for an interim injunction restraining the 2<sup>nd</sup> defendant whether by himself, servants agents or whomsoever from interfering with his occupation, possession or ownership of the demised premises until further order of this court.

The 1<sup>st</sup> defendant, Dr. Hersi Osman Hussein filed an affidavit in opposition and a further affidavit in opposition on 21<sup>st</sup> December 2011 and 19<sup>th</sup> January 2012 respectively and which affidavits he sworn. The deponent denied that the plaintiff has spent K200 million and stated that it was an exaggeration according to the Inspection Report obtained from the Ministry of Lands and a copy of which he exhibited as "HOH 1". He deposed further that when he went to his property Stand Number 10492, Lusaka on 21<sup>st</sup> November 2011 he was not a trespasser. He further deposed that the Commissioner of Lands in August 2008 issued an advertisement in the Zambia Daily Mail of the intention to re-enter several properties which included Stand Number 10492 Lusaka which belonged to the plaintiff and he exhibited a

copy of the said advertisement as "HOH 2". Dr. Hersi Osman Hussein deposed that several other people and himself showed interest in the advertisement and on 20<sup>th</sup> December 2009 he applied to the Commissioner of Lands for Stand Number 10492, Lusaka and he exhibited "HOH 3", a copy of the application letter dated 20<sup>th</sup> December 2009. He stated that at the time he was applying for Stand Number 10492, Lusaka the plaintiff was not the legal owner as the Commissioner of Lands had re-entered the property on 29<sup>th</sup> July, 2009 as indicted exhibit "HOH 4", an entry in the Lands Register. He deposed further that on 8<sup>th</sup> August, 2011, he was called for interviews at the Ministry of Lands where he was interviewed with three others out of five short listed applicants for Stand Number 10492, Lusaka and he exhibited "HOH 5" a copy of the minutes of the interviews conducted on 8<sup>th</sup> and 29<sup>th</sup> August 2011. He stated that on 26<sup>th</sup> September 2011, the Ministry of Lands wrote to him informing him that he was the successful applicant and that should pay the sum of K42.5 million and he exhibited "HOH 6" a copy of the said letter and he stated further that on 8<sup>th</sup> November 2011 he was issued with a formal letter of offer a copy of which he exhibited as "HOH 7" and that he also paid the K42.5 million on the same date, as shown by exhibit "HOH 8", copy of the receipt. Dr. Hersi Osman Hussein also deposed that on 9<sup>th</sup> November, 2011, he paid the Ministry of Lands K2,824 172-00 for ground rent, consideration registration and preparation fees as shown by exhibit "HOH 9" and on 11<sup>th</sup> November, 2011 also paid K21 38 646-00 to the Lusaka City

Council as shown by "HOH 10 a to d." The 1<sup>st</sup> defendant stated further that due to the foregoing allegation by the plaintiff that he trespassed on his property is not true as the property in issue was repossessed by the Commissioner of Lands. He stated that, therefore, that the plaintiff is not entitled to the relief of interim injunction because he cannot be restrained as the legal owner and that the plaintiff as the former owner cannot seek an injunction against him he knew or ought to know from July 2009 that his property had been repossessed by the Commissioner of Lands and that if he had issues, it should be between him and the Commissioner of Lands. The deponent further denied ever threatening anyone over his land but he reported the plaintiff to Lusaka Central Police Station for threatening his worker and seeking his physical address and he added that the plaintiff is the trespasser in this regard and he urged the court to dismiss the application for an interim injunction with costs.

In the further affidavit in opposition filed on 19<sup>th</sup> January, 2012 Dr. Hersi Osman Hussein deposed that the Ministry of Lands had issued him with a certificate of title for Stand Number 10492, Lusaka and he exhibited a copy of the same as "HOH 1."

The plaintiff, Nic Jembunath Money in the affidavit in reply filed on 9<sup>th</sup> February, 2012, deposed that he wished to correct the erroneous reference to the 2<sup>nd</sup> defendant in his affidavit in support as the one he was seeking an order of interim injunction against



instead of the 1<sup>st</sup> defendant and that this fact is augmented by the fact that the 1<sup>st</sup> defendant filed the affidavit in opposition and further affidavit in opposition in which he clearly indicated in paragraph 18 and 19 thereof that he opposed the plaintiff's application for the order of interim injunction against him. He deposed further that the costs he incurred are not only in relation to the developments on the property such as putting up the boundary wall and the gates but also on the cost of paying the architects experts and consults as is evidenced by exhibit "NM6" to the affidavit in support and he added that he had consistently paid for utility rates and ground rent, which are paid up to August, 2012 and he exhibited "NJM1" a copy of the ground rent receipt in his favour dated 28<sup>th</sup> October, 2011 and showing ground rent paid up to 30 September 2012. The plaintiff deposed that the developments he alluded to happened before the 2<sup>nd</sup> defendant issued the certificate of entry on the Lands Register in relations to the property and he referred the court to exhibit "NM8" attached to his affidavit in support. He also exhibited "NJM 2" and NJM 3" respectively, being copies of water bills for December 2011 and January 2012. With respect to exhibit "HOH 1", the purported Inspection Report from Ministry of Lands, the plaintiff stated that the photographs in the said report do not cover the entire premises and he could not confirm when they were taken but he stated that the building plans which he submitted to the Lusaka City Council were only approved in the year 2010 and that he could not do much on the property before then. He also exhibited

as "NJM4" copies of the experts of the approved building plans which were submitted to the Council in December 2008 through his architects Messrs Ndilila Associates and which were only approved in 2010. Nic Money further stated that as far as he was concerned, as at November 2011, the 1<sup>st</sup> defendant did not have any title deed to the land and that he was still in possession of it and which is exhibit "NM1" and he added that the 1<sup>st</sup> defendant was a trespasser as he had no right to enter the premises and that this is confirmed by the copy of the certificate of title issued to the 1<sup>st</sup> defendant and exhibited as "HOH1" and dated 6<sup>th</sup> January 2012.

The plaintiff stated further that he sincerely believed that this is a proper matter where the court can exercise its equitable and statutory jurisdiction by granting him the order of interim injunction against the 1<sup>st</sup> defendant so as to preserve the status quo pending the determination of the matter at trial as the matter relates to land which is a unique type of property and that he sincerely believes that it would be in the interest of justice and the justice of the case for the application to be granted. Nic Money stated further that if the injunction is not granted and the 1<sup>st</sup> defendant proceeds to take possession of the premises and he starts developing the land, he would be prejudiced. He further stated that the fact that the 1<sup>st</sup> defendant had itemized the amount he spent to process documents to acquire the land amounting to K47 462 818-00 he believed that it would be fairly

simple to compensate him in monetary damages if the case is decided in his favour and he added that he believed that damages would not atone for the loss he would suffer if the land is taken away from him by the 1<sup>st</sup> defendant. The plaintiff stated further that he was certain that the 2<sup>nd</sup> defendant cannot find a similar piece of land for him in the same locality. He stated that he was seeking the order for an interim injunction against the 1<sup>st</sup> defendant more especially since the 1<sup>st</sup> defendant had also filed a counter-claim against him seeking among other things a declaration that he is the legal owner of the property in issue, Stand Number 10492, Lusaka.

In the plaintiff's submissions filed on 10<sup>th</sup> February, 2012, the plaintiff and his advocates reiterated the contents of his affidavit in support and affidavit in reply and the reason why he seeks the order of injunction. In the submissions and skeleton arguments, it is contended that since the plaintiff has challenged the Commissioner of Lands' decision to re-enter the property and the plaintiff still has his title deed, it would only be fair to maintain the status quo pending the determination of this matter by the court. They referred to the general principles on injunction as laid down in the celebrated case of **AMERICAN CYANAMID COMPANY v ETHICON LTD**<sup>1</sup> and they submitted that the plaintiff's claims meet or satisfy all those standards or criteria. They also cited the case of **SHELL & BP (ZAMBIA) LTD v CONIDARIS & ORS**<sup>2</sup> where the Supreme Court held *inter alia* that:

***“ The court will grant an injunction only if the right to relief is clear and the injunction is necessary to protect the plaintiff from irreparable injury which cannot be atoned for by damages mere inconvenience is not enough.”***

In the present case, Counsel for the plaintiff submitted that the plaintiff is contesting the issuance of a certificate of title to the 1<sup>st</sup> defendant whilst the 1<sup>st</sup> defendant in his counter-claim seeks a declaration from the court to the effect that he is the legal owner of the property in issue. His contention is that the fact that the plaintiff was issued with a valid certificate of title to the land which he still has and he has shown that he objected to the Commissioner of Lands’ notice of intention re-entry is sufficient evidence that the plaintiff has raised serious questions to be tried and that the as a clear right to the relied he is seeking. The plaintiff relied on the case of **TURNKEY PROPERTIES LTD v LUSAKA WEST DEVELOPMENT COMPANY LTD & ORS**<sup>3</sup> where the Supreme Court stated *inter alia* that:

***“An interlocutory injunction is appropriate for the preservation or restoration of a particular situation pending trial.”***

The plaintiff through Counsel urged the court to preserve the status quo relating to the state of the land pending the determination of the matter and he submitted that the status quo

from the affidavit evidence, is that the 1<sup>st</sup> defendant has not yet taken possession of the property or put up any developments on the and that the only developments on the land are the ones put up by the plaintiff. The plaintiff submitted that if the 1<sup>st</sup> defendant is allowed to take possession of the land and to put up developments of his own, he would be highly prejudiced and he would not be adequately compensated for the loss of land should the court find in his favour at the trial and that he would suffer irreparable damage. The plaintiff relied on the case of **GIDEON MUNDANDA v TIMOTHY MULWANI & ORS**<sup>4</sup> where the Supreme Court established that damages cannot adequately compensate a party where land is the subject matter is issue, however ordinary.\_

The plaintiff further relied on the case of **HILLARY BERNARD MUKOSA v MICHAEL RONALDSON**<sup>5</sup> where the Supreme Court observed 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.”***

In the instant case, it is contended that since the plaintiff was the registered owner of the land in issue until the certificate of re-entry was issued by the 2<sup>nd</sup> defendant on 29<sup>th</sup> July, 2009, the plaintiff is entitled to question the 2<sup>nd</sup> defendant’s decision to re-enter the land, even though the 1<sup>st</sup> defendant has since been

issued with a certificate of title to the disputed land. The plaintiff also cited the case of **ZIMCO PROPERTIES LIMITED v LAPCO LIMITED**<sup>6</sup> where the Supreme Court held that:

***“The balance of convenience between parties as to whether to grant an injunction will only arise if the harm done will be irreparable and damages will not suffice to recompense the plaintiff for any harm which may be suffered.”***

In relation to the present case, Counsel for the plaintiff submitted that this is a typical case where this court should exercise its inherent power to grant an order of injunction against the 1<sup>st</sup> defendant because if the order is not granted the plaintiff will suffer irreparable damage as he may lose the property in question.

The 1<sup>st</sup> defendant, through his Counsel, filed into court a list of authorities and skeleton arguments on 15<sup>th</sup> February, 2012. In the said skeleton arguments, the 1<sup>st</sup> defendant contended that the plaintiff’s application for an order of interim injunction against the Commissioner of Lands is irregular as the Commissioner of Lands can only sue or be sued through the Attorney General and that the Commissioner of Lands’ decision can only be challenged through an application for judicial review not an action commenced by a Writ of Summons.

It was further submitted by Counsel for the 1<sup>st</sup> defendant that since the plaintiff stated in paragraph 17 of his affidavit that there is a re-entry in the Lands Register, and that there was a ground rent bill in the 1<sup>st</sup> defendant's name, that clearly indicates that the plaintiff is not the owner of the land. He added that the plaintiff's certificate was cancelled due to the re-entry and that he cannot mislead the court that he is the owner of Stand No. 10492, Lusaka. He further submitted that in accordance with section 54 of the Lands and Deeds Registry Act Cap 185 of the Laws of Zambia, the 1<sup>st</sup> defendant's certificate of title exhibited as "HOH 1" in the further affidavit in opposition, is *prima facie* evidence that he is the owner of Stand No. 10492, Lusaka.

With respect to the issue of the law of granting interim injunctions, Counsel for the 1<sup>st</sup> defendant's contention is that the plaintiff has failed to demonstrate the irreparable damage he would suffer if the injunction is not granted and further that the plaintiff has not demonstrated that damages would not suffice to recompense him for the harm which he is likely to suffer, as stated in the case of **ZIMCO PROPERTIES LTD v LAPCO LIMITED.**

Counsel for 1<sup>st</sup> defendant further submitted that the plaintiff had not established a good arguable claim to the right he seeks to protect because the property in issue does not belong to him as the Commissioner of Lands caused the said land to be re-entered on 29<sup>th</sup> July, 2009 and also in the Lands Register. He also argued

that the plaintiff did challenge the Commissioner of Lands over the re-entry until 7<sup>th</sup> December, 2011 when the property was offered to the 1<sup>st</sup> defendant and he accepted it.

With regard to the likelihood of the plaintiff succeeding in his claim, the 1<sup>st</sup> defendant's Counsel submitted that his likelihood of succeeding is nil because the Commissioner of Lands followed the law in re-entering the property in issue and he even advertised the withdrawal of offers as exhibited by the 1<sup>st</sup> defendant as exhibit "HOH 2". He submitted that although the plaintiff complained in paragraphs 12 and 13 of his affidavit that the Commissioner of Lands refused to reverse his decision of re-entry, the law is very clear on what action the plaintiff should have taken immediately he became aware of the Commissioner of Lands' decision.

On the question of the plaintiff's right to relief, Counsel for the 1<sup>st</sup> defendant relied on the Supreme Court's decision in the cases in the cases of **SHELL & BP (ZAMBIA) LTD v CONIDARIS & OTHERS** and **MOBIL (ZAMBIA) LTD v MSISKA**<sup>7</sup>, where they stated 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. He argued that in the instant case, the plaintiff had failed to demonstrate that his right to relief is clear because in his affidavit in support and particularly paragraph 21 thereof he seeks an injunction against the 2<sup>nd</sup> defendant who is the



Commissioner of Lands. He submitted that the injunction cannot be granted against the 2<sup>nd</sup> defendant as this offends the provisions of the State Proceedings Act.

In conclusion, Counsel for the 1<sup>st</sup> defendant submitted that the plaintiff had failed to demonstrate how he would suffer irreparable damage when he had quantified his alleged expenses in the sum of K200 million. He submitted further that the plaintiff had no chance or likelihood of succeeding at trial and he prayed that the plaintiff application be dismissed with costs.

I have carefully considered the plaintiff's application for an order of interim injunction to restrain the 1st defendant whether by himself, servants agents or whosoever from interfering with the plaintiff's occupation possession and ownership of the property known as Stand No. 10492, Lusaka until further order of this court, the submissions, arguments and exhibits before the court, I also considered the authorities which were of great assistance to the court. Although the plaintiff directed the application at the 1<sup>st</sup> defendant, I am of the considered view that in view of the evidence of the 2<sup>nd</sup> defendant's re-entry into the property in issue, it may not be easy for the plaintiff to successfully enforce the order of interim injunction against the 1<sup>st</sup> defendant without involving the 2<sup>nd</sup> defendant.

From the affidavit evidence, it is clear that the 1<sup>st</sup> defendant is also a title holder to the said Stand No. 10492, Lusaka while the

plaintiff also claims to still have his certificate of title to the same property and in line with the Supreme Court's observation in the case of **HILLARY MUKOSA v MICHAEL RONALDSON** that an injunction should be granted only to a plaintiff who established that he has a good arguable claim to the right he seeks to protect, it may, therefore, be difficult for this court to determine at this stage who of the two title holders has a better claim for purposes of granting the injunction. In such a situation as the present one, the court considered the issue of the balance of convenience to determine or weigh where it lies and whether more harm would be done by granting or refusing the injunction. On the basis of the affidavit evidence and I relied on the court's observation in the case of **GRANADA GROUP LTD FORD MOTOR CO. LTD**<sup>8</sup> where the court held that it would be wiser to delay a new activity rather than damage one that is established. In the instant case, I am of the considered view that granting the order of interim injunction sought by the plaintiff would be prejudicial to the 1<sup>st</sup> defendant especially since the plaintiff has not been heard on his appeal against the 2<sup>nd</sup> defendant's re-entry of the property. Furthermore, I am also of the considered view that granting an order of interim to the plaintiff may more or less amount to granting an injunction against the 2<sup>nd</sup> defendant and the State which is contrary to the provision of the State Proceedings Act, which provide that no injunction can lie against the State. In the circumstances, therefore, I am of the considered view that it would be better to maintain the status quo by

delaying a new activity that may cause more harm. I, therefore, accordingly, decline to grant the injunction sought by the plaintiff and I dismiss the application with costs.

Dated this.....day of April, 2012 at Lusaka.

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F. M. Lengalenga

**JUDGE**

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