

IN THE HIGH COURT FOR ZAMBIA
2012/HP/0299
HOLDEN AT LUSAKA
(Civil Jurisdiction)

IN THE MATTER OF : **THE LANDS ACT, CAP 184**
OF THE **LAWS OF ZAMBIA**

IN THE MATTER OF : **THE LANDS AND DEEDS**
REGISTRY **ACT, CAP 185 OF THE LAWS OF**
ZAMBIA

AND

IN THE MATTER OF : **APPLICATION** **FOR**
ALLOCATION OF **STAND Nos LUS/20938 AND**
LUS/20939

BETWEEN:

PACIFIC PARTS (Z) LIMITED

Plaintiff

And

THE ATTORNEY GENERAL

1st

Defendant

FAR EASTERN RESTAURANT

2nd

Defendant

Before the Hon. Lady Justice F. M. Lengalenga this 23rd day of
October, 2012 in chambers at Lusaka

For the plaintiff : **Mr. W. Mwenya - Messrs**
Lukona
Chambers

**For the 1st defendant : Miss M. Njobvu - Assistant
Senior
State Advocate**

**For the 2nd defendant : Mr. S. Chikuba - Messrs AED
Advocates**

R U L I N G

Cases Cited:

- 1. KAPIRI GLASS PRODUCTS LTD v MARUTI OIL INDUSTRY LTD (1993 -94) ZR 73 (HC)**
- 2. WYNTER KABIMBA v THE ATTORNEY GENERAL & LUSAKA CITY COUNCIL (1996) SCJ (SC)**
- 3. SHELL & BP (ZAMBIA) LTD v CONIDARIS & ORS (1975) ZR 174**
- 4. TURKEY PROPERTIES LTD v LUSAKA WEST DEVELOPMENT COMPANY LTD ANR (1984) ZR 85**

This is the plaintiff's application for an order to stay execution of the offer of Stand Nos LUS/20938 and LUS/20939 to the 2nd defendant, Far Eastern Restaurant by the Commissioner of Lands pursuant to section 18 of the State Proceedings Act, Cap 71 of the Laws of Zambia, until the final determination of the matter. The application is supported by an affidavit filed into court on 22nd March, 2012 and sworn by one Fred Wamala, Director of the plaintiff company, who deposed that sometime in May, 2009, the

plaintiff herein applied for three parcels of land namely Stand N^os LUS/20938, LUS/20939 and LUS/20940 in the Lusaka Province of Zambia through the planning authority for commercial sites being the Ministry of Local Government and Housing as indicated in exhibit "FW1", a copy of the said letter. He deposed further that after complying with the requirements for the offer of the land, a recommendation was sent to the Commissioner of Lands for further processing of the offer as shown in exhibit "FW2", being collective copies of the said letters on which the recommendation was made. Fred Wamala further deposed that on 3rd August, 2011, the plaintiff received a letter from the Acting Chief Lands Officer(s) stating that the plaintiff was offered Stand N^os LUS/20940 and LUS/20941 leaving out Stand N^os LUS/20938 and LUS/20939 which the plaintiff had initially applied for and he exhibited a copy of the said letter as "FW3". He deposed that it became known to the plaintiff that the 2nd defendant is being considered for allocation of Stand N^os LUS/20938 to LUS/20941 on which the plaintiff has already fulfilled the offer condition of paying compensation to the squatters being allocated Stand N^os LUS/20938 to LUS/20940 and he exhibited "FW4", being a copy of payment schedule in partial fulfillment of the conditions set for the allocation of the land. He deposed further that the plaintiff would be greatly prejudiced if the 2nd defendant is offered Stand N^os LUS/20938 and LUS/20939 before the final determination of the matter which is contentious in nature.

The 2nd defendant on 20th April, 2012 filed into court an affidavit in opposition to the plaintiff's application. In the said affidavit in opposition which was sworn by Luo Zhiqing, shareholder and Director in the 2nd Defendant who disputed exhibit "FW2" to the extent that the Acting Assistant Director of Physical Planning, Mr. B. Choongo does not have authority to recommend allocation of land and as such, the letter was cancelled by the Ministry of Local Government and Housing in their letter dated 21st October, 2010 written to the Commissioner of Lands and the plaintiff is fully aware of the same and the deponent exhibited "LZ1", a copy of the said letter. He deposed further that the plaintiff also applied for Stand Nos LUS/20938, LUS/20939, LUS/20940 and LUS/20941 and received a letter of recommendation from the Permanent Secretary of the Ministry of Local Government and Housing dated 8th May, 2009, which was exhibited as "LZ2". He further deposed that the plaintiff and 2nd defendant were called for interviews by the Commissioner of Lands on or about 23rd May, 2011 to determine their eligibility for the said pieces of land as indicated in a copy of the letter exhibited as "LZ3" Luo Zhiqing stated that the 2nd defendant was the successful interviewee for Stand Nos LUS/20938 and LUS/20939 only as it was considered to have the best developmental plan for the pieces of land and he exhibited "LA4", a copy of the letter of offer to the 2nd defendant dated 3rd August, 2011. He added that, the other two pieces of land, namely LUS/20940 and LUS/20941 that the 2nd defendant was interested

in were offered to the plaintiff. He stated further that it is not true that the plaintiff was allowed to compensate the squatters as they did not get clearance from the Ministry of Local Government and Housing to do so as the plaintiff had no basis to compensate squatters on a piece of land they had not been offered. He further deposed that the 2nd defendant was authorized to compensate squatters on Stand Nos LUS/20938 and LUS/20939 and they did and thereafter the Director of Physical Planning issued a letter of recommendation dated 5th October, 2011 to the Commissioner of Lands to issue offer letters to them as they had complied with all the procedural requirements. The deponent stated that the plaintiff is not entitled to be offered Stand Nos LUS/20938 and LUS/20939 as they were offered other properties since they did not pass the interviews for the said properties.

The 1st defendant filed an affidavit in opposition to the plaintiff's application on 18th May, 2012, that was sworn by Paul Kachimba, a Legal Officer in the Lands Department in the Ministry of Lands and Natural Resources. He also stated that paragraph 5 and exhibit "FW2" was disputed to the extent that the Acting Assistant Director of Physical Planning, Mr. B. Choongo has no authority to recommend allocation of land and that as such, the letter was cancelled by the Ministry of Local Government and Housing in their letter dated 21st October, 2010 exhibited as "PK1". The deponent stated that the 2nd defendant applied for Stand Nos LUS/20940 and LUS/20941 and they received a letter of

recommendation and they were the successful interviewee for Stand Nos LUS/20938 and LUS/20939 as they were considered to have the best developmental plan for the said pieces of land as shown in the copy of the letter of offer to the 2nd defendant exhibited as "PK10". He added that the plaintiff was granted Stand Nos LUS/20940 and LUS/20941 as shown by exhibit "PK11", a copy of the said letter of offer. Paul Kachimba deposed that as per procedure, the Ministry of Local Government and Housing are supposed to recommend an applicant to the Commissioner of Lands and once the recommendation is approved, the successful applicant is granted a conditional offer which once confirmed by the Ministry that all existing squatters on the particular piece of land have been compensated the successful applicant is given a letter of offer.

In the affidavits in reply filed on 15th May, 2012 and 31st May, 2012 respectively the deponent, Fred Wamala stated that since no offer of land had been issued to either party as regard Stand Nos LUS/20938 and LUS/20939, it would be in the interest of justice for the status quo to be maintained until the determination of the matter.

In the 1st defendant's skeleton arguments filed into court on 18th May, 2012, the learned Assistant Senior State Advocate submitted that the plaintiff filed an application for stay of execution of the offer of Stand Nos LUS/20938 and LUS/20939 by

the Commissioner of Lands to the 2nd defendant, pursuant to section 18 of the State Proceedings Act, Cap 71 of the Laws of Zambia which provides that:

“Subject to the provisions of this Act all written laws relating to appeals and stay of execution, shall, with any necessary modifications, apply to civil proceedings by or against the State as they apply to proceedings between subjects.”

Learned Assistant Senior State Advocate, Miss M Njobvu observed that according to paragraph (i) of the summons to stay execution, the plaintiff is applying for an order that:

“The Commissioner of Lands and Chief Registrar of Lands and Deeds or their agents, servants or whosoever ARE STOPPED and RESTRAINED from offering Stand Nos LUS/20938 and LUS/20939 to far Eastern Restaurant until the final determination of this matter”

She submitted that by the use of the words “are stopped” and “restrained”, the plaintiff is in essence applying for an injunction against the state which is not tenable under the provisions of the State Proceedings Act. Section 16 (1) (i) provides:

“16 (1) In any civil proceedings by or against the State, the court shall, subject to the provisions of this Act, have power to make all such orders as it has powers to make in proceedings between subjects, and otherwise to give such appropriate reliefs as the case may require:

Provided that:-

Where in any proceedings against the State any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties; and

She argued that if the order sought is granted, it would have the same effect as an injunction against the Commissioner of Lands and Chief Registrar of Lands who are public officers which is contrary to section of the Act which provides:

“(2) The court shall not in any civil proceeding grant an injunction or make any order against a public officer if the effect of granting the injunction or making the order would be to give any relief against the State which could not have been obtained in proceedings against the State.”

Miss Njobvu contended further that there is no legal provision which confers a binding obligation on the Commissioner of Lands to offer land to every person who applies for a commercial plot. She added that he has the right to exercise his discretion not to offer land to an applicant who does not meet all the requirements. She submitted that this application for a stay of execution is misconceived and that there is no judgment or order of the court in this matter which justifies an application for a stay of execution and she relied on the case of **KAPIRI GLASS PRODUCTS LTD V MARUTI OIL INDUSTRY LTD**¹. She further submitted that in the present case, there is no judgment of the court whose execution must be stayed pending appeal as all there is a decision by the Commissioner of Lands to offer land to the 2nd Defendant Miss Njobvu therefore submitted that this is not an appropriate case for this court to grant a stay of execution and she submitted further that section 18 of the State Proceedings Act does not entitle the plaintiff to apply for a stay of execution where there is no judgment or appeal.

She further submitted that this is not an application for judicial review where the plaintiff would be entitled to apply for a stay of proceedings against the state as was held in **WINTER M KABIMBA v THE ATTORNEY -GENERAL & LUSAKA CITY COUNCIL**². The learned Assistant Senior State Advocate argued that in the alternative if the remedy of a stay of execution is open

to the plaintiff, then the plaintiff has not satisfied this court that it will be prejudiced if not granted the same. She contended further that since the stay of execution seeks to restrain public officers and is injunctive in nature, it cannot be granted unless the ingredients necessary for the grant of an injunction are satisfied based on the principles laid down in the case of **SHELL & BP (ZAMBIA) LTD v CONIDARIS & ORS³ and TURNKEY PROPERTIES LTD v LUSAKA WEST DEVELOPMENT COMPANY LTD & ANR⁴**. She argued that the plaintiff has not shown that it is likely to succeed in this matter as the documents exhibited in the 1st defendant's affidavit in opposition show that all procedural requirements were met before Stand Nos LUS/20938 and LUS/20939 were offered to the 2nd defendant. She submitted that since the plaintiff is in the alternative claiming the sum of K 700 million from the defendants as special damages, should the plaintiff succeed, damages would be an adequate remedy.

In the plaintiff's skeleton arguments filed on 31st May, 2012, Counsel for the plaintiff, Mr. W Mwenya relied on section 18 of the State Proceedings Act which provides that:

“Subject to the provisions of this Act, all written laws relating to appeals and stay of execution shall, with any necessary modification apply to civil proceedings

by or against the State as they apply to proceedings between subjects”.

He submitted that the essence of this provision on the application for stay of execution against the State is to ensure that the status quo of litigants remains the same until the determination of the main matter on merit. He argued that if the court refuses to grant the stay of execution until the final determination of the matter, the main case may be rendered a mere academic exercise.

Counsel for the plaintiff in response to the 1st defendant's argument that the relief prayed for by the plaintiff has the effect of an injunction and is not tenable at law, submitted that the application is premised on section 18 of the State Proceedings Act not section 16 and he argued that whether the effect of the stay of execution and injunction are the same, what is essential is that the plaintiff's application is brought under section 18 not 16.

With respect to the 1st defendant's interpretation of section 18, he submitted that the intention of the legislature is twofold, that is, that firstly a stay of execution may be granted where there is a judgment or ruling which may be appealed against and secondly, where an action of the State may be stayed pending the determination of a matter. Mr Mwenya further submitted that therefore, it is a misdirection by the State to State that a stay of execution can only apply where there is a judgment or order of

court, such as in a judicial review like in the case of **KAPIRI GLASS PRODUCTS LTD v MARUTI OIL INDUSTRY LTD.**

I have carefully considered the plaintiff's application for an order to stay execution of the offer of Stand Nos LUS/20938 and LUS/20939 to the 2nd defendant by the Commissioner of Lands until the final determination of this matter, the affidavit evidence and the skeleton arguments. First and foremost, I must point out that the granting of an order for stay of execution is at the court's discretion and the court, therefore, has to exercise its discretion cautiously. In other words, it is not automatically given as of right just because an applicant either seeks to appeal or make an application that might have a bearing on the application, judgment or order of the court. Therefore, the applicant or plaintiff has to show good cause to warrant or justify the granting of such order for stay of execution.

In the present case, from the affidavit evidence and arguments advanced by the parties, it has become apparent that the plaintiff not only failed to disclose some material facts such as the fact that when they were called for interviews with the 2nd defendant, they were unsuccessful whilst the 2nd defendant succeeded and hence the recommendation of the 2nd defendant for Stand Nos LUS/20938 and LUS/20939. Further it also emerged from the affidavits and arguments that the plaintiff was not allowed to compensate the squatters on the disputed properties

as alleged as the plaintiff had no basis to compensate squatters on a piece of land they had not been offered. I will, however, not comment on their eligibility to be offered the properties in issue as the main matter is yet to be determined.

Learned Assistant Senior State Advocate, Miss M Njobvu spiritedly objected to the use of the words “are stopped” and “restrained” in reference to the Commissioner of Lands and Chief Registrar of Lands and Deeds and she submitted that the words or phrases have connotations of an injunction being sought against the State as the order sought is directed at public officers contrary to section 16 (2) of the State Proceedings Act and which is not tenable at law as it amounts to applying for an injunction against the State. I accept Miss. Njobvu’s argument even though Counsel for the plaintiff, Mr. W Mwenya tried to justify the application by arguing that the difference is in the fact that the plaintiff’s application is brought pursuant to section 16. The mere fact that a wolf is dressed in sheep’s clothing does not make him a sheep he is still a wolf in sheep’s clothing. It is about the substance and not what it is cloaked in. After considering the application for a stay of execution of the offer of Stand Nos LUS/20938 and LUS/20939 to the 2nd defendant by the Commissioner of Lands pending the final determination of the main matter, I am not satisfied that the plaintiff has shown good cause to warrant or justify the granting of such order for stay of execution, I therefore, accordingly dismiss the application with costs. In default of agreement the costs to be taxed.

DATED this day of October, 2012 at Lusaka.

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F. M. LENGALENGA
JUDGE