

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)**

2014/HP/1388



BETWEEN:

**TASHENI ENTERPRISES LTD
BENNY ESAU ZULU
JOSEPHINE ZULU**

**1ST PLAINTIFF
2ND PLAINTIFF
3RD PLAINTIFF**

AND

ZANACO PLC DEFENDANT

**Before Hon. Mrs. Justice J. Z. Mulongoti
on the 19th day of Nov, 2014**

For the Plaintiff: Miss. K. Viyuyi of Simeza Sangwa & Associates

For the Defendant: Mrs. S. Wamulume, In House Counsel, ZANACO

R U L I N G

Cases cited:

1. *Garden Cottage Foods Ltd v. Milk Marketing Board* (1983) 2 ALL ER 770
2. *Communications Authority of Zambia v. Vodacom Zambia Ltd* SCZ Judgment No. 21 of 2009
3. *Cuckmere Brick Company v. Mutual Finance* (1971) 2 ALL ER 633
4. *American Cyanamid Co. v. Ethicon Ltd Co.* (1975) 1 ALL ER 504
5. *Turnkey Properties v. Lusaka West Development Co. Ltd & Others* (1984) ZR 85 (SC)
6. *Shell and BP Ltd v. Connidaris & Others* (1975) ZR 174
7. *Tse Kwong Lam. v. Wong & Others* (1983) 3 ALL ER 54
8. *Warner v. Jacob* (1882) 2 Ch.D 220
9. *Blackstock* (1967) 3 ALL ER 321
10. *Tau Capital Partners Incorporation & Another v. Mushinge & Others* (2008) ZR Vol. 2, p179 (HC)
11. *Preston v. Luck* (1884) 27 Ch.D497

The Ruling relates to an application for exparte summons for injunction by the Plaintiffs. The summons was supported by an exparte affidavit sworn by the 2nd Plaintiff Benny Esau Zulu. He deponed that by a third party mortgage dated 7th June 2005 and a further charge dated 18th June 2007, between himself and the third Plaintiff and the Defendant, the property known as BB Farm 1140, Lusaka, was charged by the Plaintiffs (2nd & 3rd) in favour of the Defendant to secure repayment of the first Plaintiffs loans in the sum of K1,000,000.00.

That following the proceedings for foreclosure and sale in favour of the Defendant, it proceeded to have the property advertised for sale. However, that the Defendant did not attempt to get the market value as the property was only viewed by one potential buyer, who made a bid and the Defendant is purported to have sold to this bidder at K2,500,000. The 2nd Plaintiff further deposed in paragraph 6 of the affidavit, that the Defendant did not sell the property in good faith and did not attempt to obtain the true market value of the property. That Messrs Sherwood Greene were asked by the Plaintiffs to do a valuation of the report and it disclosed the market

value as K6,150,000 with a forced sale value of K4,300,000 per valuation report exhibited as 'BEZ1'.

That the Defendant is about to complete the conveyance and give vacant possession to the buyer, which will be unfairly detrimental to the Plaintiffs due to the under value of the property. Hence these proceedings by which they have applied to set aside the sale and that the property was still registered in the names of the 2nd and 3rd Plaintiffs per 'BEZ2'.

The Plaintiffs' counsel also filed skeleton Arguments in support of the application. It was submitted that the Plaintiff's trade would be affected if the injunction is not granted. The case of **Garden Cottage Foods Ltd v. Milk Marketing Board (1)**, was cited where it was held that: *"in all these cases of interlocutory injunctions where a man's trade is affected one sees the enormous importance that there may be in interfering at once before the action can be brought on for trial, because during the interval, which maybe long or short ... a man's trade might be absolutely destroyed or ruined by a course of proceedings which ... maybe determined to be utterly illegal and yet nothing can compensate the man for the utter loss of his business by what has been done in that interval"*

It was argued further that the Supreme Court has provided useful illustrations of what would amount to irreparable injury which include instances where an established business enterprise is prevented from carrying out its business as in **Communications Authority of Zambia v. Vodacom Zambia Ltd (2)**, it was stated in that case that:

“The learned trial judge’s analysis of the principles governing the grant of injunctions was correct. However, on the facts of this case, we do not agree with his conclusion or application of the principles to the facts. And the facts of this case are that the Plaintiff was a newly incorporated company. It had not yet started business operations in telecommunications. It was yet to borrow money from Norfund to finance its intended business operations. So, it had not yet acquired business reputation or credit rating which could diminish. By contrast, the Plaintiff, in Gateway Service Station v Engen Petroleum (Z) Limited, which the learned trial judge relied on, was already doing business whose disruption by the defendant would have affected its business reputation; resulting into irreparable injury. This is the first distinguishing feature between this case and the Gateway Service Station Ltd case.”

Learned counsel contended that in this case damages would not be an adequate remedy because if the sale is allowed the Plaintiffs business would be ruined as the property is not only their home but also the 1st Plaintiff’s business premise.

It was also submitted that the Plaintiffs had a good arguable case. According to learned counsel, there is a serious question to be tried in casu as the Plaintiffs seek to set aside the wrongful sale. That the Defendant did not discharge its duty to sale the property in good faith and to take reasonable care to obtain the true market value of the mortgaged property. The case of **Cuckmere Brick Company v. Mutual Finance** (3) was cited where it was held that:

“A mortgagee was not a trustee of the power of sale for the mortgagor and, where there was a conflict of interests, he was entitled to give preference to his own over those of the mortgagor, in particular in deciding on the timing of the sale; in exercising the power of sale, however, the mortgagee was not merely under a duty to act in good faith, ie honestly and without reckless disregard for the mortgagor’s interest, but also to take reasonable care to obtain whatever was the true market value of the mortgaged property at the moment he chose to sell it.”

The Plaintiff’s counsel further argued that there is need to maintain the status quo to prevent the Defendant from conveying the property at an undervalue to a third party before the issue of whether or not the Defendant can dispose off the mortgaged property in this manner is decided by the court. And that if the status quo is not maintained the substantive action will be rendered nugatory and a mere academic exercise. Further, that

the Defendant will suffer no financial loss or prejudice should the court grant the injunction.

I granted the Plaintiffs an ex parte order of injunction and set the 3rd of October 2014 as the date for inter partes hearing.

For its part, the Defendant filed an affidavit in opposition sworn to by Jerry Muchimba, an Assistant Manager in its Special Assets Management Department. He deposed as alluded to in paragraph 4 of the affidavit in support, that following judgment granting an order for foreclosure and sale of the mortgaged property as exhibited in 'JM1', a copy of the judgment dated 2nd November, 2010, that contrary to the Plaintiff's assertions, the Defendant acted in good faith and attempted to get the market value for the property as it ran adverts in the newspapers from 2011 to 2013 in order to find a suitable buyer and the property was sold to the highest bidder per 'JM2' copies of the various adverts.

As a result of the adverts, bids were received and the Defendant took reasonable steps to obtain the market value of the property which was determined by what the market was offering, which was close to the forced sale of

K2,610,000= per exhibit 'JM4' which are the valuation reports from Sherwood Greene and RM Fumbeshi and Co. dated 22nd March 2011 and 11th October 2013, respectively. And after failing to secure favourable bids through adverts, the Defendant engaged Knight Frank Real Estate Agents who eventually found a buyer who was willing to pay K2,500,000= per 'JM5'. And that the sale has in fact concluded as the purchase price has been paid in full per 'JM6' copies of the Consent to Assign dated 30th April 2014, Tax clearance Certificate dated 19th August 2014 and Statements of Account showing payment of the sum in full. Accordingly, the injunction has been overtaken by events as the property has already been sold. The application therefore lacks merit and it be dismissed with costs.

The Defendant's counsel also filed Skeleton Arguments. She submitted that for an interlocutory injunction to be granted, the court must be satisfied that the claim is not frivolous and vexatious. There must be a serious question to be tried as stated in **American Cyanamid Co. v. Ethicon Ltd Co. (4)**. Counsel contended that the Plaintiffs in casu are defaulting debtors of the Defendant and are seeking to restrain the Defendant from enjoying its rights of foreclosure and sale which the court already

granted. That the Plaintiffs are in essence attempting to create new conditions favourable to themselves. The case of **Turnkey Properties v. Lusaka West Development Co. Ltd & Others** (5) was cited as authority that *“An interlocutory injunction is appropriate for the preservation or restoration of a particular situation pending trial, but it cannot, be regarded as a device by which the applicant can attain or create new conditions, favourable only to himself, which tip the balance of the contending interests in such a way that he is able, or more likely, to influence the final outcome by bringing about an alteration to the prevailing situation which may weaken the opponent”*.

According to Counsel, in casu there is no status quo to maintain as the property has already been sold to the highest bidder. Further, that the Plaintiffs right to relief is not clear and the Defendant and not the Plaintiff, will suffer irreparable damage as elucidated in **Shell and BP Ltd v. Connidaris & Others** (6). That the Plaintiffs having failed to service the mortgage or pay the judgment sum are highly unlikely going to be able to pay damages to the Defendant in the event that their action is unsuccessful. Quoting paragraph 766 of Halsbury' s

Laws of England, counsel contended thus *"the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Defendant, on the one hand, would suffer if the injunction was granted and he should ultimately turn out to be right, and that which the Plaintiff, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right."*

It was submitted that granting the Plaintiff's application for interlocutory injunction will create new conditions which will prejudice the Defendant and prevent it from recovering moneys owed to it by the Plaintiffs and that the balance of convenience, also shows that the Plaintiff should not be granted the injunction as they are debtors, who not only defaulted in their loan repayment but were ordered by court to do so within a specified period, which lapsed 4 years ago. Accordingly, the loss the Defendant will suffer will be far greater than the inconvenience which the Plaintiff would suffer. The Court was urged to dismiss the application for injunction with costs to the Defendant.

The Plaintiffs filed an affidavit in reply sworn by the 2nd Plaintiff, in which he deposed that the adverts exhibited by the Defendant prove that the Defendant chose to advertise the property at a gross undervalue of K2,464,500 when compared to its true market value of K6,150,000. Further, that the valuation report by Messrs R.M. Fumbeshi & Co of October 2013, contains errors and a misdescription of the property and thus unreliable.

At the hearing Ms. Viyuyi, for the Plaintiffs relied on the affidavits in support and reply and also the skeleton arguments.

Ms. Wamulume for the Defendant also relied on the affidavit in opposition and the skeleton arguments. She argued that the Plaintiffs cannot seek to set aside the sale of the property without showing that the sale was fraudulent.

That the case of Cuckmere relied on by the Plaintiffs counsel had been overruled by **Tse Kwong Lam. v. Wong & Others (7)**, where it was held that, *“however, the mortgagee and company had to show that the sale was in*

good faith and mortgagee had obtained reasonable precautions to obtain best price at the time. The mortgagee is not bound to obtain a sale in the hope of obtaining a better price or adopt a piecemeal method of sale which could only be carried over a substantial period or at some risk of loss."

The court was informed that in that case, the mortgagee guessed the price of the property, even if at undervalue, the court was still of the opinion that it obtained the best price reasonably obtainable at the time by virtue of advertising it.

And that the case of **Warner v. Jacob (8)** was cited in that case where it was held that, "a mortgagee is strictly speaking not a trustee of the power of sale. It is the power given for his own benefit to enable him, (the debtor) realise his debt. If he exercises it bonafide for that purpose without corruption or collusion with the purchaser, the court will not interfere even though the sale be very disadvantageous."

The case of **Blackstock (9)** was cited in that case that, "if a contract for sale of mortgaged property is entered into at undervalue, it is not by itself enough to prove bad faith."

It was contended therefore, that the cause of action should thus list fraudulent conduct of the mortgagee and without the Plaintiff's in casu alleging any fraud, then there is no serious question for court to try as the authorities show that a mortgagee can sell at undervalue if in good faith. Further, that the Plaintiffs seek to set aside the sale but have neglected to join the third party who has since bought the property. And that there is a possibility that the Commissioner of Lands who is equally not a party, may have issued title to the third party since it is more than a month since the Plaintiffs obtained the land record print out exhibit 'BEZ2' of the affidavit in support.

In response, Ms. Viyuyi submitted that the Plaintiffs' right to relief is clear as the Defendant grossly undervalued the property and the sale was not done in good faith. That the authorities cited by the Defendant's counsel show that the court will allow undervalue where the sale is in good faith.

I am grateful to both counsel and the skeleton arguments submitted. I could not agree more on the law and principles the court should consider when considering an application for injunction. The law on injunctions is as stated in the famous case of **American Cyanamid Co. v. Ethicon**, and followed by our Supreme Court in cases such as **Shell and BP (Z) Ltd v. Connidaris and Others**.

It is settled law that the main purpose of an injunction is to prevent irreparable injury and to maintain the status quo.

In **Tau Capital Partners Incorporation & Another v. Mushinge & Others (10)**, it was held in line with **Preston v. Luck (II)** that: “(1) The object of an injunction is to maintain the status quo. That is, to keep matters in a status quo, so that if at the hearing a Plaintiff obtains a judgment in their favour, a Defendant will have been prevented from dealing in the meantime with the property in such a way as to make that judgment ineffectual. (2) A court will generally not grant an interlocutory injunction unless the injunction is necessary to protect the Plaintiff from irreparable

damage, mere inconvenience is not enough. Irreparable injury means injury which is substantial, and can never be adequately remedied or atoned for by damages, not injury which can possibly be repaired.”

What then is the status quo in this case that has to be maintained so that the Plaintiffs’ action is not rendered nugatory? As I see it the Defendant had the right to foreclose and sale as held by Wood J in the judgment of 2nd November 2010 per exhibit ‘JM1’. In accordance with the said judgment, the Defendant foreclosed and sold the property in issue. Such that, as argued by Ms. Wamulume, there is no status to maintain as the property has already been sold, in line with the judgment. If anything, the Plaintiffs do not object or deny this fact. The Plaintiffs’ contention is that the property was undervalued as the Defendant acted in bad faith. This issue cannot be determined at this interlocutory stage. This is the gist of the main action and I am of the view that damages would be adequate to remedy whatever loss the Plaintiffs shall prove to have suffered, at trial as a result of the undervalue and bad faith by the Defendant. I cannot for this reason consider the cases of **Tse Kwong Lam and Others** on the duties of the mortgagee as argued by Ms. Wamulume. These

cases shall be considered at trial of the main action. Accordingly, the Plaintiffs will not suffer irreparable injury which cannot be atoned for by damages. I am also of the considered view that the balance of convenience also weighs in favour of the Defendant. The application for interim injunction is thus unsuccessful as there is no status quo to maintain and the Plaintiffs will not suffer irreparable injury. The exparte order of injunction granted on 3rd October 2014 is accordingly discharged with costs to the Defendant. Leave to appeal is granted.

Delivered at Lusaka this 19th day ofNov.....2014.

J. Z. Mulongoti
J. Z. MULONGOTI
HIGH COURT JUDGE