

IN THE HIGH COURT FOR ZAMBIA
HOLDEN AT LUSAKA
CIVIL JURISDICTION

2011/HP/1938

BETWEEN:

MAUREEN MWAPE

AND

MARGRET CHIKWANDA



Plaintiff

Defendant

CORAM: Honorable Mr. Justice Mubanga Kondolo, SC
MARSHAL: Ethel Phiri
FOR THE PLAINTIFF: Mr. M. Haimbe – Sinkamba Legal Practitioners
FOR THE 1st & 2nd DEFENDANTS: Mr. B. Mutale, SC & Ms. Mukuka – Ellis & Co.

J U D G M E N T

AUTHORITIES

STATUTES & PUBLICATIONS

1. The Supreme Court Rules (White Book), 1999 Editi
2. Halsbury's Laws of England¹, Vol. 12, 3rd edition paragraph 1355 and 1443
3. Halsbury's Laws of England vol. 19 at paragraph 119

CASES

4. Shell BP Zambia Limited v Conidaris & Another (1975) ZR 174
5. Preston v Luck (1884) 27 Ch
6. American Cyanamid v Ethicon (1975) AC 396
7. Ndove v National Educational Company of Zambia (1984) ZR
8. Preston v Luck (1884) 27 Chd

This ruling is with respect to the Plaintiffs application for an order of injunction which was heard inter parte. The Defendant had earlier filed a conditional memorandum of appearance and after the inter partes hearing for the injunction, the Defendant filed Summons to Strike Out Statement of Claim and Dismiss Action for being frivolous vexatious and an abuse of the court process.

The brief background to this matter is that the Plaintiff claims that the Defendant is blocking her access to her farm and filed a writ of summons seeking the following relief;

- i. For an order that the plaintiff is entitled to access to the reserve road or easement she has been using for several years now to access the gate to her farm.
- ii. An order that the Defendant is violating the plaintiff's right to property and passage, among other things, by destruction or demolition of the plaintiff's route to the main road.
- iii. Damages for blockage of passage without lawful justification, plus interest as determined by Bank of Zambia long term deposit rate from the issuance of the writ until judgment thereafter, short term deposit rate until final payment.
- iv. Damages for mental distress.
- v. For an order of interim injunction restraining the defendant either by himself, servants or agents or whatsoever from performing the following acts namely:
 - a. Performing functions of the Local authorities.
 - b. Mistreating or disregarding the plaintiff's right to passage.
 - c. Interfering and/or blocking the passage of the plaintiff to the main road, until after this matter has been fully heard and determined by the Court.
- vi. Interest on any award that the court may give at the current Bank or Zambia determined leading rate from the date of the Writ until settlement.
- vii. For an order for costs.

Both parties filed affidavits in support of their respective positions and argued viva voce at the hearing.

On behalf of the Plaintiff, the Learned Mr. Haimbe relied on the Affidavit in support filed on 31st December, 2013 particularly on paragraphs 3 to 8. He also submitted that the issue in this matter is about access to the land which is being blocked by the Defendant and that the issue of ownership of the land raised by the Defendant was therefore irrelevant.

Learned State Counsel, Mr. Bonaventure Mutale submitted on behalf of the Defendant that the application by the Plaintiff is misconceived and should be dismissed. He pointed out that the exhibit in support of the application exhibit 'MM1' is not authenticated by a registered surveyor and it even has handwritten notes on it and therefore totally lacked credibility. He argued that without the document, the substrata of the application falls away.

Ms Mukuka augmented the learned state counsel's submission by arguing that the Plaintiff had not shown that the injunction is necessary to protect her from irreparable injury. She argued that the Plaintiff was pointing to loss of business and disturbing her progress on the farm as the injury she would suffer. Ms Mukuka submitted that loss of business is not irreparable and can be atoned by damages and the plaintiff had therefore not shown that she would suffer irreparable damage as laid down in the case of **Shell BP Zambia Limited v Conidaris & Another**.¹

She further argued that the Plaintiff had not shown that there was a serious question to be tried and she argued that according to the cases of **Preston v Luck**² and **American Cyanamid v Ethicon**³ this was a pre condition for the grant of an injunction.

In relation to the Plaintiffs alleged right of passage Ms. Mukaka said that it is trite law that an easement is a right attached to the ownership of a particular piece of land and that according to **Halsbury's Laws of England**⁴, "*Easements cannot be severed or enjoyed apart from the dominant tenement and they pass with the dominant tenement into the hands of each successive owner*".

¹ *Shell BP Zambia Limited v Conidaris & Another* (1975) ZR 174

² *Preston v Luck* (1884) 27 Chd

³ *American Cyanamid v Ethicon* (1975) AC 396

⁴ *Halsbury's Laws of England*⁴, Vol. 12, 3rd edition paragraph 1355 and 1443

She further pointed out that the Plaintiff had not rebutted the assertion that her alleged farm, Farm No. 298A/25 Lusaka is not on title and in this regard she once again referred to **Halsbury's**⁵ where it states that the private right of access from premises to the Highway and vice versa is vested in the owner of the adjoining land.

Ms Mukuka concluded by submitting that the Plaintiffs action was frivolous and vexatious and the application for an injunction ought to be dismissed.

In response Mr. Haimbe submitted that the Defendant had not denied blocking access to the Plaintiffs piece of land and he argued that the fact that the Plaintiff was being denied access meant that she could suffer irreparable loss because denial of a right cannot be compensated.

I have considered the affidavits filed herein as well as the arguments presented by the parties.

The Plaintiff alleges that the Defendant has blocked off government land resulting in preventing the Plaintiff from accessing her property. This allegation is contained in exhibit MM2 of the Plaintiffs affidavit filed on 31st December, 2013. Whilst I agree with the Learned State Counsel Mr. Mutale that the Plaintiffs exhibit, MM1, in the form in which it was presented, is unreliable, I note that the Plaintiffs assertion that the Defendant has blocked government land has not been controverted. Exhibit MM1 is an unauthenticated site plan of the subject area.

The Plaintiff has not at all addressed the issue of blocking or barricading government land but emphasized that the Plaintiff has not proved that she owns the farm to which access has allegedly been denied. On behalf of the Plaintiff Mr. Haimbe opined that ownership was not at issue because it was sufficient for the Applicant to show that she was in occupation of the farm to which access is being blocked.

Ms Mukuka, on behalf of the Defendant introduced an argument based on the grant or non grant of an easement. The Plaintiff is not asking for an easement and the Defendant has not shown why the government land should be considered as a servient tenement over which the Defendant can exercise rights as the holder of the dominant tenement. To do this, the

⁵ *Halsbury's Laws of England vol. 19 at paragraph 119*

Defendant would have to demonstrate her appurtenant rights which she has not done. The argument regarding easements is therefore misconceived and dismissed accordingly.

I now revert to the law regarding the grant of interlocutory injunctions of which the general grounds are well established in Zambian law and as correctly submitted by counsel for the Defendant, it is essential that the applicant shows that there is a serious question to be tried.

This requirement was clearly laid down in the **American Cyanamid Case**⁶ and the principal was echoed by Chirwa J in **Ndove v National Educational Company of Zambia**⁷ when he approved the dictum of Cotton L.J in **Preston v Luck**⁸ in which he said an applicant for an injunction must show that "*there is a serious question to be tried*" and "*there is a probability that the Plaintiffs are entitled to relief*".

The case of **Shell BP Zambia Limited v Conidaris & Another**⁹ laid down the general principal that the Applicant for an injunction must show that if the injunction is not granted he will suffer irreparable injury or loss.

It has been argued by learned counsel for the Defendant that the Plaintiff has failed to establish these two important requirements which must result in the application for an interlocutory injunction being dismissed.

Over time the law has developed to the effect that there are certain circumstances where one may not have to prove that he will suffer irreparable loss because the irreparable loss will be presumed. This is the case in matters to do with land, on the basis that because of its peculiar nature, no two pieces of land are the same. In the case of **Wesley Mulungushi v Catherine Chomba**¹⁰ it was held that loss of land cannot always be adequately compensated.

⁶ *American Cyanamid – Vs – Ethicon (1975) AC 396*

⁷ *Ndove v National Educational Company of Zambia (1984) ZR*

⁸ *Preston v Luck (1884) 27 Chd*

⁹ *Shell BP Zambia Limited v Conidaris & Another (1975) ZR 174*

¹⁰ *Wesley Mulungushi v Catherine Chomba (2004) ZR 96*

In the Supreme Court case of **Gideon Mundanda v Mulwani & Others**¹¹ it was further demonstrated that there situations when an injunction can be granted even where damages can be quantified when the court held as follows;

“The High Court has power to award damages in addition to, or in substitution for specific performance or injunction.”

In casu, the Defendant is alleged to have barricaded state land resulting in blocking access of 3rd parties through that land. The Defendant has not shown proof of any authority from any government agency allowing her to exercise any rights over the said land. For all intents and purposes, state land is public land until and unless allocated, restricted or prescribed for a particular purpose by the government. All citizens have a right to traverse unencumbered public land.

In my view, the Plaintiff has shown that there is a serious question to be tried and there is a chance of succeeding at the main trial. The Plaintiff, or any other citizen for that matter, is entitled to seek relief against being denied access to public land by a fellow citizen and the denial of such access attracts a presumption of irreparable loss.

This is a matter in which detailed evidence and arguments regarding the rights of the parties would be presented at trial but in the meantime the Plaintiffs application for an interlocutory injunction is granted and the Defendant is restrained from blocking the Plaintiffs access across government land.

In view of my finding that that the Plaintiff has shown that there is a serious question to be tried, I find that the action is not frivolous and vexatious. That being the case, I see no need to hear the parties with regard to the Defendants application to Strike Out Statement of Claim and Dismiss Action for being frivolous vexatious and an abuse of the court process and I accordingly dismiss the application by exercising my authority as provided by **Order 3 rule 2 HCR**, which reads as follows;

¹¹ *Gideon Mundanda Vs Mulwani & Others (1987) ZR 30*

"Subject to any particular rules, the court or a judge, may in all cases and matters, make any interlocutory order which it or he considers necessary for doing justice, whether such order has been expressly asked by the person entitled to the benefit of the order or not."

The costs of the applications are granted to the Plaintiff.

Dated thisday of June, 2014



Mubanga M Kondolo. SC

Judge