

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**

2012/HP/0904

(Civil Jurisdiction)

BETWEEN:

RARRY KAPEMA



PLAINTIFF

AND

**MENGHSTEAB TEWELDE
EVANS M. SUMBELELO
EDWARD
MWAMBA
OLALO
SITALI
AND ALL OTHER PERSONS UNKOWN**

**1ST DEFENDANT
2ND DEFENDANT
3RD DEFENDANT
4TH DEFENDANT
5TH DEFENDANT
6TH DEFENDANT
7TH DEFENDANT**

Before the Hon. Madam Justice A. M. BANDA-BOBO, on the 8th day of August, 2014.

FOR THE APPLICANT: Ms. M. Marebesa of Messrs Legal Aid Board
FOR THE RESPONDENTS: In person

R U L I N G

Cases referred to:

1. American Cyanamid vs. Ethicon Limited (1975) A C 396
2. Shell & BP (Z) Ltd vs. Conidaris & Others (1975) ZR 174
3. Turnkey Properties vs. Lusaka West Development Co. Ltd (1984) ZR 105
4. Harton Ndovi vs. National Educational Company Ltd (1980) ZR 184.

5. David Nzooza Lumanyenda & Godwin Kafuko Muzumbwa v Chief Chamuka and Kabwe District Rural Council & Zambia Consolidated Copper Mines Ltd (1988/1989) ZR 194
6. Zambia Telecommunications Co. Ltd vs. Valson Pharma Zambia Ltd (2010) ZR 142
7. Msanzya Paul Zulu, Wedson White Phiri v Anna Mwape and Lusaka City Council (Appeal No. 25 of 2007)
8. Gideon Mundanda v Timothy Mulwani and The Agricultural Finance Co. Ltd & SSS Mwinga (1987) ZR 29 (SC)

Legislation referred to:

1. Section 35 of the Lands and Deeds Registry Act

By writ of summons accompanied by a statement of claim, the Plaintiff Rarry Kapema commenced this action against Menghsteab Twelede, the 1st Defendant and six other people, as the record will show. One of the reliefs claimed is that of an order of interim injunction restraining the Respondents from carrying out any developments at the said land.

There was an affidavit in support of the summons for the injunction. It was the Plaintiff's deposition that he purchased a plot from one Stanley Tembo on 14th July, 2011, through the New Village Complex Residents Development Committee under the Patriotic Front (PF), Kanyama Constituency and the same was signed by the chairman, and Secretary of the said PF Kanyama Constituency, the 2nd and 3rd Defendants herein (Evans Sumbelelo and Edward). He then proceeded to build a house on the property.

It was his averment that the 2nd Defendant in July, 2012 approached him and asked him to sign an agreement to relocate him to another plot and that during the construction of the other house, they would rent him a house for two months. He exhibited "RK2" as the agreement. He said before this could be done, other cadres in the company of the 3rd, 4th, 5th and 6th Defendants demolished his house and beat him up.

It was his deposition that the 1st Defendant started construction on the property and it was his view that if not restrained by an injunction, he would complete his building and this matter will be an academic exercise.

The 1st Defendant settled a conditional memorandum of appearance on 4th January, 2013 and Defence on 4th March, 2014. Various other interlocutory applications were made and adjudicated upon by the Deputy Registrar as the record will show. There was also an application to amend the writ and statement of claim which application was granted.

On 25th June, 2014, the 1st Defendant filed an affidavit in opposition to the affidavit in support of summons for an order of interim injunction. He stated in his affidavit in opposition that in December, 2010, MSAD Manufacturers Depot Import and Export Limited, and Delab Transport Limited obtained title to the property, the subject of this action. Later, that these companies applied and obtained

approval from the Lusaka City Council to erect a building on the said property. He referred the Court to exhibits "MT2" and "MT3" respectively, being copies of the certificate of title and the approved building permit.

He said he believed that the certificate of title is conclusive as to ownership, and that the Resident Development Committee who issued the Plaintiff with the ownership form had no authority whatsoever over land allocation since only the Commissioner of Lands is the one mandated to allocate land, through delegation to the Lusaka City Council as its agent.

It was his further statement that even assuming that exhibits "RK1" and "RK2" have any legal validity in them, which he denied, the same were issued on 14th January, 2011 and 30th June, 2012 respectively, long after MSAD Manufacturers Depot Import and Export Limited and Delab Transport Limited had lawfully acquired good title to the said property in land on 6th December, 2010.

It was his further statement that the Resident Development Committee referred to in "RK1" and "RK2" are unlawful and illegal entities in so far as land alienation and acquisition is concerned and that they are behind the unlawful invasion of land legally owned by title holders.

It was his prayer that the Plaintiff had not demonstrated sufficient

interest in the property and this Court must discharge the ex-parte order of injunction granted to the Plaintiff earlier.

In support, he also filed a list of authorities and skeleton arguments. He made submissions on the principles upon which an interlocutory injunction can be granted. He called the court's attention to the cases of **American Cynamid vs. Ethicon Limited**² and **Shell & BP (Z) Ltd v Conidaris & Others**² on the need to show a clear right to relief, and irreparable injury.

There was further reference to the case of **Turnkey Properties vs Lusaka West Development Co. Ltd**³ where the Supreme Court reiterated the position that,

“In order to succeed, the appellants should have demonstrated that, not only was their right to relief clear but, above all, that the injunction is necessary to protect them from irreparable injury.”

There was reference to the authority of **Harton Ndovi vs. National Educational Company Ltd**⁴.

It was contended on the basis of the above authorities that the Plaintiff had failed to demonstrate that there is a serious question that requires to be determined at the hearing of the main matter.

It was his submissions that the Plaintiff is relying on the ownership form he obtained from the Resident Development Committee of the PF for his claim to the property in issue. He contended that the law governing the alienation and acquisition of land is settled as per Section 33 of the Lands & Deeds Registry Act Cap 185 of the Laws of Zambia.

To augment, he called to the fore the case of **Alex Dingiswayo Jere (suing as Administrator of the Estate of Courtson Jere v Edward Kangwa Mumbi (Appeal No. 172 of 2010)**⁵ where the Supreme Court held that,

“The certificate of title is conclusive as from the date of its issue thereof. The Appellant could have had interest over the land in question before the Respondent was issued with the certificate of title. However, that interest expired following the issue of the certificate to the Respondent.”

It was his contention that based on the above, it was instructive that even if the Plaintiff had interest in the parcel of land in question, the same expired immediately a certificate of title was issued to MSAD Manufacturers Import and Export Limited and Delab Transport Limited. Further, that the Plaintiff has failed to make the two companies parties to the proceedings though the injunction granted ex-parte continues to affect them.

The Defendant called the Court's attention to Section 35 of the Lands and Deeds Registry Act, cited above. He submitted that this section was interpreted by the Supreme Court in the cases of **David Nzooa Lumanyenda & Godwin Kafuko Muzumbwa v Chief Chamuka and Kabwe District Rural Council & Zambia Consolidated Coppermines Ltd⁵** and **Zambia Telecommunications Co. Ltd vs. Valson Pharma Zambia Ltd⁶**, where it held that,

“No rights by adverse possession can be acquired if land becomes the subject of a certificate of title.”

It was his submissions that since the property the subject of these proceedings is on title, no title or adverse possession can be acquired. Further, that whatever rights the Plaintiff purports to have by virtue of “RK1” and “RK2” the same would have been acquired long after the certificate of title was issued.

The Defendant went on to state that much as it may be argued that damages may not adequately remedy the irreparable injury the Plaintiff might suffer in matters of land, in the matter in casu, the Plaintiff has failed to disclose sufficient interest in the parcel of land in question. He prayed that the injunction be discharged with costs as the Plaintiff's prospects of succeeding in the main matter does not exist.

When the matter came up for hearing on 2nd July, 2014, counsel for the Plaintiff, Ms Marebesa relied on the affidavit in support of the application filed on 10th August, 2012, whose contents I have already taken on board. She also relied on the **American Cynamid Case**¹, for the position that if damages will not be an adequate remedy for the Plaintiff, if he were to succeed at trial, no interlocutory injunction should normally be granted, but if on the other hand, damages would not provide an adequate remedy for the Plaintiff, but would adequately compensate the Defendant, and the Plaintiff's undertaking, if the Defendant were to succeed at trial there would be no reason to refuse an interlocutory injunction on this ground. Based on this, she submitted, that damages would not suffice in this regard to compensate the Plaintiff if he were to succeed.

She placed further reliance on the case of **Shell & BP (Z) Ltd v Conidaris**¹ on the principles of a right to relief being clear, and that the injunction is necessary to protect the Plaintiff from irreparable injury. It was submitted that the Plaintiff's right to relief is clear as he had exhibited a record of ownership form in his affidavit issued by Kanyama Constituency Lusaka West Land Allocation New Village Complex Residence Development Committee. That there is an official date stamp. In that regard, she submitted, if the injunction was not granted her client would suffer irreparable injury and so she urged the court to Grant the application.

In response, the 1st Defendant depended entirely on the affidavit in opposition, the list of authorities and the skeleton arguments which I have already taken on board. He added that he is a shareholder in the companies who hold the certificate of title to the land in question, and that as a result of the ex-parte order of injunction the company had incurred losses in time, material and monetary form.

There was in reply, a reiteration of the arguments made earlier by counsel.

I have carefully considered the affidavit evidence herein and the submissions by the parties. The fundamental question to determine in the present application is whether the Plaintiff, on the facts of this case is entitled to an order of interlocutory injunction to restrain the 1st Defendant from making further development on the land in issue pending trial of the main matter.

It is trite law that interlocutory injunctions such as the one in casu should only be granted where the right to relief is clear and necessary to protect a Plaintiff from irreparable injury, mere inconvenience not being enough. These principles are clearly set out in the cited case of **Shell & BP (Z) Ltd**¹.

Injunctions may be granted in cases where it appears to the Court to be just and convenient to do so. This is an equitable remedy, whose

grant is discretionary, and that discretion reposes in the Judge, who should exercise it judiciously.

Applications for injunctions are made when the legal validity of the claim or the factual basis for it may be uncertain. The classic criteria to be used when considering an application for an injunction was laid down in the already cited case of **American Cynamid**¹ by **Lord Diplock**. The starting point is to consider whether or not there is a serious question revealed by the pleadings. If there is none, then the application should not be granted.

In the matter in casu, the Plaintiff in paragraph 4 of his affidavit in support of the summons for an injunction states that he purchased a plot from Stanley Tembo, through the **New Village Committee** under the political party called Patriotic Front, Kanyama Constituency. He exhibited "RK1" being the ownership form. A perusal of this form does not show which property it refers to.

It is trite that when land is legitimately allocated, it will be numbered. It cannot just be any ownership of land without proper demarcation. That is, when land is allocated it is numbered and properly demarcated, something that was not done in this case. Further, there is, no evidence that this Stanley Tembo from whom the Plaintiff allegedly bought the land held it legitimately.

I want to agree with 1st Defendant's assertion that land is only alienated by the Commissioner of Land and delegates the local authority as its agent to administer it or allocate it on its behalf. The New Village Complex Residents Development Committee is not an agent of the Commissioner of Lands, nor can it purport to be an agent of the Local Authority the Lusaka City Council, since as an agent with delegated powers, it cannot also delegate its powers. Counsel argued that her client held legitimate interest by virtue of having the ownership form and that this is legitimate because of the date stamp it bears. I beg to differ and hold that a date stamp cannot legitimize an illegality such as a committee of this nature. Counsel did not show where the said committee derives its powers from. To hold otherwise would be to cloth this committee with a legitimacy it does not have and would be setting a bad precedent, a situation this court cannot allow.

Section 33 as read together with **Section 35 of the Lands and Deeds Registry Act**, is clear that a certificate of title is conclusive evidence of ownership of land. This was not disputed by the Plaintiff. The 1st Defendant has laid proof before Court that the land in question is jointly owned. See "MT2" on record. Further, "MT2" shows that the same was issued on 6th December, 2010, way before "RK1" was issued on 14th January, 2011 to the Plaintiff.

It is trite that the only way a certificate of title held by a proprietor can be impugned is if there is an allegation of fraud. In this case, there has been no such allegation.

I am guided by the provisions of Section 33 and 35 cited above and the cases cited by the 1st Defendant on the interpretation of Section 35 herein.

As already stated, there has been no challenge as to the validity of the certificate of title held herein. On the other hand, the Plaintiff holds a piece of paper called an ownership form issued by a committee of a political party without the necessary powers to alienate and issue land to people.

In furtherance of the law in Section 33 and 35, above, the case of **Msanzya Paul Zulu, Wedson White Phiri v Anna Mwape and Lusaka City Council (Appeal No. 25 of 2007)**⁷, the Supreme Court held that,

“We agree that an injunction cannot be issued against the 2nd Respondent because the certificate of title had already been issued.”

Further, at J5,

“An injunction is intended to maintain the status quo and

not change it.”

Furthermore that,

“Clearly the balance of convenience lies with the Respondent who is in occupation.”

It is not in dispute in the matter in casu, that the 1st Defendant’s companies are in possession of title to the land in question. Consequently and as guided by the Supreme Court in the cited case, they cannot be enjoined as title holders. Because they hold title, the balance of convenience tilts in their favour. It is this status, their holding on to title as legitimate owners that must be preserved as is. They would suffer irreparable injury which would not be adequately atoned for in damages if the status quo is upset at this point.

Further, I believe that maintaining this injunction would create new conditions favourable only to the Plaintiff. The 1st Defendant had argued that as a result of the injunction, they have lost out on time, resources, and materials. In the case of **Gideon Mundanda v Timothy Mulwani and The Agricultural Finance Co. Ltd & SSS Mwinga (1987) ZR 29 (SC)**⁸ it was held that,

“A judge’s discretion in relation to specific performance of contracts for the sale of land is limited as damages cannot

adequately compensate a party for a breach of contract for the sale of land.”

In the matter in casu, the Plaintiff has particularized and quantified the cost of his loss. This to my mind is suggestive that if ultimately the matter went in his favour, damages will suffice to atone for any injury he might have suffered as a result of the 1st Defendants action.

I am alive to the holding in the **Mundanda**⁸ case above, but in the matter in casu, the Plaintiff has not clearly shown his interest in the land in issue. On the basis of the evidence before me I deem that the Plaintiff has not raised a serious legal issue to be determined at trial. I consider that damages would suffice for any injury he may have suffered as he has stated the quantum of his loss. Further, the balance tilts in favour of the 1st Defendant.

In the case of **Ndovi v National Educational Company Limited**⁴ it was held that,

“Before granting an interlocutory injunction, it must be shown that there is a serious dispute between the parties and the plaintiff must show on the material before Court, that he has any real prospect of succeeding at trial.”

I have gone over the evidence before me, and I have not seen any serious dispute between the parties on which a Court properly

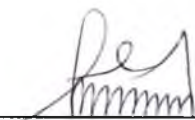
applying its mind would not consider to be vexatious or frivolous. In other words, I find this application to be vexatious and frivolous.

Based on the above, I am of the firm belief that this is not a case in which I can sustain the injunction I granted earlier. That being the case and for the avoidance of doubt, I discharge the ex-parte order of injunction that I granted to the Plaintiff on 10th August, 2012.

Costs follow the cause and are awarded to the 1st Defendant to be taxed in default.

Leave to appeal is granted.

DELIVERED BY ME AT LUSAKA THIS 8TH DAY OF AUGUST, 2010



**MRS JUSTICE A.M. BANDA-BOBO
HIGH COURT JUDGE**