

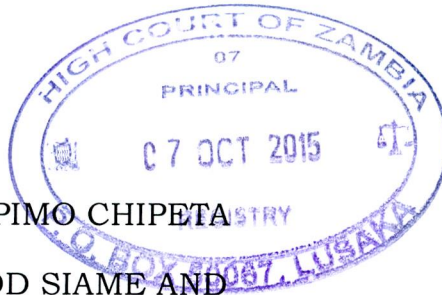
IN THE HIGH COURT FOR ZAMBIA

2014/HP/833

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(CIVIL JURISDICTION)



BETWEEN:

MARY KAMERA, RESTONE CHIPIMO CHIPETA

SARA KAULULE, JUSTICE LLYOD SIAME AND

JUSTICE FREDRICK MWELA CHOMBA

(Suing as Trustees for the United Church of Zambia)

APPLICANT

AND

DR. LUFWENDO LISHOMWA

RESPONDENT

Before The Honourable Mrs. Justice P.C.M. Ngulube in Chambers.

For the Applicants:

Mr. Chitundu Messrs Barnaby and Chitundu

Advocates

For the Respondent:

Major C.A. Lisita, Messrs Central Chambers

R U L I N G

CASES REFERRED TO:

1. **Preston vs. Luck (1884) 27 Ch. D 497**
2. **Zambia State Insurance Corporation vs. Dennis Mulikelela, SCZ Judgment Appeal Number 9 of 1991**
3. **Shell and BP vs. Conidaris and others (1975) ZR 174**
4. **Turnkey Properties vs. Lusaka West Development Company (1984) ZR 85**
5. **Jane Mwenya and Jason Randee vs. Paul Kapinga, (1998) ZR 12**
6. **Mwendalema vs. Zambia Railways Board (1978) ZR 65**

- 7. American Cyanamid vs Ethicon (1975) 1 ALL ER 504**
- 8. Hondling Xing Xing Company Limited vs. Zamcapitol Enterprises Limited (2011) ZR 105**
- 9. Wesley Mulungushi vs. Catherine Bwale Mizi Chomba (2004) ZR 96**

This is the Applicant's application for an Interim injunction. It is accompanied by an affidavit in support that was sworn by one Rodgers Ngambi, the Administrative Secretary of the Applicant, who averred that the Applicant was offered the remaining extent of Farm Number 86a, Clixby Estates, Kasaka, on or about 19th January, 1995 by the Government of the Republic of Zambia. Upon satisfying the terms of the offer, the Applicant was issued with Certificate of Title Number L255 of Farm Number 86a. Rodgers Ngambi averred that on or about 20th March, 1990, the Applicant leased a portion of the property, Subdivision 33, Clixby Estates to one Evans Munyama.

Rodgers Ngambi averred that the Respondent moved on to Subdivision 33 Clixby Estate using false documentation, alleging that the Applicant's legal tenant authorized him to move on the land. The Applicant and Evans Munyama denied ever subleasing the land to the Respondent and subsequently advised the said Respondent to stop any developments that he was carrying out on the land and asked him to vacate the same. However, the Respondent continued to occupy the land and develop it.

Rodgers Ngambi averred that the Respondent now demands compensation from the Applicant if he is to vacate the land when he has no legal interest in the land. He further averred that unless the Respondent is restrained from proceeding with the

works, the subject property will be damaged with construction works being done by the Respondent and the Applicant is likely to suffer irreparable damage if the relief sought is not granted. Rodgers Ngambi prayed that the court grants the application sought. The court granted the Applicant an ex-parte injunction on the 16th of June, 2015.

On the 14th of July, 2015, the Applicant's Advocates filed skeleton arguments and a list of authorities in support of the Application for Injunction.

The Applicant's Advocates submitted that the principles to be taken into account when considering whether or not to grant an interlocutory injunction are whether there are serious issues to be tried, whether relief is necessary to protect a party from irreparable injury and the balance of convenience. The Learned Advocates for the Applicant submitted that at this stage, the party applying for an injunction must show that there is an issue for which there is some supporting material and the outcome of which is uncertain at the interlocutory state. The Applicant's Advocates referred to the cases of ***Preston vs. Luck*¹ (1884) 27 Ch D 497** and that of ***Zambia State Insurance Corporation vs. Dennis Mulikelela*² SCZ Judgment Number 9 of 1990.**

The Applicant's Advocates further referred to the case of ***Shell and B.P. vs. Conidaris and Others*³ (1975) ZR at 174** where the court stated that –

“All the court needs to do at the interlocutory stage is to be satisfied that there is a serious question to be tried at the hearing and that the court ought to interfere to preserve

property without waiting for the right to be finally established at the trial...

The Applicant's Advocates submitted that there are serious issues to be tried by this court. The Learned Advocates for the Applicant further cited the case of ***Turnkey Properties vs. Lusaka West Development Company⁴ (1984) ZR 85***, stating that the Applicant's right to relief is clear. They further stated that in the case of ***Shell and B.P. vs. Conidaris and Others*** irreparable injury was described as injury which cannot possibly be repaired or atoned for by an award of damages. The Learned Advocates for the Applicant cited the case of ***Jane Mwenya and Jason Randee vs. Paul Kapinga⁵ of (1998) ZR 12*** where the court stated that –

“the question is not simply whether damages are adequate, but that specific performance will do more perfect and complete justice than an award of damages.”

The Applicant's Advocates submitted that the Respondent will unjustly enrich himself and illegally maintain possession of the land which he has no legal right to do so. If the injunction is not granted, this action will be rendered an academic exercise and the Applicant will suffer injury which cannot be atoned by an award in damages. The Learned Advocates for the Applicant submitted that the balance of convenience weighs more in favour of an order for injunction and further stated that it would be wise to restrain the Respondent from having any proceedings with the remaining extent of Farm Number 86a Clixby Estates, Kasaka until after the determination of this matter.

The Respondent's Advocates filed skeleton arguments in reply. They submitted that an injunction is granted at the discretion of the court and is an equitable remedy. There must be full disclosure of the material facts. The Learned Advocates for the Respondent cited the case of ***Mwendalema vs. Zambia Railways Board***⁵ (1978) ZR 65 where it was held that –

“In view of the material non-disclosure of the appellant at the time of the ex-parte application for an interim injunction, I would discharge that injunction with costs to the Respondent in any event.”

The Learned Advocates for the Respondent cited the cases of ***American Cyanamid vs. Ethicon***⁶ (1975) 1 ALL ER 504 and the case of ***Shell and BP (Zambia) Limited vs. Conidaris and Others*** and stated that the Applicant does not have a clear right to relief because the Respondent has demonstrated that he has an interest in the land. They urged the court not to be lured into weighing the relative strength of the case by embarking on anything resembling a trial and cited the case of ***Hondling Xing Xing Company Limited vs. Zamcapitol Enterprises Limited***⁷ (2011) ZR 105.

The Learned Advocates for the Respondent submitted that the Applicant stands to lose nothing as the land in issue was abandoned and undeveloped. The Learned Advocates for the Respondent referred to Halsbury's Laws of England, Fourth Edition, Volume 24, at paragraph 957 which states –

“in considering whether an interlocutory injunction should be granted, the court has regard to the conduct of the

parties before the application was made by the Plaintiff to preserve and protect his right since the jurisdiction to interfere, being purely equitable is governed by equitable principles.”

In paragraph 958, it was stated that –

“Acquiescence by the Plaintiff in the Defendant’s conduct may prevent the grant of an injunction, especially where the Defendant has incurred expenditure in the mean time.”

The Learned Advocates for the Respondent urged the court to protect the status quo and not to create a new status quo. Consideration must be had to the families, equipment and agricultural produce that would suffer waste before the case is concluded. To grant the injunction in the form in which it currently is would amount to disposing of the entire cause. It would circumvent the trial and become a grant of the relief prayed in the originating summons.

The Respondent filed an affidavit in opposition in which he stated that one Reverend B.S. Kazovu told him to go ahead and develop Plot 33 of Farm Number 86, Clixby Estates. This was after Milton Munyama asked the Respondent to take over the Plot and pay for the infrastructure development that was done by Evans Munyama. The Respondent averred that Milton Munyama handed over a Power of Attorney, a letter of intent and a letter requesting to allocate the western portion of Plot 33 to the Respondent.

In February, 2012, the Respondent received a letter from the United Church of Zambia General Secretary who instructed him to cease all work on the plot as the documents that Milton submitted were forged. The respondent averred that he was on the land with the full knowledge and encouragement of the Applicant's lawful agent. He averred that he has spent approximately K750,000 on the land and as such it would be inequitable to possess the land. The Respondent averred that there are families of his employees who live on the land and that since 23rd June, 2015, expensive equipment, agricultural plants livestock and infrastructure have been left unattended and unsecure while hippos are destroying crops on the farm.

The Respondent averred that confirming the injunction would be unfair and unjust as that would create a new status between the parties and the Applicant.

I have considered the arguments by both Learned Counsel and taken note of the cited authorities. The purpose of these proceedings is not to consider in any great detail the merits of the legal position of either party but to decide whether the conditions for the grant of an injunction have been met. As stated in the case of **Shell and BP vs. Conidaris**, it is necessary to consider inter alia whether the facts disclose a clear right to relief and whether there is a good possibility that the applicant will succeed in the main case. This can only be done by browsing the facts of the main claim.

I am mindful that land is considered to be peculiar, each piece is unique and generally represents more than monetary value. In

the case of **Wesley Mulungushi vs. Catherine Bwale Mizi Chomba**⁸ (2004)ZR 96 a matter involving a land dispute, the Supreme Court said that –

“The matter in dispute is land, very valuable commodity whose loss may not be adequately atoned in damages.”

Issues relating to land fall within the circumstances covered by Order 29/1/3 RSC, 1999 Edition. In the **American Cyanamid vs. Ethicon case, Lord Diplock**⁹ stated that-

“whether there is doubt as to the adequacy of the respective remedies in damages available to either party or both then the question of balance of convenience arises.”

In this case, the Defendant has erected substantial development on the land in issue. There are definitely serious questions to be tied in this matter. The said developments on the land which were erected by the Defendant with the full knowledge of the Applicant. The Applicant was aware of the development the Respondent embarked on in 2012 but still did not seek an injunction then. This make it difficult for this court to confirm the Ex-parte Order for Injunction that earlier was granted in the matter. As such, the Ex-parte Order of Interlocutory Injunction that was granted on the 16th of June, 2015 is hereby discharged. I will make no

order for costs. The hearing of the main matter is adjourned to the 16th of October, 2015 at 0900 hours.

Dated this 7th day of October, 2015.



**P.C.M. NGULUBE
HIGH COURT JUDGE**