

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

2014/HP/1894

BETWEEN:



HAART ESTATE DEVELOPMENT LTD

AND

THOBERT CHISHIMBA MUTONO

1ST DEFENDANT

FELIX NGOMA

2ND DEFENDANT

LUSAKA CITY COUNCIL

3RD DEFENDANT

BEFORE : HON. G.C. CHAWATAMA

For the Plaintiff : *Mr. T.K Ndlovu – Batoka Chambers*
For the 1st Defendant : *In Person*
For the 2nd Defendant : *In Person*
For the 3rd Defendant : *Ms. Emelda Bupe – Legal Officer*

RULING

CASES REFERRED TO:

1. *Shell and BP Zambia Limited V Conidaris and Others*
2. *Fellows & Son V Fisher Brown LJ*

By a writ of summons filed on the 2nd November, 2014 the Applicant claims the following:

- a) *An order that the Plaintiff is the rightful owner of stand No. 29855/917 Kamwala South Lusaka.*
- b) *An injunction restraining the Defendants whether by themselves, their servants or whosoever from trespassing on the Plaintiff property situated on stand No. 29855/917 Kamwala South and carrying out any construction works therein.*
- c) *Further or other relief the court may deem fit and reasonable.*
- d) *Costs*

Parties were heard on the 3rd February, 2015. The Plaintiff applied for and by letter dated 30th November, 2005 was allocated by the third Defendant stand No. 29855/917 Kamwala South Lusaka. In January, 2006 a person by the name of Judy Chambela claimed that she was the rightful owner of the same land. The same was offered to the first Defendant that the second Defendant who is in possession of the same land is developing it. The Applicant prays that the Defendant be restrained by an injunction from trespassing on the Plaintiff's property and carrying out any construction work.

Miss Bupe for the third Defendant informed the court that although nothing was filed by them her instruction from her client was to request that the status quo be maintained. Mr. Ndlovu objected to this stating that for the status quo to be maintained meant that the second Defendant should continue to

build. It was his submission that the order being requested is that the first and second Defendant be restrained from continuing with the construction works on the plot until final determination of the matter.

The procedure to be adopted by the court is as follows:-

- a) *The grant of an interlocutory injunction is a remedy that is both temporary and discretionary;*
- b) *The evidence available to the court at the hearing of the application for an interlocutory injunction is incomplete. It is given on affidavit evidence and has not been tested by oral cross-examination;*
- c) *It is not part of the court's functions at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial;*
- d) *When an application for an interlocutory injunction to restrain a Defendant from doing acts alleged to be in violation of the Plaintiff's legal right is made upon contested facts, the decision whether or not to grant an interlocutory injunction has to be taken at a time when ex hypothesis the existence of the right or the violation of it or both, is uncertain and will remain uncertain until judgment is given in the action;*
- e) *It was to mitigate the risk of injustice to the Plaintiff during the period before that uncertainty could be resolved that the practice arose of granting him relief by way of interlocutory injunction;*
- f) *But (at least since the middle of the nineteenth century) this has been made subject to the Plaintiff's undertaking to pay damages to the Defendant for any loss sustained by reason of the injunction if it should be held at the trial that the plaintiff had not been entitled to restrain the Defendant from doing what he was threatening to do;*

- g) *The object of the interlocutory injunction is to protect the Plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial, but the Plaintiff's need for such protection must be weighed against the corresponding need of the Defendant to be protected against injury resulting from his having prevented from exercising his own legal rights for which he could not be adequately compensated under the Plaintiff's undertaking in damages if the uncertainty were resolved in the Defendants' favour at the trial;*
- h) *The court must weigh one need against another and determine where, "the balance of convenience" lies;*
- i) *There is no rule of law or practice to the effect that the court is not entitled to take any account of the balance of convenience unless it has first been satisfied upon the evidence adduced by both parties on the hearing of the application the Applicant had satisfied the court that on the balance of probabilities the acts of the other party sought to be enjoined would if committed, violate the Applicant's legal rights. The purpose sought to be achieved by giving to the court the discretion to grant interlocutory injunctions would be stultified if the discretion were clogged by such a technical rule;*
- j) *However, the court must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried; and*
- k) *So, unless the material available to the court at hearing of the application for an interlocutory injunction fails to disclose that the Plaintiff has any real prospect of succeeding in this claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.*

A central issue regarding the grant or refusal to grant an injunction should not be granted where damages would adequately compensate for any loss caused by the refusal to grant an interlocutory injunction. In the case of **Shell and BP Zambia Limited V Conidaris and Others** referred to by Counsel; it was

laid down that a court will not generally grant an interlocutory injunction unless the right to relief is clear and unless the injunction is necessary to protect the Plaintiff from irreparable injury; mere inconvenience is not enough. Irreparable injury is stated to be injury which is substantial and can never be adequately remedied or atoned for by damages not injury which cannot possibly be repaired.

In the case of **Fellows & Son V Fisher Brown LJ** set out the following guidelines regarding the adequacy of damages as a remedy;

- a) *The governing principle is that the court should first consider whether, if the Plaintiff succeeds at the trial, he would be adequately compensated by damages for any loss caused by the refusal to grant an interlocutory injunction. If damages would be adequate remedy and the Defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the Plaintiff's claim appeared to be at that stage;*
- b) *If, on the other hand damages would not be adequate remedy, the court should then consider whether, if the injunction were granted, the Defendant would be adequately compensated under the Plaintiff's undertaking as to damages. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the Plaintiff would be in a financial position to pay them, there would be reason upon this ground to refuse an interlocutory injunction;*
- c) *It is where there is doubt as to the adequacy of the respective remedies in damages that the question of balances of convenience arises. It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to*

suggest the relative weight to be attached to them. These will vary from case to case;

- d) Where other factors appear to be evenly balanced it is Counsel of prudence to take measures as are calculated to preserve the status quo;*
- e) The extent to which the disadvantages to each party would be incapable of being compensated in damages in the event of his succeeding at trial is always a significant factor in assessing where the balance of convenience lies;*
- f) If the extent of the uncompensatable disadvantage to each party would not differ widely, it may not be improper to take into account in tipping the balance the relative strength of each party's case as revealed by the affidavit evidence adduced on the hearing of the application. This however should be done only where it is apparent upon the facts disclosed by evidence as of which there is no credible dispute that the strength of one party's case is disproportionate to that of the other party; and*
- g) In addition to the factors already mentioned, there may be many other special factors to be taken into consideration in the particular circumstances of individual cases.*

Bearing in mind that the granting of an interlocutory injunction is a remedy that is both temporary and discretionary; as well as the fact that it is not part of my functions at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend, nor to decide difficult questions of law which call out for detailed arguments and mature considerations that will be dealt with at trial.

I have considered the Plaintiff's need for protection which I have weighed against the corresponding need of the Defendant to be protected against possible injury.

The court has weighed one need against another and in determining where the balance of convenience lies, and bearing in mind that if the Plaintiff succeeds at the trial he would not be adequately compensated by damages for any loss caused by the refusal to grant an interlocutory injunction. The injunction sought is hereby granted, the Defendant is hereby restrained from trespassing on the property nor carrying out any construction work until the final determination of this matter.

DELIVERED AT LUSAKA THIS ^{23RD}..... DAY OF^{JUNE}..... 2015.


G.C.M CHAWATAMA
JUDGE