

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

2014/HP/0766

BETWEEN:

**FRANCIS CHAPOTA**

**AND**

**CHIBOMBO DISTRICT COUNCIL**  
**MR. KAPOBA**  
**MR. CHANIKA**  
**MR. CHILESHE**  
**MR. PUMULO**

**1<sup>TH</sup> DEFENDANT**  
**2<sup>ND</sup> DEFENDANT**  
**3<sup>RD</sup> DEFENDANT**  
**4<sup>TH</sup> DEFENDANT**  
**5<sup>TH</sup> DEFENDANT**



**PLAINTIFF**

**BEFORE : HON. G.C. CHAWATAMA**

*For the Plaintiff* : *Mr. H. Haimbe - Messrs Sinkamba Legal Practitioners*

*For the Defendant* : *Mr. Khunga Mayumo - Messrs Barnaby & Chitundu Advocates*

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**RULING**

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CASES REFERRED TO:

1. *America Cynamid Company V Ethicon Limited (1975) AC 396*
2. *Shell and BP V Zambia Limited V Conidaris and Others*

AUTHORITIES REFERRED TO:

1. *Section 8(3) of the Lands Act Chapter 184*

The Plaintiff filed a writ of summons on the 13<sup>th</sup> May, 2014 in which he claimed the following:-

1. *A declaration that he is the rightful owner of the said property.*
2. *A declaration that the Defendant herein are trespassing on his land*
3. *An order restraining the first, second and third Defendants from in any way dealing with the Plaintiff's land*
4. *Damages for trespass*
5. *Compensation for loss of Mesne profits.*
6. *Injunction*
7. *Whatever remedy the court may deem fit*
8. *Costs.*

On the 16<sup>th</sup> April, 2015 after several adjournments by both sides the application for an interim injunction was heard. Counsel for the Applicant relied on the affidavit in support of summons for interim injunction. The court was informed that the Applicant was allocated the piece of land to him by Headman Kalundumabwe and Chief Mungule.

Exhibited were an acceptance letter, minutes of Chibombo District Council meeting and a site plan. He stated that the Defendants have trespassed on his land the result being that he

has suffered irreparable injury which cannot be atoned for by damages.

Counsel referred the court to paragraph four and five (4 and 5) of the Applicant's affidavit. Counsel informed the court that the Applicant has not demonstrated a serious question to be tried at trial.

With reference to the pleadings filed by the Applicant, Counsel stated that the question before the court is that of ownership of the land. Counsel submitted that the Applicant's affidavit clearly shows that this is land held under customary tenure which land has not been converted to leasehold tenure. Counsel was of the view that ownership thereof can only be construed from the relevant law applicable to land held under customary tenure. Counsel went further stating that there is no offer letter from the Ministry of Lands nor a lease relating to the land in dispute. Counsel stated that being land held under customary tenure ownership or rights that can be enjoyed with regard to the land can only extend to use and occupation of land that the concept of ownership under customary tenure is collective.

The court's attention was drawn to the fact that the Applicant has not exhibited consent from the Chief in whose area the land falls nor could he state the size nor extent of the land. The court was referred to the case of Shell BP on the principle of

demonstrating that there is a serious question to be tried by the court. Counsel stated that the right to relief sought by the Applicant is not clear in terms of **Section 8(3) of the Lands Act Chapter 184 of the Laws of Zambia.**

In response Mr. Haimbe informed the court that Counsel's submission clearly show that there is a dispute relating to ownership of the land in question and further highlights the jurisdiction of boarder issues between a Chief and a Headman.

The procedure adopted by the court in hearing the application of interlocutory injunctions and the test to be applied were laid down by the House of Lords in **American Cyanamid Company V Ethicon Limited (1975) AC 396.** The key principles and guidelines derived from the speech of Lord Diplock in the American Cyanamid case may be stated 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 principles 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 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. Further having weighed the needs against one another and determining where the balance of convenience lies, it's clear that there are other factors that appear to be evenly balanced.

Whilst I agree that there is a serious question to be tried at the hearing, it is Counsel of prudence to preserve the status quo until the full determination of the matter. Application for an injunction is thus denied.

**DELIVERED AT LUSAKA THIS 23<sup>rd</sup> DAY OF JUNE 2015.**

  
**G.C.M CHAWATAMA**  
**JUDGE**