

lib

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

**2014/HP/1926**

*(Civil Jurisdiction)*

**BETWEEN:**

**CHILOMBU KAMUHUZA**

**AND**

**LUWAYA KAMUHUZA**



**PLAINTIFF**

**(In his capacity as and duly appointed**

**Executor of the Estate of the late Robert Kamuhuza)      DEFENDANT**

**BEFORE HON. MRS JUSTICE M.C. KOMBE THIS 27<sup>TH</sup> DAY OF JANUARY 2015**

For the Plaintiff :      Mr. P. Muyatwa and Mr.N.Kanyimbo of Messrs  
Muyatwa Legal Practitioners

For the Defendant:      Major M. Mushemi of Messrs Nhari Mushemi and  
Associates

---

## **R U L I N G**

---

**Cases referred to:**

- 1. Preston V Luck (1884) 27 Ch. D 497**
- 2. Zambia State Insurance Corporation V Dennis Mulikelela SCJ Judgment  
No.9 of 1990**

3. **Zambia Revenue Authority V Makeni Gardens Limited SCZ Judgment No. 69 of 1995.**
4. **Shell and BP Limited V Conidaris and others (1975) Z.R 174**
5. **Jane Mwenya and Jason Randee V Paul Kapinga (1998) ZR 17**
6. **Tito V Waddle (No.2)(1977) Ch 106 at 332**
7. **ZIMCO Properties V LAPCO (1988-89) ZR 93**
8. **American Cyanamid Company V Ethicon (1975) A.C 396**
9. **Edward Jack Shamwana V Levy Mwanawasa (1993) Z.R**
10. **Hilary Bernard Mukosa v Michael Ronaldson (1993-94) Z.R 26**
11. **Harton Ndove V Zambia Educational Company (1980) ZR 184**
12. **Gideon Mundanda v Timothy Mulwani and The Agricultural Finance CO. LTD and S.S.S. Mwiinga (1987) ZR 29**

**Legislation and other material referred to:**

1. **High Court Rules Chapter 27 of the Laws of Zambia**
2. **Supreme Court Practice (White Book) 1999 Edition**
3. **Wills and Administration of Testate Estate Act, Chapter 27 of the Laws of Zambia**
4. **Halsbury Laws of England, Volume 24, Fourth Edition**

This is a ruling on the Plaintiff's application for an interlocutory injunction following the *ex-parte* order of interim injunction granted on 8<sup>th</sup> December, 2014 restraining the Defendant whether by himself, his directors, servants or agents or otherwise howsoever from causing any form of subdivision, conveyance and developments upon Plot 6471 Kalundu, Lusaka until determination of the main matter.

The application was made by way of *ex-parte* summons dated 3<sup>rd</sup> December, 2014, filed pursuant to Order 27 Rule 1 and Orders 3 Rule 2 of the Rules of the

High Court as read together with Order 29 Rule 1 of the Rules of the Supreme Court Practice and is supported by an affidavit sworn by one, Chilombu Kamuhuza, the Plaintiff herein.

The evidence of the Plaintiff is that Robert Dryden Kamuhuza in his Will dated 26<sup>th</sup> April, 2013, appointed the Defendant, Luwaya Kamuhuza as the Executor of the Will. That after further consultations and deliberations between the family at large and the Defendant, it was agreed as a family that a separate account be opened for purposes of collecting and distributing of the rentals in accordance with the Will to be co-signed and co-managed by the Defendant and another member of the family. She exhibited a copy of the agreement marked '**CK2**'.

The Plaintiff further deposed that it was a term of the said Will that the Defendant would be Executor and Trustee for and behalf of the other beneficiaries, including the Plaintiff for the deceased's house at Plot No. 6471 Kariba Road Kalundu that being the only property remaining to be administered out of the estate of the deceased. That the Defendant as Executor would distribute rentals collected from Plot No. 6471 at 20% to the deceased's wife and the remainder in equal shares to the nine(9) beneficiaries.

Further she deposed that contrary to the provisions of the Will and the agreement reached by the family, the Defendant had proceeded to initiate the process of subdividing and conveying the said plot upon which he had also commenced the building of some structures to his personal benefit.

In addition, the Plaintiff deposed that in total disregard to the term of the grant to administer the Estate in trust and to exhibit a true, just and perfect account of the property and rentals collected, the Defendant had failed and neglected and refused to distribute the same in accordance with the Will. That unless an injunctive directive were given, there was imminent danger that the Defendant would continue to unjustly enrich himself by continuing to collect rentals and subdivide, convey and construct a personal structure on and with respect to Plot

No. 6471 Kariba Road, a property he was holding in trust for herself and other beneficiaries.

The Defendant opposed the application and filed an affidavit in opposition on 15<sup>th</sup> December, 2014. His evidence was that he was the one and only Executor of the Will of the Late Robert Dryden Kamuhuza who was his father as well as the father to the Plaintiff. That ever since the Will was read, the Plaintiff had tried all sorts of ways to harass and assassinate his character to the point of having him removed as Executor.

The Defendant explained that he signed the document marked as '**CK2**' in the Plaintiff's affidavit in support but only noticed later that it had wrong figures as the rentals due and signed for were K7,000.00/month x 3 months= K21,000.00 and not K22,500.00. That this amount could be confirmed from the Lease Agreement pertaining to Plot 6471, Kalundu, Lusaka marked '**LK3**'

The Defendant further deposed that the subdivision of the land on Plot No. 6471 was done with prior consent of the deceased before his death. To this effect, he exhibited a letter dated 30<sup>th</sup> April, 2010 which he purports was authored by the deceased and thus authorized him to build a house on the plot behind the main house. This letter was marked as '**LK4**'.

Further, the Defendant deposed that the application for the subdivision was done on 27<sup>th</sup> February, 2013 and the subdivision had commenced with the deceased's consent way before his death on 19<sup>th</sup> November, 2013. That the deceased had given him the certificate of title for this purpose which was certified by lawyers and was later submitted to Lusaka City Council for subdivision. The approval for subdivision was given by the council on the 7<sup>th</sup> November, 2013.

It was also the Defendant's evidence that the Plaintiff's wish was to illegally topple him *vis-a-vis* selling the house. He went on further to explain that it was clear from his father and his Will that the house in Kalundu should never be sold as evidenced by a letter he purports was authored by his father marked '**LK8**'.

On the issue of the rentals, the Defendant deposed that he had distributed the rentals accordingly, directly into the beneficiaries accounts and that the Plaintiff and other beneficiaries benefit was only from the rentals from the main house and not from the house that he had built. He produced bank deposit slips of the beneficiaries marked '**LK9**'.

The Plaintiff filed an affidavit in reply and the gist of the evidence was that the letters marked '**LK4**' and '**LK8**' which the defendant relied upon as evidence authorizing the Defendant to build a house on Plot No. 6471 were questionable. This is because the letters were not certified as true copies and the signatures on the two letters differed. Further, that the Will made no specific reference to these two letters and relying on them would amount to an indirect way of altering a validly made Will.

It was also the Plaintiff's evidence that that no separate account had been opened for the purposes of collecting and distributing rentals and no bank statements had been produced to show a clear account of how the rentals had been distributed.

At the *inter parte* hearing, counsel for the Plaintiff Mr. N Kanyimbo relied on the affidavit in support filed on 3<sup>rd</sup> December, 2014 which was sworn by Chilombu Kamuhuza and their skeleton arguments filed on 24<sup>th</sup> December, 2014.

In his argument, counsel stated that the principles to be taken into account when considering whether or not to grant an interlocutory order were:

1. Whether there are serious issues to be tried;
2. Whether interlocutory relief is necessary to protect a party from irreparable injury;
3. The balance of convenience.

In relation to the first principle, counsel argued that at this stage, the party applying for interlocutory relief need only show that there was an issue for which there was supporting material and the outcome of which was uncertain at the

interlocutory stage. For this proposition, counsel referred this court to the principles established in the case of **Preston V Luck** <sup>(1)</sup> and approved in the Zambian case of **Zambia State Insurance Corporation V Dennis Mulikelela**<sup>(2)</sup>. He also referred to the case of **Zambia Revenue Authority V Makeni Gardens Limited** <sup>(3)</sup> and stated that the Supreme Court in referring to the principles laid down in the case of **Shell and BP Limited V Conidaris and others** <sup>(4)</sup> held 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 waiting for the right to be finally established at the trial.”***

In view of the above principle, counsel argued that there were serious questions to be tried by this court in relation to:

- (i) The import and spirit of the last Will of one Robert Dryden Kamuhuza;
- (ii) Whether the defendant should be suspended or removed as Executor of the said Will;
- (iii) Whether the defendant has truthfully, fully and justly administered all monies received during the administration of the Estate.
- (iv) The authenticity of the letters marked ‘**LK4**’ and ‘**LK8**’, purportedly authored by the deceased authorizing the defendant to subdivide the property as they are inconsistent with the provision of the Will.

Further, the Plaintiff argued that the facts of this case were without doubt a suitable case for an award of an injunction as the Plaintiff’s right to relief was clear.

As regards the second principle of irreparable damage, counsel relied on the **Shell and BP** case for the definition of irreparable injury in which injury was described as injury which cannot be repaired or atoned for by an award of damages. Further, it was argued based on the **Jane Mwenya and Jason Randee**

**V Paul Kapinga**<sup>(5)</sup> where the Supreme Court quoted with approval the decision in **Tito V Waddle**<sup>(6)</sup> that:

**“... the question is not simply whether damages are adequate remedy but that specific performance will do more perfect and complete justice than an award of damages, This is particularly so in all cases dealing with a unique subject matter such as land...”**

In this regard, it was argued that if the Defendant was allowed to carry on with the manner he was administering the Estate, the Plaintiff together with other beneficiaries were highly probable to suffer irreparable damage that can never be adequately remedied by an award of damages.

On the third principle, counsel argued based on the case of **ZIMCO Properties V LAPCO**<sup>(7)</sup> that the balance of convenience weighed more in favour of an Order for an injunction as the Defendant would in no way be prejudiced by the granting of an injunction as his claim would still be actionable at the conclusion of the case.

In opposing the application counsel for the Defendant Major Mushemi relied on the affidavit in opposition and the skeleton arguments filed on 29<sup>th</sup> December, 2014. In his argument, counsel commenced his arguments by considering the claim sought by the Plaintiff *vis a vis* the Section 51(1) of the Wills and Administration of Testate Estate Act. This Section deals with circumstances under which an Executor can be removed. I hasten to mention that I have considered the arguments by Counsel and the cited authorities and I am of the view that counsel raised issues which are for determination at the trial of the main matter. Therefore, I will only refer to the arguments relating to the order of interlocutory injunction sought by the Plaintiff.

In addressing the principles relating to injunctions, citing the **American Cyanamid Company v Ethicon Limited**<sup>(8)</sup>, Major Mushemi referred this court to the test formulated by the House of Lords being as follows:

1. *Is there a serious question to be tried? In other words is the claim not frivolous or vexatious and amongst other things is the right to relief clear?*
2. *Would damages be adequate compensation to the Plaintiff for interim loss pending trial and if so, is the Defendant in a position to pay them? If the answer is yes to both questions, an injunction should be granted.*
3. *If the answer is no, then the court must consider whether the Plaintiff is able to give an undertaking adequately to compensate the Defendant for any interim loss pending trial if the interlocutory injunction is granted but at the eventual trial the courts find that the Plaintiff was not entitled to the injunction. If the Plaintiff is in a position to give such an effective undertaking for the interlocutory injunction, then no injustice is likely to be caused.*
4. *If there is no doubt as to adequacy of the respective positions in damages then the case depends on the balance of convenience generally. The test is whether it would cause greater hardships to grant or refuse the injunction. If even this consideration is evenly balanced other factors may be taken into account.*
5. *Where does the balance of convenience lie regard being had to the general prudence of preserving the status quo; if the latter is still in doubt;*
6. *What is the relative strength of each party's case as disclosed on the affidavit evidence at this stage*

In addressing the test of whether or not there was serious question to be tried, counsel referred this court to the case of **Preston V Luck** which was approved by our courts in the case of **Zambia State Insurance Corporation V Dennis Mulikelela**. He argued that on the affidavit evidence and authorities cited, it was clear that there were no triable issues in this suit requiring an injunctive relief and the right to relief was not clear. This was because the claim appeared frivolous and



more inclined to sibling vexatiousness when viewed from the testator's instructions point of view.

Further, counsel argued that there was no serious question to be tried as the Defendant had the blessings and approval of the deceased to commence demarcation and construction work thereon under dispute prior to the deceased's death. He argued that the Plaintiff's unsubstantiated assertions against the Defendant could not stand against the Defendant's defence.

In conclusion, counsel argued that the rights the Plaintiff sought to enforce arose not out of a contract of sale of land but were as a result of being a beneficiary to landed property under a Will. Therefore, specific performance was not a relief that could be sought by either party. In this regard, he ended by stating that it would be premature and undesirable and against the spirit of the authorities cited to grant an injunction before the conclusion of the matter.

I have considered the affidavit evidence of the parties and I have carefully addressed myself to the arguments filed by counsel for the respective parties and the authorities herein.

This is an application by the Plaintiff for an interlocutory injunction. I have to state from the outset that in making a determination whether or not the *ex - parte* order for an injunction granted to the Plaintiff on 8<sup>th</sup> December, 2014 should be extended, I have carefully considered the caution given by Ngulube J (as he then was) in the case of **Edward Jack Shamwana V Levy Mwanawasa**<sup>(9)</sup>. This caution is that I should in no way pre-empt the decision of the issues which are to be decided on the merits and the evidence at the trial of the action. This is particularly important especially that counsel for the Defendant proceeded to argue on the merits of this matter.

The test to be applied when considering whether or not an interim injunction should be granted remains that laid down by the House of Lords in the seminal case of **American Cyanamid Company case**, a case cited by counsel for the

Defendant. This case sets out a series of questions which should guide the court in making a determination. These are:

1. Is there a serious question to be tried?
2. Would damages be adequate?
3. Where does the balance of convenience lie?

The first question I should consider therefore is whether or not the Plaintiff has raised a serious question to be determined at trial. This proposition comes down to the requirement that the claim must not be frivolous or vexatious. This is in line with the holding by the Supreme Court in the case of **Hilary Bernard Mukosa v Michael Ronaldson** <sup>(10)</sup> where it was held that:

***“An injunction would only be granted to a plaintiff who established that he had a good and arguable claim to the right which he sought to protect.”***

Further, in the High Court, Chirwa J, as he then was in the case of **Harton Ndove V Zambia Educational Company**<sup>(11)</sup> 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.”***

In relation to the first principle whether there is a serious question to be tried, it is important to consider the right which the Plaintiff seeks to protect without delving in the merits and demerits of the case. The right can be construed from the claim as endorsed on the Writ of summons filed on 3<sup>rd</sup> December, 2014. The said Writ reads as follows:

- (i) ***An Order to suspend or remove the Defendant as Executor of the Will of the late Robert Dryden Kamuhuza and provide for the succession of the Plaintiff to the office of Executor;***

- (ii) An Order for the Rendering by the Defendant a true, full and just account of all moneys obtained him;*
- (iii) An Order of interlocutory injunction restraining the Defendant from collecting rentals, continuing with the subdivision, conveyance and developments upon Plot 6471 Kalundu Lusaka;*
- (iv) Damages;*
- (v) Further or other relief the court may deem fit;*
- (vi) Interest; and*
- (vii) Costs.*

I have examined the above endorsement, the statement of claim and the affidavit evidence adduced by both parties together with the exhibits. The Plaintiff has made serious allegations against the Defendant concerning the manner the Defendant is administering the estate of the deceased. The Defendant has fervently disputed the allegations.

The Plaintiff has alleged that the Defendant who is the Executor of the Estate has proceeded to subdivide and convey the land at Plot No. 6471 and commenced building on the said plot contrary to the provisions of the Will. In this regard, the Plaintiff seeks an order to suspend or remove the defendant as the Executor of the Will.

The Plaintiff further contends that in total disregard to the agreement by the family and the term of the grant, that is to administer the Estate in trust, the Defendant has failed/or neglected to render a true, full and just account of the rentals collected during the administration of the Estate.

The Defendant on the other hand has opposed these allegations and argued that the subdivision and conveyance were done with the deceased's consent prior to his death. According to the Defendant's evidence, the letter authorizing him to commence construction and the subdivision is marked '**LK4**'. The Plaintiff has questioned the authenticity of this letter and that of '**LK8**'. In her affidavit in reply, she has deposed that the letters have not been certified and the signatures on the

same are different. Counsel for the Plaintiff has proceeded to argue that the letters appear to be inconsistent with the provisions of the Will as the same Will which was made after the purported letter of authorization to subdivide Plot No. 6471 made no mention or reference to the letter of authorization.

Further, the Defendant has argued that he has not failed to distribute the rentals to the respective beneficiaries as he has done that directly in the beneficiaries' accounts.

From the above evidence adduced by the parties, I find in line with the **Harton Ndove case** that there is a serious dispute between the parties.

Further, I have considered the reliefs sought by the Plaintiff as endorsed on the Writ of Summons in the light of the evidence adduced by both parties regarding the manner the estate of the deceased is being administered. More importantly I have considered the provisions of the Will and the documents exhibited by both parties. I am of the considered view that all these documents need to be examined in more detailed manner at the hearing of this matter in the light of the reliefs sought by the Plaintiff.

In view of the above, I find that there is a serious question to be tried in this action and that the Plaintiff who is the beneficiary to the estate of the deceased has demonstrated a clear right to the relief she seeks.

Having found that there is a serious question to be tried and the right to relief is clear, I have to consider whether in the circumstances of the case, an injunction is necessary to protect the Plaintiff from irreparable damage. This consideration is made in the light of what was stated by Lord Diplock in the American Cyanamid case that:

***“If damages in the measure recoverable at common law would be adequate remedy and the Defendant would be in the financial position to pay them, no interim injunction should normally be granted.”***

Further paragraph 955 of the Halsbury Laws of England Volume 24, Fourth Edition provides that:

***“The Plaintiff must also as a rule be able to show that an injunction until the hearing is necessary to protect him against irreparable injury; mere inconvenience is not enough.”***

According to the *Shell and BP* case, irreparable injury means:

***“injury which is substantial and can never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired”.***

In considering this head, it is therefore important to consider the subject matter in question. In the present case, the Defendant has been restrained from continuing with the subdivision, conveyance and developments upon Plot 6471 Kalundu, Lusaka. The subject matter in question is therefore Land.

It is trite law that the loss of an interest in a particular piece of land or house no matter how ordinary cannot be adequately compensated by damages. This principle was adopted by the Supreme Court in the case of ***Jane Mwenya and Jason Randee V Paul Kapinga*** and in the case of ***Gideon Mundanda v Timothy Mulwani and The Agricultural Finance CO. LTD and S.S.S. Mwiinga***<sup>(12)</sup>. In the latter case, the Supreme Court 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 breach of a contract for the sale of land.”***

Further, paragraph 926 of the Halsbury Laws provides that:

**“...Even where the injury is capable of compensation in damages an injunction may be granted if the act in respect of which relief is sought is likely to destroy the subject matter in question.”**

Counsel for Plaintiff has argued that if the Defendant is allowed to carry on with the manner he is administering the Estate, the Plaintiff together with the other beneficiaries are highly probable to suffer damage that can never be adequately remedied for by an award for damages.

Counsel for the Defendant on the other hand has argued that this principle is not applicable to the present case as the right which the Plaintiff seeks to protect does not arise out of a contractual matter, for example, under the contract of sale of land. Therefore, specific performance is not the relief that can be sought by either party.

I am of the considered view that in addressing this issue on whether the injunction is necessary to protect the applicant from irreparable injury, the courts concern should be the subject matter in question. In this particular case, the subject matter is the land on Plot No.6741, Kalundu.

I therefore accept the Plaintiff's argument based on the principles outlined in the **Mundanda and Jane Mwenya cases**. If the injunction is not granted and the Defendant proceeds to subdivide, convey and cause developments on the plot in question, the Plaintiff will suffer irreparable damage which can never be atoned for in damages if she succeeds in her claims after the matter is determined. In other words, the act, which is the subdivision and conveyance in respect of which relief is sought is likely to destroy or change the subject matter.

On the question of balance of convenience, I have considered the nature of the injury which the Defendant on the one hand would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Plaintiff on the other hand might sustain if the injunction was refused and she should ultimately turn out to be right. I am satisfied based on the facts that the balance of convenience lies in favour of confirming the injunction considering that the disadvantage to the Plaintiff would be uncomensatable. This is due to the nature of the subject matter.

For the reasons stated above, I find that the application for an interlocutory injunction against the Defendant has merit.

**Accordingly, I hereby grant the application for an interlocutory injunction until determination of the main matter. For the avoidance of doubt, I confirm the *ex parte* order of interim injunction granted against the Defendant on 8<sup>th</sup> December, 2014.**

Costs follow the event.

Leave to appeal is granted.

**DELIVERED this 27<sup>th</sup> day of January, 2015**



-----  
**M. C. KOMBE**

**JUDGE**