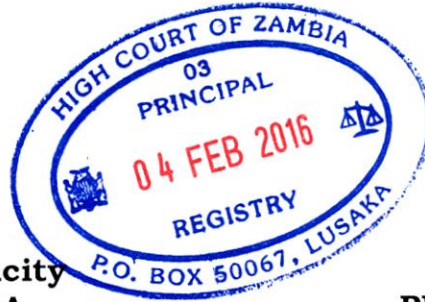


**IN THE HIGH COURT OF ZAMBIA**  
**AT THE PRINCIPAL REGISTRY**  
**AT LUSAKA**  
(Civil Jurisdiction)

**2015/HP/1359**

**BETWEEN:**

**BERNADETTE KABWE MUSONDA**  
(Married woman suing in her capacity  
as Attorney for ROSALIA NDAKALA



**PLAINTIFF**

**AND**

**DONATO KASHINGA NDAKALA**  
(male sued in his capacity as administrator  
of the estate of Francis Xavier Ndakala

**1<sup>ST</sup> DEFENDANT**

**MATILDAH MUSONDA NDAKALA (FEMALE)**

**2<sup>ND</sup> DEFENDANT**

Before the Hon. Mrs. Justice A.M. Sitali on the 4<sup>th</sup> day of February 2016.

*For the plaintiff* : *Mr. O. Sitimela, of*  
*Messrs Fraser and Associates*

*For the defendants* : *Mr. M. Sinyangwe, of*  
*Messrs Wila Mutofwe and Associates*

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

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**Cases referred to:**

1. Shell and BP (Zambia) Limited v. Conidaris and Others (1975) ZR 174
2. Turnkey Properties v. Lusaka West Development Co. Limited (1984) ZR 105.
3. American Cyanamid Company v. Ethicon Limited (1975) A.C. 396
4. Harton Ndove v. Zambia Educational Company Limited (1980) ZR 184
5. Gideon Mundanda v. Mulyani & Two Others (1987) ZR 29
6. Tito v Waddell (No. 2) (1977) Ch. D 106

**Legislation referred to:**

- 1. The High Court Rules, Chapter 27 of the Laws of Zambia, Order 27 rules 1 and 3.**
- 2. The Rules of the Supreme Court, 1999 edition, Order 29 rule 1.**

This is an application by the plaintiff for an interlocutory injunction to restrain the 1<sup>st</sup> and 2<sup>nd</sup> defendants either by themselves or by their servants, agents or whosoever from dealing with, disposing of or selling the five acres of Lot No. 12744/M Lusaka being subdivision B of Lot No. 12744/M Lusaka and from evicting Rosalia Ndakala and James Phiri from the said property pending the determination of this matter or until further order of this court. The plaintiff further seeks an interim order for the preservation of subdivision B of Lot No. 12744/M Lusaka being five acres of the property which is the subject of this action.

The application is made by way of exparte summons for an order of interim injunction and or preservation order and is supported by an affidavit sworn by Bernadette Kabwe Ndakala, the plaintiff.

The facts of the case as deposed to by the plaintiff in brief are that Rosalia Ndakala aged 83 years old is the deponent's mother and that together they reside at subdivision B of Lot No. 12744/M Lusaka the subject matter of this action. The plaintiff further deposed that some time in May 2007, the 1<sup>st</sup> defendant acting in his capacity as administrator of the estate of the late Xavier Francis Ndakala offered Rosalia Ndakala, who is the defendants' aunt, five (5) acres of Lot No. 12744/M Lusaka as a gift. The deponent stated that instead of accepting the land as a gift Rosalia Ndakala with the help of the deponent and her husband James Phiri orally offered to buy the five acres of land at K5 million (unrebated) which offer the 1<sup>st</sup> defendant accepted.

The 1<sup>st</sup> defendant directed that all the costs and expenses related to the subdivision would be borne by Rosalia Ndakala to which she agreed. The plaintiff stated that the consideration of K5 million was paid to the 1<sup>st</sup> defendant on 26<sup>th</sup> May 2007 and he granted vacant possession of the five acres of land which was virgin land at the time to Rosalia Ndakala. The plaintiff went on to state that as Rosalia Ndakala did not have financial capacity to develop the land, she and her husband sank a borehole and built a three room house and pit latrine with the full knowledge and consent of the 1<sup>st</sup> defendant. In June 2007 the plaintiff engaged a surveyor ACM Land Consultants to survey the land and prepare the site plans and prints, obtain planning permission and attend to the numbering of the subdivision. In October 2007 the surveyor lodged an application for permission to subdivide Lot No. 12744/M Lusaka and separate the five acres of land sold to the plaintiff.

In 2011 the plaintiff lodged an application for electricity at ZESCO Limited and as the five acres had no certificate of title, the 1<sup>st</sup> defendant wrote a letter to the Managing Director of ZESCO Limited confirming that Rosalia Ndakala was the owner of the five acres. ZESCO Limited then issued a quotation for power supply in the name of Rosalia Ndakala dated 29<sup>th</sup> August, 2011. The proposed subdivision was approved on 27<sup>th</sup> November, 2013 and the portion of land was numbered subdivision B of Lot No. 12744/M Lusaka in extent 2.025 hectares as per exhibited site plan marked "BKM7".

The plaintiff went on to state that before Rosalia Ndakala and the 1<sup>st</sup> defendant could complete the transaction, the 1<sup>st</sup> defendant fell sick and in July 2015, the 2<sup>nd</sup> defendant claiming to be the administrator of the estate of Xavier Francis Ndakala demanded that Rosalia Ndakala and the plaintiff and her husband should immediately vacate the said land with the approval of the 1<sup>st</sup> defendant. The 2<sup>nd</sup> defendant contended that the land was only given to Rosalia Ndakala to live on for a short while and that it did not belong to her. She further alleged that the sum of K5 million which the plaintiff paid to the 1<sup>st</sup>

defendant was a gesture of appreciation and was not consideration for the purchase of the property. The plaintiff stated that the 2<sup>nd</sup> defendant has since taken possession of the certificate of title relating to Lot No. 12744/M Lusaka and that the two defendants have decided to demarcate the said property with a view to selling it. The plaintiff contends that unless the defendants are restrained by an order of injunction, they will proceed to sell the property to third parties and that should that happen, Rosalia Ndakala will suffer irreparable injury.

The defendants filed an affidavit in opposition to the application which was jointly sworn by the 1<sup>st</sup> and 2<sup>nd</sup> defendants in their capacity as administrators of the estate of the late Francis Xavier Ndakala. They deposed that around 2007 they allowed Rosalia Ndakala who is their aunt to stay at Lot No. 12744/M for a while and that they did not offer her five acres of the said property which is known as subdivision B of Lot No. 12744/M Lusaka. They stated that the K5 million which was given to the 1<sup>st</sup> defendant by the plaintiff and her husband was in appreciation of the gesture made to Rosalia Ndakala to stay on the land and was not for the purchase of the land.

The defendants went on to state that the letter which the 1<sup>st</sup> defendant wrote to the Managing Director of ZESCO Limited was meant to facilitate the connection of electricity to the property and was not meant to confirm that Rosalia Ndakala was the owner of the property. They therefore prayed that the interlocutory order of injunction and the preservation order in respect of the property should not be granted as Rosalia Ndakala does not have title to subdivision B of Lot 12744/M Lusaka.

At the hearing of the application, Mr Sitimela, counsel for the plaintiff relied on the affidavit in support of the application sworn by the plaintiff, Bernadette Kabwe Musonda filed in court on 17<sup>th</sup> August 2015. He also relied on the skeleton arguments filed on the same day and submitted that the plaintiff by

the endorsement on the amended writ of summons had demonstrated that there is a serious question to be tried regarding the ownership of the five acres of land being Subdivision B of lot No. 12744/M Lusaka. Counsel further submitted that the affidavit evidence reveals that the land in dispute has been the home of Rosalia Ndakala since 2007 and that if an injunction is not granted and she is evicted, she will suffer irreparable injunction as damages awarded should she succeed in her action against the defendants will not suffice to compensate her for the loss of the land. Counsel cited the cases of Shell and BP Zambia Limited v. Conidaris and Others (1) and Turnkey Properties v. Lusaka West Development Company Limited (2) in support of his submissions. He therefore urged that the ex-parte order of injunction granted to the plaintiff be confirmed.

In opposing the application, Mr Sikazwe counsel for the defendants relied on the affidavit in opposition sworn by the defendants and filed in court on 21<sup>st</sup> January, 2016. He submitted that the order of injunction which the plaintiff seeks is an equitable remedy and that the plaintiff should therefore come to equity with clean hands which she did not do by not disclosing that the property in dispute was not given to her as a gift but that she was only allowed to live on it. Counsel submitted that according to the defendants the land was also not sold to the plaintiff as she alleged. Counsel went on to submit that as the estate has two administrators both administrators needed to have acted together to pass title to the plaintiff by way of gift or to sell it to her which was not done in this case. He stated that in this case the transaction was between the plaintiff and the daughter of the deceased and that the plaintiff has therefore not established a clear right to the property which she is claiming.

Counsel further submitted that an injunction cannot be granted to restrain the defendants from performing their statutory duties. He submitted that as the plaintiff was merely allowed to live on the property and does not own the property, she will not suffer irreparable injury if the exparte order of injunction

granted to her by this Court is discharged. He therefore prayed that the injunction be discharged with costs to the defendants.

In reply Mr Sitimela reiterated that the plaintiff had demonstrated a clear right to the relief she seeks and urged that the *exparte* order of injunction be confirmed.

I have carefully considered the affidavit evidence, the submissions by learned counsel for the respective parties and the authorities cited herein.

The principles upon which an interlocutory injunction is granted are authoritatively set out in the leading case of *American Cyanamid v. Ethicon Limited* (3). The Supreme Court has reaffirmed those principles in numerous cases including in the case of *Shell and BP (Z) Ltd v. Conidaris and Others* which was cited by both learned counsel for the respective parties, where the Supreme Court stated that:

*“A court will not generally grant an injunction unless the right to relief is clear and unless the injunction is necessary to protect the applicant from irreparable injury; mere inconvenience is not enough. Irreparable injury means injury which is substantial and can never be adequately remedied or atoned for by damages not injury which can possibly be repaired.”*

In the case of *Harton Ndove v. Zambia Educational Company Limited* (4) Chirwa J, as he was then, 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 the trial.”*

In the case of Turnkey Properties v. Lusaka West Development company Limited the court further stated that:

*“In applications for interlocutory injunctions the possibility of damages being an adequate remedy should always be considered.”*

I am guided by these principles in determining whether or not I should grant an interlocutory injunction pending the determination of the main matter.

For the application to succeed, the plaintiff must demonstrate that there is a serious dispute between the parties and that she has a clear right to the relief claimed. The plaintiff must also satisfy me that the injunction is necessary to protect her from irreparable injury as mere inconvenience is not enough.

In this case, the plaintiff by writ of summons claims for, inter alia, an order of specific performance of the agreement made around May 2007 for the sale by the 1<sup>st</sup> defendant acting in his capacity as administrator of the estate of Francis Xavier Ndakala of five acres of Lot No. 12744/M Lusaka to Rosalia Ndakala. Whether or not the plaintiff is entitled to an order of specific performance of the agreement in issue is a matter for determination at the trial of the main matter and does not fall for consideration at this interlocutory stage. As such, there is a serious dispute between the parties and the plaintiff as a party to the contract in issue has established a clear right to the relief she seeks.

That said, the next issue to consider in determining this application is whether, in the circumstances of the case, an injunction is necessary to protect the plaintiff from irreparable injury.

According to the case of Shell and BP (Zambia) Limited v. Conidaris and Others *“irreparable injury means injury which is substantial and can never be*

*adequately remedied or atoned for by damages not injury which can possibly be repaired.*" Mere inconvenience is not enough.

Therefore, regarding the question whether the plaintiff will suffer irreparable injury if the injunction is not granted and she later succeeds at the trial of the main matter, it is trite law that damages cannot adequately compensate a party for the loss of land or an interest in a particular piece of land or of a particular house (however ordinary) as no two parcels of land are exactly the same. This legal position is clearly stated in the cases of Gideon Mundanda v. Mulyani & Two Others (5) and Tito v. Waddell (6).

In view of this clear position of the law, I will exercise my discretion in favour of the plaintiff and confirm the exparte order of injunction which I granted earlier.

I accordingly order that the 1<sup>st</sup> and 2<sup>nd</sup> defendants whether by themselves, or by their servants, agents or whosoever are hereby restrained from selling Subdivision B of Lot No. 12744/M Lusaka and from evicting or otherwise interfering with the plaintiff's occupation of subdivision B of Lot No. 12744/M Lusaka until the final determination of this matter or such further order of this court.

The costs of the application will be in the cause. Leave to appeal is granted.

Dated this 4<sup>th</sup> day of February, 2016



**A. M. SITALI**  
**JUDGE**