

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

2015/HP/1892



BETWEEN:

**GEORGINA NYAMANSE SHAWA D'URBANO
BENITO D'URBANO
GIOVANNI D'URBANO**

**1ST PLAINTIFF
2ND PLAINTIFF
3RD PLAINTIFF**

AND

FREDERICK SULWE CHUUNGA
(Sued in his capacity as the Executor of the Estate
Of the late Benito Dominico D'urbano)

1ST DEFENDANT

JULIA VERINA CHIPMAN

2ND DEFENDANT

BEFORE HON. MRS. JUSTICE M.S. MULENGA ON THE 29TH DAY OF JANUARY 2016

**FOR THE PLAINTIFFS : MR. R. MUSUMALI OF MESSRS SLM LEGAL
PRACTITIONERS**

**FOR THE DEFENDANTS : MR. M. PHIRI OF MESSRS MWANSA PHIRI AND
PARTNERS**

R U L I N G

Cases cited:

1. **Shell and BP Zambia Limited v Conidaris (1975) ZR 174**
2. **Preston v Luck [1884] 2 Ch D 497**
3. **Ahmed Abad v Turning and Metals Limited (1987) ZR 86 (SC)**
4. **American Cyanamid Company v Ethicon Company Limited [1975] A C 396.**
5. **Turnkey Properties v Lusaka West Development Company and Another (1984) ZR 254.**
6. **Whidden Kanungwe v Zambia Sugar Plc SCZ Appeal No. 192 of 2000**
7. **Gideon Mundanda v Timothy Mulwani, Agricultural Finance Co. Ltd and S.S.S. Mwiinga (1987) ZR 29 (SC)**

This Ruling is on the application by the Plaintiffs dated 15th October, 2015 for an interim injunction pursuant to Order 27 rule 1 High Court Rules Cap 27 to restrain the Defendants from evicting the tenant, selling or any further dealings relating to S/DB of S/D No. 1 of farm No. 288a Makeni, Lusaka.

The affidavit in support is deposed to by the 2nd Plaintiff who states that the Plaintiffs have commenced this action challenging *inter alia* the grant of probate to the 1st Defendant under the purported Will of 18th July, 2014 and contesting that his father died testate under the will dated 28th January, 1987. That he is mentioned as one of the beneficiaries in both the 1987 and 2014 wills produced as “BD1 and 2” and the main property comprising the estate is the said Makeni property in issue. That the Defendants have been desirous of selling the property to the detriment of the beneficiaries and the 1st Defendant had executed a contract of sale with Mr. D.G. Smith exhibited as “BD3”. That due to the Plaintiffs’ objections Mr. Smith did not proceed to purchase the property but has continued occupying it as a tenant.

Further that, he has been advised and believes that the 1st Defendant is still desirous of selling the property and has executed a warrant of distress and evicted the tenant in preparation to give vacant possession to a prospective buyer. The Defendants have been visiting the property with various prospective purchasers and thus have a settled intention to sell and expropriate the proceeds. That if an injunction is not granted, the Defendants will sell the property and render any order granted in favour of the Plaintiffs nugatory and the

Plaintiffs will suffer irreparable damage. That the Defendants will not suffer any prejudice if an injunction is granted.

The 1st Defendant in his corrective affidavit in opposition dated 14th November, 2015 states that the 1st Plaintiff had sued the deceased, Dominico Benito D'urbano, over the same property under cause No. 2013/HP/0987 and that this action over the same property is an abuse of process. That the will of 1987 is not valid as the 1st Plaintiff in the 2013 action states that she was on separation from the deceased since 1986 when he left for Brazil and did not return. That it is prudent for an executor to act and wind up the administration of the late's estate and this has not been done behind the backs of the 2nd and 3rd Plaintiffs as they have been notified. That D.G. Smith voluntarily vacated the property in August 2014 and the warrant of distress was due to the fact of his failure to pay rentals to the estate agent. That at the time of the deceased's demise, he was married to the 2nd Defendant under customary law as per exhibit "DB2". That the Plaintiff will not suffer irreparable damage as the proceeds of the sale will be quantifiable and the shares are specified in the 2014 will. Instead it is the 2nd Defendant who would suffer irreparable damage on a balance of convenience.

The 2nd and 3rd Plaintiffs in the affidavit in reply dated 17th November, 2015 state that the dispute under cause number 2013/HP/0987 is not the same as in the current case and the deceased died whilst the matter was pending. That D.G. Smith did not voluntarily vacate the premises but was evicted. That the Defendants intend to expropriate the proceeds of sale of the property as they have been paid a down payment by a prospective purchaser called Muhammed and this has

been done clandestinely without the Plaintiffs' knowledge. That some paragraphs in the affidavit in opposition contained legal arguments, defence and were contradictory.

Both parties filed skeleton arguments. The Plaintiffs' submissions is to the effect that they have satisfied the requirements for the grant of an injunction. That they have shown a clear right to relief as beneficiaries of the estate and there is a serious question to be tried vis a vis the two wills of 1987 and 2014. The case of **Shell and BP Zambia Limited v Conidaris (1975) ZR 174** and **Preston v Luck [1884] 2 Ch D 497** were cited in support. Further that the Plaintiffs have a strong prima facie case and that an injunction is appropriate as there is a dispute concerning two wills and whichever one of them that will prevail will materially affects the rights and obligations of the parties. That even if the court were to find in favour of the 2014 will, the 2nd and 3rd Plaintiff will still have a cause of action because the 1st Defendant has not undertaken the administration of the estate prudently. Further, that based on the case of **Ahmed Abad v Turning and Metals Limited (1987) ZR 86 (SC)** an injunction is appropriate in this instant case as damages will be an inadequate remedy if the property is sold. That the balance of convenience also lies in their favour based on the case of **American Cyanamid Company v Ethicon Company Limited [1975] A C 396**. That the subject property is the only known property they have inherited from their late father.

The Defendants in their skeleton arguments dated 18th November, 2015 state that as per exhibited contract of sale the property has already been sold and the purchaser has made part payment and is in possession. That there is therefore nothing to restrain based on

the case of **Turnkey Properties v Lusaka West Development Company and Another (1984) ZR 254.** That the said case also make it clear that:

“The court in deciding whether to grant an injunction or not should in no way preempt the decision of the issues which are to be decided on merits and the evidence at the trial of the action.”

That the Plaintiffs are not likely to succeed in the matter as the 2014 will clearly revoked all former wills. That in any case damages are an adequate remedy in this case as it has not been demonstrated otherwise. That the balance of convenience favours the Defendant in that if the Defendant is restrained from selling the property he will be in breach of contract with the purchaser and so this is a proper case for the status quo to be maintained. That granting the injunction will advantage the Plaintiffs who have another case running under cause No. 2013/HP/0987.

At the hearing both parties relied on their respective affidavits and submissions. The summary of the facts as stated by the parties are that the 1st Plaintiff instituted a case under cause No. 2013/HP/0987 against the deceased and the said matter is still pending before court. There are arguments over whether the issues in that case are the same as in this case but these arguments are not relevant as there are no court documents produced to support that they are the same or that this action is an abuse of court process.

The 2nd and 3rd Plaintiffs are biological children of the deceased and are mentioned as beneficiaries under both the 1987 will and the 2014 will under which the 2nd Defendant is also indicated as a beneficiary. The estate comprises the subject property in Makeni, Lusaka and the 1st Defendant is in the process of selling the said property as executor

of the 2014 will. Among the claims by the Plaintiffs is that the 1st Defendant should account for the administration of the estate and that he has not been transparent in the administration of the estate.

The issue for determination is whether the Plaintiffs have satisfied the requirements for the grant of an interim injunction pending the determination of this matter challenging the validity of the 2014 will. The principles on the grant of an injunction are not in dispute as both parties have cited the relevant authorities on this aspect.

In the case of **Shell and BP Zambia Limited v Connidaris and Others (1)** it was held that:

"A Court will not generally grant an injunction unless the right to a relief is clear and the injunction is necessary to protect the Plaintiff 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 cannot possibly be repaired."

Further, in **Turnkey Properties v Lusaka West Development Company limited and Others (3)** It was held that:

"An interlocutory injunction is appropriate for the preservation or restoration of a particular situation pending trial; but it cannot, in our considered view, be regarded as a device by which the applicant can attain or create new conditions, favourable only to himself, which tip the balance of the contending interests in such a way that he is able, or more likely, to influence the final outcome by bringing about an alteration to the prevailing situation which may weaken the opponents' case and strengthen his own."

Further, the case of **Whidden Kanungwe v Zambia Sugar Plc SCZ Appeal No. 192 of 2000** amplifies the issue of the right to relief by stating that:

"The applicant must establish a prima facie legal right to be protected by the injunction. He must also, after establishing the right, show that the balance of convenience is in his favour and failure to give him an injunction will cause irreparable damage that cannot be atoned by damages."

As already stated above, this matter mainly hinges on the validity of the 2014 will with the Plaintiffs asserting that it is not valid hence this action to nullify it. The 1st Defendant's assertion is that the 1987 will was clearly revoked by the 2014 will as the most recent. Both parties have highlighted certain allegations to support their position. However, I cannot comment on the allegations at this interlocutory stage as the comments may have the effect of pre-empting the issues that have to be determined at trial. The opposing allegations by the parties clearly show that there are serious triable issues in this matter. The 2nd and 3rd Plaintiffs as beneficiaries under both the 1987 and 2014 wills have shown a clear right to relief as their portion of the inheritance from the estate of their deceased father will be significantly affected.

The other issue to consider is the adequacy of damages. In this case the Plaintiffs have shown that the issue centers on the subject Makeni property which is a house as the main item comprising the estate of the deceased. The fact that the subject matter is real property or land in itself shows that damages are an inadequate remedy as held in the case of **Gideon Mundanda v Timothy Mulwani, Agricultural Finance Co. Ltd and S.S.S. Mwiinga (1987) ZR 29 (SC)** that damages cannot be an adequate compensation when one is dealing with an interest in a particular piece of land. If the property was to be sold before this matter is determined, the 2nd and 3rd Plaintiffs will suffer irreparable injury which cannot be adequately atoned for by damages.

On the aspect of the balance of convenience, I find that the same weighs in favour of the 2nd and 3rd Plaintiffs. I say so due to the fact that if the 2014 will is proved to be invalid, they would stand to loose

substantially because it would mean that the 1st Defendant has no power to sell and in the meantime he would not be in a position to restore the property. On the other hand if the 2014 will is found to be valid, they would also be adversely affected by the sell of the property as it has been prima facie shown that the 1st Defendant's conduct on this matter has not been transparent. The 1st Defendant in his affidavit is not categorical on the status of the alleged sale and only states that they had drawn the Plaintiffs attention to the intended sale and that the proceeds will be quantifiable. In the submissions, the 1st Defendant states that the property was already sold as a part payment had been made and the purchaser has moved on to the property. This conduct is not consistent with the fiduciary nature of the duty of executors to the beneficiaries of the estate. If it was to be found that the 2014 will is not valid, it is not clear that the 1st and 2nd Defendants would be in a position to refund the 2nd and 3rd Plaintiffs any money the 2nd Defendant would have been paid as 50% share of the estate or proceeds.

Considering what has been discussed above, I am satisfied that the Plaintiffs have fulfilled the requirements for the grant of an interim injunction.

I hereby grant the Plaintiffs an interim injunction restraining the Defendants by themselves, their agents or servants from selling or any further such dealings in relation to S/DB of S/D No. 1 of S/D A of farm No. 288a Makeni until the determination of this matter or further order of the court. The other issue of eviction of the tenant has apparently been overtaken by events as acknowledged by the Plaintiffs in their affidavits. The exparte injunction is accordingly

confirmed to that extent and made interlocutory pending the determination of this matter.

Costs are for the Plaintiffs.

Leave to appeal is granted.

Dated this 29th day of January, 2016



.....
M.S. MULENGA
HIGH COURT JUDGE