

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)**

2015/HP/D149



BETWEEN:

MISHECK SILOMBA

PETITIONER

AND

NCHIMUNYA CHIZYUKA SILOMBA

RESPONDENT

Before Hon. Mrs. Justice A. M. Banda-Bobo on 16th October,
2017

For the Petitioner: Mrs. L. Mushota of Mushota & Associates

For the Petitioner: Mr. N Yalenga of Messrs Nganga Yalenga & Associates

R U L I N G

Cases referred to:

1. Shell & BP Zambia Limited v Conidaris (1975) ZR 174
2. American Cynamid Company v Ethicon Limited (1975) AC 396
3. Hillary Bernard Mukosa vs Michael Ronaldson S.C.Z Judgment No.7 of 1993
4. Moonda Jane Mungaila Mapiko (suing on behalf of Mungaila Royal Esabishment), John Muchabi v Victor Makaba Chaande (2010) ZR Vol. 2 416
5. Harton Ndove v National Educational Company Limited (1998) ZR 184
6. Moyo Cosmetics Company Limited v Interland Marketing (SCZA No. 34/1998)

LEGISLATION AND OTHER AUTHORITIES REFERRED TO

- McGhee, J.A. (ed) Snell's Equity 31st Edition (London:Thomson Sweet and Maxwell)
- Matrimonial Causes Act No. 20 of 2007

This is a ruling on an application by the Respondent for a Matrimonial Injunction made pursuant to **Section 101 of the Matrimonial Causes Act No. 20 of 2007 ("MCA")**. The same is supported by an Affidavit sworn by one Mrs. Nchimunya Chizyuka Silomba who deposes that when the Petitioner and her got married they lived at Plot 1080/16516 Kamwala South, Lusaka a property belonging to the Petitioner and who by Consent Judgment gave possession of that property to his former wife.

The deponent deposed that the Petitioner moved the Respondent including the children to the current property Plot 36446 Woodlands, Lusaka (the "**Property**") which became the matrimonial home and which Property is registered in the Petitioner's name.

It was deposed by the deponent that the Petitioner has caused a firm of lawyers other than the lawyers on record to give notice to vacate the matrimonial home without due process of the law being had. Further that the Petitioner moved out of the matrimonial home in January 2016 as a result of marital problems.

The deponent averred that the Petitioner petitioned for the dissolution of the marriage but after the decree nisi the deponent

discovered fresh information that she did not have at the material time which prompted her to apply to Court for recession of the Judgment which is yet to be heard. It was further deposed that by a Consent Court Order property settlement proceedings were stayed and the application awaits hearing.

The deponent further avers that the Petitioner has caused his relatives to harass and threaten her over the matrimonial home and Farm No. 11274/M New Kasama, Lusaka, where maize is grown for consumption and dogs are bred for business.

All in all the Respondent implored the Court to restrain the Petitioner and his family members, friends and or agents howsoever from harassing or threatening the Respondent and from disturbing her peace until all matters have been resolved by the Court. Further, that the Petitioner ought to be restrained from evicting the Respondent from the matrimonial home as threatened by his lawyers as shown by exhibit "NCS2" until the matter of dissolution of marriage and property settlement has been resolved.

The Petitioner filed an Affidavit in Opposition which was sworn by Misheck Silomba. It was stated by the deponent that the Property in issue was held in trust for Messhai Blessed Silomba, Abijah Edith Nalomba and Kaziah Harriet Nalomba and a copy of a computer printout from the Ministry of Lands was exhibited as "MS1" to prove the same.

The deponent also avowed that the assets the Petitioner owned at the dissolution of the marriage were to be shared in accordance with paragraph 8 of the Affidavit in Support of Summons.

The deponent deposed that he had not engaged any other law firm as stated by the Respondent but that the children whose names appear on the title to the Property are the ones who want to take possession of the same. He further deposed that their action was precipitated by their mother as their next friend and guardian as the said Property belongs to them. Additionally, that he had been advised by his Advocates that it is their legal right to demand that the Respondent vacate the said property.

Further, that he advised his Advocates that he would make alternative accommodation arrangements for the Respondent and his son. Also, that the Petitioner was willing to pay for the Respondent's alternative accommodation in the range of ZMW2,500-3,500 while awaiting the application pending before Court.

An Affidavit in Reply was filed on 3rd August, 2017 by Respondent. It was deposed that there was a Consent Order for Stay of Property Settlement pending application for rescission of the decree nisi, dated 14th February, 2017. Further that since the said application, the Respondent received numerous threats to evict her from the matrimonial home evidenced by exhibits "NCS1-3".

The deponent stated that she had applied for a Matrimonial Injunction on 6th June, 2017 which was pending hearing but that the Petitioner has insisted that the matrimonial home is for his children from his first marriage. Further that the Petitioner has exhibited another property Plot 1080/16516 Kamwala South which was the first matrimonial home which was vacated on account of the Consent Judgment of 21st February 2014.

The deponent stated that the matrimonial home became the current property from which the Petitioner seeks to evict the Respondent being Plot 36446 Woodlands, Lusaka.

It was deposed that until the matter of property settlement was heard and disposed of after the application to review judgment was heard the Respondent had a right to remain in the matrimonial home from which the Petitioner moved out in January 2016.

The gist of the Affidavit in Reply was that the Petitioner ought to build or buy the Respondent an alternative home in a suitable area equivalent to the matrimonial home before she vacates the current matrimonial home. Further, that she believed there was merit in the application for the Matrimonial Injunction. That this was compounded by the fact that by the Petitioner's application for property settlement where the Petitioner intends to share only household property and deprive the Respondent of equitable interest in real estate.

The matter came up for an inter partes hearing on 18th September, 2017. Both Counsel relied on their Affidavits in Support and in Opposition.

To augment, Mr. Yalenga submitted that, in response to paragraph 5 of the Affidavit in Support the Petitioner was merely a trustee in respect of the Property in question and that the beneficiaries of the Trust were the Petitioner's children from his first marriage. Further, in support of the foregoing Counsel submitted that there was at the Ministry of Lands ("**MoL**") registered a Trust Deed in respect of the particular Property.

It was also Counsel's submission that the application before Court was misconceived as it attempted to injunct the Petitioner from the subject Property yet the Respondent has filed before Court various documents from the law firm of OMM Banda & Company and is now attempting to portray that the Petitioner has been badgering her to vacate the said Property when in actual fact in the Respondent's exhibit there is no mention of the Petitioner as the person that instructed the said OMM Banda & Co to evict her from the said premises. Mr. Yalenga in summation argued that the application was misdirected at the Petitioner as the person threatening or harassing the Respondent.

Counsel cited the case of **Shell & BP (Z) Limited v Conidaris & Others**¹ in relation to the fact that the Respondent's right to relief was not clear and does not exist as the property in question did not belong to the Petitioner. Further that in as much as the

Respondent wanted to make the matrimonial home part of the property settlement, the facts and law did not support her claim.

Counsel also argued that in casu, damages would be an adequate remedy and that the Petitioner had indicated that he would and is ready to arrange for alternative accommodation for the Respondent.

Counsel submitted that the Court should dismiss the application as the owners of the house are entitled to the property and they cannot be vicariously enjoined by an Order imposed on the Trustee of the property to their detriment.

In response, Mrs. Mushota argued that entry 3, 4, and 5 of the computer printout from MoL shows that the Petitioner is holding the property for himself and also in trust for the named persons. Therefore, the status did not make the current application misconceived and is thus properly before this Court.

Further, Counsel argued that the Petitioner was married to the Respondent on 18th May, 2013 and that he put the Respondent in a property at Plot 1080/165616 Kamwala South. However, by a Consent Judgment dated 21st February, 2014 the Petitioner moved the Respondent to the matrimonial home.

It was Counsel's submission that the Consent Judgment gave the former wife and the Petitioner possession of the Kamwala South

Property. That, it is therefore obvious that the 2nd Property in woodlands became the matrimonial home.

Mrs. Mushota submitted that Messrs OMM Banda & Company wrote to the Respondent giving her notice to vacate the Property and that the same had been instructed to inform her that an alternative accommodation would be found for her. As such, Counsel submitted that it was not mischievous to hold the Petitioner as the person directing Messrs OMM Banda & Company because it is the Petitioner who put her in the Property in contention and instructed that an alternate accommodation be found for her.

In response Counsel also cited the case of **Shell BP (Z) v Conidaris** (Supra) and argued that the Respondent has a clear relief to her matrimonial home as the Petitioner also has a right to the matrimonial property.

Counsel submitted that until and unless the issue of property settlement has been dealt with, or alternative accommodation of the same standard has been found for the Respondent, she should not be uprooted from the Property in issue by the same Petitioner who has part ownership in the said Property.

I have carefully considered the evidence on record as well as the viva voce submissions advanced by counsel to the parties.

It is trite that Section 101 of the MCA allows either party to a marriage to apply for, and the Court to grant a matrimonial order of injunction.

The principles for the grant of an interlocutory injunction were aptly explained by J.A. McGhee in Snell's Equity 31st edition at page 405. 16-20 where it was elucidated that:

“Interim injunctions are only available where there is a dispute as to the substantive rights of the parties. They may be granted with a number of objects in mind: to enforce substantive rights even before the dispute is resolved;.....the different factual situations in which an injunction may be sought will give rise to different considerations: but in all cases the court will be aware that injunctive relief is being sought in circumstances where the claimant had not yet proven its rights to any substantive relief. (emphasis added by Court)”

Further, the test to be applied when considering whether an interim injunction should be granted was aptly laid down in the case of **American Cynamid Company v Ethicon Limited**² where Lord Diplock stated that:

“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 on 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 final judgment is given in the action". The question to be determined at this stage therefore is only whether or not the material currently available to the Court discloses that the Plaintiff has any real prospect of succeeding in its claim for a permanent injunction at the conclusion of trial. If and only if, the answer to this question is in the affirmative is the Injunction tentatively sustainable".

Further the Supreme Court of Zambia in the case of **Hillary Bernard Mukosa vs Michael Ronaldson**³ held inter alia that:

"An injunction will be granted only to a Plaintiff who establishes that he has a good and arguable claim to the right he seeks to protect".

The requirement that there must be a serious question to be tried comes down to the proposition that the claim must not be frivolous, or vexatious and it must have some prospect of succeeding at trial. The High Court had occasion to consider the aforementioned in the case **Moonda Jane Mungaila Mapiko (suing on behalf of Mungaila Royal Establishment), John Muchabi v. Victor Makaba Chaande**⁴

Chirwa J, as he was then, held in the case of **Harton Ndove v. National Educational Company Limited**⁵ that in an application for an interlocutory injunction, though the Court is not called upon to decide finally on the rights of the parties, it is necessary that the Court should be satisfied that there is serious question to be tried at the hearing, and that on the facts before it there is a probability that the Respondent is entitled to relief.

The Respondent in her Affidavit in support avers that the Petitioner and his relatives are harassing and threatening to evict her from the matrimonial home. Counsel for the Respondent submitted that the Respondent has a clear relief to her matrimonial home as the Petitioner entered into a Consent Judgment to provide her with a matrimonial home. However, Mr. Yalenga argued that the Respondent's right to relief was not clear and does not exist as the Property in question did not belong to the Petitioner.

To this end, I agree that the Respondent does not have a good and arguable claim to the right she seeks to protect and that there is no serious question to be tried as the Property in contention does not belong to the Petitioner and is held in Trust for his children from his first wife. Consequently, despite the Petitioner being part owner of the Property in contention, there are other beneficiaries who cannot have their rights restricted on his account. I find that the Respondent has not established the right to the claim she seeks to protect. Therefore, her prospects of succeeding in the main matter are minimal if not non-existent.

Following the aforementioned and having established that the Respondent has no right to be protected the next issue to consider would be whether the Respondent could if successful at trial, be adequately compensated by an award of damages.

In the **American Cyanamid** (supra) case, the question of damages was stated by Lord Diplock in the following terms:

“if damages is the measure recoverable at common law would be an adequate remedy, and the defendant would be in a financial position to pay them, no interim injunction should normally be granted.”

In the present case, the Petitioner’s Affidavit in Opposition raises two issues namely that; the matrimonial home was a Property held in Trust for the Petitioner’s children with his first wife. Secondly, that the Petitioner was willing to arrange for alternative accommodation for the Respondent and his son. In addition, he was willing to pay for the Respondent’s accommodation while awaiting the applications pending before Court.

That being the case, I am in agreement with Mr. Yalenga that in casu, damages would be an adequate remedy as the Petitioner has indicated in its Affidavit in Opposition that he would and is ready to arrange for alternative accommodation for the Respondent and his son. Further, Mrs. Mushota in stating that this was a case in which damages would not suffice, submitted that:

“.....until and unless the issue of property settlement has been dealt with and unless alternative accommodation of the same standard has been found for the Respondent she should not be uprooted from the current property in issue”.

In the case of **Communications Authority vs. Vodacom Zambia Limited**⁶, it was said inter alia that:

“We also note that the plaintiff claimed damages in lieu of or in addition to specific performance as one of

the main reliefs. This is an indication that damages were an alternative adequate remedy within the principle in Shell BP (Z) Limited v. Conidaris.”

Mrs. Mushota’s submission above is an admission that the Respondent will only suffer inconvenience and not irreparable injury. Therefore, an injunction cannot be granted as damages would be an alternative adequate remedy to the injury complained of as per the above cited authority.

Further, to allow the Respondent to continue staying in the house would be to create conditions favourable only to herself given that she has already started claiming that the Property should be considered to be the matrimonial property for purposes of property settlement and yet clearly, the property in contention is held in Trust for the Petitioner’s children. In dealing with the foregoing issue I will consider the guidance by the Supreme Court in **Turnkey Properties v Lusaka West Development Company v B.S.K Chitti and Zambia State Insurance Company Limited**⁷ where it was held that an injunction:

“.....cannot be regarded as a device by which the applicant can attain or create new conditions, favourable only to himself, which tip the balance of contending interests in such a way that he is able or more likely to influence the final outcome by bringing about an alternative to the prevailing situation which may weaken the opponent’s case and strengthen his own.”

I am fortified by the aforementioned case because an injunction should not be used as a device by which a party should create new and favourable conditions for herself. Clearly, to allow this

injunction would lead to the creation of new conditions favourable to the applicant as she will consider this to be a new matrimonial home and yet all evidence points to the fact that the petitioner holds the property in trust for other beneficiaries as well as herself. I am aware that the issue of property settlement is yet to be determined, and that's the more reason why allowing the injunction would be used to create new conditions.

In view of the foregoing, I am of the opinion that in the present case, the Respondent has no right that is capable of protecting as the Property in question is held in Trust and belongs to the Petitioner's children who are entitled and cannot be vicariously be enjoined by an Order imposed to the Trustee of the Property to their detriment. There is therefore no right that can be protected by an injunction.

I am also of the firm view that the Respondent can be fully compensated by an award of damages, as the Petitioner is willing to make alternate arrangements for accommodation. Therefore, the application for a Matrimonial Injunction should not be granted to the Respondent as it is trite law that in order for the Respondent to succeed in obtaining the injunctive relief she must have a legal right that she seeks to protect and that damages will not be atoned for. In casu, the Respondent has failed to demonstrate that legal right and it has clearly been shown that Respondent can be fully compensated by an award of damages. Her prospects of success in view of the above are minimal.

In view of the foregoing, I am of the considered view that this is not a proper case in which I can grant the Matrimonial Injunction dated 6th June, 2017. The petitioner is meanwhile directed to find her appropriate accommodation as per his undertaking.

Costs follow the events to be taxed in default of agreement.

Leave to appeal is granted.

DELIVERED AT LUSAKA THIS 16TH DAY OF OCTOBER, 2017



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HON. MRS. JUSTICE A. M. BANDA-BOBO
HIGH COURT JUDGE