

IN THE HIGH COURT FOR ZAMBIA
AT THE DISTRICT REGISTRY
HOLDEN AT KITWE
(CIVIL JURISDICTION)

2017/HK/271

BETWEEN:

SILICON ELECTRONICS LIMITED
AND
CHINGOLA MUNICIPAL COUNCIL
ATTORNEY GENERAL
MINERAL LINK LIMITED

PLAINTIFF

1ST DEFENDANT

2ND DEFENDANT

3RD DEFENDANT

Before; Hon. Madam Justice C. B. Maka-Phiri

For the Plaintiff: Mr. Nyirongo of Messrs Nyirongo & Co.

For the 1st Defendant: Mr. F. Chalenga of Messrs Freddie & C.

For the 2nd Defendant: Mr. D. Chileshe, Senior State Advocate of Attorney General's Chambers

For the 3rd Defendant: Mr. W. Banda of Messrs Wilson & Cornhill Legal Practitioners

R U L I N G

Legislation referred to:

1. High Court Rules, Cap 27 of the Laws of Zambia.
2. The Lands and Deeds Registry Act, Cap 185 of the Laws of Zambia
3. The Rules of the Supreme Court, 1999 edition

Cases referred to:

Corpus Legal Practitioners and Mwanandami Holdings

Limited SCZ Judgment No. 50 of 2014.

1. **Bellamano v Ligure Lombarda 1976 Z. R. 267.**
2. **Barclays Bank (Z) Limited v Walisko and Company & Mohamed Ashr of Mansoor (1980) Z. R. 7.**
3. **New Plast Industries v The Commissioner of Lands and the Attorney General (2001) Z. R. 51.**
4. **BP Zambia Plc. v Zambia Competition Commission, Total Aviation and Export Limited, Total Zambia Limited (2011) Z. R. vol. 3 P. 22.**
5. **American Cyanamid Co. v Ethicon Limited (1975) A. C. 396.**
6. **Shell & BP (Z) Limited v Conidaris and others (1975) Z. R. 174 (S.C).**
7. **Zambia Revenue Authority v Makeni Gardens Limited SCZ Appeal No.69 of 1995**
8. **Ndovi v National Education Company of Zambia Limited 1980 Z.R 184**
9. **Mulungushi v Chomba (2004) Z.R. 96.**
10. **Anti-Corruption Commission v Barnnet Development Corporation Limited (2008) Z. R. vol. 1 P. 69.**

This is the plaintiff's application for an order of injunction against the 3rd defendant made pursuant to the provisions of order 29 (1) of Rules of the Supreme Court and filed into Court on 3rd May 2017. In support of the application is an affidavit deposed to by one Abel Kangasa, the Managing Director in the plaintiff company.

According to the said affidavit the plaintiff is and was at all material times the legal owner of properties at number **L/38274/M** and **L/38273/M**, Chingola. The plaintiff was offered the said properties by the Commissioner of Lands on 22nd March, 2011 and 30th November, 2010 respectively. The offer letters issued by the

Commissioner of Lands were shown before court as exhibits "**AK1**" and "**AK2**" respectively. The plaintiff paid the lease charges upon being offered the properties as evidenced by the receipts on record exhibited as "**AK3**" and "**AK4**" respectively.

It is deposed that sometime in 2014, the 1st defendant advised the plaintiff that the properties in issue were mistakenly allocated as they had encroached into Kasompe Airstrip, Chingola and the plaintiff was advised to apply for alternative pieces of land. On 17th February, 2015, the plaintiff through its director, Mr. Abel Kangasa wrote to the 1st defendant requesting for alternative plot allocation. The letter is shown as exhibit "**AK5**" in the affidavit in support. The 1st defendant later listed the plaintiff to be among the affected applicants to be given alternatives as shown by an excerpt exhibited as "**AK6**".

It was further deposed that on unknown date but lately the 1st and 2nd defendants whilst working together wrongly, unlawfully, unprocedural and fraudulently re-allocated the plaintiff's pieces of land to the 3rd defendant who has since started developing the property. Subsequently, the plaintiff wrote to the 1st and 2nd defendants on 20th March, 2017, demanding the immediate return and or re-allocation of the pieces of land to it but the defendants refused to surrender the land. The plaintiff thus applied for an interim injunction to restrain the 3rd defendant from carrying out any construction works and or developments on the said pieces of land until final determination of the matter.

The 3rd defendant filed an affidavit in opposition on 23rd May, 2017 deposed to by one George Kababa Karabassis, the Managing Director in the 3rd defendant company. It was deposed in the said affidavit that both properties at number **L/38274/M** and **L/38273/M**, Chingola are on title under the name of the 3rd defendant. The Certificates of Title for the two properties were shown before court as exhibit **"GKK1"**. The deponent further pointed out that property **L/38274/M**, Chingola, was in fact not in the plaintiff's name but Abel Kangasa as shown by exhibit **"AK1"**. It was the 3rd defendant's contention that the purported letters of offer in respect of the two properties cannot supersede the Certificates of title issued to the 3rd defendant. Further that the plaintiff voluntarily applied for alternative plot allocation and as such voluntarily relinquished any interest in the properties in issue. It was deposed further that the plaintiff has since been allocated alternative plots as they had requested which allocation it has duly accepted but which fact the plaintiff has not disclosed to the court. The 3rd defendant denied that it was fraudulently allocated the said pieces of land but that it duly followed the procedure on acquisition of land. Further that the plaintiff sat on its rights by not challenging the decision of the 1st defendant to request for alternative plots.

On 1st June, 2017, the 3rd defendant filed into court skeleton arguments in opposition to the plaintiff's application for an injunction and in support of the preliminary issue on a point of law.

The preliminary point of law raised is that this court lacks jurisdiction to hear this action because it has wrongly been commenced. Counsel submitted that the plaintiff's complaint in this matter relates to the Registrar's allocation of the plots in issue and subsequent issuance of the Certificates of title to the 3rd defendant. It was the 3rd defendant's further submission that having been dissatisfied with the 2nd defendant's decision to allocate the lots to the 3rd defendant and the subsequent refusal to surrender the lots back to it, the plaintiff's cause of action ought to have come to court by way of appeal instead of writ of summons in line with the provisions of section 87 of the Lands and Deeds Registry Act. That failure by the plaintiff to bring this matter by way of appeal renders the proceedings a nullity and deprives this court of jurisdiction to hear the matter. Counsel urged the court to dismiss the action with costs.

At the hearing of the application on 9th June, 2017, counsel for the 3rd defendant, Mr. Banda, suggested that owing to the unexplained absence of counsel for the plaintiff, the court should proceed to determine the application based on affidavit evidence and written submissions. I agreed with the suggestions and ordered that the plaintiff should equally file into court their written submissions.

The plaintiff filed its skeleton arguments in response to the preliminary point of law on 21st June, 2017. The plaintiff opposed the preliminary point of law on grounds that the only way to

challenge fraud and impropriety as claimed is through a court action. The plaintiff relied on the case of **Corpus Legal Practitioners and Mwanandami Holdings Limited** ⁽¹⁾ where the Supreme Court held as follows:

“We further take the view that a person alleging fraud or any other impropriety with regard to the issuance of a Certificate of title, must challenge the same through a court action, and prove the allegations of fraud or other impropriety as the case may be, to obtain a court order for the cancellation of the affected Certificate of Title by the Registrar of Lands and Deeds.”

It was the plaintiff's further submission that this matter could not have come by way of appeal because the plaintiff is not only challenging the issuance of title or letters of offer but has also raised other claims.

The plaintiff noted that the 3rd defendant had filed unconditional Memorandum of Appearance and Defence on 23rd May, 2017. That if the 3rd defendant wanted to challenge the writ of summons for the alleged irregularity it should have complied with the provisions of Order 11 Rule (rule not cited) of the High Court Rules which enacts that:

“Any person who is served with a writ of summons may enter conditional appearance and apply by summons to court to set aside the writ on grounds that the writ is irregular.”

It was the plaintiff's further submission that by entering appearance and filing a defence, the 3rd defendant cannot plead irregularity of originating process as doing so will be contrary to order 2 rule 2 of Rules of the Supreme Court. The plaintiff cited the case of **Bellamano v Ligure Lombarda**⁽²⁾ where the Supreme Court held that:

“An application to set aside a writ will not be entertained if the applicant has taken any further steps in the action.”

It was the plaintiff's submission that the 3rd defendant's preliminary point of law lacks merit and should be dismissed.

I have considered the application for injunction and the written submissions by both parties. I have also considered the 3rd defendant's preliminary point of law and the plaintiff's objection thereto. I must state that I am greatly indebted to both counsels for the authorities that have been cited to augment the respective positions. It should be noted at the outset that a preliminary point of law can be raised at any stage of the proceedings either orally or by notice or summons. A preliminary point of law is not the same as an application to set aside writ for irregularity and as such the plaintiff's submissions on that score are misplaced and not relevant to the preliminary point of law.

It is not in dispute that where the jurisdiction of the court is brought into question by any party to the proceedings, the court must first deal with that issue before proceeding any further with

the matter. It is further trite law that the mode of commencement of action is determined by the relevant statute and not the reliefs sought. This case law has been built on a plethora of cases; the 3rd defendant cited the cases of Barclays Bank (Z) Limited v Walisko & Mohamed Ashr of Mansoor,⁽³⁾ New Plast Industries v The Commissioner of Lands and Attorney General⁽⁴⁾ and BP Zambia Plc. v Zambia Competition Commission, Total Aviation and Export Limited, Total Zambia Limited.⁽⁵⁾

I agree with the authorities cited as they depict the position of the law.

The preliminary issue for determination is whether the mode of commencement of this action should have been by way of an appeal pursuant to section 87 of the Lands and Deeds Registry or by writ of summons. Section 87 of the Lands and Deeds Registry Act, provides for an appeal to the court against the decision of the Registrar and enacts as follows:

“If the Registrar refuses to perform any act or duty which he is required or empowered by this Act to perform or if a registered proprietor or other interested person is dissatisfied with the direction or decision of the Registrar in respect of any application, claim, matter or thing under this Act, the person deeming himself aggrieved may appeal.

The first question that should be considered in determining the point of law is; what act or duty did the Registrar refuse to perform which he is required by the law to perform? The second question is what direction or decision did the Registrar make in respect of any

application, claim, matter or thing under this Act of which the plaintiff was aggrieved.

The 3rd defendant's submission is that the Registrar refused to surrender the pieces of land to the plaintiff following the letter dated 20th March, 2017. The 3rd defendant has however not specified the section in the Lands and Deeds Registry Act which empowers the Registrar to surrender pieces of land to an applicant once allocated or re-allocated to other proprietors. The second limb of the 3rd Defendant's contention is that the Registrar made a decision to issue Certificates of title to the 3rd defendant of which the plaintiff is aggrieved. The decision to issue a Certificate of title is not in my considered view the kind of decision envisaged in section 87 of the Act because according to section 34 (1) Act, a Certificate of title can only be challenged on specific grounds through a court action. The Registrar has no powers to cancel a Certificate of title for an aggrieved party for an appeal to be anticipated from him. He can only do so if there is a court order to that effect. The cited case of **Corpus Legal Practitioners** ⁽¹⁾ is authoritative in this regard. The Supreme Court stated as follows:

“Section 11 of the Lands and Deeds Registry Act empowers the Registrar to correct errors and omissions to entries made in the Land's Register, the same does not empower the Registrar to determine disputes which have the effect of determining the rights of the parties to any land or to cancel a Certificate of title duly issued to the registered proprietor of the land to which it relates”.

The Supreme Court was further of the view that a person alleging fraud or any other impropriety, with regard to the issuance of a Certificate of title must challenge the same through a court action and prove the allegations of fraud or other impropriety.

The plaintiff's claim in the case in casu is that it should be declared as legal owner of properties number L/38274/M and L/38273/M on account that the allocation of the plots to the 3rd defendant was illegal, wrongful and fraudulent. The plaintiff's claims can only be proved at trial through a court action. This action was therefore properly commenced by way of writ of summons. With the foregoing, I come to the conclusion that the preliminary point of law has no merit and it is hereby dismissed.

I now come to the application for an injunction. The principles that guides the court when faced with an application for interlocutory injunction are trite and were established in the case of **American Cynamid Co. v Ethicon Limited**⁽⁶⁾. In the case of **Shell and BP v Conidaris**⁽⁷⁾, the Supreme Court adopted the rationale in the **Cynamid case** when it held that in an application for an injunction, an applicant must demonstrate a) a clear right to relief; b) irreparable damage and injury that cannot be atoned for by damages and c) A tilt of the balance of convenience in the plaintiff's favour.

In the case of **Zambia Revenue Authority v Makeni Gardens Limited**,⁽⁸⁾ the Supreme Court stated that:

“All the court need 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 without waiting for the right to be finally established at trial.”

The court made a similar holding in the case of **Ndovi v National Educational Company of Zambia Limited**⁽⁹⁾ cited by counsel for the 3rd defendant in the skeleton arguments. Further, in the case of **Mulungushi v Chomba**,⁽¹⁰⁾ the Supreme Court noted that where a dispute is over land, its loss may not adequately be atoned for in damages.

In the case in casu, the plaintiff's evidence shows that the plaintiff was offered property no. L38273/M by the Commissioner of Lands on 30th November, 2010. Property number L/3824/M on the other hand was offered to Kangasa Abel, the Managing Director in the plaintiff company and not the plaintiff. The said Kangasa Abel is not a party to these proceedings to seek the court's protection. I thus agree with the 3rd defendant's submission that this application relates only to one property being property number L/38273/M, Chingola

On 17th February, 2015, the plaintiff through its Managing Director, Mr. Abel Kangasa wrote to the 1st defendant requesting to be allocated alternative plots. This followed the 1st defendant's advice that the Plot number L/38273/M, Chingola was mistakenly allocated into Kasompe airstrip. By this letter, the plaintiff accepted

the 1st defendant's advice and by requesting for alternative plots, the plaintiff gave up or forfeited the offer for plot number L/38273/M, Chingola. If the plaintiff was not satisfied with the 1st defendant's advice and or decision, it should have challenged the decision at that time in 2014 but this was not done. I would therefore want to agree with the 3rd defendant's deposition that the plaintiff sat on its rights.

The plaintiff has not stated whether or not the 1st defendant did in fact allocate the alternative plot as requested. This information is very cardinal as the plaintiff is mandated to place all material facts before court in an application for an injunction. It was therefore imperative for the plaintiff to state the position with regard to the requested for alternative plots. The 3rd defendant's evidence is that the plaintiff was in fact given alternative plots. This evidence remains unchallenged and as such I accept it as a fact. The plaintiff has therefore concealed material facts and thereby coming to equity with dirty hands.

It is not in dispute that the 3rd defendant is the title holder of both properties at number L/38273/M and L/3874/M Chingola. The position of the law where a Certificate of Title has been issued to a proprietor is that it shall be conclusive evidence of ownership from the date of issue. In the case of **Anti-Corruption Commission v Barnet Development Corporation Ltd**,⁽¹¹⁾ the Supreme Court held that under section 33 of the Lands and Deeds Registry Act, a Certificate of Title is conclusive evidence of ownership of the land by

the holder thereof. Suffice to note that a Certificate of title can be challenged and cancelled for fraud or other reasons relating to impropriety, in its acquisition but until that is done, its title remains good.

On the facts of this case, it is my considered view that the plaintiff has not demonstrated a clear right to the relief that it seeks. This is more especially that the plaintiff has not claimed for the cancellation of the Certificates of title issued to the 3rd defendant. The plaintiff has further not shown what irreparable damage it will suffer should the injunction not be granted. This is especially that the plaintiff was allocated an alternative plot upon application. The claims by the plaintiff can in my considered view be atoned for by damages.

With the foregoing, I come to the conclusion that this is not an appropriate case for me to exercise my discretion to grant an injunction. The application for injunction is hereby dismissed for want of merit. I have awarded costs to the 3rd defendant to be taxed in default of agreement.

Leave to appeal is hereby granted.

Delivered in Chambers at Kitwe; this 28th day of July 2017.

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C.B. MAKA-PHIRI (MRS.)
HIGH COURT JUDGE