

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

*(Civil Jurisdiction)*

**2017/HP/0578**



**BETWEEN:**

JOSEPH KOMBE

**PLAINTIFF**

**AND**

BORNFACE JOHN LUSWANGA

**DEFENDANT**

**BEFORE THE HONOURABLE MADAM JUSTICE P. K. YANGAILO  
ON 1<sup>ST</sup> DAY OF SEPTEMBER, 2017 IN CHAMBERS.**

*For the Plaintiff:*

*Mr. Joseph Kombe - In Person.*

*Defendant:*

*Mr. Bornface J. Luswanga - In Person*

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**R U L I N G**

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**CASES REFERRED TO:**

1. *Turnkey Properties vs. Lusaka West Development Company Ltd., BSK Chiti (Sued as Receiver) & Zambia State Insurance Company Ltd. (1984) ZR 85;*
2. *Zimco Properties vs. Lapco Ltd. (1988-1989) Z.R. 92;*
3. *Shell and BP (Zambia) Limited vs. Conidaris and Others (1975) ZR 174;*
4. *American Cyanamid Company vs. Ethicon Ltd. (1975) 1 All ER 504; A.C. 396;*
5. *Hondling Xing Xing Building Company Ltd. vs. ZamCapital Enterprises Ltd. (2010) Z.R. 30;*
6. *Zambia State Insurance Corporation Ltd. vs. Dennis Mulope Mulikelela (1990) Z.R.;*
7. *Abad vs. Turning & Metals Ltd. (1987) Z.R. 86; SCZ Judgment No. 13 of 1987; and*
8. *Harman Pictures NK. V Osborne [1967] 1 W. L. R. 723.*

**LEGISLATION REFERRED TO:**

1. *The High Court Rules, Chapter 27 of the Laws of Zambia*

This is an application, on the part of the Plaintiff, for an Order for an interlocutory injunction to restrain the Defendant from carrying out any activities on the property known as Lot No. 19642M ("The Property"), situated at 10 Miles, in Chibombo District of the Central Province of Zambia and from harassing, threatening the Plaintiff with eviction and interfering with the Plaintiff's quiet enjoyment. The application was made pursuant to **Order XXVII Rule 4 of The High Court Rules**<sup>1</sup>, which provides that: -

*"In any suit for restraining the defendant from the committal of any breach of contract or other injury, and whether the same be accompanied by any claim for damages or not, it shall be lawful for the Plaintiff, at any time after the commencement of the suit, and whether before or after judgment, to apply to the Court or a Judge for an injunction to restrain the Defendant from the repetition or the continuance of the breach of contract or injury of a like kind arising out of the same contract, or relating to the same property or right, and such injunction may be granted by the Court or a Judge on such terms as to the duration of the injunction, keeping an account, giving security or otherwise, as to the Court or a Judge shall seem reasonable and just:*

*Provided that any order for an injunction may be discharged, varied or set aside by the Court or a Judge, on application made thereto by any party dissatisfied with such order."*

The application in this matter was supported by an affidavit sworn by one **Joseph Kombe**, who is the Plaintiff herein. The Plaintiff in his Affidavit in Support, *inter alia*, deposed as follows: -

- i. *That he purchased The Property from the Defendant, having obtained a mortgage from Development Bank of Zambia;*
- ii. *That the Certificate of Title is in the possession of the said bank;*
- iii. *That there is still a balance outstanding on the purchase price that is due to the Defendant;*
- iv. *That on 7th April 2016, the Defendant hired more than 10 thugs who went to the property and caused damage to the property;*
- v. *That these hired thugs attempted to evict students from the students' hostels on the property;*
- vi. *That several attempts have been made to have the matter settled but to no avail and that unless restrained by an injunction, the Defendant will continue to harass, threaten and interfere with the Plaintiff's quiet enjoyment.*

The Plaintiff, with leave of the Court, also filed a further Affidavit in Support of the application for an Injunction on 14<sup>th</sup> July 2017, where he, *inter alia*, deposed as follows: -

- i. *That the assignment to purchase the property was executed between the Plaintiff and the Defendant sometime in 2014 and produced a true copy of the Assignment marked "JK1";*
- ii. *That the purchase of the property was financed by Development Bank of Zambia and produced a true copy of the Banking facility which the Bank offered to the Plaintiff marked "JK2" and a true copy of the Certificate of Title marked "JK3"*

- iii. *That a consent to assign the property from the Defendant to the Plaintiff was granted by the Ministry of Lands and produced a true copy the Consent to Assign marked "JK4";*
- iv. *That a Notice to Complete directed at the Defendant was issued and produced a true copy of the Completion Statement marked "JK6";*
- v. *That there seems to be a dispute on the outstanding balance due to the Defendant which has been caused by statutory charges and unsettled bills incurred by the Defendant on the property;*
- vi. *That there is also a trespasser on the property who was sold a piece of land within the property by the Defendant;*
- vii. *That unless restrained, the Defendant, his servants and/or agents, will continue carrying out activities on the property, harassing, threatening and interfering with the Plaintiff's quiet enjoyment of the property.*

On the foregoing, the Plaintiff beseeched this Court to grant him an Order for an Injunction restraining the Defendant from carrying out any activities on the property, harassing, threatening the Plaintiff with eviction and interfering with the Plaintiff's quiet enjoyment of the property until these proceedings are concluded or until further Order of the Court.

At the *inter parte* hearing of this application, the parties appeared in person. The Plaintiff made the application and reiterated the averments in his Affidavits filed herein. The Defendant did not file herein any Affidavit in Opposition, but opted to submit *viva voce*. The Defendant opposed the application for an injunction on the basis that he has never hired any thugs or caused damage to the property as alleged by the Plaintiff in his Affidavits in Support. He

submitted that he had only gone to the property to take stock of the goods that he had left there. The Defendant admitted that the property was sold to the Plaintiff although the sale has not been completed to date as there is an outstanding balance. He denied having threatened or harassed the Plaintiff and contends that the injunction is unnecessary as he never goes to the property. In reply, the Plaintiff reiterated his prayer for the Court to grant an injunction.

I have carefully considered all the affidavit evidence before me and the submissions by the parties.

The three basic principles of law when a Court can grant an injunction are summarised as follows: -

1. That there must be a serious action to be tried at the hearing;
2. That there is a clear right of relief and that the Applicant has a good arguable claim to the interest he seeks to protect; and
3. That the Applicant would suffer irreparable harm or injury that cannot be atoned for by payment of damages.

In the case of ***Turnkey Properties vs. Lusaka West Development Company Ltd and Zambia State Insurance Corporation Ltd***<sup>1</sup> it was stated that: -

- a) ***An interlocutory injunction is appropriate for the preservation of a particular situation pending trial;***

- b) An interlocutory injunction should not be regarded as a device by which an applicant can attain or create new conditions favourable only to himself;*
- c) In application for Interlocutory Injunction the possibility of damages being an adequate remedy should always be considered.*

In the case of ***Zimco Properties vs. Lapco Limited***<sup>2</sup> the Supreme Court held, in respect of the balance of convenience between the parties, that: -

*“The balance of convenience between the parties as to whether to grant an injunction will only arise if the harm done will be irreparable and damages will not suffice to recompense the Plaintiff for any harm which may be suffered.”*

The ***Shell & BP Ltd vs. Conidaris & Others***<sup>3</sup> case is one of the leading authorities, which states as follows: -

*“A Court will not generally grant an interlocutory injunction unless the right to relief is clear and unless 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 the damages, not injury which cannot be possibly repaired.”*

The principles and guidelines to be applied in interlocutory injunctions were laid down by the House of Lords in the case of ***American Cyanamid Company vs. Ethicon Ltd***<sup>4</sup> and these are of a general application.

In the case of **Hondling Xing Xing Building Company Limited vs. ZamCapital Enterprises Limited**<sup>5</sup> Matibini SC. J. as he then was held that: -

*“It is settled fundamental principle of Injunction law that Interlocutory Injunctions should only be granted where the right to relief is clear, and where it is necessary to protect a Plaintiff against irreparable injury; mere inconvenience is not enough.”*

In the matter of **Zambia State Insurance Corporation Limited vs. Dennis Mulope Mulikelela**<sup>6</sup>, it was stated by Gardner AJS that:-

*“...of course, in order to entitle the Plaintiffs to an Interlocutory Injunction, though the Court is not called upon to decide finally on the right to the parties, it is necessary that the Court should be satisfied that there is a serious question to be tried at the hearing, and that on the facts before it there is a probability that the Plaintiffs are entitled to relief.”*

The primary objective of the grant of injunctions is to preserve the status quo, until the rights of the parties have been determined in the action as was held in the case of **Abad vs. Turning & Metals Limited**<sup>7</sup>.

This Court is of the view that where there was doubt as to whether damages would be adequate or not in an application for an injunction, the Court ought to consider the balance of convenience of the parties concerned. In the case of **Zimco Properties vs. Lapco Limited**<sup>2</sup>, the Supreme Court held that, where the convenience favoured retaining the status quo, in so far as it related

to the subject matter of the issue to be tried upon, in such circumstances an interlocutory injunction was a proper way of protecting the parties' interest.

This Court also places reliance on the case of **Turnkey Properties Limited vs. Lusaka West Development Limited and Others**<sup>1</sup> for the position that an interlocutory injunction was appropriate for the preservation of a particular situation pending trial, as long as it was not being used as an instrument to take or create an advantage of one party over the others pending trial.

In conclusion, it is the view of this court that the Plaintiff has satisfied, on a preponderance of probability, all the ingredients set by the authorities cited above for the grant of an interlocutory injunction. There exists, in the considered view of this Court, a real issue to be inquired into by this Court at trial. The issue that needs to be determined is whether or not the Plaintiff is the lawful and rightful owner of the property and the amount of the outstanding balance due on the property, which has been disputed by the parties. This can only be properly addressed with the opportunity of the Parties herein laying their respective evidence at trial before this Court. Indeed, in the event that the Plaintiff were to be unsuccessful at the trial of this matter, the Plaintiff has undertaken, to pay damages that may be occasioned to the Defendant by the order of interlocutory injunction being sought here.

In the case of **Harman Pictures NK. vs. Osborne**<sup>8</sup> it was held that:-

*"...the case must be considered on the basis of fairness, justice, and common sense."*

On the facts of this case and for the foregoing reasons, I find that this is a proper case in which to exercise my discretion under **Order XXVII Rule 4** of **The High Court Rules**<sup>1</sup> and I hereby grant the Interlocutory Injunction as prayed for by the Plaintiff. I make no order as to costs.

Leave to Appeal is granted.

**Delivered at Lusaka this 1<sup>st</sup> day of September 2017.**



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**P. K. YANGAILO  
HIGH COURT JUDGE**