

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

2017/HP/0764



B E T W E E N :

ELIAS TEMBO

PLAINTIFF

AND

BEAUTY MOYO

1ST DEFENDANT

THE ATTORNEY GENERAL

2ND DEFENDANT

**Before Honorable Mrs. Justice M. Mapani-Kawimbe in Chambers on the
22nd day of September, 2017**

For the Plaintiff : *Mr. P.G Kapikisha, Messrs Milner & Paul Legal Practitioners*
For the 1st Defendant : *No Appearance*
For the 2nd Defendant : *Mr. E. Tembo, Assistant Senior State Advocate*

R U L I N G

Cases Referred To:

1. *American Cyanamid Co. v Ethicon* (1975) AC 396
2. *Shell an BP (Z) Limited v Conidaris & Others* H9752 ZR 17
3. *Zambia State Insurance Corporation Limited v Dennis Muliokela* SCZ No. 9 of 1990
4. *Wesley Mulungushi v Catherine Bwale Mizi Chomba* ZR 96 S.C.Z No. 11 of 2004)
5. *Shelter for All, Evans Mukula Chomba v Kingfred Rumsey and Precious Rumsey* SCZ/8/192/2009

Legislation Referred To:

1. *High Court Rules, Chapter 27*

By this application, the Plaintiff seeks an interim injunction pursuant to Order 27 Rule 1 of the High Court Rules as read with Order 29 of the Rules of the Supreme Court. It is supported by an Affidavit.

The Affidavit discloses that on 6th January, 2000, the Lusaka City Council placed an advertisement in one of the daily papers where it invited members of the public to apply for residential plots in Libala South, Lusaka. Consequently Charles Lububi submitted his application on 26th January, 2000 as shown in the exhibit marked "**ET1.**" That on 30th May, 2000, the Acting Director of the Lusaka City Council advised Charles Lububi that his application was successful and that he was recommended to the Commissioner of Lands for the allocation of Stand No. LUS/24399 as shown in the exhibit marked "**ET2.**"

The Affidavit further discloses that pursuant to the recommendation, the Commissioner of Lands issued an offer letter to Charles Lububi on 14th August, 2001 as shown in the exhibit

marked "**ET3.**" The deponent states that sometime in 2001, Charles Lububi offered to sell him the property.

The deponent avers that on 18th June, 2002, he executed a contract of sale with Charles Lububi and paid ZMW4,000.00 as consideration, as shown in the exhibit marked "**ET6.**" That the contract of sale was lodged at the Ministry of Lands alongside an application to transfer the property from Charles Lububi to the deponent. This is shown in the exhibits marked "**ET7**" and "**ET8.**"

It is deposed that on 12th February, 2003, the Commissioner of Lands approved the transfer of the property from Charles Lububi to him, as shown in the exhibit marked "**ET9.**" That there was a condition in clause 4(1) of the offer letter, for the offeree to develop the property within 18 months. It is also deposed that Charles Lububi subsequently applied to the Lusaka City Council for planning permission as shown in the exhibit marked "**ET10.**"

The deponent states that in complying with clause 4(1) of the offer letter, he spent in excess of K500,000.00 in building a dwelling structure as shown in the exhibit marked "**ET11.**" The deponent also states that on or about 1st June, 2004, the dwelling structure

was partially completed and rented out as shown in the exhibit marked "**ET12**." That unknown to the deponent, the Commissioner of Lands erroneously issued an offer letter to the 1st Defendant as shown in the exhibit marked "**ET13**", and later a certificate of title as shown in the exhibit marked "**ET17**." That on 11th May, 2005, the Commissioner of Lands issued an offer letter on Stand No. LUS/24399, Libala South, Lusaka to Eddie Webber Sambwa. The deponent avers that on the strength of the offer letter, Eddie Webber Sambwa demolished his structures on the property.

The deponent also avers that the Commissioner of Lands has not issued him a notice of withdrawal or revocation of the offer letter, which he believes to be valid. The deponent contends that the certificate of title issued to the 1st Defendant does not have retrospective effect and that he has prior interest in the property. The deponent states that since the dispute involves land, any loss cannot be atoned by damages. He prays to the Court to grant him an order of interim injunction pending determination of the matter. The deponent states that if the injunction is not granted, the 1st Defendant will proceed to deal with the property to his detriment thereby rendering his action an academic exercise.

The 1st Defendant did not contest the application.

Learned Counsel for the Plaintiff filed Skeleton Arguments. The gist which is that the Court has power to grant injunctive relief as elucidated in the case of **American Cynamid Company v Ethicon**¹. He also cited the case of **Shell and BP Zambia Limited v Conidaris and Others**², where it held *inter alia* that:

“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 the irreparable injury, mere inconvenience is not enough.”

Counsel contended that the Plaintiff had demonstrated that he had acquired the following rights under the contract of sale; namely:

- (i) *The right of ownership*
- (ii) *Right of possession or occupation.*
- (iii) *Inchoate interest.*

Counsel went on to submit that upon that basis, the Plaintiff had shown sufficient interest as the person in possession and also had an equitable right to seek the Court's protection from anyone interfering with his right to quiet possession.

On the issue of a serious question to be tried, Counsel referred me to the case of **Zambia State Insurance Corporation Limited v Dennis Muliokela**³, where the Supreme Court citing the case of **Preston v Luck**, where Lord Cotton stated 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 rights of 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.”

Counsel argued that the affidavit evidence adduced disclosed a serious question to be tried and it was whether the acts of the Defendants amounted to the breach of Circular No. 1/1985 and the deprivation of the Plaintiff's right to quiet possession and enjoyment of the property.

On the balance of convenience, Counsel submitted that if the injunction was not granted, greater injustice would occasion to the Plaintiff, as he would suffer irreparable injury and damages, which could not be atoned by an award of damages. He went on to state that the 1st Defendant had repeatedly issued threats to demolish the Plaintiff's property and another claimant had in fact demolished his dwelling structure.

Counsel cited the case of **Wesley Mulungushi v Catherine Bwale Mizi Chomba**⁴, where the Supreme Court inter alia held that:

“Land is a valuable commodity whose loss may not be adequately atoned for by way of the award of damages.”

I have anxiously considered the affidavit evidence and the skeleton arguments filed herein. The main issue to be determined is whether I can confirm the ex-parte order of interim injunction that was granted on 8th August, 2017 pending the final determination of the main cause.

In the case of **Shell and BP Zambia Limited v Conidaris and Others**², the Supreme Court stated that a person seeking injunctive relief must demonstrate the following:

- a) *A clear right to relief*
- b) *Irreparable damage and injury that cannot be atoned for by damages*
- c) *A tilt of the balance of convenience in the Plaintiff's favour.*

The first issue I must consider is whether there is a serious issue to be tried. There is an antecedent to this case that is worth stating. The Plaintiff commenced his first action against the 1st

Defendant on 16th June, 2006. There were several other subsequent actions launched by the Plaintiff against the 1st Defendant, on similar facts, which were never prosecuted. This action taken out on 11th May, 2017 involves the same Defendants yet again on similar facts. The Plaintiff's claims have never been heard on the merits and *prima facie* suggests that there is a question to be determined regarding the ownership of the property in dispute.

The second issue to be considered is whether the Plaintiff would be adequately atoned by an award of damages if he was not granted an injunction and was to succeed at trial. The Plaintiff avers in his affidavit that he put up investments in excess of K500,000.00 on the property, which were destroyed by Eddie Webber Sambwa. If that is the case, these properties no longer exist. It is therefore a paradox that the 1st Defendant should threaten to demolish structures that are non-existent.

In my view, the Plaintiff has no property to protect and if at all there are structures on the property, their value might be less than the alleged K500,000.00.

It is obvious stating that the current dispute involves land which is not a moveable asset. In the case of **Shelter for All, Evans Mukula Chomba v Kingfred Rumsey and Precious Rumsey**⁵, the Supreme Court held that where the dispute is over ownership of land, any developments made thereon have a monetary value, which can easily be ascertained by assessment. Therefore, I hold that if the Plaintiff was to succeed at trial, his injury can be atoned by an award of damages.

The affidavit evidence discloses that the 1st Defendant has a certificate of title as opposed to the Plaintiff who possesses an offer letter. Given the circumstances, I would be inclined to state that the balance of convenience tilts in favour of the 1st Defendant.

In the result, I find that this is not a proper case where I can confirm the ex-parte order of interim injunction granted on 8th August, 2017. The events complained of arose in 2006, and in my view an injunction at this very late stage would serve no useful purpose. I accordingly, discharge the ex-parte order. I make no order as to costs.

R10

Leave to appeal is granted.

Dated this 22nd day of September, 2017.

M. Mapani
M. Mapani-Kawimbe
HIGH COURT JUDGE