

**IN THE HIGH COURT FOR ZAMBIA**

**2017/HP/0782**

**HOLDEN AT LUSAKA**

(Civil Jurisdiction)



**BETWEEN:**

**AYUB MULLA**

**1<sup>ST</sup> PLAINTIFF**

**ENIGMA PETROLEUM LIMITED**

**2<sup>ND</sup> PLAINTIFF**

**COUNTRYYARD HOTEL EXPRESS LIMITED**

**3<sup>RD</sup> PLAINTIFF**

**AND**

**INTERMARKET BANKING CORPORATION (Z)  
LIMITED**

**DEFENDANT**

***BEOFE HONORABLE JUSTICE MR. MWILA CHITABO, SC***

*For the Plaintiffs : Mr. B. Mosho of Messrs Mosho and Company*

*For the Defendant: Mr. R. Ngulube of Tembo Ngulube and Associates*

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**RULING**

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**Cases Referred to:**

- 1. American Cynamid Company v Ethicon Ltd. (1975) AC 396*
- 2. Communication Authority of Zambia v Vodacom Zambia Limited (2009) ZR 196*

3. *Hondling Xing Xing Building Company Limited v ZamCapital Enterprise Limited*
4. *Shell BP Zambia Limited v Conidaris and Others (1975) Z.R. 174.*
5. *Turnkey Properties Limited v Lusaka West Development Limited and Others (1985) ZR 85.*

This is was the Plaintiffs' application for an interlocutory injunction pursuant to Order 27 of the High Court Rules as read together with Order 29 of the Supreme Court Rules of the England 1999 Edition. An Ex-parte Order of Interim Injunction was granted o16th May, 2017 pending the inter-parte hearing. The Applicant filed in a supporting affidavit filed into Court on 12<sup>th</sup> May 2017. The said affidavit was deposed to by one Ayub Mulla, the 1<sup>st</sup> Plaintiff herein.

He swore that he was the legal owner of two properties known as Subdivisions A and C of Lot No. 16609 Chibombo in Chibombo District. Copies of printouts from the Ministry of Lands showing his ownership were exhibited and marked "**AM1**".

The affidavit revealed that the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiff are tenants on Subdivisions A and C respectively and that said properties are adjacent to a property known as Subdivision B of Lot No. 16609 Chibombo which is registered to a company known as Courtyard Hotel Limited. It was contended that in an arrangement that was completely separate from the Plaintiffs' herein, Courtyard Hotel Limited obtained a mortgage from the Defendant herein and the Defendant subsequently obtained an Order of Foreclosure for Subdivision B of Lot 16609 Chibombo. A copy of the Writ of

Possession executed by the Sherriff of Zambia was exhibited and marked "**AM2**".

The deponent further swore that the Defendant through negligence or inadvertence foreclosed on the two properties belonging to the 1<sup>st</sup> Plaintiff. That the Plaintiffs had since been denied access to the said properties and the businesses of the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs had come to a standstill.

He averred that since the foreclosure, the Plaintiffs had constantly engaged the Defendant to bring the matter to an amicable conclusion to no avail. Copies of the series of correspondence by the Plaintiffs to the Defendants were exhibited and marked "**AM3**". He stated that it had since come to his attention that the Defendant was in the process of looking for buyers for the foreclosed property.

He further deposed that the Defendant had not informed any prospective buyers of the anomalies on the property and stated that if the Defendant was allowed to proceed with the planned sale, there was a real danger that the new buyer would be under the impression that the property on sale includes the property that belongs to the 1<sup>st</sup> Plaintiff.

It was averred that any attempts to dialogue with the Defendant over the same had proved futile. It was for this reason that the Plaintiffs sought the indulgence of this Court to grant an injunction preventing the Defendant from selling the property until this matter is disposed of. He contended that this was a fit and proper case for the Court to grant an order of interim injunction.

The Defendant filed in an affidavit in opposition on 26<sup>th</sup> May, 2017 deposed to by one Zaliwe Saili, the Possession Manager of the Defendant Bank. He swore that on or about the 3<sup>rd</sup> of February, 2012 the 1<sup>st</sup> Plaintiff through his company, Courtyard Hotel Limited (hereinafter referred to as **"the Borrower"**) applied for a loan facility from the Defendant in the unrebased sum of K5,600,000,000.00. A copy of the Loan Facility Agreement was exhibited and marked **"ZS1"**.

He averred that in terms of clause 6.1 of the said Agreement, the Borrower agreed to mortgage its property known as Subdivision A of Lot No. 16609/M, Chibombo which purported to have a Hotel Building. He stated that in unknown and suspicious circumstances, the Borrower through the 1<sup>st</sup> Plaintiff as Director thereof, submitted to the Defendant Bank a different Certificate of Title for a property known as Subdivision B of Lot No. 16609/M, Chibombo for purposes of creating a legal mortgage.

He deposed that the Borrower was supposed to submit a Valuation Report and according to the documents available at the Defendant bank, the Borrower through the 1<sup>st</sup> Plaintiff submitted the said Valuation Report prepared by Knight Frank. The Report showed that the market value for the proposed property to be mortgaged was the unrebased sum of K25,100,000,00. A copy of the said Report was exhibited and marked **"ZS2"**.

He averred that according to the Valuation Report, the property comprised of several developments which included among others, a Hotel Building, Food Court Building, Fitment Centre and a canopy

for a fuel station. The Defendant, being satisfied with the Report, proceeded to create a legal mortgage over subdivision B of Lot No. 16609/M, Chibombo. A copy of the legal mortgage was exhibited and marked **"ZS3"**.

The affidavit further revealed that when the Borrower defaulted on its payment obligations of the loan facility, the Defendant applied and obtained a Foreclosure Judgment and a Writ of Possession was subsequently issued and the mortgaged property was seized by the Sherriff of Zambia.

The deponent averred that what ensued several months later were a myriad of letters from the 1<sup>st</sup> Plaintiff purporting to claim that the Defendant bank had executed on a wrong property. He further stated that the Defendant through its Advocates did respond and forewarned the 1<sup>st</sup> Plaintiff regarding possible consequences over his apparent scheme to defraud the Bank. Copies of the letters in question were exhibited and marked **"ZS4"**.

He further swore that both the Defendant bank and the Borrower had appealed to the Supreme Court against certain interlocutory orders of the High Court regarding the Foreclosure Judgment. That on 30<sup>th</sup> March, 2017, the Supreme Court delivered its Judgment in favour of the Defendant bank. A copy of the Supreme Court Judgment was exhibited and marked **"ZS5"**.

He stated that after the delivery of the said Supreme Court Judgment, the 1<sup>st</sup> Plaintiff has had to rush to Court to seek for an Order of interim injunction. He contended that from the foregoing

facts, it was patently clear that the 1<sup>st</sup> Plaintiff schemed a plan to defraud the Defendant bank from inception when he deliberately submitted a wrong Certificate of Title for Subdivision B of Lot number 16609/M, Chibomba and a fake Valuation Report in order to defraud the Defendant Bank.

He stated that the Plaintiffs hands were gravely dirty as not to be entitled to the equitable relief of injunction being sought hereof. The Defendant filed in a further affidavit in opposition deposed to by one Thompson Silwimba, the Principal Credit Officer of the Defendant bank. The said affidavit restated the facts in the first affidavit in opposition and added that the Defendant had no issues with the 1<sup>st</sup> Plaintiff directly submitting the Valuation Report, because it was apparently prepared by Knight Frank who were on the bank's panel of recommended Valuers.

He added that as per normal banking practice, the Defendant bank's officers conducted a physical inspection of the proposed property to be mortgaged and the Head of Corporate Banking, who was among the team of inspectors, confirmed to the deponent that he was satisfied that the value of the proposed mortgaged property was sufficient as it had a Hotel, Supermarket, Fitment Centre and a Canopy for a fuel station.

He stated that being satisfied with the Valuation Report, the Defendant availed the Borrower the loan facility applied for. It was contended that the 1<sup>st</sup> Plaintiff's purported claim that the Defendant executed on the wrong property was a deliberate and calculated scheme to defraud the bank.

The matter was heard on 5<sup>th</sup> July, 2017 and the parties made oral submissions. The learned Senior Counsel for the Plaintiff, Mr. Mosho augmented that this was a fit a proper case for the Court to grant the relief sought. He submitted that the Defendant's opposition to this application was hinged on an allegation of fraud. He argued that the Plaintiffs' position in the affidavit in support of the application distanced itself from any claim of fraud.

He argued that the Plaintiffs' position was that there were serious issues to be tried especially that they touched on allegations of fraud. He added that it would be premature for the Court to delve into these issues at this stage and it would be in the interest of justice to confirm the interim order pending trial.

In response the learned Senior Counsel Mr. Ngulube brought to the Court's attention that Subdivision B of Lot 16609, Chibombo was a subject of a Foreclosure Judgment which Judgment was endorsed by the Supreme Court in Appeal No. 133/2015 as shown in exhibit "ZS5" in the Affidavit in opposition.

I have considered the affidavit evidence, the list of authorities filed by the learned defence Counsel and arguments on record. From the onset I must state that injunctions are an equitable remedy, whose grant is discretionary, and that discretion should exercise it judiciously. The principles of consideration in granting injunctions were clearly espoused in the **American Cyanamid** case cited by the Plaintiff where Lord Diplock laid down guidelines on how the Court's discretion in relation to injunctions should be exercised.

The starting point in injunction was well articulated in the case of **Hondling Xing Xing Building Company Limited v Zamcapital Zambia Limited (2010) ZR 30** where Dr Justice Matibini, SC (as he then was) stated that irreparable injury is said to be the first and primary element in injunctions.

Irreparable injury was well defined in the case of **Shell BP Zambia Limited v Conidaris and Others** where the Court defined irreparable to mean

*“injury which is substantial and can never be adequately remedied, or atoned for by damages. It is not injury which cannot be possibly be repaired”.*

Thus, an injunction will not be granted were damages would be an alternative adequate remedy to the injury complained of if the applicant succeeds in the main action.

Another important consideration the Court makes before exercising its discretion to grant an injunction is whether the Applicant has a clear right to relief. This was also established in the case of **Shell BP Zambia Limited v Conidaris and Others** where it was held that

*“The court will not generally grant an interlocutory injunction unless the right to relief is clear”.*

Justice Dr. Matibini, SC in the case of **Hondling Xing Xing** stated that



*“In an application for an injunction the overriding requirement is that the applicant must have a cause of action in law entitling him to relief”.*

Similarly in the case of ***Communications Authority v Vodacom Zambia Limited (2009) ZR 196***, the Supreme Court stated that as regards the right to relief, it is for the party seeking an injunction to establish clearly that he is entitled to the right which he seeks to protect by an injunction.

Another important consideration is maintaining the status quo. Whilst it is generally accepted or acknowledged that an interim injunction is appropriate for the preservation or restoration of a particular situation pending trial, it cannot be regarded as a device by which the applicant can attain, or create new conditions favourable only to himself. These sentiments were echoed by Ngulube D.C.J. as he was then, in ***Turnkey Properties Limited v Lusaka West Development Limited and Others (1985) ZR 85***.

Having outlined the above and the facts in this case are clear that Plaintiffs in this matter contend that Courtyard Hotel Limited obtained a mortgage from the Defendant bank and the Defendant subsequently obtained an Order of Foreclosure for Subdivision B of Lot 16609 Chibombo, which property is adjacent to Subdivisions C and C of Lot 16609, Chobombo. According to the Plaintiff, the Defendant through negligence or inadvertence foreclosed on the two properties belonging to the 1<sup>st</sup> Plaintiff. This has resulted in the Plaintiffs being denied access to the properties

and the businesses of the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs had come to a standstill.

The Defendant on the other hand contends that the 1<sup>st</sup> Plaintiff's claim that the Defendant executed on the wrong property was a calculated scheme to defraud the bank.

Having considered the principles on injunctions I must state that damages would not be adequate compensation in issues relating to land. I therefore find, from the onset, that the Plaintiff would suffer irreparable injury if the injunction were not granted and the matter was later determined in their favour.

Further, I find that there are serious questions of law to be tried in this matter as the Defendant raises allegations of fraud on the part of the Plaintiffs. The fact that the Plaintiff is alleging that the Defendant foreclosed on the wrong property gives the Plaintiffs a clear right to relief.

Finally, having considered the totality of the evidence before me, I am satisfied that this is a fit and proper case for this Court grant an Interim Order of Injunction pending the determination of the main matter in order to preserve the status quo in this matter.

Having said this, it is of paramount importance to note that I have considered the submissions by defence Counsel pertaining to Subdivision B of Lot 16609 Chibombo, which is the subject of a Foreclosure Judgment in the Supreme Court. It is trite law that the doctrine of **Stare Decis** entails that the High Court is bound by the decisions of the Supreme Court.

I therefore entirely agree with the learned defence Counsel that this Court has no jurisdiction to grant an injunction with respect to Subdivision B of Lot 16609 Chibombo as the matter relating to it has already been concluded by the Supreme Court.

In view of the foregoing, I confirm my earlier Order for Interim Injunction with respect to Subdivisions A and C only. Taking into account the fact that the exparte interim injunction has been varied to the extent of removing Subdivision B from the interlocutory injunction the same having been subject to and determined by the Supreme Court, the justice of the case is that I make no order as to costs. Put differently each party is to bear its own costs.

Leave to appeal is granted.

**Delivered under my hand and seal this <sup>10th</sup>..... day of July, 2017**



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**Mwila Chitabo, SC  
Judge**