

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

2017/HP/0083

BETWEEN:



ETHEL CHILWALO
(Suing as Administrator of the estate of
the late Branford Kondo Munsaka)

1st PLAINTIFF

TITUS KATONGO

2nd PLAINTIFF

AND

SAELI RICKY KALALUKA

DEFENDANT

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 14th DAY OF MARCH,
2017**

For the Plaintiffs : Mrs M. M. Harawa, MC Mulenga & Company

For the Defendant : Mr H. Kabwe, Hobday Kabwe & Company

R U L I N G

CASES REFERRED TO:

1. *Shell and BP Zambia Limited V Connidaris and Others 1975 ZR 174*
2. *American Cynamide V Ethicon Limited 1975 AC 396*

LEGISLATION REFERRED TO:

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

This is a ruling on an application made by the Plaintiff for an order of interim injunction, made pursuant to Order 27 Rule 1 of the High

Court Rules, Chapter 27 of the Laws of Zambia. Counsel relied on the affidavit filed in support of the application on 19th January, 2017, as well as the affidavit in reply and skeleton arguments.

It was stated that paragraph 9 of the affidavit in opposition in the last sentence, makes reference to the Lands Register having been concealed. Counsel submitted that a perusal of the said Lands Register shows that entries number 7 and 8 were only cancelled on 3rd May 2011, way after the sale. That entry number 9 is permission to subdivide, and therefore the argument that the Task Force on Corruption had cleared the issues by the time the Defendant bought the land is incorrect.

Counsel also submitted that exhibit 'TK1' on the affidavit in reply is dated 4th December 2009, and in paragraph 3 of that document the Task Force urges expeditious sub division of the property. Reference was also made to exhibit 'TK2' on the affidavit in reply, and Counsel stated that this is a photograph showing the structures before they were demolished. That therefore the argument that the said structures were tumbled is equally incorrect.

Exhibits 'TKa-c' on the affidavit in reply were explained as account statements from the Lusaka City Council with 'a' being rates for the late Munsaka, 'b' for the State and 'c' for the 2nd Plaintiff, which was sold to the Defendant.

That based on this, the Plaintiffs' had demonstrated that there is a serious issue to be tried, and that there is likelihood of success, as

the 1st Plaintiff had purchased the land earlier than the Defendant. Counsel argued that the right to relief is clear, and asked the Court to confirm the ex-parte order of injunction, earlier granted.

In response, Counsel for the Defendant opposed the application and relied on the affidavit in opposition. He stated that they would file written submissions, having just been served the Plaintiff's list of authorities.

It was submitted that an injunction will only be granted where the right to relief is clear, as was held in the case of **AMERICAN CYNAMIDE V ETHICON LIMITED 1975 AC 396**. That this position was adopted in our own jurisdiction, and the case of **SHELL AND BP ZAMBIA LIMITED V CONNIDARIS AND OTHERS 1975 ZR 174**, is one such case that had adopted those principles. Counsel argued that the affidavits before court allege that Brainford Kanini Munsaka, while on others that Brainford Kondo, and on others as merely Munsaka, bought the property in dispute.

That the documents exhibited by the 2nd Plaintiff name the buyer as Brian Kanini Kondo, yet exhibit 'JM1' on the affidavit sworn by Jaqueline Mulapwa has nothing to do with the estate of Brian Munsaka Kanini. That the exhibits 'TK1a-b' and 'TK2a-e' are receipts for monies received by an unknown person, as there is no name, and it is for a subject matter that does not relate to Stand No 10563. That exhibit 'TK2e' is for the purchase of Bing Bang Restaurant from Brainford Kondo, which is not in issue in this matter.

Counsel stated that the same goes for exhibits 'TK2b-d'. Further that the contract of sale does not cite Munsaka as a party, and neither does it refer to Brian Kondo. That even the grant of probate giving the 1st Plaintiff authority to sue, is in the names of Brian Munsaka Kanini, who had no relationship with the subject matter. It was argued that in view of all this, the right to relief is not clear.

It was also submitted that the 1st Plaintiff had argued that the Defendant was sold a portion of Stand No 10563, yet the 2nd Plaintiff had deposed that he could not recall doing so, as it was his lawyers Ngenda Sipalo who did the conveyance, and who had acted for both the vendor and purchaser. Further that the 2nd Plaintiff denies having signed anything, arguing that the signature was not his. However fraud had not been pleaded.

As regards to whether the Plaintiffs would suffer irreparable damage if the injunction were not granted, Counsel's submission that paragraph 10 of the affidavit in opposition is very clear that the new buyer of the property had taken possession of the property, and demolished the structures, even before the Plaintiffs' applied for the injunction.

Counsel's view was that courts should not be moved to make nugatory orders, as it is against public policy. That notwithstanding the demolished structures could be assessed, and damages paid, if the Plaintiff were to succeed at trial. With regard to the balance of convenience, the argument was that the Plaintiff had not disputed that a third party had bought the premises, and was

moved on the basis of a search conducted at the Ministry of Lands, and upon enquiry from the Chief Registrar, as to whether the property could be bought as a whole.

Counsel stated that the 2nd Plaintiff did not want the Court to see entries 7 and 11 on the Lands Register. He prayed that the injunction be discharged with costs.

Counsel for the Plaintiffs' in reply stated that there was no concealment of the entries in the Lands Register, as paragraphs 7 and 8 of the affidavit of Jacqueline Mulapwa have referred to exhibit 'JM2', the Lands Register. Further that even the 2nd Plaintiff refers to the said entries in paragraphs 9 and 10 of his affidavit, when he states that there was an encumbrance or entry placed by the Task Force on Corruption, which was only cancelled in May 2010.

It was stated in conclusion that the contract of sale exhibited as 'TK1a' makes reference to Stand No 10563 in the first paragraph, and so does 'TK1b'.

I have considered the application. Order 27 (1) of the High Court Act, Chapter 27 of the Laws of Zambia states that;

“in any suit in which it shall be shown, to the satisfaction of the Court or a Judge, that any property which is in dispute in the suit is in danger of being wasted, damaged or alienated by any party to the suit, it shall be lawful for the Court or a Judge to issue an injunction to such party, commanding him to refrain from doing the particular act complained of, or to

give such order, for the purpose of staying and preventing him from wasting, damaging or alienating the property, as to the Court or a Judge may seem meet, and, in all cases in which it may appear to the Court or a Judge to be necessary for the preservation or the better management or custody of any property which is in dispute in a suit, it shall be lawful for the Court or a Judge to appoint a receiver or manager of such property, and, if need be, to remove the person in whose possession or custody the property may be from the possession or custody thereof, and to commit the same to the custody of such receiver or manager, and to grant to such receiver or manager all such powers for the management or the preservation and improvement of the property, and the collection of the rents and profits thereof, and the application and disposal of such rents and profits, as to the Court or a Judge may seem proper”.

The question for determination is whether the ex-parte order of injunction granted should be confirmed? It is trite that an interlocutory injunction is granted pending the determination of a main matter. It is also trite, as rightly submitted by Counsel for the Defendant that the principles governing the grant of injunctions, were laid down in the case of **AMERICAN CYNAMIDE V ETHICON LIMITED 1975 AC 396**. That the said principles have been adopted in our jurisdiction, as seen from a number of authorities.

Going by the principles laid down in the above cases, the first issue for consideration is whether there is a serious issue to be tried, and whether the right to relief is clear. Counsel for the Plaintiffs' argued that the right to relief is clear, as it had been shown that the Defendant had only bought a portion of land from the 2nd Plaintiff, and that the late Munsaka also bought another portion of the 2nd Plaintiff's land.

Exhibits 'TK4' and 'TK5' on the affidavit in support of the application sworn by the 2nd Plaintiff, shows that the 2nd Plaintiff had written to the Executive Chairman on the Task Force on Corruption, stating that he had written to the Ministry of Lands to expedite the sub division of Stand No 10563 into three plots, in favour of himself, the State, and Mr B.M Munsaka. The proposed sub divisions are as on exhibit 'TK5'.

Exhibit 'TK7' is the Lands Register and entry 7 on that document is a remark that no further transactions would be done on the property No 10563, without reference to the Acting Chief Registrar of Lands, and the Anti-Corruption Commission (ACC). This was on 9th January, 2003. Entry number 8, dated 15th August 2005 states that the property was forfeited to the State. Exhibit 'SRK4' on the affidavit in opposition is the Lands Register which shows that on 28th May 2007 entry 9 was lodged which allowed subdivision of the property by the Task Force on Corruption, by virtue of the letter dated 5th December 2006.

Entry 10 dated 3rd May 2011 cancelled the remark at entry 7. Exhibit 'SRK1' on the affidavit in opposition is a deed of assignment and disclaimer for the sale of Stand No 10563, in the extent of 1871 square metres, between the 2nd Plaintiff as vendor, and the Defendant as purchaser. The certificate of title for Stand No 10563, 'SRK2', shows the entire extent of the land as 1871 square metres.

In paragraph 4 of the affidavit in reply, the 2nd Defendant denies having signed the deed of assignment as well as the disclaimer dated 14th February, 2008 for the sale of the land to the Defendant, stating that as at 28th October, 2009, the Defendant was still conducting due diligence on the portion of land that he was about purchase, as shown on the letter he wrote to the National Housing Authority, exhibited as 'TK1' on the said affidavit.

That exhibit 'TK3' shows that the Defendant had bought the portion of the land comprising Adams Apple, which was forfeited to the State. Further exhibits 'TK4a-c' are rates documents from the Lusaka City Council to the effect that Stand No 10563 was subdivided into, 'a' for Munsaka Brianford Kondo, 'b' for the Government of the Republic of Zambia, and 'c' for the 2nd Plaintiff.

Counsel for the Defendant argued that there are various names that have been exhibited for the person whose estate, the 1st Plaintiff represents. While it may be a fact that there are various names, this does not take away the fact that there is a dispute as to what extent of the land was sold to the Defendant.

Given the documentary evidence on record, it is my finding that there is a serious issue to be tried. Therefore the first requirement for the grant of an injunction has been satisfied. The next consideration is whether damages would be an adequate remedy, if the injunction were not granted? Counsel for the Defendant argued that damages would be an adequate remedy if the Plaintiffs were to succeed at trial, as the buildings that have been demolished can be valued.

While this is true, it must be noted that the said structures that have been demolished, were used as a business. The Defendant has not stated that he would be able to pay the damages that may be awarded for the illegal execution of the warrant of distress, as well as the damages for loss of business that have been claimed by the Plaintiffs, if they were to be awarded.

I also note that the buildings had in fact been already demolished when the application for the injunction was made. While the aspect of damages being an adequate remedy was not successfully established, the essence of obtaining the injunction has been defeated by the demolition. The Defendant in paragraph 5 of the affidavit in opposition avers that the 2nd Plaintiff sold him the entire Stand No 10563, a fact as already seen is denied by the 2nd Plaintiff. He claims that on that basis he sold the property in its entirety to a 3rd party, Suhail Bharuchi, who is not a party to these proceedings.

The contract of sale between the Defendant and the 3rd party is exhibited as 'SRK3' on the affidavit in opposition. This document is

only the first page of the agreement, and does not show the extent of land sold to the 3rd party.

Taking into account the fact that the 1st Plaintiff's structures have already been demolished, and seeing that there is a third party who is not party to the proceedings, but is directly affected by the action, I will discharge the interim order of injunction that was granted earlier. As the Defendant has filed his defence, the Plaintiff is directed to apply for orders for directions, so that the matter is heard expeditiously. That matter shall come up for status conference on 27th April, 2017 at 09:00 hours. Costs shall be in the cause. Leave to appeal is granted.

DATED THE 14th DAY OF MARCH, 2017.

S. Kaunda

**S. KAUNDA NEWA
HIGH COURT JUDGE**