

**IN THE HIGH COURT FOR ZAMBIA  
AT THE NDOLA DISTRICT REGISTRY**

**2017/HN/265**

*(Civil Jurisdiction)*

**BETWEEN:**

**ELLEN OLGA MORELLI  
DYNES MUKULUKUSHA  
AND  
ROBERT K. CHITANGI**



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

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

**DEFENDANT**

Before The Honourable Madam Justice M.C. Mulanda in Chambers

**FOR THE PLAINTIFFS** : Mrs. D.P.S. Chabu,  
Messrs Lumangwe Chambers.

**FOR THE DEFENDANT** : Major G.B. Mubanga,  
Messrs Mubanga & Associates.

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**R U L I N G**

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**CASES REFERRED TO:**

1. *Shell and BP Vs. Conidaris and Others* (1975) ZR 174.
2. *American Cyanamid Co. Vs. Ethicon Limited* (1975) AC 396.
3. *Nottingham Building Society Vs. Eurodynamics Systems* (1993) F.S.R. 468  
at 474.

4. *Shepherd Homes Limited Vs. Sandham (1971) 1CH 340.*
5. *Morris Vs. Redland Bricks Limited (1969) 2 All ER 576.*
6. *Attorney General for the Dominion of Canada Vs. Ritchie Contracting and Supply Co. Ltd (1919) AC 999.*
7. *Mkushi Christian Fellowship Trust Limited (Hold out as Chengelo School) Vs. Henry Musonda, Appeal No. 178 of 2005 (Unreported).*

**LEGISLATION REFERRED:**

1. *The Lands and Deeds Registry Act, Chapter 185, Sections 33, 34 (1) and (2).*
2. *The Rules of the Supreme Court, 1999 Edition, Order 29/L/1*

This is a Ruling on the Plaintiffs' application for an interlocutory order of mandatory injunction to compel the Defendant to re-open the 1<sup>st</sup> Plaintiff's building situate on Plot number NDO/10972, Ndola, which is rented and used by the 2<sup>nd</sup> Plaintiff as a bar. The application is supported by a joint affidavit sworn by both the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs.

On 10<sup>th</sup> August, 2017, the Plaintiffs commenced this action against the Defendant by way of Writ of Summons, accompanied by a Statement of Claim, seeking the following reliefs:

- (i) A declaration that the 1<sup>st</sup> Plaintiff is the registered and legal owner of Stand No. NDO/10972 situate in Ndola in the Copperbelt Province of Zambia.

- (ii) An Order restraining the Defendant whether by himself, his agents, servants howsoever from trespassing onto the 1<sup>st</sup> Plaintiff's Plot.
- (iii) An Order of Mandatory Injunction to compel the Defendant to re-open the Plaintiff's bar which the 2<sup>nd</sup> Plaintiff rents from the 1<sup>st</sup> Plaintiff situate on Plot No. NDO/10972 situate in Ndola which the Defendant closed on or about 21<sup>st</sup> July, 2017.
- (iv) Refund of K2, 685.00 per day for loss of business and payment for electricity and water bills and Gotv from 21<sup>st</sup> July, 2017 at K927.00 per month.
- (v) Damages for trespass.
- (vi) Costs.

In her affidavit in support of the application for *anex-parte and interlocutory* order of mandatory injunction, the 1<sup>st</sup> Plaintiff, Ellen Olga Morelli, deposed that she is the legal and registered owner of Stand No. 10972, Kasuba Road, Ndola. A Copy of a Certificate of Title dated 10<sup>th</sup> October, 2011, was exhibited and marked "OEM 1" to "OEM 8". She further deposed that there was a building on her said Stand that houses a bar which she has rented out to the 2<sup>nd</sup> Plaintiff, Ms. Dainess Mukulukusha since November, 2001.

The 1<sup>st</sup> Plaintiff went on to depose that on or about 21<sup>st</sup> July, 2017, the Defendant locked the main gate to the premises, thereby preventing the 2<sup>nd</sup> Plaintiff from having access to the bar. Further

that, as owner of the Plot, she was also unable to access her offices situated on the said property. She deposed that the closure of her premises by the Defendant was unexpected and came to her with a sense of shock. It was the Deponent's further averment that the Defendant who owns the adjoining property claimed that part of the said Stand No. 10972, Kasuba Road, Ndola, was his.

She further deposed that as a result of the Defendant's actions, her tenant, the 2<sup>nd</sup> Plaintiff, is unable to carry out her business as well as access deliveries and customers. The 1<sup>st</sup> Plaintiff concluded by deposing that unless the Defendant is compelled to re-open the gate to her Stand No. 10972, Kasuba Road, Ndola, she will suffer irreparable injury, as she would not have free access to her property.

In her affidavit, the 2<sup>nd</sup> Plaintiff deposed that the closure of the 1<sup>st</sup> Plaintiff's property by the Defendant has denied her access to the bar which she was renting from the 1<sup>st</sup> Plaintiff. As a result, she has lost business from which she generates income of a total sum of K2, 685.00 per day. The 2<sup>nd</sup> Plaintiff further averred that the closure of the bar by the Defendant has embarrassed her, as members of public are under the impression that the closure is due to failure on her part to pay rent. It was the 2<sup>nd</sup> Plaintiff's further deposition that unless the Defendant is ordered to re-open her bar, she will lose much more money.

On 14<sup>th</sup> August, 2017, I granted the Plaintiffs an *ex-parte* order of Mandatory Injunction and adjourned the matter to 18<sup>th</sup> October, 2017, for *inter-partes* hearing.

In his affidavit in opposition, filed on 24<sup>th</sup> August, 2017, the Defendant, Robert Chitangi, denied that the owner of the said Stand No. 10972, Kasuba Road, is the 1<sup>st</sup> Plaintiff. He deposed that he will at trial put the 1<sup>st</sup> Plaintiff to strict proof of the authenticity and legality of the 1<sup>st</sup> Plaintiff's purported Certificate of Title relating to the said Stand No. 10972.

The Defendant further deposed that he is the registered owner of Stand No. 10636 with Certificate of Title No. 91195, dated 19<sup>th</sup> November, 2009. A Copy of the said Certificate of Title was exhibited and marked "RC1" to "RC9". It was the Defendant's further deposition that he purchased the said piece of land which the 1<sup>st</sup> Plaintiff was claiming as hers, from Zambia Railways Limited, after duly following all the processes relating to alienation of land in accordance with the Laws of Zambia. He deposed that the said bar which the 2<sup>nd</sup> Plaintiff claims to have been renting from the 1<sup>st</sup> Plaintiff actually sits on his Stand No. 10636.

The Defendant, however, admitted having locked the said premises for the reason that several reminders to the 1<sup>st</sup> Plaintiff to vacate his property went unheeded. He further averred that the Plaintiffs had no legitimate claim to the property in question, as he was the legally

registered owner of the said property. He urged the Court to accordingly dismiss the application for an order of Interlocutory Mandatory injunction and discharge the *ex-parte* order.

On 25<sup>th</sup> August, 2017, the Defendant filed a Defence to the Plaintiffs claim. He counter-claimed as follows:

1. The Defendant claims for an order that Certificate of Title issued on Stand No. 10972 be cancelled on account of fraud.
2. By reason of the matters aforesaid, the Defendant has suffered loss, damage and inconvenience and, therefore, counter-claims against the Plaintiffs as follows:
  - a. An order for cancellation of Certificate of Title relating to Stand No. 10972.
  - b. Costs.

To further buttress his affidavit in opposition to the application for an interlocutory order of mandatory injunction, the Defendant filed, on 2<sup>nd</sup> September, 2017, Skeleton Arguments. It was submitted that the law on whether or not to grant an injunction was espoused in the case of **SHELL AND BP Vs. CONIDARIS AND OTHERS** <sup>(1)</sup> wherein the Supreme Court held that:

- (i) **A Court will not 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 in damages, not injury which can possibly be repaired.**
- (ii) **Where any doubt exists as to the Plaintiff's rights or if the violation of an admitted right is denied the Court takes into consideration the balance of convenience to the parties, the burden of showing the greater inconvenience is on the Plaintiff."**

It was contended that this was not a fit and proper case to grant an injunction as the Plaintiff would not suffer irreparable injury which could not be adequately atoned for in damages if the Court declined to grant an injunction. The Defendant further submitted that the balance of convenience in this matter tilted in his favour.

It was further submitted that, although the two Certificates of Title exhibited in the matter by both the 1<sup>st</sup> Plaintiff and the Defendant have different Plot numbers, they both refer more or less to the same parcel of land in issue. The Defendant argued that a scrutiny of the two Certificates of Title shows that, his, dated 19<sup>th</sup> November, 2009 was issued earlier than that of the Plaintiff which was dated



10<sup>th</sup> October, 2011. Sections 33 and 34 (1) and (2) of the Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia, were cited as authorities on the effect of issue of a Certificate of Title. He contended that he had a better title to the land in issue, because he was a registered proprietor claiming under a Certificate of Title which was prior, in date, to that of the 1<sup>st</sup> Plaintiff.

In conclusion, the Defendant urged the court to dismiss the application and discharge the *ex-parte* Order of mandatory Injunction granted on 10<sup>th</sup> August, 2017, with costs.

When the matter came up on 20<sup>th</sup> October, 2017, for hearing of the application, Mrs. Chabu, Counsel for the Plaintiffs, informed the Court that she would rely on the affidavits sworn by the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs, dated 10<sup>th</sup> August, 2017, particularly paragraphs 4 to 10 of the 1<sup>st</sup> Plaintiff's affidavit, and paragraphs 4 to 9 of the 2<sup>nd</sup> Plaintiff's affidavit.

Mrs. Chabu recapped the affidavit evidence as contained in the affidavits of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs. She further submitted that a perusal of the two Certificates of Title filed in the matter by both the 1<sup>st</sup> Plaintiff and the Defendant, clearly shows that the parties possess two distinct and separate pieces of land. Counsel contended that the extent of their respective pieces of land can only be challenged after a verification of the boundaries by a surveyor from the Ministry of Lands. She submitted that the Defendant was



not qualified to question the authenticity of the Certificate of Title of the 1<sup>st</sup> Plaintiff's Stand No. 10972, Ndola, in the manner he has done in his affidavit.

On the Defendant's claim that the 2<sup>nd</sup> Plaintiff's bar sat on his Stand No. 10636, Counsel submitted that no independent verification was done to support such a claim. She contended that the Defendant cannot be said to have been enforcing his rights to the property when he locked up the Plaintiff's premises, because there was no court order authorising him to do so. Counsel contended that no reminders to the Plaintiffs, to vacate the premises, were exhibited in the matter.

Counsel further submitted that if the interim order of mandatory injunction which was granted is discharged, the Plaintiffs will suffer irreparable injury which cannot be adequately atoned for in damages. It was Counsel's further submission that the Plaintiffs' application meets all the requisite requirements for the grant of an injunction in that the right to relief is clear; the grant of injunction is necessary to protect the Plaintiffs from irreparable injury; the plaintiffs have an action at law entitling them to reliefs; and that there is a serious issue to be tried. Counsel contended that by locking up the premises, the Defendant has denied the 1<sup>st</sup> Plaintiff access to her property to which she holds a Certificate of Title. She submitted that the Plaintiffs have real prospects of succeeding in the claim at the trial. It was her further submission that the balance

of convenience in this matter lies in granting an Interlocutory Order of Mandatory Injunction until issues of ownership are resolved.

In conclusion, she urged the Court to maintain the *status quo* in line with the decision in the case of **AMERICAN CYANAMID CO. Vs. ETHICON LIMITED** <sup>(2)</sup>.

In reply, Major Mubanga, on behalf of the Defendant, submitted that the Defendant was opposing the application for the grant of an Interlocutory Order of Mandatory Injunction. He equally told the Court that he would rely on the affidavit in opposition filed on 21<sup>st</sup> August, 2017, together with the Skeleton Arguments filed on 20<sup>th</sup> September, 2017.

Counsel further submitted that the Plaintiffs have not shown any proof how damages would not be adequate compensation in the event that a decision was made in their favour at trial. He contended that the evidence before the Court clearly supports the submission that the balance of convenience tilts in favour of the Defendant. It was his further submission that the greater convenience lies in favour of not granting the application. He maintained that this is not a proper case in which to grant an interlocutory order of mandatory injunction.

In conclusion, Counsel implored the Court to dismiss the application and discharge the *ex-parte* order of mandatory injunction granted on 14<sup>th</sup> August, 2017.

I have scrutinized and considered the affidavit evidence, submissions by Counsel for both parties as well as the Skeleton Arguments filed by the Defendant.

Order 29/L/1 of the Rules of the Supreme Court, 1999 Edition, clothes the Court with jurisdiction to grant an interlocutory order of mandatory injunction. The said Order 29/L/1 thus reads:

**“The Court has jurisdiction upon an interlocutory application to grant a mandatory injunction directing that a positive act should be done to repair some omission or to restore the prior position by undoing some wrongful act but it is a very exceptional form of relief.”**

The tests for the granting of an interlocutory order of mandatory injunction were set out in the case of **NOTTINGHAM BUILDING SOCIETY Vs. EURODYNAMICS SYSTEMS** <sup>(3)</sup> where Chadwick J said:

**“In my view the principles to be applied are these. First, this being an interlocutory matter, the overriding consideration is which course is likely to involve the least risk of injustice if it turns out to be “wrong” in the sense of granting an interlocutory injunction to a party who fails to establish his right at trial (or would fail if there was a trial) or, alternatively, in failing to grant an**

injunction to a party who succeeds (or would succeed) at trial. Secondly, in considering whether to grant a mandatory injunction, the Court must keep in mind that an order which requires a party to take some positive step at an interlocutory stage, may well carry a greater risk of injustice if it turns out to have been wrongly made than an order which merely prohibits action, thereby preserving the *status quo*. Thirdly, it is legitimate, where a mandatory injunction is sought, to consider whether the Court does feel a high degree of assurance that the plaintiff will be able to establish his right at a trial. That is because the greater the degree of assurance the plaintiff will ultimately establish his right, the less will be the risk of injustice if the injunction is granted. But, finally, even where the Court is unable to feel any high degree of assurance that the plaintiff will establish his right, there may still be circumstances in which it is appropriate to grant a mandatory injunction at an interlocutory stage. Those circumstances will exist where the risk of injustice if this injunction is refused sufficiently outweigh the risk of injustice if it is granted.”

Further, in the case of **SHEPHERD HOMES LIMITED Vs. SANDHAM** <sup>(4)</sup>, Megarry J said, a mandatory injunction will only be granted if the applicant's case is “**unusually strong and clear**” and the Court must feel a “**high degree of assurance**” that at the trial it

will appear that the injunction was rightly granted (See editorial note 29/L/1 of the Supreme Court Practice 1999 Edition at p. 563). In the case of **MORRIS Vs. REDLAND BRICKS LIMITED** <sup>(5)</sup>, Lord Upjohn said:

**“A mandatory injunction can only be granted where the Plaintiff shows a very strong probability upon the facts that grave danger will accrue to him in the future.”**

All the foregoing authorities clearly demonstrate that an order of mandatory injunction should not be lightly ordered unless the applicant shows that he has a strong case and that he is likely to succeed at the hearing of the action. Further, the Court needs to feel assured that the applicant will be able to establish his right at a trial. Due to the potential danger of a harmful effect on the Defendant, the Court's jurisdiction to order a mandatory injunction should be exercised sparingly and with caution; as was observed by Lord Dunedin in the case of **ATTORNEY GENERAL FOR THE DOMINION OF CANADA Vs. RITCHIE CONTRACTING AND SUPPLY Co. LTD** <sup>(6)</sup> when he said:

**“It is a jurisdiction to be exercised sparingly and with caution but in the proper case unhesitatingly.”**

In the present matter before me, it is not in dispute that both the 1<sup>st</sup> Plaintiff and the Defendant possess Certificates of Title. The 1<sup>st</sup> Plaintiff's Certificate of Title dated 10<sup>th</sup> October, 2011, is in respect of Stand No. 10972, Ndola. On the other hand, the Defendant's Certificate of Title dated 19<sup>th</sup> November, 2009, is for Stand No. 10636, Ndola.

According to the affidavit evidence as deposed by the 1<sup>st</sup> Plaintiff, the Defendant locked up the bar which she had rented out to the 2<sup>nd</sup> Plaintiff, and her office, claiming that part of the land upon which her building sits, was his. She deposed that the Defendant was the owner of the Stand adjoining her property. Whereas, the Defendant averred that the bar in question sits on his land.

Mrs. Chabu, Counsel for the Plaintiffs, submitted that the Plaintiffs will suffer irreparable injury which would not be atoned for in damages. Major Mubanga on the other hand, contended that the Plaintiffs had not demonstrated that damages would not be sufficient to compensate the injury that may arise in the event that the Court finds in their favour at the conclusion of the matter.

The main issue to determine in this application is whether or not the Plaintiffs have shown that they have a strong case and that they are likely to succeed at the hearing of the action. Further, whether the Court can feel a high degree of assurance that if it grants an interlocutory mandatory injunction at this stage, it is likely to



involve the least risk of injustice if it turns out to be "wrong". A further consideration will be made on whether the risk of injustice, if this injunction is refused, sufficiently outweighs the risk of injustice if it is granted. In determining this application, I am mindful of the counsel given by the Supreme Court in the case of **MKUSHI CHRISTIAN FELLOWSHIP TRUST LIMITED (HOLD OUT AS CHENGELO SCHOOL) Vs. HENRY MUSONDA** <sup>(7)</sup> that:

**"An application for an injunction, whether mandatory or not, should be treated as such and should not be taken as a convenient opportunity for the summary determination of an entire suit... The learned Trial Judge misdirected himself when he decided to grant an interlocutory mandatory injunction which had the effect of determining the substantive issue at interlocutory stage."**

Although the Defendant alleged that the 1<sup>st</sup> Plaintiff's Certificate of Title was obtained fraudulently, I am of the view that at this stage it is not for the Court to decide on that issue as that is a matter to be determined at trial. Assuming that the 1<sup>st</sup> Plaintiff's Title was valid, would it be said that she has a genuine right to the property in question? I believe she would. The extent of her property and the authenticity of the certificate of title are matters to be proved at trial with the help of a registered surveyor from the Ministry of Lands as was submitted by Mrs. Chabu. The need for a Surveyor to determine whether Stand No.10972 was the same as the

Defendant's Stand No. 10636 is heightened by the Defendant's Skeleton Arguments where it was stated that:

*“Of special interest to note however is that both certificates more or less refer to the same parcel of land in issue.”*

My understanding of the preceding statement is that the Defendant was not certain as to what extent the two certificates refer to the piece of land in question.

Considering the fact that the 1<sup>st</sup> Plaintiff has been in occupation of Stand No. 10972 since 2011 when the Certificate of Title was purported to have been issued to her; and further considering that there are two distinct certificates of title in this matter referring to different parcels of land, it is my considered view that the 1<sup>st</sup> Plaintiff has a strong and clear case. Having weighed the balance of convenience in this matter, I am of the firm belief that granting of a mandatory injunction to the 1<sup>st</sup> Plaintiff at this interlocutory stage is likely to involve the least risk of injustice if it turns out to be “wrong”. I believe that withholding a mandatory injunction would in effect pose a risk of greater injustice.

In the circumstances, I strongly believe that this is a fit and proper case in which to grant an interlocutory order of mandatory injunction. Accordingly, I grant an interlocutory order of mandatory injunction in this matter. I order and direct that the Defendant re-

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opens the main gate to the 2<sup>nd</sup> Plaintiff's bar until the final determination of the action or until further orders of this Court. Costs shall be in the cause.

Dated at Ndola this <sup>9<sup>th</sup></sup>..... day of..... *November* 2017.



  
M.C. MULANDA  
JUDGE