

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



2013/HP/0733

BETWEEN:

ENGINE CENTRE ZAMBIA LIMITED

PLAINTIFF

AND

GOD PROVIDES CAR SALES ENTERPRISES LTD

DEFENDANT

Before Honourable Mrs. Justice S. M. Wanjelani on 10th day of April, 2018.

*For the Plaintiff: Mr. R. Chongwe, Messrs RMA Chongwe & Company
For the Defendant: Mr. M. Phiri, Messrs Mwansa Phiri, Shilimi and
Theu Advocates*

RULING

Cases referred to:

- *Jane Mwenya and Another v Paul Kapinga(1998) ZR 71*

Legislation referred to:

- *The High Court Act, Cap 27 of the Laws of Zambia*
- *The Rules of the Supreme Court, 1999 Edition(White Book)*

This is a Ruling on the Defendant's application for confirmation of the Ex-parte Injunction granted on 31st January, 2018.

The brief back ground of this Matter is that the Plaintiff commenced this action against the Defendant seeking various reliefs including that the Defendant was a squatter on the Plaintiff's property and sought vacant possession of the property. The Defendant filed a Defence alleging that the Plaintiff had obtained the disputed portion of the land where the Defendant had erected a boundary wall through fraud and further that this entailed that the Defendant was boxed in and unable to access its property and further filed a Counter-Claim.

On 6th March, 2017, after an Inter-parte hearing, the Plaintiff was granted Injunction, with a condition that the Defendant be allowed access to its property pending determination of the Matter.

On 19th January, 2018 the Plaintiff wholly discontinued the matter against the Defendant and on 31st January 2018, the Defendant filled Summons for an interim injunction alleging that the Plaintiff had engaged the Lusaka City Council to issue a letter to the Defendant issuing Seven (7) days ultimatum, requesting it to show proof of Planning permission in relation to the boundary wall.

It was averred, in the Affidavit in Support of the application that the Plaintiff, that the Plaintiff in the company of a large number of police officers, soldiers and Council employees arrived on site and started demolishing the wall on 30th January 2018 and on 31st January, 2018, the Plaintiff started digging foundations for another wall within the disputed portion of the land with the object of completely "*boxing in*" the Defendant. The Defendant thus sought

an Injunction pending determination of the matter alleging that it would suffer irreparable damage, if the Plaintiff was not restrained.

The Plaintiff, through its Managing Director filed an Affidavit in Opposition on 12th February, 2018 basically stating that the demolition was done by the Lusaka City Council and that the Defendant had been given Notice of the same exercise but had not complied. The Plaintiff prayed that the Ex-parte injunction be discharged.

The Defendant then filed an Affidavit in Reply alleging that the Plaintiff had procured the Lusaka City Council to carry out the demolition despite the existence of the Ex-parte injunction, including the earlier injunction granted on 6th March, 2017.

The Plaintiff then filed an Affidavit responding to the Affidavit in Reply on 23rd March, 2018.

During the hearing, Counsel for the Defendant relied on the Affidavit in Support of the Application and the Affidavit in Reply as well as the Ruling on injunction dated 6th March 2017. He further submitted that Injunction should be confirmed as the Defendant would suffer irreparable damage which could not be atoned for damages. He further prayed that the Affidavit filed in Opposition to the Affidavit in Reply dated 23rd March, 2018, should be expunged as it was filed without leave of Court and that there was need for end in litigation.

Counsel for the Plaintiff opposed the application and relied on the Affidavit in Opposition and the Affidavit in Response to the Affidavit in Reply. He reiterated that the Plaintiff was not involved in the demolition exercise and could not be punished for torts committed by another person. He added that there was no rule that precluded a party from filing an Affidavit, if the Affidavit in Reply raised issues that needed to be responded to, and in this case, there was need to respond to the allegations in the Affidavit in Reply.

I have carefully considered the Parties' submissions and the Affidavits on record.

The first issue to address is the filing of the "*Plaintiff's Affidavit in Response to the Defendant's Affidavit dated 20th February, 2018*" filed on 23rd March, 2018 which was in essence as affidavit in response to the Defendant's Affidavit in Reply. The **Rules of the Supreme Court**, which are applicable in this jurisdiction by virtue of **section 10 of the High Court Act** provide under **Order 18 Rule 4** as follows:

"No pleading subsequent to a reply or a defence to counterclaim shall be served except with the leave of the Court."

While an Affidavit may not be a pleading per se, the sequence and names of documents in proceedings mirror those of the pleadings. I therefore find that the Plaintiff's Affidavit filed on 23rd March, 2018 was filed contrary to the Rule cited above as no Leave of Court was obtained and it is consequently expunged from the Record.

In relation to the substantive application, it is a fact that the Plaintiff discontinued its claim against the Defendant but that did not extinguish the Defendant's Counter-claim. In view of the fact that the Injunction Ruling dated 6th March, 2017, had made reference triable issues between the parties including arising out of the Counter-claim and further directed that the Defendant be allowed access to its premises pending determination of the matter means that, that Ruling is still valid and binding on the Parties and their agents.

The Plaintiff claims it had no role to play in the demolition exercise undertaken by the Lusaka City Council but it is also notable that the Plaintiff actually communicated to the Defendant enclosing a "Call Out" from the Lusaka City Council, showing that it was not merely "*standing by*" but being fully aware of the Injunction on the disputed portion, watched the Council carry out the demolition. Further, I find it difficult believe that the Lusaka City Council could start rebuilding the wall on private property, immediately after demolition it. No other argument was raised in relation to whether the Defendant ought to be granted the Injunction as prayed except that it should be discharged.

In sum total, the principles on granting of injunction and reasons espoused in my Ruling dated 6th March, 2017 are still valid. I find that it is necessary to maintain the status quo pending determination of the Defendant's Counter-claim, particularly as the subject matter is land and damages are generally an inadequate

remedy as alluded to in the case of **Jane Mwenya and Another v Paul Kapinga**. I further find that the issues raised by the Plaintiff in the Affidavit in Opposition are subject to determination at the main hearing.

I, therefore confirm the Ex-parte Order Injunction granted on 31st January, 2018 as read together with my Ruling dated 6th March 2017. This means that the Plaintiff by itself, its agents, its servants or whosoever, including the Lusaka City Council, are restrained from digging new foundations, building, erecting or constructing a new wall fence within the disputed portion of the land between **Stand Nos. 14177** and **37055**, Kafue Road. It is further ordered that the Defendant shall have access to its property through the disputed portion pending determination of the Defendant's Counter-claim or further order of the Court.

Costs are for the Defendant.

Leave to appeal is granted.

Dated at Lusaka this 10th day of April, 2018.



**S.M WANJELANI
HIGH COURT JUDGE**