IN THE HIGH COURT FOR ZAMBIA **2017/HP/0425**

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

CHANCE KAONGA **PLAINTIFF**

AND

PATRICK KATYOKA **1ST DEFENDANT**

JULIET MWANGE **2ND DEFENDANT**

BEFORE THE HONOURABLE JUSTICE P. K. YANGAILO ON 13TH DAY OF FEBRUARY, 2018 IN CHAMBERS.

For the Plaintiff: *Mr. K. Mambwe - Messrs. Mosha & Company*
For the Respondents: *Mr. H. Mulenga - Messrs. Philsong & Partners*

R U L I N G

CASES REFERRED TO:

1. *Shell and BP (Zambia) Limited vs. Conidaris and Others (1975) ZR 174;*
2. *Turnkey Properties vs. Lusaka West Development Company Ltd., BSK Chiti (Sued as Receiver) & Zambia State Insurance Company Ltd. (1984) ZR 85;*
3. *American Cyanamid Company vs. Ethicon Ltd. (1975) 1 All ER 504; A.C. 396;*
4. *Hall vs. Woolston Hall Leisure Limited (2001) 1 WLR 225;*
5. *Horton Ndove vs. National Educational Co. Zambia Limited (1980) ZR 184;*
6. *Zimco Properties vs. Lapco Ltd. (1988-1989) Z.R. 92;*
7. *Hondling Xing Xing Building Company Ltd. vs. ZamCapital Enterprises Ltd. (2010) Z.R. 30;*
8. *Zambia State Insurance Corporation Ltd. vs. Dennis Mulope Mulikelela (1990) Z.R.;*
9. *Abad vs. Turning & Metals Ltd. (1987) Z.R. 86; SCZ Judgment No. 13 of 1987;*
10. *Preston vs. Luck (1884) 24 Ch. 497 at 505;*
11. *Ubuchinga Investments Limited vs. Teklemicael Menstab and Semhar Transport & Mechanical Limited - SCZ Judgment No. 25 of 2014;*
12. *Series 5 Software vs. Phillip Clarke (1996) 1 All ER 853;*
13. *Fellowes and Son vs. Fisher (1976) QBD 122 at 123; and*

14. *Harman Pictures NK. V Osborne [1967] 1 W. L. R. 723.*

LEGISLATION AND OTHER WORKS REFERRED TO:

1. *The High Court Rules, Chapter 27 of the Laws of Zambia;*
2. *Snell's Equity 31st Edition paragraph 16 - 19 page 405;*
3. *The Supreme Court Practice Sweet & Maxwell 1999 Edition*
4. *Halsbury's Laws of England Vol. 24 4th Edition*
5. *McGill Law Journal*

The Plaintiff took out of the Principal Registry Originating Process by way of Writ of Summons and Statement of Claim dated 16th March, 2017, claiming the following reliefs: -

(i) *An order of specific performance to order the 1st Defendant to complete the Contract of Sale dated 30th January 2014;*

(ii) *An Injunction to restrain the Defendants, whether by themselves or by their agents from interfering with the Plaintiff's quiet enjoyment of proposed subdivision of Stand No. 40 in extent of 290 square metres;*

(iii) *A declaration that the Contract of Sale executed between the Defendants is null and void in so far as it includes the Plaintiff's proposed subdivision in extent of 290 square metres;*

(iv) *Damages for trespass;*

(v) *Costs; and*

(vi) *Any other relief the Court shall deem fit.*

By an *Ex Parte* summons filed herein on 22nd March, 2017, the Plaintiff applied for an Order of Interim Injunction. I directed that the same be heard *Inter Parte* on 12th April 2017.

In the Summons for an Order of Interim Injunction, the Plaintiff sought the following Orders: -

1. *An Injunction restraining the Defendants whether by themselves or by their agents from interfering with the Plaintiff's quiet enjoyment of proposed subdivision of Stand No. 40 in extent of 290 square metres ("The Property").*

The application was made pursuant to ***Order XXVII Rule 1*** of ***The High Court Rules***[1]. It was supported by an Affidavit deposed to by one **CHANCE KAONGA,** who is the Plaintiff and filed herein on 22nd March, 2017. The Plaintiff in his Affidavit in Support averred, *inter alia*, as follows: -

1. *That by Contract of Sale dated 30th January 2014, he purchased the proposed subdivision from the 1st Defendant at the sum of K297,000.00. The Contract of Sale is exhibited marked "CK 1";*
2. *That it was a term of the contract that the 1st Defendant was responsible for the creation of the subdivision and assignment of the property to the Plaintiff once approval was granted by the Surveyor General;*
3. *That pursuant to the aforesaid Contract, the Plaintiff paid a cash sum of K238,000.00 and gave his motor vehicle Mercedes Benz registration No. ALG 1595 valued at K59,000.00 to the 1st Defendant, therefore discharging payment of the full purchase price. Copies of Acknowledgment of payment are exhibited marked "CK 2" and "CK 3";*
4. *That sometime in May 2014, after being granted possession of the property, the Plaintiff executed a Tenancy Agreement with one Matakala Norma, who occupied the property at a monthly rental sum of K2,500.00. The Tenancy Agreement is exhibited marked "CK 4";*
5. *That sometime in 2015 when the Plaintiff accosted the 1st Defendant on the delays in securing the Certificate of Title for the proposed subdivision, he explained that the delay was due to the fact that the 290 square metres was below the acceptable minimum of 900 square*

metres hence the local authority declined to approve it and suggested for a common leasehold;

6. *That as the Plaintiff was awaiting for the creation of a common lease option by the 1st Defendant, he came to learn through the press of an action in the High Court of one Anne Chifungula who claimed to have purchased the said property from the 1st Defendant at a sum of K1,400,000.00. A copy of the press publication is exhibited marked "CK 5";*
7. *That sometime in January 2015, the 2nd Defendant approached the Plaintiff's tenants notifying her of being the new owner of the subject property and ordered her to vacate, of which she refused as she had a valid tenancy agreement with the Plaintiff. A copy of the letter is exhibited marked "CK 6";*
8. *That arising from the uncertainty as regards the ownership of the property, the tenant started resisting in paying the Plaintiff rentals leading him to issue a Notice to Quit. The Notice is exhibited marked "CK 7":*
9. *That further the 2nd Defendant commenced action against the Plaintiff's tenant for purported eviction proceedings to which the Plaintiff applied to be joined to the proceedings. Copies of the Writ of Summons and Statement of Claim are exhibited marked "CK 8" and "CK 9";*
10. *That before the Plaintiff's application for joinder could be determined, the 2nd Defendant discontinued the matter on the basis that the Plaintiff's tenant had moved out of the house. A copy of the covering letter on the discontinuance is marked "CK 10"; and*
11. *That the 2nd Defendant has since locked the house whilst enjoying quiet possession of her property which is on the remainder of Stand No. 40, thereby denying the Plaintiff access to his house.*

On the return date on 12th April 2017, none of the parties were in attendance and the application was struck out with liberty to

restore to the active cause list. The application was subsequently restored to the active cause list and cause listed for hearing on 22nd June, 2017. At the scheduled hearing, the parties requested to adjourn the matter to a date convenient to the Court to afford the 1st Defendant to study the matter and the matter was adjourned to 6th December, 2017.

In the meantime, the Plaintiff filed herein his skeleton arguments on 1st December 2017, in which the Court's attention was drawn to the case of ***Shell and B.P. vs. Conidaris and Others***[1], where the Supreme Court noted as follows: -

> ***"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 by damages, not injury which can possibly be repaired.***
>
> ***Where any doubt exists as to the Plaintiffs 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."***

The Plaintiff asserts that he has a good chance of success at the termination of these proceedings in the main matter and that in any event, whoever succeeds in this matter, the 1st Defendant has no right to unilaterally transfer title to the land in dispute whilst his contract with the Plaintiff subsists as that amounts to a total disregard of the Plaintiff's interest in the Contract of Sale of the

land. The Plaintiff submits that the 1st Defendant received consideration for the sale of the land to the Plaintiff and his decision to sell the land to two different persons, being the Plaintiff and 2nd Defendant, is a serious matter seeking the Court's intervention.

The Plaintiff further submits that an Interlocutory Injunction is meant to maintain the status quo in the period between the issue of proceedings and the trial of the action. He also submits that it is intended to prevent the party against whom the injunction is sought from continuing in the course of conduct which it is alleged is wrongful in the main action and contends that the actions being taken by the 1st Defendant are wrongful, which actions can only be prevented from continuing by the grant of an injunction.

My attention was further drawn to the case of ***Turnkey Properties vs. Lusaka West Development Company Limited***[2], where Chief Justice Mathew Ngulube, as he then was, stated as follows: -

> ***"An interlocutory injunction is appropriate for the prevention or restoration of a particular situation pending trial. It cannot in our considered view be regarded as a device by which the applicant can attain or create new conditions favourable only to himself which tip the balance of the contending interests in such a way that he is able or more likely to influence the final outcome by bringing about an alteration to the prevailing situation which may weaken the opponent's case and strengthen his own."***

My attention was also drawn to the celebrated case of ***American Cyanamid Company Limited vs. Ethicon***[3], where Lord Diplock stated as follows: -

> ***"On an application for an interlocutory injunction, the Court must look at the respective situations of the two contending positions. The first question to ask is why the Plaintiff should not be left to fight his action and get his relief by succeeding. The normal rule of English litigation is that a person gets no relief till he has gone to trial and persuaded the Court that he has been infringed. He is not entitled to an interlocutory injunction just because he has a strong case. He is only so entitled if it is shown that there could be injustice if the Defendant is left unfettered and that there is a serious risk of irreparable damage to the Plaintiff."***

On the basis of the authorities cited above, the Plaintiff contends that serious injustice will ensue if the Defendants are left unrestrained in this matter. It is the Plaintiff's submission that irreparable injury is such injury as cannot be adequately remedied by damages and that *in casu,* there is no limit to the number of persons that the property can be transferred to or the extent of developments/improvements that can be made on the land in dispute. It is further the Plaintiff's submission that this is a case where damages cannot atone for the potential injury the Plaintiff stands to suffer if the Defendants are not restrained from taking any further action in relation to the transfer or development or improvements to the land in dispute.

It has also been submitted by the Plaintiff that the balance of convenience lies in favour of granting this injunction than in not doing so and that should the injunction not be granted, there is no limit to the manner in which the Defendants can deal with the land, including disposing of it to third parties. The Plaintiff urges the Court to grant the injunction as he contends that his case qualifies for grant of an injunction according to the test espoused in the cited authority of ***Shell and B.P. vs. Conidaris and Others***[1] and that he has a clear right to relief. He further contends that he may suffer irreparable damage if the Defendants are not restrained and that the balance of convenience appears to tilt in his favour in this case.

The 1st Defendant **PATRICK KATYOKA**, filed herein an Affidavit in Opposition on 18th January, 2018, where he averred *inter alia*, as follows: -

1. *That whilst it is true that he sold 290 square metres to the Plaintiff, the Contract of Sale could not materialise as it was contrary to public policy and it was agreed that since the subdivision of 290 square metres in Kabulonga is prohibited the Plaintiff will be refunded the purchase price, to which the Plaintiff agreed. Letters exchanged between the Plaintiff and 1st Defendant are exhibited and collectively marked "PK 1";*
2. *That the Plaintiff did confirm that the subdivision of 290 square metres in Kabulonga area is prohibited by by-laws;*
3. *That the parties did not at any time agree to create common leasehold as alleged but that when the contract of sale became impossible to perform, the Plaintiff and 1st Defendant agreed that the 1st Defendant should refund the Plaintiff and that the only reason that the Plaintiff*

has not been refunded is due to the fact that he began to demand huge sums of money than what he paid for the property;

4. *That subsequently, the 1st Defendant notified the Plaintiff of his intention to sell his property and that since it was legally impossible to leave out the 290 square metres where the servant's quarters is built, he proceeded to sell the property at Plot No. 40 Kudu Road, Kabulonga to a third party;*
5. *That the 2nd Defendant is the legal owner of Stand No. 40 Kudu Road, Kabulonga, which property comprises 290 square metres erroneously sold to the Plaintiff, given the provisions of the by-law, which prohibit the subdivision of the land which is less than 900 square metres in extent;*
6. *That given the provisions of the law, the sale of 290 square metres to the Plaintiff was void ab initio and the allowing of the Plaintiff to rent out the servant quarters which was built on the 290 square metres was merely meant to allow him mitigate his loss, whilst the 1st Defendant looked for a purchaser or developer of the entire property at Stand No. 40 Kudu Road, Kabulonga to enable him to refund the purchase price to the Plaintiff;*
7. *That it is not the 1st the Defendant who locked the servant quarters as the property is not his, having been sold to the 2nd Defendant; and*
8. *That the Plaintiff is not entitled to the reliefs sought as the property in question did not pass to him given the provisions of the law, which prohibit such subdivision.*

The Plaintiff was granted leave to file an Affidavit in Reply, which he filed herein on 31st January 2018, in which he averred *inter alia,* as follows: -

1. *That the Contract of Sale between the Plaintiff and 1st Defendant is not contrary to public policy as the subject property is legal and a Certificate of Title can be issued under a common leasehold.*
2. *That the 1st Defendant's contention of illegality is merely an afterthought meant to disguise his dishonest of selling the property to a third party when he had received the full purchase price from the Plaintiff;*
3. *That the 1st Defendant cannot allege that there was no express agreement of creation of common leasehold in the agreement as it is his duty as a vendor to facilitate for the transfer of the property to the purchaser who is the Plaintiff, by executing all necessary deeds that may envisage the creation of a common leasehold;*
4. *That the 1st Defendant upon receipt of the purchase price from the Plaintiff could not proceed to deal with the property as his own when he alleges that he sold the same property to a third party whilst a valid Contract of Sale was subsisting between the Plaintiff and 1st Defendant as this is dishonest more so that upon alleging that the contract was rescinded, no payment was made to the Plaintiff as refund despite the purposed sale to a third party having happened more than 2 years ago;*
5. *That the Plaintiff rented out the property on the strength of him being the beneficial owner of the property as he paid the full purchase price and had taken vacant possession of the property;*
6. *That in any case, the 1st Defendant has to date not refunded the Plaintiff the purchase price in instalments that he has admitted to have received the purchase price; and*
7. *That the Plaintiff remains the legal and bonafide owner of the land in dispute.*

The 1st Defendant filed herein his skeleton arguments, in which he submits that it is now settled law that injunctions are not available

for the taking anyhow and that the injunction should be granted only to a Plaintiff who established that he has a good arguable claim to the right he seeks to protect. He drew my attention to the cited case of ***Shell and B.P. vs. Conidaris and Others***[1] and submitted that the Contract of Sale signed between the Plaintiff and 1st Defendant was an illegal contract, in that it was contrary to the public policy that has limited the sub-division in Kabulonga area to 900 square metres and not the 290 square metres that the parties agreed upon. That the Plaintiff was informed of this development, which fact the Plaintiff acknowledged in his Affidavit in Support and that given the illegality of the contract of sale, the 290 square metres did not pass to the Plaintiff.

My attention was further draw to the case of ***Hall vs. Woolston Hall Leisure Limited***[4], where Peter Gibson LJ. had this to say: -

> ***"no court will lend its aid to a man who founds his cause of action upon an immoral or illegal act, it, from the Plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi cause, or transgression of a positive law of this law country then the court says he has no right to be assisted."***

The 1st Defendant contends that the action by the Plaintiff is based on an illegal contract signed by the parties and that the likelihood of the Plaintiff succeeding at trial is almost nil as this Court cannot enforce an illegal act. He further contends that the contract is a transgression of positive public policy of this country, in which the Court cannot assist the Plaintiff.

It is also the 1st Defendant's contention that there is no serious dispute between the parties herein, more importantly that the contract which the parties entered into cannot be performed because it is contrary to public policy. My attention was drawn to the case of ***Harton Ndove vs. Zambia Educational Company Limited***[5], where it was held as follows: -

> ***"Before granting an interlocutory injunction it must be shown that there is a serious dispute between the parties and the Plaintiff must show on the material before Court, that he has any real prospects of succeeding at the trial."***

The 1st Defendant submits that although the Plaintiff is entitled to some reliefs, it surely cannot be the specific performance of an illegal contract and therefore his application for an injunction should fail with costs. He further submits that it is settled law that the intent of the parties to the contract can only be understood from the plain meaning of the written terms and that the written terms in the contract before this Court does not suggest a common lease.

The 1st Defendant referred to the cited case of ***Turnkey Properties vs. Lusaka West Development Company Limited***[2], where it was held that: -

> ***"An interlocutory injunction is appropriate for the preservation or restoration of a particular situation pending trial."***

On the basis of the above cited authority, the 1st Defendant contends that, *in casu*, there is no right that accumulated to the Plaintiff on the property in question, given that the contract of sale

the parties entered into was contrary to public policy and that the Plaintiff vacated the property in question long before the commencement of this matter. He prays that the Plaintiff's application for an injunction be dismissed with costs.

The 2nd Defendant did not appear at any of the scheduled hearings and has not filed herein an Affidavit in Opposition to the application for an injunction.

At the scheduled hearing of this application, the parties agreed for the Court to proceed to render a Ruling based on their respective Affidavits and skeleton arguments. I have carefully considered the affidavit evidence before me and I am grateful to both Counsel for their skeleton arguments.

It is trite law that the Court has discretionary power to grant the equitable remedy of an Injunction. ***Order XXVII Rule 1*** of ***The High Court Rules***[1] gives the Court the power to grant an Injunction where property in dispute is in danger of being wasted, damaged or alienated by a Party to an action. The learned author of ***Snell's Equity***[2] stated that an Order is expressed in the widest terms because injunctions are equitable and temporary relief whose jurisdiction, to grant or not to grant, is left entirely to the discretion of the Judge.

The principles and guidelines to be applied in interlocutory injunctions were laid down by the House of Lords in the case of ***American Cyanamid Company vs. Ethicon Ltd***[3] and these are of

a general application. In the said case, Lord Diplock put it this way:-

> ***"The Court no doubt, must be satisfied that the claim is not frivolous or vexatious. In other words, that there is a serious question to be tried...unless the material available to the Court at the hearing of the application for an interlocutory injunction fails to disclose that the Plaintiff has any real prospects of succeeding in his claim...the Court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought."***

The three basic principles of law when a Court can grant an injunction are summarised as follows: -

1. That there must be a serious action to be tried at the hearing;
2. That there is a clear right of relief and that the Applicant has a good arguable claim to the interest he seeks to protect; and
3. That the Applicant would suffer irreparable harm or injury that cannot be atoned for by payment of damages.

There are a plethora of case authorities on the principles involved in the grant of Injunctions. In the case of ***Turnkey Properties vs. Lusaka West Development Company Ltd and Zambia State Insurance Corporation Ltd***[2] it was stated that: -

> ***a) An interlocutory injunction is appropriate for the preservation of a particular situation pending trial;***

b) ***An interlocutory injunction should not be regarded as a device by which an applicant can attain or create new conditions favourable only to himself;***

c) ***In application for Interlocutory Injunction the possibility of damages being an adequate remedy should always be considered.***

In the case of ***Zimco Properties vs. Lapco Limited***[6] the Supreme Court held, in respect of the balance of convenience between the parties, that: -

> ***"The balance of convenience between the parties as to whether to grant an injunction will only arise if the harm done will be irreparable and damages will not suffice to recompense the Plaintiff for any harm which may be suffered."***

The ***Shell & BP Ltd vs. Conidaris & Others***[1] case is one of the leading authorities on this issue, which states as follows: -

> ***"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 irreparable injury; mere inconvenience is not enough. Irreparable injury means injury which is substantial and can never be adequately remedied or atoned for the damages, not injury which cannot be possibly repaired."***

In the case of ***Hondling Xing Xing Building Company Limited vs. ZamCapital Enterprises Limited,***[7] Matibini SC. J. as he then was, held that: -

> ***"It is settled fundamental principle of Injunction law that Interlocutory Injunctions should only be granted where the right to***

relief is clear, and where it is necessary to protect a Plaintiff against irreparable injury; mere inconvenience is not enough."

In the matter of ***Zambia State Insurance Corporation Limited vs. Dennis Mulope Mulikelela,***[8] it was stated by Gardner AJS 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 right to 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."

Looking at the case *in casu,* it is imperative for me to establish whether or not the Plaintiff's claims, *prima facie,* are likely to succeed. The Plaintiff claims that he is the beneficial owner of the Property in dispute having paid the full purchase price and that all that he awaits is the creation of common leasehold by the 1st Defendant. Therefore, the Plaintiff should have provided sufficient factual basis on which this Court could have inferred that indeed the 1st Defendant agreed to create a common leasehold. Other than the contract of sale which will be subject of determination in the substantive matter, no agreement or addendum has been availed which suggest contrary to what is contained in the Contract of Sale. In this regard, since the Plaintiff has not provided proof of intention to create a common leasehold on which this Court can infer that the property in dispute was intended to be transferred to him under such a scheme, I find that *prima facie* his claim may not succeed.

That said, however, the Plaintiff also has to show that damages would not be an adequate remedy to atone him for his injury that he is likely to suffer and that he has made an undertaking to compensate the Defendants in the event that no such injury is in fact suffered by him. Thus, I shall proceed to consider whether damages would be an adequate remedy in this case and the issue of the Plaintiff's undertaking.

According to ***paragraph 29/L/5*** of the ***Rules of the Supreme Court***[3] on the guidelines on the adequacy of damages as a remedy, one of the fundamental principles of injunction law that the Courts must determine when considering whether to grant an injunction or not is whether if a Plaintiff succeeded at the trial, he would be adequately compensated by damages for any loss caused by the refusal to grant an interlocutory injunction. If damages would be adequate remedy, and the Defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted however strong the Plaintiff's claim appeared to be at that stage.

If on the other hand damages would not be an adequate remedy, the Court should then consider whether if the injunction were granted, the Defendant would be adequately compensated under the Plaintiff's undertaking as to damages. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the Plaintiff would be in a financial position

to pay them, there would be no reason upon this ground to refuse an interlocutory injunction.

It is where there is doubt as to the adequacy of the respective remedies in damages that the question of balance of convenience arises. The Court must consider the wide range of matters which go to make up the general balance of convenience. These include the status quo, relative strength of cases, and special factors.

In considering the above principles, the question to be addressed is if the Plaintiff were to succeed in the substantial matter in establishing his claims set out in the Writ of Summons, would he be adequately compensated by an award of damages for the loss caused by the refusal to grant an interlocutory injunction?

I am guided by ***paragraph 955*** of the ***Halsbury's Laws***[4] which provides that: -

> ***"The Plaintiff must as a rule show that an injunction until the hearing is necessary to protect them against irreparable injury; mere inconvenience is not enough."***

According to the ***Shell and BP (Z) Limited v Conidaris and others***[2] case, irreparable injury means: -

> ***"Injury which is substantial and can never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired".***

In casu, the Plaintiff stated in his Affidavit in Support of this application that the 2nd Defendant has been in occupation of the

property having succeeded in evicting the Plaintiff's tenant and it was also submitted by the 1st Defendant that the 2nd Defendant occupies the property as beneficial owner. The Plaintiff has argued that the Defendants may deal with the land, including disposing of it to third parties. He has not provided this Court the basis of his belief and has not produced any cogent facts to show that damages would not adequately atone for any loss that he is likely to suffer.

The primary objective of the grant of injunctions is to preserve the status quo, until the rights of the parties have been determined in the action as was held in the case of ***Abad vs. Turning & Metals Limited***[9]. Chirwa J. as he then was, in the case of ***Ndove vs. National Educational Company Zambia Limited***[5], cited the observation of Colton L.J. in the case of ***Preston vs. Luck***[10] as follows: -

> ***"This is an application for an interlocutory injunction, the object which is to keep things in status quo, so that if at the hearing the Plaintiffs obtain a Judgment in their favour, the Defendants will have been prevented from dealing in the meantime with the property in such a way as to make that Judgment ineffectual."***

This Court is of the view that where there was doubt as to whether damages would be adequate or not in an application for an injunction, the Court ought to consider the balance of convenience of the parties concerned. In the case of ***Zimco Properties vs. Lapco Limited***[6], the Supreme Court held that, where the convenience favoured retaining the status quo, in so far as it related to the subject matter of the issue to be tried upon, in such

circumstances an interlocutory injunction was a proper way of protecting the parties' interest.

This Court also places reliance on the case of ***Turnkey Properties Limited vs. Lusaka West Development Limited and Others***[2] for the position that an interlocutory injunction was appropriate for the preservation of a particular situation pending trial, as long as it was not being used as an instrument to take or create an advantage of one party over the others pending trial.

The question also for determination is whether the Plaintiff is, under the present circumstances, entitled to an Order for Specific Performance, a declaration that the Contract of Sale of land executed between the Defendants is null and void in so far as it includes the Plaintiff's proposed subdivision of 290 square metres and damages for trespass. In other words, has the Plaintiff demonstrated a clear right to relief or even the likelihood of success at trial?

The Supreme Court in the case of ***Ubuchinga Investments Limited vs. Teklemicael Menstab and Semhar Transport & Mechanical Limited***[11] noted and agreed with other authorities cited that the serious question test takes precedence over the balance of convenience test and quoted from the learned authors of ***McGill Law Journal***[5] where it was stated as follows:-

> ***"The best test to adjudicate on an application for an interlocutory injunction is always whether the right the Applicant seeks to***

protect does indeed seem to exist; the balance of inconvenience test is merely second best."

This view seems to have been taken from Lord Diplock in ***American Cyanamid***[4] case, where it was stated that: -

"Unless the material available to the Court at the hearing of the application for an interlocutory injunction fails to disclose that the Plaintiff has any real prospects of succeeding in his claim...the Court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought."

It is trite law that it is not part of the Court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.

Laddie, J. held a similar view in ***Series 5 Software vs. Phillip Clarke***[12] that: -

"Applications for interlocutory injunctions cannot be mini trials of disputed issues. Rather, the Court would have to reduce the risk of granting a decision which will ultimately produce an unjust result."

This is because these are matters subject to the main trial. It is not part of the Court's duty at this stage to determine difficult questions of law which call for detailed arguments and mature considerations.

Lord Denning in ***Fellowes and Son vs. Fisher (1976),***[13] observed that: -

> ***"There are cases where it is urgent and imperative to come to a decision. The affidavits may be conflicting, the questions of law may be difficult and call for detailed consideration. Nevertheless the need for immediate decision is such that the Court has to make an estimate of the relative strength of each party's case. If a plaintiff makes out a prima facie case, the Court may grant an injunction. If it is a weak case, or it may be met by a strong defence, the Court may refuse the injunction. Sometimes it means that the Court virtually decides the case at that stage. At other times it gives the parties such good guidance that the case is settled. At any rate, 99 cases out of 100, the matter goes no further."***

On the foregoing, it is the view of this Court that the Plaintiff has not satisfied, on a preponderance of probability, all the ingredients set by the authorities cited above for the grant of an interlocutory injunction. There exists, in the considered view of this Court, a possibility that the Defendants may put up a strong defence. The issue is who is entitled to beneficial ownership of the land in dispute and whether the contract of sale between the Defendants is null and void. This can only be properly addressed with the opportunity of the Parties herein adducing their respective evidence at the trial before this Court. Indeed, in the event that the Plaintiff is to be unsuccessful at the trial of this matter, the Plaintiff has not undertaken to pay damages that may be occasioned to the

Defendants by the order of interlocutory injunction being sought here.

In the case of ***Harman Pictures NK. vs. Osborne***[14] it was held that:-

> ***"...the case must be considered on the basis of fairness, justice, and common sense."***

On the facts of this case and for the foregoing reasons, I find that this is not a proper case in which to exercise my discretion under ***Order XXVII Rule 1*** of the ***High Court Rules***[1]. Accordingly, the Plaintiff's application is dismissed for lack of merit. The costs occasioned hereof are in the cause.

Leave to Appeal is granted.

Delivered at Lusaka this 13th day of February, 2018.

P. K. YANGAILO
HIGH COURT JUDGE