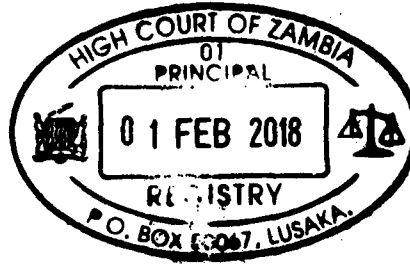


**IN THE HIGH COURT OF ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA**  
(Civil Jurisdiction)

**2017/HP/0788**



BETWEEN:

**LILLIAN NACHIBI MWAMBA MUYUNDA**

**PLAINTIFF**

AND

**CHRISTINA SHULA**

**DEFENDANT**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 1<sup>st</sup> DAY OF  
FEBRUARY, 2018**

*For the Plaintiff : Mr Lungu, Suba Tafeni and Associates*

*For the Defendant : Ms Gambi, Legal Aid Counsel, Legal Aid Board*

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## **R U L I N G**

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CASES REFERRED TO:

- 1. American Cyanamid CO V Ethicon Limited 1975 1 ALL ER 504**
- 2. Shell and BP Zambia Limited V Conidaris 1975 ZR 174**
- 3. Wesley Mulungushi V Catherine Bwale Mizi Chomba 2004 ZR 96**
- 4. Mutuwila Farms Limited V Johan Nortje SCZ No 28 of 2010**
- 5. Maureen Mwape V Margaret Chikwanda 2011/HP/1938.**

LEGISLATION REFERRED TO:

- 1. The High Court Rules, Chapter 27 of the Laws of Zambia**
- 2. The Rules of the Supreme Court, 1999 edition**

This is a ruling on an application made by the Plaintiff for an order of interim injunction, pursuant to Order 27 Rule 1 of the High Court Rules, Chapter 27 of the Laws of Zambia, as read with Order 29 Rule 1 of the Rules of the Supreme Court of England, 1999 edition. Counsel relied on

the amended affidavit filed in support of the application on 16<sup>th</sup> October, 2017, and the affidavit in reply dated 24<sup>th</sup> November, 2017, as well as the skeleton arguments filed on 2<sup>nd</sup> November, 2017.

It was Counsel's submission that there are a plethora of authorities that provide for what must be satisfied before an order of injunction can be granted. He named these as being, firstly that the Applicant's right to relief is clear, secondly that the injunction is necessary to protect the Applicant from irreparable damage, and lastly that the Applicant's need is greater when weighed against the Respondent's corresponding need.

Counsel stated that the Plaintiff had met these requirements, adding that the case of **AMERICAN CYNAMID CO V ETHICON LIMITED 1975 1 ALL ER 504** held that in determining whether the Applicant has clear right to relief, the court need only be satisfied that the Applicant's claim is not frivolous or vexatious, and that there is a serious issue to be tried. That the Applicant in this matter had not only shown that she is the bonafide owner of the property in question by exhibiting the title deed to the property, she had also shown in the affidavit in reply that the Defendant had built on her property. Therefore there is a serious issue to be tried.

As regards the second requirement, Counsel stated that it is trite that where a dispute involves land, irreparable damage is presumed because land cannot adequately be atoned for by the payment of damages, and the claim in this matter is for land.

Further in submission, Counsel stated that the Plaintiff being the bonfide owner of the land, has a greater need to have the land prevented from being disposed of, as opposed to the Defendant's corresponding need, as she had erroneously built of the Plaintiff's property. Counsel prayed that the injunction be granted.

Counsel for the Defendant in response stated that they relied on the affidavit in reply filed on 24<sup>th</sup> November, 2011.

There was no reply.

I have considered the application. Order 27 Rule 1 of the High Court Rules, chapter 27 of the Laws of Zambia, pursuant to which the application was made provides that;

***“1. 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”.***

Order 29 Rule 1 of the Rules of the Supreme Court, 1999 edition on the other hand states that;

***“An application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter, whether or not a claim for the injunction was included in that party's writ, originating summons, counterclaim or third party notice, as the case may be.”***

The amended affidavit filed in support of the application on 16<sup>th</sup> October, 2017 shows that the Plaintiff is the registered owner of Plot L/18223/M Lusaka, and was issued a certificate of title in respect of the property on 1<sup>st</sup> November, 2012, as shown on exhibits 'LNMM1' and 'LNMM2' to the said affidavit. That the Plaintiff discovered that someone was building on her land and had put a three bedroomed house that appeared to be partly occupied.

It is also deposed in the affidavit that enquires and verification at the Ministry of Lands revealed that the Defendant had constructed on the Plaintiff's property, and the Commissioner of Lands wrote to the Defendant informing her of the same. However she had continued developing the property with impunity. That as a result of the structures put up by the Defendant, the Plaintiff has been prevented from developing the property, and this will lead to her suffering the inevitability of price escalation of building materials and related costs, as well as the cost of repossession and demolition of the structures put up.

The Plaintiff further deposes that there is a possibility that the Defendant may dispose of the property in issue, by either selling it, leasing it or

mortgaging it, which will result in irreparable damage being suffered by her.

The Defendant in the affidavit in reply dated 22<sup>nd</sup> November, 2017, which should have been an affidavit in opposition, deposes that the Plaintiff's plot is not the same as hers which is L/18222/M. Exhibited to the affidavit is a certificate of title for L/18222/M. The Defendant's contention is that she is not in occupation of the Plaintiff's plot, but hers, and she denies the assertion that verification was done by the Ministry of Lands which showed that she had built on the Plaintiff's land, or that the Ministry of Lands wrote to her and informed her of its findings. She also denies the claim that the Plaintiff will incur costs as a result of her having erroneously built on the Plaintiff's property.

The affidavit in reply exhibits 'LNMM1' a report done by the Chief Survey Examiner addressed to the Surveyor General showing that the owner of L/18222/M had built on L/18223/M.

The Plaintiff in the skeleton arguments referred to the case of **MUTUWILA FARMS LIMITED V JOHAN NORTJE SCZ No 28 of 2010** where the Supreme Court held that ***"one of the cardinal principles in the grant of an interlocutory injunction is that the applicant must show inter alia that he has an arguable case, and that if he is not granted the relief, he will suffer from irreparable injury that cannot be atoned for by damages"***.

Further reference was made to the case of **SHELL AND BP ZAMBIA LIMITED V CONIDARIS 1975 ZR 174** which held that the court will generally not grant an interlocutory injunction, unless the right to relief is clear, and the injunction is necessary to prevent irreparable injury, which cannot be atoned for by damages. That the above cases endorsed

the general principles laid down in the case of **AMERICAN CYNAMID CO V ETHICON LIMITED 1975 1 ALL ER 504**. That in that case it was stated with regard to considering where the balance of convenience lies when granting an injunction, that the Plaintiff's need for protection must be weighed against the corresponding need of the Defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights, for which he could not adequately be compensated under the Plaintiff's undertaking in damages if the uncertainty were resolved in the Defendant's favour at trial.

From the above authorities, it can be seen that the criteria to be considered when granting interim injunctions can be summarized as follows;

1. *Is there a serious issue to be tried?*
2. *If yes, would damages be an adequate remedy?*
3. *If yes, the injunction should not be granted. If no then;*
4. *Where does the balance of convenience lie?*

Thus the first issue is whether there is a serious issue to be tried in this matter. It has been seen from the affidavit evidence before the court that there is indeed a serious issue to be tried, as the Plaintiff claims that the Defendant has built on her land. The next question is whether damages would be an adequate remedy if the Plaintiff were to succeed on her claim? Counsel for the Plaintiff argued that it is trite that in matters involving land there is a presumption that damages may not be adequate compensation.

Reliance was placed on the case of **WESLEY MULUNGUSHI V CATHERINE BWALE MIZI CHOMBA 2004 ZR 96**, where it was stated

that ***“land is a very valuable commodity whose loss may not adequately be atoned in damages”***. That this position was reiterated in the case of **MAUREEN MWAPE V MARGARET CHIKWANDA 2011/HP/1938**.

To support the position further, reliance was also placed on Order 29/1/3 of the Rules of the Supreme Court, 1999 edition which provides that damages may also not be sufficient if the wrong is irreparable, or outside the scope or pecuniary compensation or if damages would be very difficult to assess.

From these authorities it can be seen that damages may not adequately atone for loss of land, and as this case involves land, the application for an injunction should weigh in favour of the granting of the injunction, especially that it has been demonstrated that the Plaintiff is the bonafide owner of the land in dispute. In fact this is where the balance of convenience lies.

Having found so, I find that this is a proper case for the granting of the injunction, and I so order that the ex-parte order of interim injunction granted on 17<sup>th</sup> October, 2017, restraining the Defendant by herself, agents, servants or whomsoever from disposing of, selling, leasing or mortgaging Plot No L/18223/M Lusaka, or any part thereof as well as from continued construction of any structures, whatsoever on the said property, and engaging in environmental degradation of the said land is confirmed, until final determination of the matter.

The Defendant having filed her defence and counterclaim, the following shall be the orders for directions;

1. That the Plaintiff shall file a reply and defence to the counterclaim within fourteen days from today.

2. That the Defendant shall within fourteen days thereafter file a reply to the defence to the counterclaim.
3. That there shall be discovery by list within fourteen days of the Defendant filing a reply to the counterclaim.
4. That there shall be inspection of documents within fourteen days of the discovery.
5. That the parties shall file their respective bundle of documents and bundle of pleadings within fourteen days of the inspection.
6. That there shall be liberty to apply by either party.
7. The matter shall come up for status conference on 30<sup>th</sup> April, 2018 at 08:45 hours.

Costs shall be in the cause, and leave to appeal is granted.

**DATED THE 1<sup>st</sup> DAY OF FEBRUARY, 2018**

S. Kaunda  
**S. KAUNDA NEWA**  
**HIGH COURT JUDGE**