

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

2017/HP/1818

BETWEEN:

AARON KAMALONDO

AND

FRED KAFULA



PLAINTIFF

DEFENDANT

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 30th DAY OF
JANUARY, 2018**

For the Plaintiff : Mr G. Lungu, Muleza Mwiimba and Company

*For the Defendant : Mrs M. Marabesa Mwenya, Legal Aid Counsel, Legal Aid
Counsel, Legal Aid Board.*

R U L I N G

CASES REFERRED TO:

- 1. *Shell and BP Zambia Limited V Conidaris and others 1975 ZR 174***
- 2. *American Cyanamid V Ethicon Limited 1975 1 ALL ER 504***

LEGISLATION REFERRED TO:

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

This is a ruling on an application for an order of injunction, made pursuant to Order 27 of the High Court Rules, Chapter 27 of the Laws of Zambia. Counsel relied on the affidavit sworn in support of the application, and filed on 19th October, 2017. He prayed that the application be granted.

Counsel for the Defendant stated that they strongly opposed the application, and relied on the affidavit in opposition filed on 25th October, 2017, as well as the skeleton arguments filed on the same date. Counsel's submission was that in granting the order of injunction, the court should take into account firstly that the property in issue belongs to the Defendant, and that the Plaintiff did not take possession of the said property in terms of occupying it, and lastly that the Plaintiff was in rental arrears of over three months, and the Defendant as landlord by law was entitled to take possession of the property.

It was further Counsel's argument that the Plaintiff's claims could be atoned for by damages, and therefore this was not a proper case in which the injunction should be granted. On that basis, Counsel prayed that the ex-parte order of injunction should be discharged.

In reply, Counsel for the Plaintiff submitted that there is procedure for evicting a defaulting tenant, and no notice had been given to the Plaintiff notifying him of the breach. It was also submitted that the Defendant had contradicted himself by stating in one breath that the Plaintiff did not take possession of the property, and in another that he had accumulated rental arrears. It was prayed that the ex-parte order of injunction be confirmed.

I have considered the application. It was made pursuant to Order 27 of the High Court Rules, Chapter 27 of the Laws of Zambia which 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”.

The case of ***AMERICAN CYANAMID V ETHICON LIMITED 1975 1 ALL ER 504*** laid down the principles that ought to be considered when granting injunctions, which are summarized as follows;

1. *Is there a serious issue to be tried?*

If the answer to that question is yes;

2. *Would damages be an adequate remedy for the injured party if the injunction is or is not granted?*

3. *If not where does the balance of convenience lie?*

In this case, the Plaintiff contends that after he paid the Defendant K13, 000.00 as part of the rentals for three months for the shop, at K5, 000.00 a month, the Defendant left the country, and he could not access the shop. That the said monies paid would be for the period up to May, 2017 when works on the shop would be completed. The Plaintiff further avers that as the Defendant was out of the country, the commencement of the works delayed, and were only commenced in mid April 2017 when the Plaintiff returned, and it was agreed that the rentals would run up to June 2017 instead of May, 2017.

It is also deposed that K56, 615.00 was spent on the renovations, and in August, 2017 the Defendant asked the Plaintiff when he would start business, and he had responded that after a week. He then left for a Dar-es-Salaam and bought goods worth K120, 000.00, but on his return he learnt that the Defendant had changed the locks on the doors of the shop, and was told that the Defendant had put another tenant in the shop as he had delayed to occupy it.

The Defendant in the affidavit in opposition states that contrary to the assertions by the Plaintiff, the Plaintiff was in fact given the keys to the shop when he paid for it, and the Defendant's absence had nothing to do with the Plaintiff accessing the shop. That the Plaintiff only started the renovations in May, 2017 and not April, 2017 as agreed, due to lack of funds by the Plaintiff. His assertion is that the renovations cost K42, 000.00, and not K56, 615.00 as alleged, and that he would refund the K42, 000.00.

The Defendant also deposes that he had asked the Plaintiff when he would occupy the shop, as he was losing out on income, and that he had told him that he would put another tenant in the shop if he did not pay the rentals.

From affidavit evidence it is clear that there is indeed an issue to be tried, contrary to the assertions by the Defendant. Thus the next question is whether damages would be an adequate remedy? The Plaintiff in the affidavit in support of the application has shown that the amounts spent on the renovations can be ascertained, and therefore damages would be an adequate remedy.

The Defendant relied on the case of **SHELL AND BP ZAMBIA LIMITED V CONIDARIS AND OTHERS 1975 ZR 174** where it was held that **"a court will generally 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.** As the damages in this case are ascertainable and the Plaintiff has not shown that he will suffer irreparable injury if the injunction is not granted, and taking into account the fact that the Plaintiff did

not actually occupy the shop, as he even stated so in the affidavit in support of the application, this is not a proper case in which the injunction granted ex-parte should be maintained, and I accordingly discharge the said injunction. Costs shall be in the cause, and leave to appeal is granted.

I had on 9th November, 2017 issued orders for directions, and directed that the matter comes up for status conference on 2nd March, 2018 at 08:30 hours, and the matter shall accordingly come up on that day.

DATED THE 30th DAY OF JANUARY, 2018

S. Kaunda

**S. KAUNDA NEWA
HIGH COURT JUDGE**