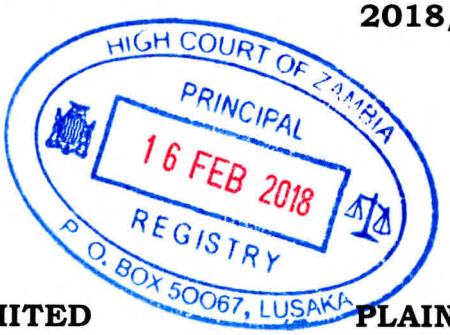
IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2018/HP/0020



BETWEEN:

MM INTEGRATED STEEL MILLS LIMITED **PLAINTIFF**

AND

AFRICAN TRADING LIMITED **1st DEFENDANT**
(Trading as Lake Petroleum)

CARDINAL DISTRIBUTORS LIMITED **2nd DEFENDANT**

LUSAKA CITY COUNCIL **3rd DEFENDANT**

ATTORNEY GENERAL **4th DEFENDANT**

BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 16th DAY OF FEBRUARY, 2018

For the Plaintiff : *Mr W. Muhanga, AKM Legal Practitioners*

For the 1st and 2nd Defendants : *Mr P.Songolo, Philsong and Partners*

For the 3rd Defendant : *No appearance*

For the 4th Defendant : *No appearance*

RULING

CASES REFERRED TO:

1. ***Shepard Homes Limited V Sandham 1971 CH 340***
2. ***Shell and BP V Connidaris and others 1975 ZR 174***
3. ***American Cyanamid V Ethicon 1975 AC 396***
4. ***Societe Francoise D'applications Commerciales Et***
5. ***Industries S.A.R.L Electronic Concepts Limited 1976 1 WLR 51***
6. ***Harton Ndove V Zambia Educational Company Limited 1980***

ZR 184

7. ***Turnkey Properties Limited V Lusaka West Development Limited and others 1984 ZR 84***
8. ***Cayne V Global Natural Resources 1984 2 ALL ER 225***
9. ***Garden Cottage Foods Limited V Milk Marketing Board 1984 A.C 130***
10. ***Intercontex V Schmidt 1988 F.S.R 574***
11. ***Zambia State Insurance Corporation Limited V Dennis Muliokela 1990 ZR 18***
12. ***Hilary Bernard Mukosa V Michael Ronaldson 1993-1994 ZR 26***
13. ***Yengwe Farms Limited V Masstock Zambia Limited, Commissioner of Lands and the Attorney General 1999 ZR 65***
14. ***Wesley Mulungushi V Catherine Bwale Mizi Chomba 2004 ZR 96***
15. ***Limpics V Mawere and others Appeal No 121 of 2006 (unreported)***
16. ***Hongling Xing Xing Building Company Limited V Zamcapital Enterprises Limited 2010/HP439***
17. ***Michael Chilufya Sata V Chanda Chimba III, Zambia National Broadcasting Corporation, Muvi TV Limited, Mobi TV International Limited 2011 Vol 2 ZR 445***
18. ***Stripes Zambia Limited V Cinderella Investments Limited and Sana Industries Limited Appeal No 200/2012***

This is a ruling on application made by the Plaintiff for an order of interim injunction, made pursuant to Order 29 Rule 1 of the Rules of the Supreme Court, 1999 edition. The injunction was granted ex-parte on 9th January, 2018 and made returnable on 23rd January, 2018. On that date the matter was adjourned to 5th February, 2017, to enable Counsel for the Plaintiff to peruse the affidavit in opposition that had been filed the previous day, and which was quite bulky, and then obtain instructions thereon.

When the matter came up on 5th February, 2018, only Counsel for the 1st and 2nd Defendants was before the court, and he asked to proceed with the application, which was granted. It was Counsel's submission that they opposed the application, and relied on the affidavit in opposition filed on 22nd January,

2018, together with the skeleton arguments and abstract of authorities, filed on 23rd January, 2017.

Counsel's contention was that the Plaintiff's case is weak, and has no prospects of success at the trial. He went on to state that even assuming that the Plaintiff's right to relief is clear, which they denied, it had come to court late in the day. Therefore the ex-parte order of injunction that was granted, should be discharged, so that the 1st Defendant could continue with its construction.

I have considered the application. The affidavit in support of the application shows that the Plaintiff is the registered owner of Subdivision 1 of Subdivision A of Farm No 387a, also known as property No F/387a/A/1, and was issued certificate of title no 203790 on 10th December, 2012, which is exhibit 'BZ1' to the said affidavit. That the land in question measuring 12.6720 hectares was acquired from the then title holder Lusaka Building and Transport Limited.

However the 1st Defendant is developing the land at properties known as subdivision 86 to 90 of Subdivision 1 of subdivision A of Farm No 387a, also known as property numbers F/387a/A/1/86, F/387a/A/1/87, F/387a/A/1/88, F/387a/A/1/89, and F/387a/A/1/90. That these properties are all situated within the Plaintiff's property number F/387a/A/1. Attached to the affidavit as exhibit 'BZ2(a)-(c)' is a picture of a notice on a billboard erected on the site, as well as the construction activity undertaken in November, 2017.

That a search conducted at the Ministry of Lands shows that the 2nd Defendant is the owner of the properties F/387a/A/1/86, F/387a/A/1/87, F/387a/A/1/88, F/387a/A/1/89, and F/387a/A/1/90. It is further deposed in the affidavit, that when the Plaintiff acquired the property the Great East Road passed through the property, and that in or about the years 2014-2015, the State through the Road Development Agency (RDA), without the consent of the Plaintiff constructed a bituminous road through the Plaintiff's land, which road has not been named, and the Plaintiff erected a wall fence around some of its structures and buildings for security reasons. Then in or around May, 2017,

the Plaintiff discovered that the 3rd Defendant, without its consent erected a bill board within the Plaintiff's premises, which is exhibited as 'BZ2(a)-(c)' to the affidavit.

That the Plaintiff did not react to the said billboard, as it referred to Stands 86, 87, 88, 89 and 90/1/A/37a measuring 4, 077m2 in extent, which was small, and which it understood to mean that the 3rd Defendant was merely using the area to advertise the said notice to the public, even though it did not obtain the Plaintiff's authority to do so. Then in November, 2017, the Plaintiff discovered that a holding fence made out of corrugated steel sheets had been constructed next to where the billboard was erected, and there was excavation being done for a proposed filling station under the brand name Lake Petroleum, which developments were found as being undertaken by the 1st Defendant.

It is further averred in the affidavit that upon the Plaintiff conducting further enquiries, it discovered that the notice that the 3rd Defendant had put up was meant for the land in question under construction, which land is situate in its property F/387a/A/1. Further that there were newly created plots known as F/387a/A/1/86, F/387a/A/1/87, F/387a/A/1/88, F/387a/A/1/89, and F/387a/A/1/90, as shown on exhibit 'BZ3(a)-(j). That the said leases were registered as direct leases from the President of the Republic of Zambia to five different individuals on 13th November, 2014, and that certificates of title were issued for all the said properties on the same day by officers of the 3rd and 4th Defendant, without the Plaintiff's knowledge.

It is also averred that the 2nd Defendant acquired the five properties from the five different individuals on the same day, being on or about 27th May, 2017 for the same consideration of K100, 000.00 each, and the certificates of title were issued to the 2nd Defendant on the same day. Further that all the five properties had different descriptions from the ones on the LCC Notice to the public, and had been created inside the Plaintiff's property F/387a/A/1/90.

That the 3rd and 4th Defendants had no authority whatsoever to create, allocate, and alienate the said subdivisions inside the Plaintiff's land, and the same was therefore fraudulent, illegal, null and void. It is also deposed that efforts to engage the 3rd Defendant had gone unanswered, as shown on exhibit 'BZ5', while the 4th Defendant had given unsatisfactory responses.

In the skeleton arguments, reference is made to Order 27 of the High Court Rules, Chapter 27 of the Laws of Zambia, as well as Order 29 of the Rules of the Supreme Court of England, 1999 edition, as the law providing for the granting of injunctions. That in this case there is a question of who owns the property in dispute, and the current status of the property should be preserved until the matter of disposed of. The case of ***TURNKEY PROPERTIES V LUSAKA WEST DEVELOPMENT COMPANY LIMITED, B.SK CHITI (sued as Receiver) 1984 ZR 85,*** where it was held that ***"an interlocutory injunction is appropriate for the preservation or restoration of a particular situation pending trial",*** is relied on to this effect.

The Plaintiff also submits that it will suffer irreparable damage which cannot be atoned for damages, as the 1st Defendant is already in the process of erecting structures on the said land in dispute, which if completed will change the structure of the land, and which may be in contrast with what the Plaintiff intends to use the land for. Reference is made to the case of ***LIMPICS V MAWERE AND OTHERS APPEAL No 121 of 2006 (unreported)*** in which the Supreme Court observed that;

> ***"before we leave this matter, we wish to say that from the pictures which were shown in the motion that was in this appeal, the appellant has expended a lot of money on the property in question. To allow the respondent to take the property in question with massive improvements made by the appellant will amount to unjust enrichment of the respondents. Equity will not allow that. We, therefore order that the improvements be assessed by the Deputy***

Registrar and the appellants be paid by the respondent the amount worth of the improvements".

That therefore, the court should maintain the status quo by granting the injunction. The Plaintiff also submits that the courts will generally not grant injunctions unless the right to relief is clear, and unless the injunction is necessary to protect the Plaintiff from irreparable injury. The cases of ***SHELL AND BP V CONNIDARIS AND OTHERS 1975 ZR 174, ZAMBIA STATE INSURANCE CORPORATION LIMITED V DENNIS MULIOKELA 1990 ZR 18*** and ***TURNKEY PROPERTIES V LUSAKA WEST DEVELOPMENT COMPANY LIMITED, B.SK CHITI (sued as Receiver) 1984 ZR 85,*** are relied on as authority.

It is argued that this matter involves land, and it is trite that the law presumes that damages cannot compensate for the loss of the land, as the case of ***WESLEY MULUNGUSHI V CATHERINE BWALE MIZI CHOMBA 2004 ZR 96,*** held that ***"the matter in dispute is land, a very valuable commodity whose loss may not adequately be atoned in damages".*** Citing the case of ***MICHAEL CHILUFYA SATA V CHANDA CHIMBA III, ZAMBIA NATIONAL BROADCASTING CORPORATION, MUVI TV LIMITED, MOBI TV INTERNATIONAL LIMITED 2011 VOL 2 ZR 445,*** the Plaintiff notes that the granting of injunctions is a discretionary remedy, but asks that the same be exercised in its favour, as it may suffer irreparable damage if it is not granted, as the 1st Defendant will continue the construction on the property, and the Plaintiff if successful in the matter, may not be able to enjoy the fruits of its judgment.

Further, that the injunction should be granted as this is where the balance of convenience lies, and the case of ***HONGLING XING XING BUILDING COMPANY LIMITED V ZAMCAPITAL ENTERPRISES LIMITED 2010/HP439*** is relied on. That the court in that case when considering the balance of convenience stated that this is done in three stages; the first consideration being whether a

claimant would be adequately compensated if they were to succeed at trial, and the defendant would be able to pay the damages. That if no, the injunction should be granted, however strong the claimant's case.

The second is whether if the injunction is granted, but the defendant succeeds at trial, would the defendant be adequately compensated by the claimant, and would the claimant be able to pay the damages? That if there is doubt as to the respective remedies in damages available to either party or to both, then the court should consider where the balance of convenience lies. That the cases of ***SHELL AND BP V CONNIDARIS AND OTHERS 1975 ZR 174*** and ***TURNKEY PROPERTIES V LUSAKA WEST DEVELOPMENT COMPANY LIMITED, B.SK CHITI (sued as Receiver) 1984 ZR 85*** held that the balance of convenience lies where the right to relief is clear, where there is existence of arguable issues, and where damages would be inadequate compensation.

That in this case the balance of convenience lies with the Plaintiff, as the 1st Defendant will have recourse from the 2nd Defendant for any losses that it may incur, and the 3rd Defendant will have recourse from either the 3rd or 4th Defendant who illegally allocated it the land, as there was no valid re-entry of the land before it was allocated to the five individuals, but the Plaintiff who owns the land may not adequately be compensated by money.

The 1st and 2nd Defendants in opposing the application filed the affidavit in opposition on 22nd January, 2018, in which it is deposed that the 2nd Defendant was approached by Irfan who informed it that Kalota Robinson was selling property number F/387a/A/1/86. That the said Kalota Robinson informed the 2nd Defendant that four of his friends who owned the adjoining properties in the same area were also selling them. The affidavit in opposition further states that Robinson Kalota introduced the 2nd Defendant to Given Junior Lwenshi who was selling F/387a/A/1/87, Humphrey Kapapula who was selling F/387a/A/1/88, Geoffrey Mulenga who was selling

F/387a/A/1/89, and Trevor Mulenga Chisha who was selling F/387a/A/1/90, all at K100, 000.00 each.

It is averred that the 2nd Defendant conducted its own due diligence at the Ministry of Lands and Natural Resources, where it found that the five persons did in fact own the respective properties, and were issued certificates of title which were exhibited as 'VSNAP1(a) to (e)' to the affidavit in opposition. Further that a visit to the 3rd Defendant showed that it had it in its quest to maximize land use identified the land in question, and proposed that five residential properties be created on it, which proposal was referred to the Plans Works, Development and Real Estate Management Committee. The said Committee approved the proposal and it was taken to the full council meeting which approved the same on 16th September, 2014, as shown on exhibit 'VNSAP2'.

Further that the acting Town Clerk on behalf of the 3rd Defendant wrote to the Commissioner of Lands informing him of the decision and attaching the layout plan, which were exhibited as 'VNSAP3' and 'VNSAP4'. The Commissioner of Lands approved the same, as shown in the letter exhibited as 'VNSAP5', and that office issued invitations to treat to the five individuals which were exhibited as 'VNSAP6(a)-(e)'. The five individuals then paid the consideration fees as seen on exhibits 'VNSAP7(a)-(e)', and were issued the offer letters marked 'VNSAP8(a)-(e)', and subsequently certificates of title.

It is further stated in the affidavit in opposition that the 2nd Defendant then purchased the five properties after contracts of sale,, consents to assign and assignments were executed, and the statutory outgoings including property transfer tax were paid to the Zambia Revenue Authority, as shown on exhibits 'VNSAP9(a)-(e)','VNSAP10(a)-(e)','VNSAP11(a)-(e)',and'VNSAP12(a)-(e)'. Thereafter as shown on exhibit 'VNSAP13(a)-(e)', the 2nd Defendant obtained certificates of title to the properties, and sold the property to the 1st Defendant as shown on exhibits 'VNSAP14(a)-(e)'.

The 1st and 2nd Defendants also depose that the 1st Defendant on purchasing the property applied to change the land use from residential to commercial, and paid for the same, as shown on exhibit 'VNSAP15', and that the 3rd Defendant in compliance with the law issued a public notice on 8th May, 2017 which was placed on the properties in question, as reflected on exhibit 'VNSAP16 (a)-(d)'. The Plaintiff however ignored or neglected to file its objections with the 3rd Defendant, within a period of thirty days from 8th May, 2017, despite the notice being put in a conspicuous place. That in the meantime the 1st Defendant applied to the Zambia Environmental Management Agency (ZEMA) to construct a filling station, which was approved, as shown on exhibit 'VNSAP18', and the 3rd Defendant on 24th August, 2017 wrote the letter of no objection 'VNSAP19' to the 1st Defendant.

Then on 12th October, 2017, the Energy Regulation Board (ERB) wrote 'VNSAP20' to the 1st Defendant approving the construction of the filling station, and the RDA wrote 'VNSAP21', to the 1st Defendant referring the construction of the filling station to the 3rd Defendant. The same was granted by the 3rd Defendant on 25th October, 2017, as shown on exhibit 'VNSAP22'.

That the Plaintiff only wrote to the 3rd Defendant and copied ZEMA and the Commissioner of Lands that the land in question was a road reserve bordering its plot on the eastern direction, and was the only access to its plot. Exhibit 'VNSAP23' is the said letter. That the Plaintiff obtained the ex-parte order of injunction based on half-truths, as while the RDA has constructed a road passing through or next to the Plaintiff's land, the Plaintiff deposes that the only access to its land is where the 1st Defendant owns the five plots that were created on the eastern side, and thereby creating an impression that it has been boxed in, when this is not the truth. That exhibit 'VNSAP24(a)-(c)' are pictures of the unmarked access road out of Great East Road into the Plaintiff's property.

It is also deposed that after the 1st Defendant has spent a lot of money on acquiring the land, and complying with all the statutory permissions and obtaining licences, and has started developing the land, the Plaintiff now claims ownership of the property, and therefore the allegations of fraud by the Plaintiff cannot stand. That the land in question was state land, which the Plaintiff called a road reserve, and which was re-planned in 2014, and therefore the Plaintiff has lost nothing. Further that as the Plaintiff in the statement of claim states that damages would be an adequate remedy, the injunction should not be granted.

In the skeleton arguments filed, the 1st and 2nd Defendant submit that the law is settled that an applicant for an injunction must demonstrate their ability to honour an undertaking as to damages, and the case of ***INTERCONTEX V SCHMIDT 1988 F.S.R 574 cited with approval in the book Commercial Litigation: Pre-emptive Remedies, by Ian S. Goldrein, K.H.P Wilkinson and M. Kershaw*** is authority. That where no such undertaking is made in an affidavit in support of the application, the court is at large to doubt the applicant's ability to meet the same.

Further that the applicant in making the application is under an obligation to make full and frank disclosure of all the material facts relevant to the application, as stated in paragraph 29/1A/24 of the Rules of the Supreme Court of England, 1999 edition. That the Supreme Court in the case of ***STRIPES ZAMBIA LIMITED V CINDERELLA INVESTMENTS LIMITED AND SANA INDUSTRIES LIMITED APPEAL No 200/2012*** discussed the same when it stated that ***"...the party applying for an injunction must have clean hands; ie they must have acted properly themselves. They must disclose all relevant facts to the court including any matters favourable to the other side. This is important, as failure to do so can result in the injunction being set aside, together with an order to pay costs of the other party and damages for any harm caused by the injunction".***

The argument is that the Plaintiff has not come to court with clean hands as the letter exhibited in paragraph 26 of the affidavit in support of the application, 'BZ5', shows that the RDA has constructed a road passing through or next to the Plaintiff's land, which is yet to be named, which it did not object to, and that the only access that it has to the land lies on the western direction of the land where the 3rd Defendant created five plots, and thereby suggesting that it has been boxed in, when this is in fact not true. Therefore based on the above case, the court should discharge the ex-parte order of injunction, as it was obtained on half-truths.

The 1st and 2nd Defendants also argue that the dispute is over a piece of land that was kept as a road reserve by the 3rd Defendant as the planning authority, which is confirmed by exhibit 'BZ5' to the affidavit in support of the application, before it was re-planned. That even the pictures exhibited to the affidavits show that the area is the boundary of the Plaintiff's land as confirmed not only by the Plaintiff's wall fence, but also the Plaintiff's neighbours who have recognized the area as a road reserve. That after Chirugula area was moved further west as admitted by the Plaintiff in 'BZ5', a sizeable piece of land remained on the western side, and any member of the public including the Plaintiff was at liberty to apply for by way of extension of their land. It is also argued that the Plaintiff had no right of first refusal to the land, on the premise that it owns the land next to the road reserve.

That even if that were the position, which is denied, it took the Plaintiff nearly six years from the time it acquired the land to apply for an extension of the said land to reach the disputed land after the 3rd Defendant created the properties. Therefore the argument that the land belonged to the RDA was misplaced.

The 1st and 2nd Defendants also argue that an injunction is an equitable remedy, and it is trite that equity aids the vigilant. The Plaintiff slept on its rights for six years, and seeks an injunction six years later. That the main relief being sought in this matter is cancellation of the 2nd Defendant's title deed on

the basis of fraud. That contrary to the allegations, the land in question was initially a road reserve on the eastern boundary of the Plaintiff's land, as admitted by the Plaintiff in 'BZ5'. Later the 3rd Defendant as a planning authority re-planned the area, and created new plots which was approved by the Commissioner of Lands. That the Commissioner of Lands contrary to the assertions by the Plaintiff is not bound by Circular No 1 of 1985, and the case of ***YENGWE FARMS LIMITED V MASSTOCK ZAMBIA LIMITED, COMMISSIONER OF LANDS AND THE ATTORNEY GENERAL 1999 ZR 65*** is authority.

That the creation of these plots was transparent, as could be seen from the documentation exhibited to the affidavit in opposition, evidencing the steps that were followed when creating the five plots. Further that the Plaintiff did not raise any objection to the notice within thirty days of its being put up, and only came to court eight months later, seeking an equitable remedy. This the 1st and 2nd Defendants argue is not the action of a diligent applicant, and refer to page 70 of ***Commercial Litigation: Pre-emptive Remedies which states that "as with all equitable relief, delay is a relevant factor in interlocutory proceedings for injunctive relief: vigilantibus non dormientibus jura subcenient- a plaintiff should not sleep on his rights.***

The case of ***SOCIETE FRANCOISE D'APPLICATIONS COMMERCIALES ET INDUSTRIES S.A.R.L ELECTRONIC CONCEPTS LIMITED 1976 1 WLR 51*** is also relied as authority for this, as well as the case of ***SHEPARD HOMES LIMITED V SANDHAM 1971 CH 340.*** That the Plaintiff seeks to injunct the 1st Defendant from continuing to construct on its own land, having acquired it from the 2nd Defendant that has title deeds to the same. That in asking the court to preserve the status quo in this matter, the Plaintiff neglected to inform the court that when it acquired the land in 2012, the road reserve was still there, and the area was only re-planned in 2014.

Therefore there is no status quo to be maintained, as after re-planning, the land was offered to five persons who sold the same to the 2nd Defendant. Reference is made to the case of ***TURNKEY PROPERTIES LIMITED V LUSAKA WEST DEVELOPMENT LIMITED AND OTHERS 1984 ZR 84*** where it was stated that ***"while it is generally accepted that an interim injunction is appropriate for the preservation or restoration of a particular situation pending trial, it cannot be regarded as a device by which an applicant can attain or create new conditions favourable only to himself, and 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".***

The 1st and 2nd Defendants submit that going by the above case, the question is what status quo should be preserved in this matter? They rely on the case of ***GARDEN COTTAGE FOODS LIMITED V MILK MARKETING BOARD 1984 A.C 130*** where Lord Diplock observed that;

> ***"the relevant status quo to which reference was made in the American Cyanamid case is the state of affairs existing during the period immediately preceding the issue of the writ claiming the injunction, or if there is unreasonable delay between the issue of the writ and the motion for the interlocutory injunction, the period immediately preceding the motion. The duration of that period since the state of affairs last changed must be more than minimal, having regard to the total length of the relationship between the parties in respect of which the injunction is granted; otherwise the state of affairs before the last change would be the relevant status quo."***

It is argued that the status quo to be preserved in this matter is that which existed immediately before the writ was issued, being that the 1st and 2nd

Defendants embarked on the construction activities which have been restrained. That this status quo should be maintained. The 1st and 2nd Defendants have also argued on where the balance of convenience lies in this matter. It is their argument that looking at their submission regarding the status quo, the balance of convenience should tilt in their favour as the 1st and 2nd Defendants who were innocent purchasers for value without notice of the Plaintiff's unsubstantiated claims.

They rely on the case of ***CAYNE V GLOBAL NATURAL RESOURCES 1984 2 ALL ER 225,*** and the case of ***AMERICAN CYANAMID V ETHICON LIMITED 1975 AC 396,*** to this effect. That the list of matters to be taken in account in arriving at where the balance of convenience lies cannot be listed, and that they vary from case to case. However the status quo, relative strength of the cases, and special factors are among the matters to be considered. That in this case when one looks at the relative strength of the case for each of the parties, they will note the fact that the 2nd Defendant is the holder of the title deed to the land in contention, and the allegations of fraud made by the Plaintiff have no hope of success.

That the evidence that the Plaintiff has produced points to the fact that the land in issue was a road reserve before it was re-planned as residential, and offered to five people. Therefore the Plaintiff cannot seek an injunction for land that it does not own, as it has no legal claim to it. That it follows then that the balance of convenience lies with the 1st and 2nd Defendants. Relying on the case of ***HILARY BERNARD MUKOSA V MICHAEL RONALDSON 1993-1994 ZR 26*** where it was held that an injunction will only be granted to a Plaintiff that establishes that he has a good and arguable claim to the right which he seeks to be protected, the 1st and 2nd Defendant argue that this is not the position in this case.

Further that the Plaintiff cannot claim to suffer irreparable loss, as it has never owned the land in issue. That the Plaintiff claims damages for loss of use of the

land as one of its claims in the writ of summons, and it is trite that an injunction is not available where damages would be an adequate remedy, and the case of ***AMERICAN CYANAMID LIMITED V ETHICON 1975 AC 396*** is authority. Lastly that before an injunction is granted it must be demonstrated that there is a serious issue to be tried, as was held in the case of ***HARTON NDOVE V ZAMBIA EDUCATIONAL COMPANY LIMITED 1980 ZR 184.*** That this has not been shown in this case, and the 1st and 2nd Defendant's argue that on that basis the ex-parte order of injunction should be discharged.

In the affidavit in reply, the Plaintiff maintains that the certificates of title for the five properties were wrongly issued, as it owns the said land. That exhibit 'VNSAP3' to the affidavit in opposition relates to a completely different property, being No F/379/A/1unrelated to these proceedings, and relates to a proposed subdivision, while 'VNSAP4' relates to proposed creation of plots. Further that the letters by the Town Clerk to the Commissioner of Lands have not been exhibited, and it is curious that the applications for consent to assign the property, and the actual consent to assign were given on the same day, and that on the same date, the assignments were lodged.

That the reason that the Plaintiff did not react to the placement of the advertisement on the billboards was because different property numbers from its land were placed thereon, and the dispute is on the access road and the five properties being created in the Plaintiff's property, and not about the access road.

I have considered the application, and I am indebted to both Counsel for their very elaborate submissions. Order 27 of the High Court Rules, Chapter 27 of the Laws of Zambia empowers the court to grant orders of injunction. Further Order 29 of the Rules of the Supreme Court of England, 1999 edition also empowers the court to grant injunctions. From the authorities referred to by Counsel for both parties, it is clear that there a number of principles that need to be considered when granting injunctions. A reading of the case of

AMERICAN CYANAMID V ETHICON 1975 AC 396 shows that these principles 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?*

In addressing the first question of whether there is a serious issue to be tried, it can be seen that the Plaintiff in the affidavit in support of the application deposes that it is the owner of the land on which the 3rd and 4th Defendants alienated five plots, which were then offered to five persons. That the five persons on acquiring the said properties sold the land to the 2nd Defendant who in turn sold it to the 1st Defendant.

The 1st and 2nd Defendants on the other hand argue that in fact the land in issue has never belonged to the Plaintiff as it was a road reserved before it was re-planned as a residential area and offered to members of the public. That the Plaintiff had even acknowledged this fact in the letter exhibited as 'BZ5' to the affidavit filed in support of the application, and 'VNSAP23' to the affidavit in opposition. A reading of the said letter shows that the Plaintiff refers to the land in issue as a being a road reserve, and not that it owns the land.

As can be seen from the arguments advanced by the 1st and 2nd Defendant, an applicant for an order of interim injunction must give full disclosure of all the material facts, even if they are favourable to the other party. That being the position, it was expected that the Plaintiff in making the application would have disclosed in the affidavit in support of the application that indeed the land in dispute was initially a road reserved which was subsequently offered to individuals to buy, and further state its interest in the said land on the basis of those facts, and why the injunction should be granted.

What was portrayed by the Plaintiff is that the land in dispute forms part of its land, and the 3rd and 4th Defendants without its consent went ahead and alienated the said land. However exhibit 'BZ5' to the affidavit in support of the application is authored by the Plaintiff to the 3rd Defendant in which it acknowledges that the land in dispute was a road reserve. The failure to disclose in the averments in the affidavit, that the land in dispute was a road reserve, in my view shows that the material facts in this matter were not fully disclosed by the Plaintiff when applying ex-parte for the order of injunction. On that basis, this is ground for the discharge of the injunction, without any further considerations, as was held in the case of ***STRIPES ZAMBIA LIMITED V CINDERELLA INVESTMENTS LIMITED AND SANA INDUSTRIES LIMITED APPEAL No 200/2012*** cited by the 1st and 2nd Defendants. I accordingly discharge the ex-parte order of injunction, and order that costs of and incidental to the application shall go to the 1st and 2nd Defendants, to be taxed in default of agreement. Leave to appeal is granted.

DATED THE 16th DAY OF FEBRUARY, 2018

Kaunda

S. KAUNDA NEWA
HIGH COURT JUDGE