

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

2018/HP/0196



BETWEEN:

ASSET PLUS PROPERTIES LIMITED

PLAINTIFF

AND

REUBEN TEMBO

DEFENDANT

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA IN CHAMBERS THIS 11th
DAY OF SEPTEMBER, 2020**

For the Plaintiff : Messrs Nkusuwila Nachalwe Advocates

For the Defendant : Messrs Dzekedzeke and Company

R U L I N G

CASES REFERRED TO:

- 1. Shell & BP Zambia Limited v Conidaris and others 1975 ZR 174**
- 2. American Cynamid v Ethicon Limited 1975 AC**
- 3. Michael Chilufya Sata v Chanda Chimba III, Zambia National Broadcasting Corporation, Muvi TV Limited, Mobi TV International Limited 2011 Vol 1 ZR 519**

LEGISLATION REFERRED TO:

- 1. The Rules of the Supreme Court of England, 1999 Edition**

In this matter, judgment was delivered on 7th August, 2019, in which I directed that the office of the Surveyor General be engaged to

determine the extent of the plaintiff's land. The same was to be done within three (3) months of the date of the judgment, and a report submitted for the court's record.

I further directed that after the verification was done, and it was found that the defendant had encroached on the plaintiff's land, the plaintiff would be at liberty to demolish the wall fence that been constructed by the defendant, and recover the costs of demolition from the defendant. I also found that if the defendant was found to have encroached on the plaintiff's land, the plaintiff would be entitled to damages in trespass, which damages are the diminution in the value of the land.

The said damages were to be assessed by the Registrar. If, however, the verification found that the defendant had not encroached on the plaintiff's land, he would be entitled to damages, being the value of the wall fence that had been demolished by the plaintiff. He would further be entitled to loss of profits, if there were tenants in the two flats that he had built on his property, at the time the plaintiff demolished the wall fence, and the tenants vacated the property as a result. The loss of profits was also to be assessed by the Deputy Registrar.

On 5th November, 2019, the plaintiff applied for review of the judgment and to confirm the same. The basis of the application for review was that the judgment could not crystallise or be made final until a report from the office of the Surveyor General had determined the extent of the plaintiff's land. The contention was that the report by the Surveyor General had been done, which revealed that the plaintiff's land is in

extent of 3.124 square metres, and not 4, 037.26868 square metres, as per the contract of sale, hence the application for review.

It is deposed in the affidavit that the letter from the office of the Surveyor General advised that the plaintiff needed to extend 20.05 metres to the left on the eastern side, if that was the desired direction of extension, or that 922 square metres needed to be obtained to get a total of 4, 046 square metres, as purchased by the contract of sale. In my ruling, I noted that my judgment was very clear that what needed to be determined was the extent of the plaintiff's land upon approved survey diagrams being obtained. Anyone found encroaching thereafter, would do as directed in my judgment. Thus, there was nothing to review.

On 2nd April, 2020, the plaintiff applied for an order for extension of time to produce the approved survey diagrams, pursuant to Order 3 Rule 2 of the High Court Act, Chapter 27 of the Laws of Zambia, and on 29th May, 2020, he applied for leave to commence committal proceedings against the defendant. Then on 11th June, 2020, the defendant applied for an order of interim injunction. On 8th July, 2020, the parties appeared before me for a status conference.

I directed the parties to respond to each of the applications, and I would thereafter deliver my ruling. In the affidavit in support of the application for leave to commence committal proceedings, which is deposed to by Kaseke Chinyemba, a director of the plaintiff company, he deposes that the judgment could only crystallise or be made final after a report from the office of the Surveyor General, and after obtaining approved survey diagrams from that office.

He avers that the office of the Surveyor General undertook the exercise of determining the plaintiff's land, and generated a report on 20th September, 2019. It is also stated that the plaintiff applied for extension of time to produce the approved survey diagrams which was granted on 27th April, 2020, as evidenced by the order, which is exhibited as 'KC1' to the affidavit. The plaintiff has since obtained the approved survey diagrams which is in the notice to produce, which was filed on 8th May, 2020.

The averment is that the approved survey diagrams were preceded by replacement of the beacons by the Surveyor, in consonance with the Surveyor General's report, which shows that the defendant has encroached on the plaintiff's land. Consequently, the plaintiff has issued a writ of demolition as a first step in executing the court's judgment, and the Sherrif of Zambia proceeded to execute the same, by demolishing the wall fence on 18th May, 2020. This is evidenced by the Debit and Advice Note, which is exhibited as 'KC2' to the affidavit.

However, on 19th May, 2020, an Undersheriff, Mr Kashimbi, called the deponent and informed him that he was visited by a group of police officers in the company of the alleged contemnors, alleging impropriety in the manner that the judgment was obtained. The deponent instructed a Mr Zimba, a Surveyor to lead the contractor to construct the wall fence on the correct boundaries, as per the approved survey diagrams.

That when they did, on 19th May, 2020, they were harassed, threatened and hounded out forcefully by the intended contemnors, who even beat the caretaker who had remained on the property.

Further, the 2nd contemnor called the deponent, and threatened him with being in contempt of court, and told him to report to his office for interrogation. When advised that the demolition was done in line with the judgment of this court, the alleged 2nd contemnor insisted that the judgment was erroneous, and acquired through procedural impropriety.

The deponent contends that he has been unable to execute the judgment of the court, as he has been threatened by the intended contemnors, in the presence of Counsel for both parties. He has lodged a complaint with the police, and has written to the Commanding Officer for the police to provide him with security, as a result of the threats. The letter is exhibited as 'KC3'.

In the affidavit verifying facts for contempt of court, and for an order on interim injunction, which is deposed to by the defendant, he avers that the plaintiff in the affidavit in support of the application for review of the judgment deposed that the report of the Surveyor General found that the plaintiff's property covered 3, 124 square metres, and a recommendation for the extension of the property on the eastern side was made, to get the required size of the land, as per the contract of sale.

The defendant states that his plot is not located on the eastern side, and the report of the Surveyor General does not show that he had encroached on the plaintiff's land, but rather, that the plaintiff's plot needed to be extended by 20.0 metres to the left, on the eastern side. The report is exhibited as 'RT1'. The defendant goes on to depose that

the plaintiff left some land unfenced on the eastern side, thus reducing the size of its plot.

He alleges that the plaintiff on 22nd April, 2020 proceeded to unilaterally obtain survey diagrams by erecting new boundaries on his property without his consent, thereby giving the plaintiff the size of 4, 133 square metres, which diagrams are exhibited as 'RT2'. That these survey diagrams bear dimensions which are not in the Surveyor General's report, which is unlawful and contemptuous, in the absence of any other report by the Surveyor General.

The averment is further that based on the report, the plaintiff proceeded to obtain a writ of demolition on 18th May, 2020, and the demolition was done, as shown on the writ of demolition, and the Sheriff's seizure, which is exhibited as 'RT3'. The defendant applies for an order of injunction restraining the plaintiff's actions.

In the affidavit in opposition to the application, which is deposed to by Kaseke Chinyemba, a director in the plaintiff company, he states that the Surveyor General made a determination that the plaintiff's property covered the area of the wall fence, and the additional area that was required to satisfy the approximated dimensions in the sketch plan attached to the contract of sale. He states that the report that was made to court did not have dimensions, and was superseded by the approved survey diagrams in accordance with the letter from the Surveyor General.

That the approval of the survey diagrams was done by the Surveyor General after the plaintiff engaged a surveyor practicing under the

name and style of Chikupe Consulting and Trading, to conduct a survey, and file the same with the Ministry of Lands for approval and subsequently prepare the survey diagrams. It is contended that the survey diagram is in conformity with the sketch plan that was attached to the contract of sale.

The contention is further that the survey diagram has shown a distance between the beacons on 9D on the sketch plan attached to the contract of sale, and now approved and numbered as BC on the survey diagram, was way less than the sketch plan afforded. Hence, the area that the Surveyor General termed as "required land" to satisfy the demand of the contract, and the allegations by the plaintiff.

That in order to meet the land that was required, the Surveyor General noted that the plaintiff was supposed to move the wall fence 20 metres into the defendant's land. He further deposes that the distance on the sketch plan is approximately twelve (12) metres between the two beacons, while at trial, the distance was found to be less than two (2) metres. The survey diagrams put the distance at thirteen (13) metres.

It is deposed that the deponent has been advised by the surveyor that the disparity in the distance of one (1) metre between 9D on the sketch and BC on the diagram is so minimal and tolerable, and does not change the fact that the wall fence was built within the plaintiff's property. Still in his averments, the deponent states that the surveyor used the approved survey diagram to aid in the construction of the wall fence on the correct boundaries, following the beacons on the

approved survey diagram, but the team was forcibly ejected from the premises.

Further, the surveyor and the builder were assaulted by the defendant and Gerald Manda the alleged second contemnor, and Gerald Manda summoned the deponent to the police on allegations of wrongful execution, allegedly reported by the defendant. The deponent states that he facing charges of malicious damage to property before the Subordinate Court. That the survey diagram is clear, is reiterated, and there is no order to stay execution of the judgment.

In the skeleton arguments opposing the application for an order of injunction, reference is made to Order 27 Rule 4 of the High Court Rules, Chapter 27 of the Laws of Zambia. The cases of ***Shell & BP Zambia Limited v Conidaris and others*** ⁽¹⁾, ***Michael Chilufya Sata v Chanda Chimba III, Zambia National Broadcasting Corporation, Muvi TV Limited, Mobi TV International Limited*** ⁽³⁾ and ***American Cynamid v Ethicon Limited*** ⁽²⁾ are relied on to argue that an order of injunction is only granted when the right to relief is clear, and to protect the applicant from suffering irreparable damage, which is injury that cannot be atoned from in damages. Further, that this is a discretionary remedy.

As to whether the right to relief is clear in this matter, it is argued that the defendant has applied for an order of injunction to restrain the plaintiff from executing a judgment of this court, and the plaintiff has obtained survey diagrams pursuant to that judgment, which survey diagrams have determined the extent of the plaintiff's land. Therefore,

the court having delivered the judgment, it is functus officio, and an order of injunction cannot issue when the matter has been concluded.

Other cases have also been cited in support of the principles that govern the granting of orders of injunction. On whether damages would be an adequate remedy, the plaintiff argues that an injunction is granted to preserve the status quo. That in this matter, the status quo is to stop execution and enforcement of the judgment, and has no legal basis at law. The order of injunction should therefore not be granted.

With regard to the balance of convenience, it is argued that this lies largely in favour of the plaintiff who is a judgment creditor and desires to enforce the judgment of the court.

In the affidavit in reply, the defendant deposes that he is challenging the act of the plaintiff in obtaining approved survey diagrams which are at variance with the report of the Surveyor General. The contention is also that the private surveyor who was engaged by the plaintiff disregarded the existing beacons when determining the extent of the plaintiff's land and instead installed new ones on the southern part of the defendant's property at the plaintiff's instructions.

He states that the court judgment did not allow the plaintiff to obtain fresh diagrams as specified in the contract of sale, to suit the determination of the matter. The defendant reiterates that the report of the Surveyor General does not state that he has encroached on the plaintiff's land. He denies having used force on the plaintiff and its

agents, but that he merely reported the demolition of his wall fence to Chilanga police.

I have considered the applications. I will begin with the application for leave to commence contempt proceedings. It has been made pursuant to Order 52 Rule 2 of the Rules of the Supreme Court of England, 1999 edition. The said Order provides as follows;

“(1) The power of the High Court or Court of Appeal to punish for contempt of court may be exercised by an order of committal

(2) Where contempt of court -

(a) is committed in connection with -

(i) any proceedings before a Divisional Court of the Queen's Bench Division, or

(ii) criminal proceedings, except where the contempt is committed in the face of the court or consists of disobedience to an order of the court or a breach of an undertaking to the court, or

(iii) proceedings in an inferior court, or

(b) is committed otherwise than in connection with any proceedings,

then, subject to paragraph (4), an order of committal may be made only by a Divisional Court of the Queen's Bench Division.

This paragraph shall not apply in relation to contempt of the Court of Appeal”.

The basis of the application is that the Surveyor General has approved the survey diagrams for the plaintiff's property and the defendant has been preventing the plaintiff from executing the judgment of the court pursuant to the approved survey diagrams.

The defendant on the other hand contends that the approved survey diagrams were obtained outside the directives of the judgment, as the survey did not take into account the beacons that were existing on the property. Further, the plaintiff unilaterally had the survey done.

When this matter was before court for trial, the sketch plan at page 8 of the defendant's bundle of documents was referred to as showing the properties that PW2 had created as subdivisions on his land, and which he offered for sale. I noted that there are no dimensions on that document showing the sizes of the sub divisions, although the contract of sale executed between the plaintiff and PW2 has.

The defendant disputes the size of the plaintiff's land, as he alleges that the plaintiff unilaterally varied the size of the land. In order for there to be finality in this matter, I direct that both parties shall obtain approved survey diagrams from the office of the Surveyor General, in line with the sketch plan at page 8 of the defendant's bundle of documents. The costs shall be shared equally by the parties.

In ascertaining the sizes of both the plaintiff and the defendant's land, the initial owner of the property, being PW2, shall be engaged to confirm the sizes of the properties. When that process is complete,

and the Surveyor General has approved the survey, my directives in the judgment shall come into force. Pending the determination, the judgment is hereby stayed.

Therefore, the applications for leave to commence contempt proceedings and for an order of interim injunction fall away. Each party shall bear their own costs of this application.

DATED AT LUSAKA THIS 11th DAY OF SEPTEMBER, 2020

S. Kaunda
S. KAUNDA NEWA
HIGH COURT JUDGE