

IN THE HIGH COURT FOR ZAMBIA

2019/HP/1572

AT THE PRINCIPAL REGISTRY

AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

JOSEPH MWANZA

1ST PLAINTIFF

SYLVIA NACHIVULA MWANZA

2ND PLAINTIFF

AND

BETTERNOW FINANCE COMPANY LIMITED 1ST DEFENDANT

BADUCO COMMODITIES LIMITED 2ND DEFENDANT

MARY CHITIMBA MULENGA 3RD DEFENDANT

T/A PALMBRIDGE PROPERTIES

**BEFORE THE HONOURABLE LADY JUSTICE P. K. YANGAILO, IN
CHAMBERS, ON 3RD JULY, 2020.**

For the Plaintiffs: N/A

For the Defendants: N/A

RULING

CASES REFERRED TO:

1. *American Cyanamid Company vs. Ethicon Limited* [1975] A. C. 396; [1975] 1 All ER 504.
2. *Shell and BP (Zambia) Limited vs. Conidaris and Others* (1975) Z.R. 174;
3. *Turnkey Properties vs. Lusaka West Development Company Limited, B.S.K. Chiti (sued as Receiver) and Zambia State Insurance Corporation Limited* (1984) Z.R. 85;
4. *Mutuwila Farms Limited vs. Johan Nortje* (2010) Vol. 3 Z.R. 88;
5. *Kanjala Hills Lodge Limited, Veronica Namakau Jayetileke vs. Stanbic Zambia Limited - SCZ Judgment No. 17 of 2012;*
6. *Hina Furnishing Lusaka Limited vs. Mwaiseni Properties Limited* (1983) Z.R. 40;

7. *Finance Bank Zambia Plc vs. Lamasat International Limited - Appeal No. 175/2017 (2018) ZMCA 15;*
8. *Alex Dingiswayo Jere (suing as Administrator of the Estate of Courtson Jere) vs. Edward Kangwa Mumbi - Appeal No, 172 of 2010;*
9. *Hondling Xing Xing Building Company Limited vs. ZamCapital Enterprises Limited (2010) Z.R 30;*
10. *Harton Ndove vs. National Educational Company Zambia Limited (1980) Z.R. 184 (HC);*
11. *Mothercare Limited vs. Robson Books Limited (1975) F.S.R. 466; and*
12. *Zambia State Insurance Corporation Ltd. vs. Dennis Mulope Mulikelela - S.C.Z. Judgment No. 9 of 1990.*

LEGISLATION REFERRED TO:

1. *The High Court Act, Volume 3, Chapter 27 of the Laws of Zambia;*
2. *The Supreme Court Practice, 1999 edition, London Sweet & Maxwell; and*
3. *The Lands and Deeds Registry Act, Chapter 185, Volume 12 of the Laws of Zambia.*

1 BACKGROUND

1.1 On 2nd October, 2019, the Plaintiffs, issued a Writ of Summons and Statement of Claim, which was amended with leave of Court on 1st June, 2020, seeking an Order for vacant possession of Lot No. 11261/M, Lusaka (the subject property); an Order for refund of K121,675.00, being the amount overpaid by the Plaintiffs to the 1st Defendant; an Order declaring the sale of the subject property null and void; an Order of restitution against the 2nd Defendant for K770,000.00 paid by the Plaintiffs to the 1st Defendant, less K121,675.00 claimed from the 1st Defendant; an Order of Injunction against the 3rd Defendant; damages; and costs.

1.2 Simultaneously, the Plaintiffs took out an *Ex Parte* Summons for an Order of Interim Injunction pursuant to

Order XXVII, Rule 4 of **The High Court Rules**¹ and **Order 29, Rule 1** of **The Rules of the Supreme Court**².

The Plaintiffs seek to restrain the 3rd Defendant from alienating, disposing off, altering the nature and/or usage of the subject property until determination of this matter.

2 AFFIDAVIT EVIDENCE

2.1 In the accompanying Affidavit in Support sworn by the Plaintiffs, it was averred *inter alia*, that the Plaintiffs had a third party mortgage guaranteed by the subject property for K250,000.00 in 2015, in which the party they had guaranteed defaulted, resulting in an Order of foreclosure being granted against them in a Judgment dated 11th July, 2017, under Cause No. 2015/HPC/0274. According to the said Judgment, the Plaintiffs were given 45 days within which to pay the principal sum and interest, failure to which the property would be sold. The Plaintiffs failed to pay the K1,200,000.00 demanded by the 1st Defendant in that mortgage action, thus they yielded vacant possession of the subject property on 1st September, 2017.

2.2 It was further averred that the 1st Defendant approached the Plaintiffs and they verbally agreed to the Plaintiffs to pay off the debt and retake possession of the subject property. Thereafter, the Plaintiffs made payments of amounting to K770,000.00 on various dates, leaving a

balance of K362,982.45 towards the Judgment. In August, 2018, the Plaintiffs approached the 1st Defendant with a view of taking possession of the subject property, but that request was denied on account of the outstanding balance. Their request to be allowed to subdivide the subject property to enable them sell a portion and pay off the outstanding balance was also rejected.

- 2.3 Furthermore, it is averred that despite having paid a substantial amount towards the Judgment debt, the 1st Defendant went ahead to sell the subject property in August, 2018 to the 3rd Defendant, who has since obtained title to the subject property.
- 2.4 It is also averred that the injunction is sought so as not defeat the interest of justice by not preserving the subject property, in which the Plaintiffs have sufficient interest.
- 2.5 The 3rd Defendant filed herein an Affidavit in Opposition on 19th June, 2020, deposed to by Mary Chitimba Mulenga Harawa, in which it is averred *inter alia* that she is the registered owner of the subject property as shown on certificate of title issued in her name, having bought the subject property from the 1st Defendant who obtained it through Judgment under Cause No. 2015/HPC/0274 after the Plaintiffs failed to redeem the amounts owed to 1st Defendant.

- 2.6 It is further averred that the Plaintiffs lost the contractual and equitable right of redemption and their interest pertains to the monies obtained under the charged property and not the subject property itself.
- 2.7 It is also averred that the 3rd Defendant's interests as a *bona fide* owner far outweigh the Plaintiffs' unjustified need to sanction her activities and enjoyment of the subject property.

3 SUBMISSIONS

- 3.1 In their brief Submissions filed herein on 1st June, 2020, it is submitted that if the injunction or preservation order is not granted, the Plaintiffs shall suffer irreparable damages that cannot be atoned for in damages and the Plaintiffs shall subsequently be exposed to similar prejudice. They placed reliance on the cases of ***American Cyanamid Co. vs. Ethicon Co. Ltd***¹, ***Shell and BP Zambia Ltd vs. Conidaris***², ***Turnkey Properties vs. Lusaka West Development Co. Ltd, BSK Chiti (Sued as Receiver) and ZSIC***³ and ***Mutuwila Farms Limited vs. Johan Nortje***⁴.
- 3.2 The 3rd Defendant filed written submission on 19th June, 2020, in which it is submitted *inter alia* that this is not a proper case to maintain an injunction because the rights of the Plaintiffs are in serious dispute and that the Plaintiffs are not entitled to an injunction as they lost their contractual and equitable right of redemption to the

subject property, thereby entitling the 1st Defendant to sell the subject property to the 3rd Defendant, after the lapse of the 45 days moratorium imposed in the Court's Judgment. The case of **Kanjala Hills Lodge Limited, Veronica Namakau Jayetileke vs. Stanbic Zambia Limited**⁵ was cited to fortify this submission.

- 3.4 It is contended that the Plaintiffs' failure to discharge their guarantor responsibilities and consequent breach of the third party mortgage, bars them from invoking the equitable remedy of injunction. For this contention, the 3rd Defendant relied on the maxim "*he who comes to equity must come with clean hands*" and the cases of **Hina Furnishing Lusaka Limited vs. Mwaiseni Properties Limited**⁶ and **Finance Bank Zambia Plc vs. Lamasat International Limited**⁷.
- 3.5 The 3rd Defendant further submits that she has established a *prima facie* case of ownership of the subject property by exhibiting her certificate of title, which position conforms with **Section 33** of **The Lands and Deeds Registry Act**³. The case of **Alex Dingiswayo Jere (Suing as Administrator of the Estate of Courtson Jere) vs. Edward Kangwa Mumbi**⁸.
- 3.6 The 3rd Defendant also contends that the Plaintiffs' right to relief is not clear and has been denied, seeing that the 3rd Defendant is a *bona fide* purchaser of the subject property which was free of any encumbrances at the time

of purchase. The 3rd Defendant called in aid many cases, amongst them being ***Hondling Xing Xing Building Company Limited vs. ZamCapital Enterprises Limited***⁹, ***Harton Ndove vs. National Educational Company Zambia Limited***¹⁰ and ***Mothercare Limited vs. Robson Books Limited***¹¹.

4 **THE LAW**

4.1 I must stress at the outset that an injunction is a remedy that should only be granted if the applicant has a substantive cause of action. It is dependent upon there being a pre-existing cause of action against the Defendant arising out of an invasion, actual or threatened, of a legal or equitable right of the applicant.

4.2 The Plaintiffs have made this application pursuant to ***Order XXVII, Rule 4 of The High Court Rules***¹, which provides as follows: -

"In any suit for restraining the defendant from the committal of any breach of contract or other injury, and whether the same be accompanied by any claim for damages or not, it shall be lawful for the plaintiff, at any time after the commencement of the suit, and whether before or after judgment, to apply to the Court or a Judge for an injunction to restrain the defendant from the repetition or the continuance of the breach of contract or wrongful act complained of, or the committal of any breach of contract or injury of a like kind arising out of the same contract, or relating to the

same property or right, and such injunction may be granted by the Court or a Judge on such terms as to the duration of the injunction, keeping an account, giving security or otherwise, as to the Court or a Judge shall seem reasonable and just:

Provided that any order for an injunction may be discharged, varied or set aside by the Court or a Judge, on application made thereto by any party dissatisfied with such order."

4.3 As can be seen from the above cited provision, this Court is empowered to grant an injunction where it is satisfied that it is necessary to restrain breaches of contract or tort. In resolving whether the grant of an injunction herein is necessary or not, I have considered the three basic principles of law when a Court can grant an injunction, which 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.

4.4 In the matter of **Zambia State Insurance Corporation Limited vs. Dennis Mulope Mulikelela**¹², 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." (Court's emphasis)

- 4.5 The **Shell & BP Ltd vs. Conidaris & Others**² case, cited by the parties, is one of the leading authorities on injunctions, wherein it was stated 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." (Court's emphasis)

- 4.6 In the case of **Hondling Xing Xing Building Company Limited vs. ZamCapital Enterprises Limited**³, 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." (Court's emphasis)

5 ANALYSIS AND FINDINGS

- 5.1 I have carefully considered the Application by the Plaintiffs, all the Affidavit evidence before me, the submissions, list of authorities and even the exhibits which I found to be of great assistance to me in guiding me on the issue of the balance of convenience. I am indebted to Counsel for the cited authorities, which have made my task considerably more straightforward.
- 5.2 Being guided by the principles espoused in the cases cited above, I have perused the pleadings and all the Affidavits on record. It is clear from the Affidavit evidence and exhibits attached thereto that the Plaintiffs failed to guarantee the 2nd Defendant's default and discharge the mortgage of the 1st Defendant within the period of 45 days as adjudged by the High Court in the earlier case under Cause No. 2015/HPC/0274. Following the failure to exercise their right of redemption, the 1st Defendant exercised its right of sale and liberty of foreclosure by sale of the subject property to the 3rd Defendant. Further, the exhibits show that the 3rd Defendant is the registered owner of the subject property.
- 5.3 Having perused the pleadings and considering the reliefs sought by the Plaintiffs, I have no doubt that there is a serious question to be tried herein. However, I have to consider whether the Plaintiffs could if successful at trial, be adequately compensated by an award of damages. I must state that it is not part of the Court's function at

this stage of the litigation to try to resolve conflicts of evidence on Affidavits as to the facts on which the claims of either party may ultimately depend, or decide difficult questions of law which call for detailed argument, and mature considerations.

5.4 A fundamental principle of injunction law is that an interim injunction should not be granted to restrain actionable wrongs for which damages are the proper or adequate remedy. If the Applicant can be fully compensated by an award of damages, no injunction should be granted at all. In the case of ***American Cyanamid Company vs. Ethicon Limited***¹, the test stated by Lord Diplock is that if damages in the measure recoverable at common law would be adequate remedy and the Defendant would be in a financial position to pay them, no interim injunction should normally be granted. Damages will often be an adequate remedy for the Applicant in claims for breach of contract. However, damages will be inadequate if the Defendant is unlikely to pay the sum likely to be awarded at trial and if damages would be difficult to assess. In the present case, the Plaintiffs did not indicate whether or not the Defendants would unlikely be able to pay an award of damages.

5.5 I must further state that an Injunction is an equitable remedy and it is in the discretion of this Court, to grant

an interlocutory injunction or not. If granted, the object would be to keep things *status quo* until the question at issue between the parties can be determined. I am mindful that the discretion has to be exercised judicially.

- 5.6 In the case of ***Turnkey Properties vs. Lusaka West Development Company Limited, B.S.K. Chiti (sued as Receiver) and Zambia State Insurance Corporation Limited***³, the Supreme Court held *inter alia* that an interlocutory injunction is appropriate for the preservation of a particular situation pending trial and that such injunction should not be regarded as a device by which an applicant can attain or create new conditions favourable only to himself. In the same case, the Court also discussed the issue of the balance of convenience which should be considered by the Court by determining where it lies or in whose favour the scale tilts and whether more harm would be done by granting or refusing to grant the injunction. This was also the holding in the case of ***American Cyanamid Company vs. Ethicon Limited***¹ cited by the parties, where it was stated that the guidelines to be considered are whether the claimant has a strong or arguable case; the adequacy of damages as a remedy; the balance of convenience; and maintaining the *status quo*. Being guided accordingly, I considered whether the balance of convenience tilts in favour of the Plaintiffs or 3rd Defendant and found that


the balance of convenience lies heavily in favour of my not granting the injunction sought.

- 5.7 It is my considered view, without delving into the main action and looking at the facts presented before me, that there is a probability that the 3rd Defendant, who is the registered owner of the subject property may put up a good defence.
- 5.8 As stated earlier, an injunction being an equitable remedy, entails that he who comes to equity must do so with clean hands. In the case of ***Hina Furnishing Lusaka Limited vs. Mwaiseni Properties Limited***⁶, it was held that an injunction is an equitable remedy and the Court may not exercise its discretion to grant it where the Plaintiff is in breach of the contract; for he who comes to equity must do so with clean hands. From the documents placed before this Court, it is quite clear that the Plaintiffs failed to fulfil their obligations as third party guarantors within the period that was given and lost their right to redemption of the subject property.
- 5.9 I am guided by the principle expounded therein. I am also of the view that in the present case, where the principle relief sought is in monetary terms, damages would suffice as the injury, if any, to be occasioned to the Plaintiffs and can be atoned for by an award of damages.

6 CONCLUSION

- 6.1 For the foregoing reasons and having given due consideration to the Affidavit evidence on record, I find that this is not a case where it would be proper for this Court to grant an interim injunction as claimed by the Plaintiff. On the facts obtained, the Plaintiffs' rights if any, in my judgment, lie in damages rather than an interim injunction.
- 6.2 Accordingly, the application is dismissed with costs to the 3rd Defendant, to be taxed in default of agreement.
- 6.3 Leave to appeal is granted.

Delivered at Lusaka on 3rd July, 2020.



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P. K. YANGAILO
HIGH COURT JUDGE