

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
(CIVIL JURISDICTION)**

2019/HP/1292

BETWEEN

RONALD MASEBO

PLAINTIFF

AND

BHAVAS (MALE)

DEFENDANT



BEFORE HON. JUSTICE ELITA PHIRI MWIKISA

**FOR THE PLAINTIFF: MR. K. MWALE OF MESSRS K. MWALE & ASSOCIATES
FOR THE DEFENDANT: MR. L. PHIRI OF C. CHONTA ADVOCATES**

RULING

Cases Referred To:

1. *Cliffshore Real Estate and Properties Limited.*
2. *Gideon Mundanda v Timothy Mulwani (1987) ZR 29.*
3. *Auto Spares Ltd v Patel (2014/HP/153).*
4. *Hillary Bernard Mukosa v Michael Ronaldson (S.C.Z Judgment No. 7 of 1993).*
5. *American Cyanamid v Ethicon [1975] AC 396.*
6. *Gideon Mundanda v Timothy Mulwani, Agricultural Finance Co. Ltd and S.S.S Mwiinga (1987) ZR 29 (SC).*
7. *Turnkey Properties Limited v Lusaka West Development Company Limited (1984) ZR 85.*

of the wall fence as shown by exhibits marked "RM5-6" respectively. He deposed further that the defendant is frustrating his efforts as he has to re-build the wall fence again.

The plaintiff deposed that the continued claims and harassments by the defendant are illegal as he is the title owner of the land in issue. He craved the indulgence of the Court to grant him the reliefs sought.

On the other hand, the defendant herein filed an affidavit in opposition dated 4th October, 2019. He deposed that he has a legal claim to the property known as Plot No. KDC/RS/18, which is the property in issue herein. The defendant deposed that he applied for land and paid a sum of K650 for interviews as shown by exhibit marked "BSS1". After successfully applying, he was given an invitation to treat dated 20th April, 2017, relating to the property in issue and after making all necessary payments, as exhibited, he was accordingly offered the property in issue by offer letter dated 29th May, 2017, as shown by exhibit marked "BSS4".

The defendant deposed further that he proceeded to submit plans for a boundary wall and guard house to the Council which plans were scrutinized by the Council at a total cost of K900. That on or about 13th March, 2019, he commenced work on the property in issue and on or about 7th April, 2019, he started constructing a boundary wall.

The defendant went on to depose that the plaintiff has failed to disclose that the defendant's offer letter is dated prior to his (the plaintiff) offer letter relating to the property in issue.

It was deposed that there is no two roomed house built on the subject property by the plaintiff and further that the plaintiff has failed to disclose that a senior council official advised both parties not to carry out any work on the property in issue until the matter was resolved by the Council. It was also deposed that the plaintiff ignored the direction of the Council and proceeded to build on the property in issue.

The defendant deposed that the plaintiff failed to disclose that he was issued with a Stop Order Notice by the Kafue District Council in or around July, 2019, to stop all developments on the subject property until the double allocation matter was resolved as shown by exhibit marked "BSS7". It was also deposed that in addition to the Stop Order Notice, the plaintiff was again requested, through his workers, by the officers from the Council to stop any development but that he again ignored this order which led to the demolition of his development on the property in issue.

The defendant deposed that the plaintiff failed to disclose to the Court whether he legitimately met the terms of the invitation to treat, if

accorded to him, and further that no alternative land was offered to either party. That the Council has not made any determination as to ownership of the subject property.

When the matter came up for hearing on 4th December, 2019, Counsel on behalf of the plaintiff, Mr Mwale, submitted that the criteria for the grant of an injunction; that is to say there being a good arguable claim and serious issue to be tried, have been met by the plaintiff in that the plaintiff has demonstrated that he is the title holder of the property in dispute as exhibited at “RM1” and “RM2”.

Mr Mwale also submitted that damages are not an adequate remedy for loss of land as stated in the case of **Gideon Mundanda v Timothy Mulwani (1987) ZR 29²**. Mr Mwale further argued that the balance of convenience tilts in favour of the plaintiff by virtue of him being the title holder. Counsel prayed that the Court confirms the interim order of injunction earlier granted.

On the other hand, Counsel on behalf of the defendant, Mr Phiri, contended that the defendant opposes the application and relies on the affidavit and list of authorities filed into Court on 4th October, 2019. He submitted that the plaintiff has failed to demonstrate that he has a clear right of relief as shown at exhibit “BSS3” in the affidavit in opposition, which is an offer letter from the Kafue District

Council, dated 29th May, 2017. Mr Phiri submitted that the offer letter exhibited in the plaintiff's affidavit is dated 11th August, 2017, clearly after the offer letter in the name of the defendant was issued.

Furthermore, Mr Phiri submitted that the plaintiff's application should fail because he has failed to disclose material facts in his affidavit which should support any equitable relief. That as per exhibit marked "BSS7" the plaintiff has failed to disclose that he was issued with a Stop Order to stop all developments on the property until the final determination of the matter. Mr Phiri argued that Order 29 rule 1A of the RSC 1999 edition, states that an Applicant has a duty to make full and frank disclosure of material facts.

He went on to state that a perusal of the affidavit in opposition will also show that the defendant followed all the requisite procedures in order to get the land in question such as receipts, invitation to treat and offer letter. Mr Phiri submitted that the plaintiff opted not to file an affidavit in reply showing that he has not complied with procedures. He cited the case of **Value Auto Spares Ltd v Patel (2014/HP/153)**³ where the Judge was of the view that where an affidavit has been filed and no affidavit in opposition or reply has been filed, he is deemed to have admitted the contents of the affidavit in question. Mr Phiri submitted that all the issues deposed that have

not been opposed by the plaintiff must be deemed to have been accepted.

Counsel prayed that this is not a proper case for the Court to exercise its discretion to confirm its earlier order and that it be vacated with costs.

In reply, Mr Mwale contended that the documents exhibited in the defendant's affidavit in opposition cannot defeat the title which the plaintiff possesses. He argued that a certificate of title is absolute evidence of ownership and therefore there is no requirement for a party to demonstrate ownership by producing receipts.

I have carefully considered the affidavit evidence herein as well as the oral submissions made by Counsel from both sides. In an application for an interim injunction, the Court should satisfy itself that there is a serious question to be tried at the hearing and that on the facts before it the plaintiff is entitled to a right to relief. In the case of **Hillary Bernard Mukosa v Michael Ronaldson (S.C.Z Judgment No. 7 of 1993)**⁴ It was held that:

“An injunction would only be granted to a plaintiff who established that he had a good and arguable claim to the right which he sought to protect.”

Further, it is trite that if the Court finds that there is a serious question to be tried on the merits of the substantive claim, the Court

should consider whether the plaintiff will be adequately compensated by an award of damages at trial.

In this case, the plaintiff has exhibited an occupancy licence registered in his name, dated 15th February, 2019, relating to the property in issue. According to Section 30(1) of the Urban and Regional Planning Act No. 3 of 2015:

(1)“A person shall not, without an occupancy licence issued under this section and except in accordance with the conditions of the occupancy licence, build, use, let, sell, create a lien or security or in any way deal with any dwelling or building erected on any piece or parcel of land.”

(2)“The holder of an occupancy licence shall have such rights and obligations in respect of the piece or parcel of land to which the licence relates and in respect of any dwelling or other building erected thereon as may be prescribed.”

In light of the above provisions, a person with an occupancy licence has rights in relation to the piece of land in respect of that occupancy licence. This shows that the plaintiff herein has a good and arguable claim to the right which he sought to protect as an occupancy licence was issued in his name herein.

The plaintiff herein also exhibited an offer from the Kafue District Council dated 11th August, 2017, offering him to purchase the property in issue. However, the record also shows that the defendant also exhibited an offer letter from the Kafue District Council dated

29th May, 2017, relating to the same property, which is the property in issue herein. It is clear that the defendant was offered the property in issue before the plaintiff was offered the same. This shows that there is a serious question to be tried at the main trial as shown by exhibit marked "BSS7" which clearly shows that there was a double allocation in this matter.

I will not delve into any conflicting statements at this point as per the case of **American Cyanamid v Ethicon [1975] AC 396⁵** wherein the Court held that:

"It was not the Courts' role to consider conflicting evidence in respect of an interim application. This was a matter for trial."

The fact that the subject matter herein is real property shows that damages are an inadequate remedy as was held in the case of **Gideon Mundanda v Timothy Mulwani, Agricultural Finance Co. Ltd and S.S.S Mwiinga (1987) ZR 29 (SC)⁶** that damages cannot be an adequate compensation when one is dealing with an interest in a particular piece of land. I am therefore satisfied that on the facts before me, the plaintiff herein is entitled to relief.

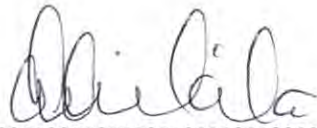
In the case of **Turnkey Properties Limited v Lusaka West Development Company Limited (1984) ZR 85⁷** it was held that:

“An interlocutory injunction is appropriate for the preservation or the restoration of a particular situation pending trial.”

I accordingly confirm the order of interim injunction earlier granted on 25th September, 2019.

Leave to appeal is granted.

Dated at Lusaka this 30^m day of June 2020



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ELITA PHIRI MWIKISA
JUDGE