IT

IN THE HIGH COURT FOR ZAMBIA **2019/HP/1376**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

CHANDRAKANT GIRDHAR VAGHELA **PLAINTIFF**

AND

THE ATTORNEY GENERAL **2ND DEFENDANT**
MAXWELL KALUMBA LUFOMA **3RD DEFENDANT**

BEFORE THE HONOURABLE JUSTICE M.C KOMBE

For the Plaintiff	:	*Ms. G. C. Chilekwa – Messrs A.B. and David*
For the 2nd Defendant	:	*No Appearance*
For the 3rd Defendant	:	*Mr. B. Luo – Messrs Palan and George Advocates*

RULING

Cases referred to:

1. **Edward Jack Shamwana v. Levy Mwanawasa (1993-94) Z.R. 149.**
2. **American Cyanamid Company v. Ethicon (1975) A.C. 406.**
3. **Hilary Bernard Mukosa v. Michael Ronaldson (1993-94) Z.R.26**
4. **Harton Ndove v. Zambia Educational Company (1980) Z.R. 184.**
5. **Shell and BP (Z) Limited v. Conidaris and Others (1975) Z.R 174.**

6. **Jane Mwenya and Jason Randee v. Paul Kapinga (1998) Z.R 17.**
7. **Afritech Asset Management Company and CPD Properties Limited v. Gynae and Antenatal Clinic Limited and Kenneth Muuka- Selected Judgment No. 11 of 2019.**
8. **Michael Chilufya Sata v. Chanda Chimba III and others (2011) 1 Z.R. 519.**
9. **Ahmed Abad v. Turning and Metals Limited (1986) Z.R. 86.**
10. **Cayne v. Global Natural Resources (1984) 1 ALL E.R 225.**
11. **Francome v. Mirror Group Newspapers (1984) 1 W.L.R. 892.**
12. **Turnkey Properties v. Lusaka West Development Company Limited (1984) Z.R. 85.**
13. **Fellows v. Fisher Fellowes v. Fisher (1975) 3 W.L.R 184.**

Legislation and other material referred to:

1. **The High Court Rules Chapter 27 of the Laws of Zambia.**
2. **Halsbury Laws of England Volume 24, Fourth Edition.**
3. **Iain S. Goldrein, K.H.P. Wilkinson and M. Kershaw: Commercial Litigation: Pre-emptive Remedies, London, and Sweet & Maxwell 1997.**

Pending the determination of this matter the Plaintiff applied for an order of interim prohibitory injunction pursuant to Order 27 Rule 4 of the High Court Rules, Chapter 27 of the Laws of Zambia as read together with Order 29 Rule 1 of the Supreme Court RSC 1965 (White Book) 1999 Edition Volume 1.

By this application the Plaintiff seeks an order to restrain the 3rd Defendant whether by himself, his agents or anyone acting under his authority howsoever or otherwise from entering upon and dealing in the property known as L/2323/M, Lusaka in any way whatsoever including erecting upon, leasing, selling or mortgaging or disposing of any interest thereon until after hearing and determination of the substantive matter herein or until further order of this Court.

This application is supported by an affidavit deposed to by the Plaintiff **CHANDRAKANT GIRDHAR VAGHELA.**

He deposed that in the early 1980s, Vaghela Investments Lusaka Limited purchased land in an area now known as state lodge in Lusaka. That following the purchase, it was unable to take possession of the said land as the state lodge security officers acting under the instructions of the Office of the President advised that the land was too close to the actual state lodge and that due to security reasons, the company would not be allowed to take possession of the land.

However, following the said repossession, his late father made several follow ups with the Commissioner of Lands for Vaghela Investments Lusaka Limited to be compensated with another piece of land and

sought help from Judge W. Mainga (as he then was) who in this regard wrote to the Commissioner of Lands on the same. Copies of the said letter were exhibited in the affidavit and marked **"CGV1"**.

The deponent further explained that Lot No. 2323/M was accordingly offered to Vaghela Investments Lusaka Limited and a Certificate of title No. 57976 dated 4th November, 1985 was subsequently issued. A copy of the title was exhibited and marked **"CGV2"**.

That Vaghela Investments Lusaka Limited held possession of and had quiet use and enjoyment of Lot No. 2323/M from 1985 until the 9th of May, 2013 when the said property was conveyed to him through a Deed of Gift.

He further explained that he was subsequently issued with a Certificate of Title for the said property which was later subdivided in subdivisions 'A', 'B', 'C', and 'D' of Lot No. 2323/M with Certificates of Title numbers 217969, 21971, 217972 and 217973 respectively. The titles were exhibited.

That the said land was further subdivided into Subdivision 'E of Lot No. 2323/M and remaining extent of Lot No. 2323/M and that he

currently held Certificates of Title No. 40215 for Subdivision 'E' of Lot No. 2323/M. Copies of the said Certificates of Title were exhibited in the affidavit and marked **"CGV7"** and **"CGV8"** collectively. That all these transactions on the property were processed without any queries or issues arising.

He deposed further that for more than thirty (30) years there had been no interference from the 3rd Defendant until late 2018 when he started claiming ownership of the said land that it was improperly re-entered and re-allocated in 1984.

He further explained that on 7th February, 2019, they had a meeting in relation to the subject property with the then Commissioner of Lands, Honourable Muma and the 3rd Defendant. That it was agreed that a report would be rendered by the Commissioner of Lands in consultation with the Chief Lands Registrar, Principal Legal Officer, Principal Planning Officer and Rates Officer who were all present at the site visit.

That shortly after that, on 20th May, 2019, he wrote to the Commissioner of Lands for removal of the caveat that had been placed

on the property by the Ministry and for an amicable resolution to the issue of ownership. A copy of the letter was marked **"CGV9"**.

That following the 3rd Defendant's claims and instead of rendering a report on the dispute as agreed at the meeting, the Commissioner of Lands started issuing ground rent bills in the 3rd Defendant's name. By letter dated 3rd June, 2019, the Acting Commissioner of Lands, communicated to him of his intention to cancel the re-entry done in 1984 and revert ownership to the 3rd Defendant unless he presented a better option.

The deponent explained that he instructed his advocates to respond to the letter from the Commissioner of Lands presenting a better option and stating that the Commissioner of Lands had undertaken to issue a report following a site visit to the subject property which had not been done; that the burden to prove that the re-entry was erroneously done lay with the Commissioner of Lands not himself and to correct the change in details on the ground rent bill.

That the Commissioner of Lands had since cancelled the re-entry and reverted ownership to the 3rd Defendant. He deposed that he verily believed this was done without due regard to the time that had elapsed

since the re-entry was done and the developments that he had made on the property.

That he verily believed that the cancellation of his Certificate of Title was erroneous and illegal and that it was done in contravention of the law; that there was no consideration by the Defendants herein that the deponent had legally been in occupation of the same for over 30 years.

He explained that the 3rd Defendant had been to the property late at night with the intention of evicting the Plaintiff and/or workers and depriving him of quiet possession and enjoyment of the property.

He further explained that the 3rd Defendant's conduct if unrestrained by an order of this Court would continue to pose a threat to him and infringe on his rights as titleholder of the property; that as Plaintiff, he stood to suffer irreparable damage as a result of the Defendant's activities which could not be atoned for by damages.

I did not consider the application *ex parte* but directed that it be heard *inter partes*.

The 3rd Defendant opposed the application and filed an affidavit in opposition which he deposed to.

He explained that in 1979 he was offered Lot No. 2323/M and on 19th December, 1979 he paid Five Hundred and Ninety three Kwacha sixty ngwee (K593.60) as lease charges. Further, by a lease dated 18th March, 1981 between him and the President, he was granted a ninety-nine (99) years lease in respect of Lot No. 2323/M. He exhibited a copy of the official receipt which was marked **"MKL1"**.

Subsequently a Certificate of Title No. 49801 was issued to him in respect of the said property. A copy of the title was exhibited and marked **"MKL2"**.

He explained that by a Mortgage Deed made on 3rd June, 1981 between him and the Zambia National Building Society (ZNBS) he was given a loan in the sum of Thirty Five thousand Kwacha (K35, 000.00) and the same was registered on the property on 9th June, 1981.

He further explained that following the offer of Lot No. 2323/M he embarked on developing a three-bedroomed house complete with sewer system. Upon completing constructing the said house, he applied for electrification of the structure to the Zambia Electricity Supply Corporation Limited (ZESCO) and the property was subsequently

electrified; that he also drilled a borehole on the property for the provision of water supply.

However, he did not take up occupation of the property as sometime in 1984 the property was without notice dubiously re-entered and subsequently offered to the Plaintiff under unclear circumstances. This was notwithstanding that he had met the minimum offer conditions *vis- a- vis* the development requirements

That at the time of the re-entry, the file pertaining to Lot 2323/M which had information relating to him went missing and the Land Register was obliterated and the information pertaining to him was removed. That the Land Register then started at entry No. 5.

The 3rd Defendant further explained that at the time of re-entry, his title was with ZNBS as security for mortgage obtained therefrom; that following the loss of the file as well as obliteration of the Land Record, it was difficult for him to assert his rights as he was not in possession of any document linking him to the property.

However, he continued to purse the issue of the re-entry until 30th May, 2018 when the Acting Chief Registrar Ms. Agatha N. Banda wrote a letter to him advising that the missing entries had been registered.

He further explained that on or about 2nd October, 2018, ZNBS advertised a list of redeemed titles amongst which was his title. On the 8th October, 2018 at his own instigation, Lusaka City Council caused a physical inspection on Lot No. 2323/M which clearly indicated that the Plaintiff had constructed a substandard and unplanned boundary wall and guard house.

By letter dated 19th July, 2019 the Commissioner of Lands advised him that the re-entry entered on his property had been cancelled and that the property had reverted to him. A copy of the said letter from the Commissioner of Lands was exhibited and marked **"MKL13"**.

He further deposed that it was irrelevant that time had elapsed as the Commissioner of Lands rightfully exercised his administrative function. He added that he was a senior citizen as well as a former Minister and that he had never at any time visited the property in question at night. That the Plaintiff herein was offered property which had been adversely possessed and therefore the Commissioner of

Lands was on all fours within the law when he redressed an historic wrong.

He further deposed that the Plaintiff herein would not be prejudiced if his application was not granted as prayed but conversely if this Court were to grant this application as prayed, it would be perpetuating an injustice against him as he had never accessed his property for over thirty five (35) years and that he had now been rendered a destitute.

At the hearing of the application, learned Counsel for the Plaintiff Ms. G.C Chilekwa relied on the affidavit in support, affidavit in reply and skeleton arguments. The same were augmented with verbal submissions.

Learned counsel for the 3rd Defendant Mr. B. Luo equally relied on the affidavit in opposition and the skeleton arguments.

I will not attempt at this stage to replicate the submissions suffice it to mention that I have considered the evidence adduced and addressed my mind to the arguments. I shall be referring to them as and when it is necessary in this ruling.

By this application, I have been called upon to determine whether the Plaintiff is entitled to an Order of interlocutory injunction pending the final determination of the matter. In doing so, I have carefully considered the caution given by Ngulube J. (as he then was) in the case of **Edward Jack Shamwana v. Levy Mwanawasa**[1]. This caution is that I should in no way pre-empt the decision of the issues which are to be decided on the merits and the evidence at the trial of the action.

The test to be applied when considering whether or not an injunction should be granted remains that laid down by the House of Lords in the seminal case of **American Cyanamid Company v. Ethicon** [2]. This case sets out a series of questions which should guide the court in making a determination. These are:

1. Is there a serious question to be tried?
2. Would damages be adequate?
3. Where does the balance of convenience lie?

However, I am mindful of the fact that the principles established in the ***American Cyanamid*** case are of general application and must not be treated as a statutory definition. This is because it is possible to grant

or refuse an interim injunction without applying the ***American Cyanamid*** guidelines.

In following the ***American Cyanamid*** guidelines, the first question I should consider therefore is whether or not the Plaintiff has raised a serious question to be determined at trial. This proposition comes down to the requirement that the claim must not be frivolous or vexatious. This is in line with the holding by the Supreme Court in the case of **Hilary Bernard Mukosa v. Michael Ronaldson** [3] where 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, in the High Court, Chirwa J, (as he then was) in the case of **Harton Ndove v. Zambia Educational Company** [4] held that:

> **"Before granting an interlocutory injunction it must be shown that there is a serious dispute between the parties and the plaintiff must show on the material before court that he has any real prospect of succeeding at trial."**

In view of the above principles, for the application to succeed, the Plaintiff must demonstrate that there is a serious question to be tried and he has a good and arguable claim to the right he seeks to protect.

The starting point is the endorsement on the writ of summons. By this action, the Plaintiff seeks *inter alia* a declaratory order that he is the legal and beneficial owner of Lot No. 2323/M Lusaka. He contends that the property in question was transferred to him by a Deed of Gift and was accordingly registered in his name on 10th May, 2013 under Certificate of Title No. 217951. That the Commissioner of Lands had since cancelled the Certificate of Title and reverted ownership of the property to the 3rd Defendant. Furthermore, that the re-entry done in 1984 had also been cancelled without having regard to the period of time that had elapsed and the developments that he had made on the property.

In this regard, it was submitted that the question of who was the legal and beneficial owner of the subject property and whether the re-entry was liable to cancellation more than 30 years after it was done were best suited to be determined at trial. That therefore, there was a serious question to be tried.

The 3rd Defendant on the other hand in his counter claim seeks a declaratory order that he is the beneficial owner of the property. He contends that the property in question was granted to him on 18th March, 1981 and a Certificate of Title was issued to him.

However, on 14th March, 1984, his property was dubiously re-entered as it was done without the requisite notice and without taking into account that it had been developed as he had actually obtained a mortgage from ZNBS and constructed a three bedroomed house and also drilled a borehole for the provision of water.

It was therefore submitted on this question that the Plaintiff had failed to demonstrate through the pleadings that there was a serious question to be tried.

Given the positions taken by the parties, it seems to me perfectly plain that the parties have raised contentious issues on the question of ownership of Lot 2323/M.

However, this Court cannot at this stage of the litigation try to resolve conflicts on the parties respective rights in the property based on affidavit evidence. I am of the considered view that there is need for

this Court to examine in more detailed manner at the trial of this matter the evidence and the exhibits in the light of the reliefs sought by the Plaintiff.

In view of the above, I find that there is a serious question to be tried by the Court in relation to the claims made by the Plaintiff.

Having said that, I will proceed to consider the next question as the existence of a serious question to be tried is not itself sufficient. The Plaintiff has to show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.

(i) Adequacy of damages

When considering this question, the question I ask is this: if the Plaintiff were to succeed at the trial in establishing the claims set out in the statement of claim would he be adequately compensated by an award of damages for the loss caused by the refusal to grant an interlocutory injunction?

If damages would be adequate remedy, and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted however strong the plaintiff's claim appeared to be at that stage.

If on the other hand damages would not be an adequate remedy, the court should then consider whether if the injunction were granted, the defendant would be adequately compensated under the plaintiff's undertaking as to damages. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction.

Further paragraph 955 of the Halsbury's Laws of England Volume 24, Fourth Edition provides that:

> **"The Plaintiff must also as a rule be able to show that an injunction until the hearing is necessary to protect him against irreparable injury; mere inconvenience is not enough."**

According to the **Shell and BP (Z) Limited v. Conidaris and Others** [5] case irreparable injury means:

"Injury which is substantial and can never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired".

What the foregoing means is that an injunction will not be granted where damages would be an adequate remedy to the injury complained of in the event that the Plaintiff later succeeds in the main action.

It has been submitted on behalf of the Plaintiff that if the injunction was not granted in this case, and the Plaintiff evicted, the Plaintiff would suffer irreparable injury which cannot be atoned for in damages. This is because the magnitude of the damages suffered for loss of land that has been occupied and developed for well over 30 years would be great and unquantifiable.

Reliance was placed on the case of **Jane Mwenya and Jason Randee v. Paul Kapinga** (6) where it was stated that an award of damages could not adequately compensate a party for loss of land.

The 3rd Defendant on the other hand has submitted that damages would be an adequate compensation as the Plaintiff in the originating process in particular in its fourth claim also seeks compensation for the full value of the property. Counsel referred the Court to the case of

Afritech Asset Management Company and CPD Properties Limited v. Gynae and Antenatal Clinic Limited and Kenneth Muuka[7] where it was stated that the fact that the Respondents in the matter were claiming compensation was a demonstration that refusal or grant of injunction was not irreparable.

In countering this argument, it was submitted by counsel for the Plaintiff that the Plaintiff's alternative claim for compensatory relief or damages in the main matter did not preclude this Court from granting an injunction as a claim for damages was not a bar to grant of relief of an order of injunction.

Ms. Chilekwa relied on Order 27 of the High Court Rules to the effect that 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 to apply for an injunction.

The case of **Michael Chilufya Sata v. Chanda Chimba III and others**[8] was also called in aid as it confirmed that the courts have power to grant injunctions notwithstanding that there is a claim for damages.

Counsel also distinguished the case of ***Afritec Asset Management*** with the present case and argued that in that case, the primary claim related to the payment of levies as opposed to accessing land. That the damage that the defendant would have suffered in that case was accumulated levies that they would be paying up to the time the question of levies was determined and not the wastage or damage to their property.

That this was not the case in the present case as the nature of the Plaintiff's damages if the injunction was not granted would clearly be loss of occupation and use of the property as well as waste and damage to the property. That the damage could not clearly be quantifiable.

It was further submitted that the Plaintiff's peaceful and quiet enjoyment of the property for over 30 years indicated a clear right to relief and the curtailment of such would result in the Plaintiff suffering irreparable injury which damages could not atone for.

I have given careful consideration to the above arguments. It is clear that the dispute relates to land. It is trite law that the loss of an interest in a particular piece of land or house no matter how ordinary cannot be adequately compensated by damages.

I should also add that the Supreme Court arrived at a similar conclusion earlier in the case of **Ahmed Abad v. Turning and Metals Limited** (9) when it stated that an injunction was inappropriate when damages would be an adequate remedy. In that case, the dispute did not relate to land but to ownership of a trailer. It was therefore found that the plaintiff was not going to suffer irreparable injury as the damages were quantifiable. This is not the case in the present case.

Moreover, under Order 27 which has been relied upon by the Plaintiff, the court may grant an injunction notwithstanding claim for damages. This is because there are certain cases where the applicant cannot be confined to a claim for damages.

Having said that, I have also considered that the 3rd Defendant claims an interest in the land. Therefore taking into account the position he has taken that the procedure was not followed when the re-entry was done on the property to which he held title, there is a doubt also at this stage that he will adequately be compensated under the Plaintiff's undertaking as to damages and that he will be in a financial position to do so. This is because the Plaintiff has not indicated this in his affidavit.

For the foregoing reasons, I find that there is a doubt at this stage as to the adequacy of the respective remedies in damages for the parties as the issues raised by the parties have not been determined on merit. In this regard, I shall proceed to consider the balance of convenience.

In the case of **Cayne v. Global Natural Resources** (10) May L.J explained that:

> **"That the balance of convenience is the phrase which of course is always used in this type of application. It is, if I may say so a useful shorthand but in truth, the balance that one is seeking to make is more fundamental more weighty than mere 'convenience'. I think it is quite clear from both cases that although the phrase may well be substantially less elegant, the 'balance of the risk of doing an injustice' better describes the process involved.'**

Sir John Donaldson M.R. expanded on the same theme in the case of **Francome v. Mirror Group Newspapers** (11) when he stated that:

> **"I stress again that we are not at this stage concerned to determine the final rights of the parties. Our duty is to make such orders if any as appropriate pending the trial of the action. It is sometimes said that this involves a weighing of the balance of convenience. This**

is an unfortunate expression. Our business is justice, not convenience. We can and must disregard fanciful claims by either party. Subject to that, we must contemplate the possibility that either party may succeed and must do our best to ensure that nothing occurs pending the trial which will prejudice his rights. Since the parties are usually asserting wholly inconsistent claims, this is difficult but we have to do or best. In doing so, we are seeking a balance of justice, not convenience." (Underlining mine for emphasis only).

Therefore on the question of balance of convenience, the court is required to determine which of the two parties will suffer greater harm from granting or refusing of an injunction pending a decision on the merits. Thus in making a determination on this question, the court must consider all the circumstances of the case and the wide range of factors. Although Lord Diplock in the case of ***American Cyanamid*** expressly mentioned three factors that is status quo, relative strength of the cases and special factors, he further stated that:

"It would be unwise even to attempt to list all the various matters which may need to be taken into consideration in deciding where the balance lies let alone to suggest the relative weight to be attached to them. These vary from case to case."

On the other hand, if the injunction is granted and the 3rd Defendant succeeds at the trial of this matter, he will be restrained temporarily and the harm will not be substantial as he has admitted that he has never accessed the property for more than 30 years.

It is for this reason that I find that the balance of convenience tilts in granting the injunction so as to preserve the status quo which existed before the Plaintiff's Certificate of Title was cancelled until the rights of the parties have been determined in this matter.

For the foregoing reasons, I find based on the fundamental principles of injunction law that the Plaintiff has demonstrated to the satisfaction of this Court that this is a proper case in which I can exercise my discretion and grant the interlocutory injunction albeit with slight modification on the scope.

For the avoidance of doubt, an interlocutory injunction is hereby granted restraining the 3rd Defendant, whether by himself or his agents from entering upon and dealing in the property known as L/2323/M Lusaka in any manner which will be detrimental to the Plaintiff until final determination of this matter or until further order of this Court.

I should however point out that by this Order, I have not determined at this stage the final rights of the parties. This will be determined at the trial of this matter. I make no order as to costs.

Delivered at Lusaka this 29th day of June, 2020

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M.C. KOMBE

JUDGE