

**IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
AT LUSAKA**

**2019/HP/1670**

*(Civil Jurisdiction)*

**BETWEEN:**

**JIMMY SIKAZWE**

**AND**

**CHARLES BANDA**



**PLAINTIFF**

**DEFENDANT**

**BEFORE HONOURABLE LADY JUSTICE P. K. YANGAILO, IN  
CHAMBERS ON 10<sup>TH</sup> DAY OF FEBRUARY, 2020.**

*For the Plaintiff: Mr. M. Kunga – Messrs. Barnaby & Chitundu  
Advocates*

*For the Defendant: N/A*

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**RULING**

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**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. *Preston vs. Luck* (1884) 27 CD 497;
4. *Tommy Mwendalema vs. Zambia Railways Board* (1978) Z.R. 65 (SC);
5. *Zambia State Insurance Corporation Ltd. vs. Dennis Mulope Mulikelela* - S.C.Z. Judgment No. 9 of 1990;
6. *Hondling Xing Xing Building Company Limited vs. ZamCapital Enterprises Limited* (2010) Z.R 30;
7. *Kajimanga vs. Chilemya* - (Appeal No. 50/2014) [2016] ZMSC 189;
8. *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; and
9. *Mundanda vs. Mulwani & Another* - SCJ 10/1997; and

**LEGISLATION REFERRED TO:**

1. *The High Court Act, Volume 3, Chapter 27 of the Laws of Zambia; and*
2. *The Lands and Deeds Registry Act, Volume 12, Chapter 185 of the Laws of Zambia.*

**1 BACKGROUND**

- 1.1 On 17<sup>th</sup> October, 2019, the Plaintiff, Jimmy Sikazwe, issued a Writ of Summons and simultaneously, took out Summons for an Order of Interim Injunction pursuant to ***Order XXVII, Rule 1 of The High Court Rules***<sup>1</sup>.
- 1.2 The Plaintiff alleges that the Defendant has encroached on the Plaintiff's land as well as the road reserve, which is adjacent to the Plaintiff's land, the consequence of which the Plaintiff has been inconvenienced and stands to suffer irreparable damages if the Plaintiff is not restrained by an injunction pending determination of the substantive matter.
- 1.3 The Plaintiff therefore seeks an Interim Injunction to restrain the Defendant from carrying on with the building on the property known as LN-1547/9, Libala South, Lusaka; doing anything; and/or dealing with the subject property in such a manner detrimental to the Plaintiff until further Order of the Court.

**2 AFFIDAVIT EVIDENCE**

- 2.1 In the accompanying Affidavit in Support sworn by the Plaintiff, it was averred *inter alia*, that in the year 2015,



the Plaintiff was offered Stand No. LN-1547/9 ("subject property"), located along Lilayi Road, in Libala South, Lusaka and upon following all formalities, he was subsequently issued with Certificate of Title No. 7782 to the said property. The Plaintiff proceeded to clear the subject property and commenced construction of a dwelling house, which is now at roofing stage.

- 2.2 It was further averred that on 19<sup>th</sup> September, 2019, the Plaintiff found that the Defendant had encroached on the said property by constructing a wall fence. Surveyors engaged confirmed that indeed the Defendant had encroached onto the Plaintiff's land and now the Defendant's illegal constructions have extended to the road reserve next to the Plaintiff's property.
- 2.3 It is also averred that the Defendant has continued to build the wall fence into the Plaintiff's property as well as the illegal structure on the road reserve, and if not restrained, he will cause irreparable damage to the Plaintiff.
- 2.4 On 22<sup>nd</sup> October, 2019, I granted the Plaintiff an *Ex Parte* Order of Interim Injunction, returnable on 22<sup>nd</sup> November, 2019 for *Inter Parte* hearing.
- 2.5 On 22<sup>nd</sup> November, 2019, Learned Counsel for the Defendant requested for an adjournment on the basis that he had just been retained and required to file herein

an Affidavit in Opposition. The matter was accordingly adjourned to 4<sup>th</sup> December, 2019.

- 2.6 The Defendant filed herein an Affidavit in Opposition on 3<sup>rd</sup> December, 2019, deposed to by the Defendant, Charles Banda, in which it is averred *inter alia* that the Plaintiff's subject property is separate and very distinct from his plot. That following the re-planning of the area, several smaller residential plots were created and that there is no longer a road reserve.
- 2.7 It is further averred that the Defendant has not encroached on any portion of land at all and that it is in fact the Plaintiff who has not followed the dimensions of his plot when constructing a septic tank that encroached on the Defendant's land as confirmed by the Surveyor brought by the Plaintiff.
- 2.8 It is also averred that the Plaintiff has erected another beacon into the Defendant's land which was not there initially.

### **3 SUBMISSIONS**

- 3.1 The Defendant filed written submission on 3<sup>rd</sup> December, 2019, in which it is submitted *inter alia* that the Plaintiff is not entitled to an injunction as he has not shown that there is a serious question of law to be tried since public roads are a preserve of the Road Development Agency and Local Authority.



- 3.2 It is further submitted that the Plaintiff has included damages in his claims, which goes to show that damages would be an adequate remedy and that the fact that the Plaintiff has put another beacon onto the Defendant's plot shows that the Plaintiff is creating conditions favourable to himself, which is against the spirit of an injunction.
- 3.3 It is also submitted that the Plaintiff has suppressed material facts that there is no longer a road reserve but residential plots, which have been developed.
- 3.4 To fortify his submissions, the Defendant called in aid the cases of ***American Cyanamid Company vs. Ethicon Limited***<sup>1</sup>, ***Shell and BP Zambia vs. Conidaris and Others***<sup>2</sup>, ***Preston vs. Luck***<sup>3</sup> and ***Tommy Mwendalema vs. Zambia Railways Board***<sup>4</sup>.
- 3.5 On the return date on 6<sup>th</sup> February, 2020, only the Plaintiff's Advocates were in attendance. The Defendant and his Advocates were not in attendance, despite being notified of the return date. No reason was advanced for their absence. I proceeded to hear the matter.
- 3.6 Learned Counsel for the Plaintiff, relied on the Summons and Affidavit in Support filed herein on 17<sup>th</sup> October, 2019, which he augmented with *viva voce* submissions. It is submitted that the Defendant has not exhibited any proof of ownership to the land that he is claiming to be his and that the document exhibited marked "CB1" in the

Defendant's Affidavit in Opposition does not bear any approval of the authority responsible for issuance of title.

- 3.7 It is further submitted that the Plaintiff who has placed before this Court his Certificate of Title of the subject property has shown that there is triable issue and that he has a clear right to the relief sought.
- 3.8 It is also submitted that since the dispute herein involves land, damages cannot adequately atone or cure injuries that the Plaintiff is likely to suffer, were this Court to find in his favour and that the balance of convenience lies in favour of the Plaintiff.
- 3.9 The Plaintiff anchored his submissions on the cases of ***American Cyanamid Company vs. Ethicon Limited***<sup>1</sup>, ***Shell and BP Zambia vs. Conidaris and Others***<sup>2</sup> and ***Order XXVII, Rule 1 of The High Court Rules***<sup>1</sup>. The Plaintiff prayed that the interim injunction be granted.

#### **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 Plaintiff has made this application pursuant to ***Order XXVII, Rule 1 of The High Court Rules***<sup>1</sup>, which provides as follows: -



***"In any suit in which it shall be shown, to the satisfaction of the Court or a Judge, that any property which is in dispute in the suit is in danger of being wasted, damaged or alienated by any party to the suit, it shall be lawful for the Court or a Judge to issue an injunction to such party, commanding him to refrain from doing the particular act complained of, or to give such order, for the purpose of staying and preventing him from wasting, damaging or alienating the property, as to the Court or a Judge may seem meet, and, in all cases in which it may appear to the Court or a Judge to be necessary for the preservation or the better management or custody of any property which is in dispute in a suit, it shall be lawful for the Court or a Judge to appoint a receiver or manager of such property, and, if need be, to remove the person in whose possession or custody the property may be from the possession or custody thereof, and to commit the same to the custody of such receiver or manager, and to grant to such receiver or manager all such powers for the management or the preservation and improvement of the property, and the collection of the rents and profits thereof, and the application and disposal of such rents and profits, as to the Court or a Judge may seem proper."***

- 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 for the protection of the Plaintiff's property from irreparable injury. 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**<sup>5</sup>, 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**<sup>2</sup> 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**<sup>6</sup>, 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 Plaintiff, 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 exhibit marked "JS1" that the Plaintiff is the title holder of the subject property. The Certificate of

Title No. 7782, exhibited by the Plaintiff, shows that Stand No. LN-1547/9 belongs to the Plaintiff. The Defendant who averred in his Affidavit in Opposition, that there is no longer a road reserve adjacent to the Plaintiff's land as the same was included in the re-planned residential plots, which includes his plot, has not placed before this Court cogent evidence to support his assertion. I am therefore satisfied that triable issues exist, thus the Plaintiff's claim is not frivolous

5.3 In *casu*, the Plaintiff has shown that he is the title holder of the land in dispute. In determining who will be greatly inconvenienced if the interim injunction is confirmed, I addressed my mind to the provisions of **Sections 33, 34 (1) and 35** of **The Lands and Deeds Registry Act<sup>2</sup>**, which are all instructive on the fact that any title holder is regarded as the conclusive owner to a parcel of land. This is the case unless evidence is led that suggests that the title was acquired fraudulently. This position was reiterated in the Supreme Court Judgment of **Kajimanga vs. Chilemya<sup>7</sup>**, where it was held as follows: -

- "1. **A Certificate of Title is conclusive evidence of ownership of the property to which it relates. It can only be nullified if fraud in acquisition is proved;**
2. **An allegation of fraud must not only be clearly and distinctly alleged but it must also be clearly and distinctly proved by evidence. The standard**



***of proving an allegation of fraud is higher than the civil law standard of proof."***

- 5.4 As it stands, the Plaintiff has demonstrated that he has title to the subject property and in the absence of any fraud vitiating such title, it is conclusive proof of his legitimate ownership to the subject property.
- 5.5 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***<sup>8</sup>, 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***<sup>1</sup> 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 Plaintiff or Defendant and found that the balance of convenience lies heavily in favour of my granting the injunction sought.

5.6 As stated above, the Plaintiff is a title holder as evidenced by Certificate of Title, which has not been challenged by the Defendant. Without delving into the main action and looking at the facts presented before me, it is my considered view that the *status quo* should be maintained until the rights of the parties have been properly and finally determined by the Court and that this can be done by this Court granting the order of interim injunction to the Plaintiff.

5.7 I have also determined whether the Plaintiff can be adequately compensated by an award of damages in monetary value. The subject matter is real property and in such instances, the position of the Courts has been that compensation by an award of damages is not an adequate remedy. The case of ***Mundanda vs. Mulwani & Another***<sup>9</sup> is very instructive on this. Further, in the case of ***Mobile Zambia Limited vs. Msiska***<sup>10</sup>, the Supreme Court stated that the Court will only grant an injunction if the right of relief is clear and where the injunction is necessary to protect the Plaintiff from irreparable injury that cannot be atoned for by an award of damages. Being satisfied with the evidence placed



before me by the Plaintiff, I am of the view that in the present case, damages would not suffice if injury is occasioned to the Plaintiff, who is a title holder.

**6 CONCLUSION**

- 6.1 Accordingly, I grant the injunction sought by the Plaintiff. The *Ex Parte* Order of Interim Injunction granted to the Plaintiff on 22<sup>nd</sup> October, 2019, is hereby Confirmed.
- 6.2 I make no order as to costs.

**Delivered at Lusaka on 10<sup>th</sup> February, 2020.**

  
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**P. K. YANGAILO**  
**HIGH COURT JUDGE**