

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

2020/HP/018



B E T W E E N:

BEAUTY MWEETE

PLAINTIFF

AND

**OLIVER KALAMBALALA
SOLOMON NAMUKOMBO
HARDSON SHIMAYUNGWA**

1ST DEFENDANT

2ND DEFENDANT

3RD DEFENDANT

Before the Hon. Justice Mr. M.D. Bowa the 3rd day of July 2020

For the Plaintiff: In Person

For the Defendants: In Person

RULING

Cases referred to:

1. *American Cyanamid Company v Ethicon* 1975 AC 396
2. *Hilary Bernard Mukosa vs. Michael Ronaldson* (1993-1994) ZR26
3. *Harton Ndove vs. Zambia Educational Company Ltd* 1980 ZR 184
4. *Shell and BP v Conidaris and Others* 1975 ZR p174
5. *Sherpard Homes Ltd vs. Sandham* 1970 3 ALL ER p402
6. *Heinrich Hostels Limited TA Hotel Edinburg v Kitwe City Council & Other* 2011 ZR Volume 1
7. *Nevers Mumba vs. Muhabi Lungu Selected judgment* No 55 of 2014.

8. *Turnkey Properties vs. Lusaka West Development Co Limited & another (1984)*
ZR p85

Other works referred to:

Rules of the Supreme Court of England 1999 edition Order 29/ 1A/2

This is the Plaintiff's application for an interim injunction filed into court on 9th January 2020. The affidavit in support of even date was sworn by the Plaintiff Beauty Mweete. She deposed that following the death of her brother former headman Mweete who reigned from 1993 to 28th March 2018 she was duly appointed headwoman by the Shambololo Royal establishment at a ceremony commonly known at Imbeta. She was then as per custom, taken to his Royal Highness Senior Chief Shakumbila's Palace for anointment and formal installation as the recognized headwoman of Shambololo village. Produced and marked "**BM1**" is a copy of the certificate of appointment as headwoman.

She averred further that the Defendants have willfully refused and neglected to honour and submit to her headwoman position despite having the blessings of Senior Chief Shakumbila who is the superintendent of all headmen and women in the Shibuyunji District of Central Province of Zambia.

It was averred further that on the 17th of December 2019, the Defendants arranged their own installation ceremony where the 1st Defendant was installed as headman of Shakumbila village contrary to the custom and practice adopted and observed over time immemorial. The Plaintiff contended that the 1st Defendant does not qualify for the position as he does not fall within the line of descendants with the right of heir to the throne of headmanship in the Shambololo Royal establishment.

Further that unless and until the Plaintiff relinquishes her installation and the proper procedure is followed as per custom, the 1st Defendant sets a bad precedence and he will never be a legitimate headman of the people of Shambololo village. The Plaintiff thus contends that the 1st Defendant is illegally masquerading as headman and unless his installation is declared null and void he shall continue imposing himself as headman of Shambololo village.

She added that following his questionable installation as headmen, the 1st Defendant intends to usurp her powers and has started letting out and selling customary land in the village. Produced as proof of this assertion are **“BM2”** and **“BM3”** being a copy of letter

written at the police station by the 1st Defendant confirming a reversal of sale of customary land allegedly illegally sold by him. The Plaintiff thus seeks an interim injunction to maintain the status quo pending the determination of the matter.

The 1st Defendant filed an affidavit in opposition dated 4th March 2020. He deposed that after the death of headman Benson Mweete his elder brother, he was duly appointed headman by the Shambololo Royal establishment at a ceremony known Imbeta. This was after the Mweete family members sat and elected him to succeed the late headman on the 31st of August 2018.

81 family members were in attendance but the Plaintiff was not present. It was averred that she opted instead to go to the Palace of her Royal Highness Chief Shakumbila and decided to sue the family members. She however lost the case. Within a week, the family members sat and he was re-elected as headman.

Being dissatisfied with that outcome, the Plaintiff for the second time appealed to her Royal Highness Chief Shakumbila's Palace. She lost the second elections which were conducted in the presence of all the Royal committee members who declared the 1st Defendant

the winner. He added that he was given two letters of recognition and the certificate of headmanship of Shambololo village exhibited **“OKM1” “OKM2” and “OKM3”** respectively.

In her affidavit in reply dated 16th March 2020, the Plaintiff contended that contrary to the Defendant’s assertions, the founder headman of Shambololo village is Joseph Mweete Shambololo. That after his demise by practice and tradition of the Shambololo people, the right of headmanship was passed on to his 8 children one of whom is herself. She further contended that Benson Mweete Shambololo and the 1st Defendant were not brothers as suggested but cousins.

She added that after several wrangles over the headman position in the village, the Plaintiff and 1st Defendant appeared before the traditional advisory court at his Royal Highness Senior Chief Shakumbila’s Palace. Upon hearing both sides, a judgment was delivered declaring her the rightful headwoman of the people of Shambololo village. A copy of the judgment is exhibited **“BM1.”**

She questioned the composition of the 81 family members who selected the 1st Defendant and dismissed them as not being from

the lineage of Joseph Mweete Shambololo, the founder of the village. Further that they did so against the customs and traditions practiced and recognized in the village. She also questioned the authenticity of exhibits **“OKM3,” “OKM2” and “OKM3”** in the affidavit in opposition and reiterated her appeal for the injunction to maintain the status quo.

I have carefully considered the application before me. The parties dispensed with an oral hearing opting to rely on their filed documents and invited the court to deliver a ruling as I now do.

The principles and tests to be applied when a court is considering whether or not to grant an interim injunction are well settled. In the case of *American Cyanamid Company v Eithicon*¹, Lord Diplock set out the tests that a court should apply in exercising its discretion when faced with such applications. Notably, that the court should address the question whether or not on the facts, the Plaintiffs has raised a serious question to be determined at trial; whether damages would be an adequate remedy and the Defendant is in a position to pay; and lastly where the balance of convenience lies.

The first test I must apply therefore is to ascertain if there is a serious question to be tried and a clear right of relief established on the facts. In applying this test the Supreme Court in the case of **Hilary Bernard Mukosa vs. Michael Ronaldson**² went further and held that.

"An injunction would only be granted to a Plaintiff who established that he had a good and arguable claim to the right he sought to protect."

Further in the case of **Harton Ndove vs. Zambia Educational Company**³ Chirwa J held that:

"Before granting an 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"

Having examined the parties' respective affidavits, I find that there is a dispute centering on the right to assume the position of headman in Shambololo village. In particular, I find that the question of who between the Plaintiff and the 1st Defendant qualified to be headman and was duly appointed is a serious issue to be determined at trial. Without making any attempt to delve into the merits of the case I also find that prima facie the Plaintiff has

demonstrated a clear right of relief and arguable claim granted the disclosed defined lineage and right of heritage.

The second question I must interrogate is whether damages would be an adequate remedy or if irreparable injury would result from the court's refusal to grant an injunction. In the case of ***Shell BP Zambia Limited v Conidaris and Others***⁴ the Supreme Court defined irreparable injury to mean

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

If therefore, an applicant can be adequately compensated by an award of damages and the respondent would be in a position to pay the damages then an injunction should not be granted irrespective of how strong the applicant's case is. I find that the right to hold position of leadership in a village set up as headman cannot be compensated in damages as this would be difficult to quantify.

That said there is one fundamental fact that is disclosed in the evidence before me. That is, the fact that the 1st Defendant has already been installed as headman and performing his functions. The act being frowned upon has already taken place. There is

therefore nothing for the court to injunct. The application before me as evidenced in the originating process, summons and submissions is for an interim "prohibitory injunction" as opposed to a "mandatory injunction" by which the court can order that some positive act be done to restore the prior position through the undoing of the wrongful act.

Order 29/1A/2 of the Rules of the Supreme Court 1999 edition

explains the distinction in the following terms:

"An injunction is said to be prohibitory if it forbids the commission or continuance of the act and to be mandatory if it directs that a positive act should be done to repair some omission or to restore the prior position by undoing some wrongful act."

Different considerations apply to the grant of mandatory injunctions. Suffice to state that it is a very exceptional form of relief. In the case of ***Sherpard Homes Ltd vs. Sandham***⁵ Megarry J. laid down some general guidelines to be taken into account when considering an application for a mandatory injunction. He stated that the Applicants case has to be *"Unusually strong and clear"* before a mandatory injunction will be granted. He went on to say

the court must feel a "*high degree of assurance*" that at the trial it will appear that the injunction was rightly granted. He further stressed that the requisite degree of assurance was of a higher standard than was required for a prohibitory injunction.

These guidelines have found persuasion in the consideration of such applications before our courts in cases such as ***Heinrich Hostels Limited TA Hotel Edinburg v Kitwe City Council***⁶ and the Supreme Court decision in the case of ***Nevers Mumba vs. Muhabi Lungu***⁷ In the Nevers Mumba case, the court considered the distinction between the two types of injunction and found that when all the circumstances and evidence of that case were taken into account, the appellant had made a strong case to warrant the court to order a mandatory injunction notwithstanding the appeal had centered on the discharge of a prohibitory injunction by the trial court.

I have considered the appropriateness of granting a mandatory injunction in this matter I am not satisfied nor do I feel that there is a high degree of assurance that the plaintiff will be able to establish this right at trial based on the material and evidence before me at

this stage. I am therefore not able to rule out the risk of injustice that may be occasioned if the grant of the mandatory injunction turns out to be wrong.

Lastly, I am of the considered view that the grant of an injunction will have the effect of creating new conditions that would only be suitable for the Plaintiff as there will be a reversal of the present position and the Plaintiff will then assume the contested position. In ***Turnkey Properties vs. Lusaka West Development Co Limited & another***⁸, Ngulube DCJ as he was then delivering the Judgment of the Supreme Court settled the law in the following terms:

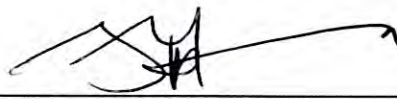
“An interlocutory injunction is appropriate for the preservation or restoration of a particular situation pending trial; but it cannot, in our considered view, be regarded as a device by which the applicant can attain or create new conditions, favourable only to himself, which tip the balance of the contending interests in such a way that he is able, or more likely, to influence the final outcome by bringing about an alteration to the prevailing situation which may weaken the opponents' case and strengthen his own.”

The maintaining of the status quo would thus be that the 1st Defendant continues as headman pending the determination of the

parties' respective legal positions. In sum and for the avoidance of doubt, the application for an interlocutory injunction fails and is dismissed with costs to the Defendants to be taxed in default of agreement.

Dated at Lusaka theday of 2020.

3rd July



JUDGE.

