

Phiri

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

2020/HPC/0459

BETWEEN:

BRIAN PHIRI



PLAINTIFF

AND

NATIONAL HOUSING AUTHORITY

DEFENDANT

**CORAM: Hon. Mr. Justice Bonaventure C. Mbewe in Chambers
on the 14th July, 2020.**

RESEARCHER : Mwiche Ntinda

MARSHAL : Esther Ng'uni

*For the Plaintiff : Ms. N. Chileshe of Messrs. Paul Norah
Advocates*

*For the Defendant : Mr. Z. Phiri of Messrs. Kaumbu
Mwondela Legal Practitioners*

RULING EX TEMPORE

Cases and Authorities Referred to:

1. *American Cyanamid Co. v. Ethicon Limited*, (1975) A,C 396;

2. *Shell and BP and BP Zambia Limited v. Conidaris and Others*, (1975) Z.R 174;
3. *Order 27, Rule 1 of the Rules of the High Court, Chapter 27 of the Laws of Zambia.*

INTRODUCTION

This is an application for injunctive relief which the Plaintiff has endorsed in his Writ of Summons dated 11th June, 2020 as follows;

“(3) An injunction restraining the Defendant from evicting the Plaintiff from House No. 23673, Bennie Mwiinga Lusaka for which the purchase price has been paid in full;

(4) An injunction restraining the Defendant from selling whether by themselves or by their servants agents or otherwise howsoever from disposing of or changing, assigning or dealing with House No. 23673 Bennie Mwiinga, Lusaka to any other party apart from the Plaintiff;

(5) In the alternative, damages from the Defendant for breach of contract and consequently loss to the Plaintiff.”

The Plaintiff filed an *ex parte* summons for an interim injunction on 11th June, 2020 pursuant to **Order 27, Rule 1 of the Rules of the High Court, Chapter 27 of the Laws of Zambia** wherein he claims “...an interim order of injunction to restrain the Defendants from selling Stand No. 23673, Bennie Mwiinga, Lusaka to any third

party and further the Defendant is restrained from evicting the Plaintiff from the said property pending the full and final determination of the main matter or until further order for the reasons stated in the affidavit in support of this application and further that costs be for the Plaintiff in any event.”

The Court granted the Plaintiff an interim injunction on the *ex parte* application on 11th June, 2020.

ARGUMENTS AND EVIDENCE

The Plaintiff filed an affidavit in support of the application for interim injunction wherein he deposes that he was a tenant of the Defendant and was offered House No. 23673, Bennie Mwiinga to buy and settle a deposit of 40% of the purchase price by 15th March, 2019. In Paragraph 9 of the affidavit, the Plaintiff deposes that he was not able to pay the purchase price by the demand date and the offer was subsequently withdrawn by the Defendant. In Paragraph 10 he deposes that he paid the purchase price in full and had in turn contracted to on-sell the property to one Lucy Namuyamba in whose name the title for the property should be processed, which facts he informed the Defendant of this fact by letter of 30th April, 2019. That the Defendant acknowledged receipt of the Plaintiff's payment by letter dated 30th April, 2019 and though by letter dated 30th March, 2019 the Defendant withdrew the offer and demanded vacant possession of the house. The Defendant again wrote the Plaintiff a letter dated 5th June, 2020 demanding vacant possession. The Plaintiff deposes that he has

an arguable case on the merits and that unless this Court restrains the Defendant from evicting him, he will suffer irreparable injuries that may not be atoned for in damages as the Plaintiff is currently unemployed and shall have nowhere else to stay and has no means to pay for alternative accommodation until final determination of the matter and he will suffer extreme loss if the property is sold to a third party.

The Plaintiff's skeleton arguments argue that the case of **American Cynamid Co. v. Ethicon Limited (1)** lays down the principles for the granting of interim injunctive relief posing the following questions;

(a) Is there a serious question to be tried

(b) Would damages be adequate remedy for a party injured by the Court's grant of, or its failure to grant an injunction

The Plaintiff submits that it has satisfied both tests from its pleadings and affidavit evidence. The Plaintiff prays that the Court exercises its discretion in its favour.

RULING

As argued by the Plaintiff that the case of **American Cynamid v. Ethicon Limited (1)** lays down the elements that need to be established for a Court to grant an injunction, namely;

- a. The Plaintiff must establish that he has a good arguable right which he seeks to protect;
- b. The Court must be satisfied that the Plaintiff has shown that there is a serious question to be tried; and
- c. Damages would not be an adequate remedy for a party injured by the Court's grant of, or its failure to grant an injunction.
- d. If an applicant satisfies these (above) tests, the grant or refusal of an injunction is a matter for the exercise of the Court's discretion on a balance of convenience.

The principles in the **American Cyanamid** case were affirmed by the Zambian Supreme Court in the case of **Shell and BP Zambia Limited v. Conidaris and Others (2)**. The principle is briefly put that the right to relief must be clear and the injunction is necessary to protect the Plaintiff from irreparable injury, which injury, cannot be atoned for in damages.

The Plaintiffs writ claims the following *inter alia*; “(5) in the alternative, **damages from the Defendant** for breach of contract and consequently loss to the Plaintiff.” The Plaintiff is clearly telling the Court that damages would be sufficient recompense to the Plaintiff in the event that he is not granted the initial remedy of specific performance of the contract of sale for House No. 23673, Bennie Mwiinga, Lusaka.

I am therefore of the firm position that the Plaintiff has not met the test set out in the authorities cited above and he cannot in the same breath argue as he has in his claim number 5 and at the same time that he will suffer irreparably injury or inestimable loss which cannot be atoned for in damages if the Defendant is allowed to sell the property to a third party or evict him from the house.

I therefore refuse to exercise my discretion and confirm the injunction. I hereby discharge the interim injunction I granted *ex-parte* on 11th June, 2020.

Costs to the Defendant, to be taxed in default of agreement.

I do refuse to grant the Plaintiff leave to appeal against this Ruling and I will proceed to set down a date for a scheduling conference to be communicated to the parties.

Delivered at Lusaka this 14th July, 2020.

A handwritten signature in black ink, consisting of a large, stylized 'B' and 'M' intertwined, enclosed within a large, loopy circle. Below the signature is a horizontal dotted line.

**Bonaventure C. Mbewe
HIGH COURT JUDGE**