

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

2013/HP/1468

BETWEEN:

RONBEAT INVESTMENT LTD

PLAINTIFF

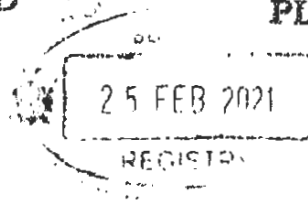
AND

MTN (ZAMBIA LIMITED)  
NDOLA CITY COUNCIL  
HIS ZAMBIA LIMITED

1<sup>st</sup> DEFENDANT

2<sup>nd</sup> DEFENDANT

INTERESTED PARTY



BEFORE: HON. MR. JUSTICE E.L. MUSONA.

For the Plaintiff:	Mr. J. Zimba of Messrs Makebi, Zulu Adv.
For the 1 <sup>st</sup> Defendants:	Mr. M. J. Chitupila with Ms. V. N. Sholande of Messrs hill and seph Adv.
For the 2 <sup>nd</sup> Defendant:	Ms. M. Dimingu Phiri in house counsel for the 2 <sup>nd</sup> Defendant
For the interested party:	Ms. D. Nalishuwa of Messrs Musa Dudhia and C.o

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## JUDGMENT

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DATE: 25<sup>TH</sup> FEBRUARY, 2021

Cases referred to:

1. *Wilson Masauso Zulu v Avondale Housing Project Ltd*  
(1982) ZR 172
2. *Galaunia Farms Ltd v National Milling Corporation Ltd*  
(2004) ZR
3. *Khalid Mohamed v Attorney General* (1982) ZR 49
4. *Shell and BP Zambia Ltd v Conidaris and others* (1975)  
ZR 174

Legislation referred to:

1. 5.33 of the lands and deeds registry Act Cap 185 of the laws of the Republic of Zambia.

Other works referred to:

1. *Winfield and Jolowiz on torts cases and Materials.*
2. *Cheshire and Fifoot's law of contract, 10<sup>th</sup> edition, London Butterworths, 1981.*
3. *Chitty on contracts, General Principles Volume 1, Sweet and Maxwell, 2008.*

The plaintiff commenced this action on 7<sup>th</sup> October, 2013 against M.T.N Zambia Limited by writ of summons with an accompanying statement of claim.

On 8<sup>th</sup> August, 2014 Ndola city council joined these proceedings as the second Defendant. And on 14<sup>th</sup> November, 2019, HIS Zambia Limited was added as an interested party.

The plaintiff's claims as against both Defendants is for the following reliefs:

- i. Damages for trespass including aggravated damages.
- ii. Mesne profits for the use by the Defendant of the signal tower erected on the plaintiff's land.
- iii. An injunction restraining the Defendants whether by themselves or by their servants or agents from entering, using or erecting any further signal towers upon the plaintiff's land with or without motor vehicle.
- iv. Interest on 1 and 2 above at the current bank lending rate from the date of the writ to the date of full settlement.
- v. Any other relief the court may deem fit.
- vi. Legal costs hereof and incidental to the proceedings.

As shown above, this matter was commenced at the principal registry at Lusaka on 7th October, 2013. Judgement is being delivered today the 25<sup>th</sup> of February, 2021. Undoubtedly, this is an epitome of delay.

By simple calculation, this case has taken more than seven (7) years. The case fell into backlog. The backlog was serious. It was finally allocated to me in August, 2018 under the auspices of the task force on backlog appointed by the Honorable Chief Justice. From August, 2018 when this matter was allocated to me to today when this Judgement is being delivered, shows that I have had conduct of this matter for about two (2) years.

I remind myself on the outset that in matters of this nature the standard of proof is on a balance of probabilities. Further, the duty to prove the case rests on the plaintiff.

I have looked at a plethora of authorities and am well guided. I have looked at the cases of **Wilson Masanso Zulu v Avondale Housing Project Ltd (1)**, **Galaunia Farms Ltd v National Milling Corporation Ltd (2)** and **Khalid Mohamed v The Attorney General (3)**

In all these authorities, it was settled that a plaintiff has a duty to prove the case against the Defendant. What I garner, therefore, is that if the plaintiff fails to prove the case, then the plaintiff's case must fail.

In support of their case, the plaintiff called three (3) prosecution witnesses. I shall, hence forth, refer to these witnesses as PW1, PW2 and PW3 respectively.

PW1 was M/Ronald Bwale Nsokoshi, who is the plaintiff herein, the evidence for PW1 was that between the years 1999 and 2000 he applied to Ndola city council to purchase the swimming pool being then the property of Ndola city council situate on sub division 10 of stand number 266 Kandabwe, Ndola. That application was successful and the plaintiff purchased that swimming pool between the years 2012 and 2013.

The problem is that there is a tower which until it was sold to IHS Zambia Limited belonged to MTN Zambia Limited. According to the plaintiff, this tower sits on sub division 10 of stand number 266, Kandabwe Street, Ndola in the Republic of Zambia, the plot allegedly belonging to the plaintiff.

PW2 was M/Paul Phiri who is a government land surveyor.

PW2 came to court under a subpoena duces tecum.

PW2 told this court that the beacons on the disputed plot are intact and that, those beacons define the boundaries of the disputed property being sub 10 of stand 266, Ndola, and within that

boundary there is an MTN Zambia Telecommunications Mast. PW2 emphasized that the MTN Mast was within sub 10 of stand 266, Ndola.

PW3 was M/Francis Musonda Mwila who is an accounts officer for the plaintiff.

The evidence for PW3 was that the first Defendant had encroached on sub division 10 of stand 226, Ndola which belongs to the plaintiff.

That arising from this encroachment, the plaintiff has been unable to implement their economic activities on the disputed plot.

The defence called two (2) witnesses one by the 1<sup>st</sup> Defendant and the other by the interested party. I shall refer to those defence witnesses as DW1 and DW2 respectively.

DW1 was M/Tom Nguni who is a technologist for capital projects for the 1<sup>st</sup> Defendant. By the Defendant's witness statement, DW1 averred that the relationship between the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant in this case arose from a lease agreement between the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant. The duration of the lease was 10 years from 1<sup>st</sup> January, 2011 to 31<sup>st</sup> December, 2021. Pursuant to that lease agreement the 1<sup>st</sup> Defendant leased from the 2<sup>nd</sup> Defendant stand number 266 Kandabwe, Ndola, for the purpose of setting up a base station which was to be operated on a national wide basis throughout the Republic of Zambia. That is the tower. In consideration of the use of the premises, the 1<sup>st</sup> Defendant paid to

the 2<sup>nd</sup> Defendant a monthly rental of K1, 500 (rebased). According to DW1, the premises in issue being stand number 266 Kandabwe, Ndola is property of the 2<sup>nd</sup> Defendant. DW1 further avered that the 2<sup>nd</sup> Defendant never notified the 1<sup>st</sup> Defendant that there has been a change of ownership or transfer of interest in the property to any other party.

DW1 further avered that the 1<sup>st</sup> Defendant sold the tower on the disputed land to the interested party herein in December, 2014, subsequent to which the lease agreement between the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant come to an end.

The interested party also gave evidence through their witness. I shall refer to the witness called by the interested party as DW2.

DW2 was M/Bernard Kaputo Mulenga a senior site acquisitions coordinator for the interested party.

DW2 avered through his witness statement that in around 2014 the interested party and the 1<sup>st</sup> Defendant entered into an agreement whereby the interested party purchased the 1<sup>st</sup> Defendant's Base Transceiver (BTS) commonly called; tower' located on stand number 266 Kandabwe, Ndola as part of the transaction wherein the interested party herein purchased the 1<sup>st</sup> Defendant's telecommunication towers in Zambia. It was a term of agreement in that purchase that he interested party could acquire everything attached to the tower including the lease agreement between the 1<sup>st</sup> and the 2<sup>nd</sup> Defendant. Before completing the purchase of the tower the interested party conducted investigations as part of its due

diligence to ascertain the ownership of the land on which the tower stood. The 2<sup>nd</sup> Defendant confirmed to the interested party that truly the 2<sup>nd</sup> Defendant was the owner of the portion of the land on which the tower stood.

On those basis, on 22<sup>nd</sup> December, 2014, the interested party executed a lease agreement with the 2<sup>nd</sup> Defendant. Prior to the acquisition of the tower by the interested party, the 1<sup>st</sup> Defendant had a lease agreement over the land on which the tower is sited with the 2<sup>nd</sup> Defendant. As part of the acquisition of the tower, the interested party took over the lease and to this extent entered into a lease agreement with the 2<sup>nd</sup> Defendant. That lease agreement was exhibited on pages 23 to 35 of the interested party's bundle of documents. The monthly rentals in the sum of ZMW1, 800 were to be paid by the interested party to the 2<sup>nd</sup> Defendant and have ever since that agreement had been paid to the 2<sup>nd</sup> Defendant.

According to the interested party, the land on which the tower is sited belongs to the 2<sup>nd</sup> Defendant and this is what the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant have always represented to the interested party.

Additionally, the interested party avered that the portion on which the tower stands is not party of the plaintiff's property.

I have heard all parties.

I shall now consider the reliefs sought.



i. **Damages for trespass including aggravated damages**

Am alive to the law on trespass to property. In simple terms, trespass is an unlawful entry on the land that belongs to another person.

According to **Winfield and Jelowiz** a trespasser is “**one who enters or remains upon land in the possession of another without privilege to do so**”.

In order for a plaintiff to prove that the other is a trespasser, the burden of such proof lies upon the plaintiff. The plaintiff must, therefore, prove that;

i. The plaintiff is the actual owner of the property or in possession thereof.

ii. The entry by the other was intentional and unlawful.

Regarding the ownership of stand number 266 Kandabwe, Avenue, Ndola which is in dispute, I note that the plaintiff applied for the purchase by themselves from the 2<sup>nd</sup> Defendant of sub division number 10 of stand number 266 Kandabwe Avenue, Ndola. That application was approved and the payment by plaintiff to the 2<sup>nd</sup> Defendant for the purchase of sub division 10 of stand number 266, Kandabwe Avenue, Ndola is not in dispute. Subsequently, on 13<sup>th</sup> September, 2011 a certificate of title was issued to the plaintiff.

I am alive to the provisions of **S.33 of the lands and deeds registry Act Cap 185 of the laws of the Republic of Zambia** that section provides that:

**“A certificate of title shall be conclusive as from the date of its issue and upon and after the issue thereof”.**

There is no dispute concerning the ownership of this subdivision number 10 of stand number 266 situate in Ndola on Kandabwe Avenue. The only dispute is that the tower is sited on the above said property. The plaintiff alleges that the tower is on their property. To the contrary, the 2<sup>nd</sup> Defendant, in their defence filed into court contend that the tower is on their property and not on the property of the plaintiff.

In order to resolve this impasse I travelled from Lusaka to Ndola on 16<sup>th</sup> August, 2019 for a site visit. My observations at the site were as follows;

- a. The property is popularly referred to as Ndola swimming pool.
- b. The property is in extent 1.5412 hectares.

- c. The swimming pool part is in a concrete wall fence while the rest of this property is not in a wall fence.
- d. The property has five (5) beacons labeled as A-B-C-D-E.
- e. It is 134.52 meters from beacon A to beacon B, 112.89 meters from beacon B to beacon C.  
140.47 meters from beacon C to beacon D, 100.54 metres from beacon D to beacon E and 8.81 metres from beacon E to beacon A.
- f. The property is situated at the corner of Kandabwe Avenue and Kanongesha Road. It is a sub division of the remaining extent of stand number 266 Ndola a property of the 2<sup>nd</sup> Defendant.
- g. The Mast is on the side of beacon D, clearly inside sub division 10 of stand number 266 Kandabwe, Ndola, the property of the plaintiff.

My above findings have been fortified by a survey report on the boundary verification of sub 10 stand 266, Ndola that report which was prepared by Paul Phiri who is a land surveyor from the Surveyor General's Office with its sketch plan and an accompanying letter dated 18<sup>th</sup> November, 2019 under the hand of Joseph Minango who is the Surveyor General all show that the tower in

issue, indeed, falls within the boundaries of sub 10 stand 266 Kandabwe, Ndola, the property of the plaintiff.

What I discern from this is that the tower is truly on the property of the plaintiff. Who then is the trespasser?

The plaintiff was offered to purchase the disputed property by Ndola Council in a letter of offer dated 29<sup>th</sup> April, 2011.

That letter of offer was exhibited on page 12 of the plaintiff's bundle of documents.

The plaintiff made the first part payment of Sixty Thousand Kwacha ZMK 60, 000.00 [unrebased] on 17<sup>th</sup> May, 2011 towards the purchase of the disputed property. A receipt of payment of this money was exhibited on page 11 [a] of the plaintiff's bundle of documents. The plaintiff obtained title to the disputed property on 13<sup>th</sup> September, 2011 when the certificate of title number 130 844 in respect of this disputed property was issued in favour of the plaintiff. It can therefore, not be disputed that the plaintiff acquired interest in the disputed property on 17<sup>th</sup> May, 2011 when he paid the initial payment towards the purchase of the disputed property although title was issued to him on 13<sup>th</sup> September, 2011. When then, did the tower start sitting on that property? According to the plaintiff's statement of claim, the tower was erected during the duration of the lease between the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant. Clearly the plaintiff was a leasee at that time and not the owner.

Notwithstanding that the lease[ enjoys certain rights and privileges, the plaintiff was fortified when the plaintiff made initial payment to the 2<sup>nd</sup> Defendant for the purchase of the disputed property. That was on 17<sup>th</sup> May, 2011. As from 17<sup>th</sup> May, 2011, the plaintiff began to enjoy ownership of the disputed land as opposed to mere usufructus rights. As from 17<sup>th</sup> May, 2011, therefore, the plaintiff acquired proprietary rights in the disputed property. As from 17<sup>th</sup> May, 2011 the 1<sup>st</sup> Defendant was obliged to pay rentals to the plaintiff and not to the 2<sup>nd</sup> Defendant.

There was need by the 1<sup>st</sup> Defendant to transfer their allegiance to the plaintiff and rentals directed to the new owner of the disputed property. Failure by the 1<sup>st</sup> Defendant to regularize their stay on the disputed property with the plaintiff rendered the 1<sup>st</sup> Defendant trespasser. This was aggravated by non payment of rentals by the 1<sup>st</sup> Defendant to the plaintiff. What also went wrong, too wrong infact, was the conduct of the 2<sup>nd</sup> Defendant who continued to receive rentals from the 1<sup>st</sup> Defendant in respect of the property which they had since leased to and later sold to the plaintiff.

On those basis, I find that the 1<sup>st</sup> Defendant was a trespasser because they had no consent of the plaintiff to be on that property. The 2<sup>nd</sup> Defendant exacerbated the situation when they kept receiving and pocketing rentals paid to them by the 1<sup>st</sup> Defendant in respect of the property which they had already leased and later sold

to the plaintiff that constituted a trespass on the part of the 2<sup>nd</sup> Defendant.

I also find that the 1<sup>st</sup> Defendants who were the lessee under a lease agreement between the 2<sup>nd</sup> Defendant and the 1<sup>st</sup> Defendant liable in damages for trespass both on their own selves as well as under the indemnity clause which is clause 16.1 in their lease agreement between the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant. Under that indemnity clause the 1<sup>st</sup> Defendant is to indemnify the 2<sup>nd</sup> Defendant against any liability. It follows, therefore, that the 1<sup>st</sup> Defendant are liable on this claim. The liability accrued from the time when the tower was created on the plaintiff's property. It is clear that when the tower was created the plaintiff was not yet the owner of land but a lessee. The plaintiff subsequently becomes the owner of the land when they bought it. The liability on the 1<sup>st</sup> Defendant to the plaintiff is effective from the time the tower was erected, because, although not as an owner of the property that time, the plaintiff as a tenant had usufratus <sup>rights</sup> in the property. The plaintiff was in possession of the property and was paying rent to the 2<sup>nd</sup> Defendant. What the 1<sup>st</sup> Defendant did to erect a tower on that property was a trespass to the plaintiff. A tort of trespass can also be committed against a leasee other than the actual owner of land.

A tort of trespass can also be committed by the owner of land against the tenant. This case is an epitome of circumstances under

which leasee can sustain a claim for trespass against the landlord and other trespassers.

There is no dispute that at the material time the plaintiff was in possession of the disputed land. Therefore at all material times the plaintiff was in the possession of the disputed land.

In the case of **Shell and BP Zambia Ltd v Conidaris and others (4)** the Supreme Court held that;

**“Trespass to the land in the unlawful entry on land in the possession of another.”**

The Defendants in this case knew that the plaintiff was in possession of that disputed land. Their conduct was deliberate and intentional. This is what made it unlawful.

This claim for damages for trespass including aggravated damages is upheld against the 1<sup>st</sup> Defendant with interest at the short term bank deposit rate from the date the tower was erected on sub division 10 of stand 266, Ndola to date of Judgement and thereafter at the current Bank of Zambia lending rate until full payment.

I refer it to the Registrar for assessment.

**ii Mesne profits for the use by the Defendant of the signal tower erected on the plaintiff's land.**

It is trite that the signal tower on the plaintiff's land was erected for the purpose, largely, of financial gain. It can, therefore, not be disputed that the 1<sup>st</sup> Defendant enjoyed financial gain yet at the expense of the plaintiff who was legitimately entitled to those

benefits. Having established that the tower was wrongly on sub division 10 of stand number 266, Ndola it follows, therefore, that the financial gain which accrued to the Defendant's be handed over to the plaintiff who is legitimately entitled to those monies.

Consequently, I order that all the rentals which the 2<sup>nd</sup> Defendant received from the 1<sup>st</sup> Defendant be remitted to the plaintiff forth with. In default of agreement same shall be assessed by the Registrar. This shall be paid with interest at the short term bank deposit rate from the date of the first payment to date of Judgement and therefore at the Bank of Zambia lending rate.

- iii **An injunction restraining the Defendants whether by themselves or by their servants or agents from entering, using or erecting any further signal towers upon the plaintiff's land with or without motor vehicle.**

This was an interlocutory application for an order of interim injunction. The application was delt with during proceedings.

This claim, therefore, falls off.

- iv **Interest on 1 and 2 above at the current bank lending rate from the date of the writ to the date of full statement.**

The issue of interest on the first and second claims has already been delt with when I dealt with those claims.

- v **Any other belief the court may deem fit.**

I have seen no other relief due to the plaintiff.



**Vi Legal costs hereof and incidental to the proceedings.**

I order costs of and incidental to these proceedings in favour of the plaintiff against the Defendants to be taxed in default of agreement.

For the avoidance of doubt, the plaintiff has succeeded on two (2) claims and those are claims 1 and 2. Claim one is for damages for trespass including aggravated damages. Claim 2 for Mesne profits for the use by the 1<sup>st</sup> Defendant of the signal tower erected on the plaintiff's land.

I have seen no liability on the party of the interested party. In fact, the interested party were not privy to what was happening but only found themselves entangled in the spiders' web innocently.

The learned authors of **Cheshire and Fifoot's law of contract, 10<sup>th</sup> edition, London Butterworths, 1981** stated that,

**"In the middle of the nineteenth century the common law judges reached a decisive conclusion upon the scope of contract. No one, they declared, may be entitled to or bound by the terms of a contract to which he is not an original party."**

I am also fortified by **Chitty on contracts, General Principles, Volume 1, Sweet and Maxwell, 2008**, wherein, the learned authors wrote that,

**“The common law doctrine of privity means, and means only that a person cannot acquire rights, or be subjected to liabilities, arising under a contract to which he is not a party”.**

Indeed the interested party were not privity to this kerfuffle.

However, that is not to suggest that the interested party has the right to be on the plaintiff's property without the express consent of the plaintiff. The continued stay of the interested party on the plaintiff's land is subject to mutual agreement on terms to be agreed by the interested party and the plaintiff. In default of agreement the interested party shall vacate the plaintiff's land.

Effective from today 25<sup>th</sup> February, 2021 up to the date when parties shall execute a lease the interested party shall pay rentals to the plaintiff at the monthly rental of Ten Thousand Kwacha as was proposed by the plaintiff to the 1<sup>st</sup> Defendant.

The interested party shall pay to the plaintiff a monthly rental of K10, 000.00 up to date the interested party shall sign a lease if both parties are still interested in executing a lease provided that the negotiation between the interested party and the plaintiff shall not exceed 90 days from today. When the negotiation collapse or they exhaust 90 days, the interested party shall vacate the premises together with their tower.

Ten Thousand Kwacha monthly rental is what the plaintiff had requested the 2<sup>nd</sup> Defendant to pay. This is according to the

evidence of the plaintiff adduced in court in this case on 2<sup>nd</sup> October, 2019.

Parties shall have the liberty to agree on what to put in their lease including the rentals payable.

It is of interest to note that the 2<sup>nd</sup> Defendant failed to avail any witness.

However, when the matter was adjourned for Judgement and while it was still pending Judgement, summons were received from the 2<sup>nd</sup> Defendant for an application to call a witness. A date was given for the hearing of that application. However, on the hearing of that application the 2<sup>nd</sup> Defendant did not attend. Only the plaintiff, the 1<sup>st</sup> Defendant and the interested party were in attendance. So, the hearing of that application could not be held on account of the non attendance of the 2<sup>nd</sup> Defendant who were in fact, the applicants.

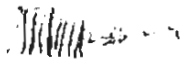
This demonstrates that the 2<sup>nd</sup> Defendant had opportunity to call witnesses but failed to do so. First, it was during trial of the matter when the 2<sup>nd</sup> Defendant failed to avail any witness until the matter was adjourned for Judgement. The second opportunity which the 2<sup>nd</sup> Defendant had was when the hearing of matter had closed and was awaiting Judgement when the 2<sup>nd</sup> Defendant filed summons to arrest Judgement so that they could be heard on their application to call a witness. On the date for the hearing of this application, the 2<sup>nd</sup> Defendants who were the applicants did not attend court, yet the other parties did.

I then proceeded to deliver Judgement as scheduled.

Leave to appeal is granted.

In view of the Covid 19 phobia and attendant health guidelines, this Judgement shall not be delivered to the parties but parties shall proceed to uplift the Judgement.

**DATED AT LUSAKA THIS THE 25<sup>th</sup> DAY OF FEBRUARY, 2021**



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**HON. MR JUSTICE E.L. MUSONA**  
**HIGH COURT JUDGE**