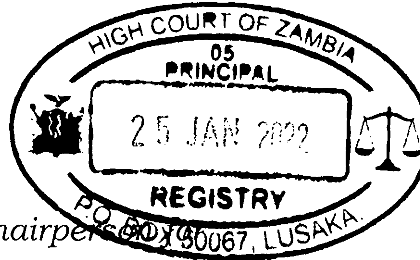
IN THE HIGH COURT FOR ZAMBIA **2021/HP/1280**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)



BETWEEN:

KASANKA TRUST LIMITED — **1ST PLAINTIFF**

ETSON MWEWA *(Suing as Chairperson for Mapepala Community Forest Management Group)* — **2ND PLAINTIFF**

LEFAI MUKOSHA *(Suing as Chairperson for Nabowa Community Forest Management Group)* — **3RD PLAINTIFF**

AND

GULF ADVENTURE LIMITED — **1ST DEFENDANT**

LAKE AGRO INDUSTRIES LIMITED — **2ND DEFENDANT**

ZAMBIA ENVIRONMENTAL MANAGEMENT AGENCY — **3RD DEFENDANT**

WATER RESOURECES MANAGEMENT AUTHORITY — **4TH DEFENDANT**

CHITAMBO DISTRICT COUNCIL — **5TH DEFENDANT**

THE COMMISSIONER OF LANDS — **6TH DEFENDANT**

THE ATTORNEY GENERAL — **7TH DEFENDANT**

BEFORE HON. MR. JUSTICE C. KAFUNDA IN CHAMBERS AT LUSAKA THE 25TH DAY OF JANUARY, 2022.

For the Plaintiffs: **M. Batakathi**
Muyatwa Legal Practitioners

For the 1st & 2nd Defendants: **A. Kasolo**
Mulilansolo Chambers
N. Kamanga

	J.B Sakala
For the 3rd Defendant:	**B. Matandiko – In House Counsel**
For the 4th Defendant:	**C. Ngaba- In House Counsel**
For the 5th Defendant:	**M. Chikabe**
For the 6th & 7th Defendants:	**T. Shambulo**

RULING

Cases referred to:

1. **American Cyanamid Co. v Ethicon Co. Ltd (1977) A.C 396**
2. **Shell and BP(Z) Ltd v Conidaris and Others (1975) Z.R 174**
3. **Harton Ndove v National Educational Company of Zambia Limited[3],**
4. **Preston v Luck (1884) 27 Ch.D 497**
5. **Moses Lukwanda and 9 Others v Zambia Airforce Projects Limited and 7 Others CAZ/08/323/2018 (unreported)**
6. **Turnkey Properties v Lusaka West Development Company Limited (1980) Z.R 184 H.C**

Legislation referred to:

The Zambia Wildlife Act No.14 of 2015

This Ruling is on the Plaintiffs' application for an order for an interim injunction directed at the 1st and 2nd Defendants herein to restrain them, whether by themselves, their agents or servants or whosoever from continuing cutting down trees, cultivation of crops, abstraction of water from the Luwombwa River, construction works, fencing off or further developments in the Kafinda Game Management Area ("the Kafinda GMA").

In the affidavit in support of the interim injunction sworn by Christopher Chisula C.K Kangwa, it was deposed that the 1st Plaintiff has co-managed the Kafinda GMA together with the Department of National Parks and Wildlife (DNPW) since 1989 pursuant to a co-management agreement executed between itself and the Government of the Republic of Zambia. The 1st Plaintiff in partnership with Senior Chief Chitambo IV supported the formation of two community forest management groups in Chitambo Chiefdom, namely Mapepala and Nabowa, represented by the 2nd and 3rd Plaintiff herein, which are both within Kafinda GMA. The Plaintiffs have been working together to manage and conserve the forestry resources in the community forests within the GMA. The 1st Plaintiff manages Kasanka National Park and supports local farmers within the Kafinda GMA.

It was deposed that the 1st Defendant was granted permission to set up a wildlife sanctuary in September, 2018. The 1st Defendant has occupied more than 5,000 hectares of land located in the buffer zone of the Kafinda GMA, covering significant parts of the Mapepala and Nabowa Community Forests and significantly encroached in the Kasanka National Park by fencing and introducing species of animals that are not native to that area. That the 1st Defendant has also

cleared over 5 hectares of riparian water berry trees in 200 metres stretch on both sides of the Luwombwa River thereby destroying a riverside habitat in the GMA's landscape. The 1st Defendant has also constructed over 14kilomtres of wide gravel roads, an airstrip and permanent dwelling structures within the area.

It was further deposed that the 2nd Defendant has occupied and commenced large scale commercial farming activities in parts of the GMA and obtained leasehold titles for the same. In addition, the 2nd Defendant has cleared in excess of 860 hectares of native forest in the Kafinda GMA and diverted parts of the Luwombwa River for its own use and continues to abstract large and unregulated quantities of water from the River to feed the 7 centre pivots installed by them without any licence or permit from the 4th Defendant.

Between July 2019 and July 2021, the Ministry of Tourism and Arts and the Director DNPW has issued written orders to the 2nd Defendant directing the 2nd Defendant to halt its activities but has neglected or failed to abide by the said directives. That the establishment of commercial agriculture in such an ecologically and climatically sensitive area could have potentially irreversible negative impact on the area.

The 1st and 2nd Defendants filed an affidavit in opposition to the summons for an interim injunction sworn by the Managing Director of the 1st and 2nd Defendant companies, Abulaziz Ahmed Muhamed. He deposed that the 2nd Defendant holds a Certificate of Title over the land that is the subject of the Plaintiffs' application for injunction. The 2nd Defendant was granted permission to undertake commercial activities on the land by appropriate authorities and has installed centre pivots for irrigation. There are other farmers in the neighbourhood who cultivate macadamia nuts and are in the business of cattle ranching.

That the Kasanka Sanctuary is more than 7.5km from the 2nd Defendant's farm and as result does not fundamentally support the Plaintiffs' application. It was deposed that the 2nd Defendant would be prejudiced by the injunction sought as it would stop farming activities which are underway. Further that there will be lots of damage and loss of assets and that the 1st and 2nd Defendants have been operating in the respective areas for over a year and have employed a total of over 180 local people who will be left destitute, should the injunction be granted. That the injunction will be

discriminatory considering that other farmers in the same line of business have not been cited.

I have considered the affidavit and skeleton arguments in support of the application, as well as the affidavit in opposition to the application and the oral submissions advanced at the hearing of the application.

The issues that must be considered before a Court can grant an order of interim injunction are well settled. These were stated in the well-known case of **American Cyanamid vs. Ethicon**[1], and cited with approval by our Supreme Court in the celebrated case of **Shell & B.P. Zambia Limited vs. Conidaris & Others**[2]. The Court in the former case held that:

> **"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 by damages not injury that cannot be repaired."**

Counsel for the Plaintiffs, in arguing the ground of whether there is a serious question to be tried, called in aid the case of **Harton Ndove**

v National Educational Company of Zambia Limited[3], in which Justice Chirwa citing the case of **Preston v Luck**[4] stated that:

> **"...though the Court is not called upon to decide finally on the rights of the parties, the Court should be satisfied that there is a serious question to be tried at the hearing on the merits and that on the facts before it, there is a probability that the Applicant is entitled to relief."**

It was submitted that the Plaintiffs have raised serious questions of law and fact and that the Writ of Summons and Statement of Claim disclose a genuine dispute between the parties which needs to be settled at trial Counsel for the Plaintiffs argued that the Plaintiffs are persons directly affected by the actions of the 1st and 2nd Defendants, and that the activities have occasioned massive damage to the environment. The Plaintiffs have alleged that the 1st Defendant has significantly encroached onto the Kasanka National Park by fencing and introducing species of animals that are not native to that area, has destroyed a riverside habitat in the GMA landscape and has constructed wide gravel roads, an airstrip and permanent dwelling structure within the area. It is also alleged that the 2nd Defendant

has commenced large scale commercial farming activities in parts of the wilderness and development zones of the Kafinda GMA..

Counsel for the 1st and 2nd Defendants argued that it is not in dispute that the 1st and 2nd Defendants are the legal owners of the property and they have obtained all necessary licences to carry out agricultural activities on their property. That there is nothing in this application that satisfies this requirement to warrant an order for injunction. Counsel also argued at the hearing that the Plaintiffs have no locus standi in the matter, and were therefore not entitled to the relief sought.

It is not in dispute that the 1st and 2nd Defendants have leasehold titles for the parts of areas in which activities are being undertaken. Notwithstanding the 1st and 2nd Defendant's leasehold titles, Plaintiffs' Counsel argued that there are serious questions to be tried as the 1st and 2nd Defendants are encroaching on Kafinda GMA and that the 1st and 2nd Defendants are undertaking activities without lawful authority. I agree with Counsel for the Plaintiffs and accordingly find that there are serious issues to be tried at trial.

On the question of adequacy of damages as a remedy, Counsel for the Plaintiffs submitted that the 1st and 2nd Defendants have

commenced and continue to engage in cutting down treed which threatens the ecological balance and biodiversity of Kafinda GMA. That if they are not restrained, the damage on the environment will be irreparable and incapable of being atoned for in damages. It was argued that the evidence on record will show that the environmental destruction inflicted by the 1st and 2nd Defendants will continue and that an award of damages at trial will not be sufficient considering that the subject matter is the environment.

I find that the Plaintiffs in this case do not have to prove that damage is being occasioned to the environment by the 1st and Defendant's activities. I am fortified in my finding by the holding in **Moses Lukwanda and 9 Others v Zambia Airforce Projects Limited and 7 Others**[5], in which Justice Kondolo stated that:

> **"In this case, I would state that disputes to do with damage to the environment reside in a hallowed place and should enjoy the principles that apply to loss of land where one does not have to prove irreparable injury.**
> **In my view one does not need to prove that damage to the environment will result in irreparable injury because once damaged, the environment, like land**

cannot be restored to its original state and the damage may result in untold suffering for generations"

Therefore, I am of the considered view that the status quo should not be maintained. It would be wiser to restrain ongoing activity rather than risk irreparable damage to the environment.

On the balance of convenience, Counsel for the Plaintiffs citing the **American Cyanamid**[1] case argued that the Plaintiffs have shown that the 1st and 2nd Defendants continue to carry out activities that are detrimental to the environment and prohibited by the Kafinda GMA General Management Plan and the Zambia Wildlife Act. That the need to protect the environment for the overall benefit of the community and wildlife and adherence to statutory provisions outweighs any individual commercial interests. That the balance of convenience lies with the Court granting an injunction. Counsel for the 1st and 2nd Defendants argued that the Court should grant an order to preserve the status *quo*, and not for the Plaintiffs to use the injunction as a device to create a condition which has not been in existence before the matter was commenced.

In the **Turnkey Properties Limited**[5] case 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. 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 as was held in the **American Cyanamid Company** case. On account of the alleged damage to the environment and further possible damage whose consequences or injury may be irreparable, I find that the balance of convenience in this case lies heavily in favour of my granting the injunction sought.

Given the competing interests of the parties that form the serious questions that this Court has to resolve, I am of the view that the grant of the injunction to the Plaintiffs will not act as a device by which the Plaintiffs can attain or create new conditions favourable to themselves.

The injunction in the circumstances of this case will have the effect of protecting the environment from any further damage, which as stated above, cannot be atoned for by damages.

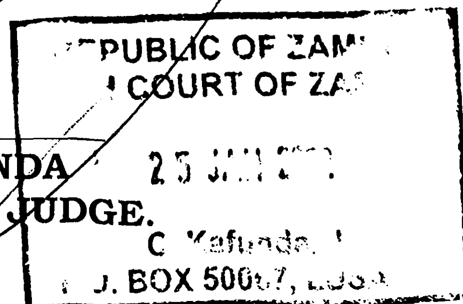
On account of the reasons given above, I am of the strong view that the Plaintiffs are entitled to an order of an interim injunction until the rights of the parties have been properly and finally determined by this Court.

The 1st and 2nd Defendants are hereby restrained from **<u>any further cutting down of trees, clearing vegetation, further construction works, fencing of or any other further activities or development on the land and abstraction of water from the Luombwa River exceeding amounts stated in the water permit.</u>**

Costs of and incidental to this application be in the cause.

Leave to appeal is granted.

Dated at Lusaka this 25th Day of January, 2022.



C. KAFUNDA
HIGH COURT JUDGE.