

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

(Civil Jurisdiction)

2023/HP/1513



BETWEEN:

CHARITY KAPONA

PLAINTIFF

AND

DENAI MWALE

1ST DEFENDANT

LEMY CHINYAMA

2ND DEFENDANT

EVANS THOSI

3RD DEFENDANT

JOHN SUSU

4TH DEFENDANT

**BEFORE HON. MRS. JUSTICE G.C. CHAWATAMA
ON 05TH JUNE, 2024 - IN CHAMBERS**

For the Plaintiff : Mr. C. Monde and Mr. B Chantu from Messers. Joseph Chirwa and Company.

*For the Defendant : 1st and 2nd in person
Mr. T. Chikonde and Miss. N Phiri from Messers Teeford and Company.*

RULING

CASES REFERRED TO:

1. *American Cyanamid Co v Ethicon Co Ltd*
2. *Shell and B P (Z) Ltd v Conidaris*
3. *Sailas Ngowani and others v Flamingo farms Limited SCZ 15 of 2019*
4. *Still Waters Limited v Mponge District Council and others⁴ SCZ 90 of 2001*
5. *Finsbury Investments Limited and Others v Antonio Ventriglia SCZ No. 17 of 2013*

LEGISLATION AND OTHER WORKS REFERRED TO:

1. *The High Court Act Chapter 27 of the Laws of Zambia.*
2. *The Rules of the Supreme Court (Whitebook) 1999 edition.*

1.0 INTRODUCTION

- 1.1 This is a Ruling on an application by the Plaintiff for an order of interim injunction. The application for an interim injunction was made pursuant to **Order 27 Rule 1 of the High Court Rules. Order 27 Rule 1 of the High Court Rules** provides that:

“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.”

- 2.2 The brief background leading to this application is that the Plaintiff on the 30th August, 2023 filed a writ of summons and statement of claim, seeking the following reliefs:

- (i) *For a declaration that the said Charity Kapona is the legal owner of the property situate at 9 Miles Malaila Village, Headman Malaila having duly purchased the same from Kapios Chigariro.*
- (ii) *For a declaration that any form of contract of sale between the Defendants and any other person relating to the property for one Charity Kapona is null and void.*
- (iii) *For an order that any illegal settlers on the said piece of land be evicted forthwith and all illegal structures thereon be demolished.*
- (iv) *For an order of interim injunction restraining the Defendants herein either by themselves, servants, agents and or whosoever from trespassing on the said piece of land situate at 9 Miles under headman Malaila.*

2.3 The ex-parte summons was accompanied by an affidavit in Support and Skeleton arguments. This Court on the 10th October, 2023 granted the ex parte Order of interim injunction pending inter-parte hearing.

3.0 **AFFIDAVIT EVIDENCE**

3.1 The affidavit in support of the ex-parte summons for an order of interim injunction was sworn by Plaintiff herself. She deposed that on the 18th November, 2013, the Plaintiff entered and executed a contract of sale with a Mr. Kapios Chigariro wherein she purchased a piece of land situate at 9 miles under

time ever approached the 1st and 2nd Defendant to stop them from subdividing and selling the piece of land, the Plaintiff purports belong to her when in fact the said piece of land belongs to the 1st and 2nd Defendants.

3.6 In the affidavit in opposition deposed by John Susu, the 4th Defendant herein, it was averred that on the 10th July, 2023, the 3rd Defendant purchased a piece of land from Solomon Kapona at the consideration of K240,000.00 measuring two acres in 9 miles under headman Malaila in Chibombo district. A copy of the contract of sale was exhibited and marked "JS1". That on the aforesaid letter of sale, the 3rd Defendant came to know the Plaintiff as the mother to Solomon Kapona, the vendor and that the Plaintiff witnessed on receipt, each time, the money was given to Solomon Kapona.

3.6 It was also averred that sometime in November, 2023, the 4th Defendant received a call from the Plaintiff stating that part of the two acres land sold to the 3rd Defendant by Solomon Kapona was being claimed by the 1st and 2nd Defendant. That the Plaintiff, also informed him that she intended to commence an action against the 1st and 2nd Defendant in relation to the piece of land being claimed. The 4th Defendant indicated to the Plaintiff and Solomon Kapona that he cannot be involved in the disputed land as the 1st and 2nd Defendants were third parties to him. That the Plaintiff and Solomon Kapona re-allocated the 4th Defendant another piece of land in relation to the piece of

land that was in dispute measuring 40m by 80m situated in the same headman. That the 4th Defendant retained the piece of land that was not in dispute from the initial purchase plus the new allocation for the disputed piece of land. He proceeded to subdivide and sold both pieces of land that is the undisputed land from the initial purchase and the new allocation that was compensation to him for the disputed land. That he sold the new allocation to four people and one of them has almost finished building his house. That he received a call from the Plaintiff sometime in January, 2024 that he should stop the other three clients he had sold the pieces of land to from clearing the land as the Plaintiff had changed her mind and that she wanted to use it for another purpose.

3.7 It was averred that the 4th Defendant decided to engage both the Plaintiff and Solomon Kapona but were uncooperative. That the Plaintiff, later came to the 4th Defendant stating that they wanted the piece of land back because the 4th Defendant had made a lot of money from the resale of the property he purchased. Further that they indicated to the Plaintiff that they would just use the injunction that they were granted to chase the 4th Defendant from the plot as the same injunction was couched in a manner that it could apply to any land under headman Malaila.

3.8 It was further deposed that the property that was re-allocated to the 4th Defendant by the Plaintiff and Solomon Kapona is not

part of the land in dispute before this Court. That the piece of land in dispute is the one that the 4th Defendant was asked to "leave" for re-allocation. That should this Court decide to grant an injunction, the injunction should be limited to the property in dispute with the 1st and 2nd Defendant. That the Plaintiff deliberately couched the ex parte injunction in a manner she did to deprive innocent people of the land that is not in dispute so long as it was under the same headman. That the pleadings are actually not specific and that it will be difficult to tell which land in question this action is dealing with.

4.0 **SKELETON ARGUMENTS**

4.1 The Plaintiff and the 4th Defendant filed Skeleton Arguments which I shall not reproduce but include the same in my decision hereunder.

5.0 **HEARING**

5.1 At the hearing of this matter both parties relied on the documents filed. Save to state that counsel for the Applicant in reply briefly augmented that the Respondent's skeleton argument has not addressed the court as to why the injunction must not be awarded to the Applicant. Further that the Respondent has made allegations contrary to the rules that govern circumstances on which an injunction must be granted.

6.0 ANALYSIS AND THE DECISION OF THIS COURT

6.1 I have carefully considered the affidavit in support, opposition and skeleton arguments filed. As stated above, I granted the ex parte injunction order on the 10th October, 2023. The said order was granted pending the inter-parties hearing of the injunction application. The central issue for determination in this application is whether or not this is a proper case for this Court to confirm or discharge the ex parte interim injunction earlier granted the Applicant. It is trite law that courts are endowed with discretionary jurisdiction under **Order 27 rule 4 of the High Court Rules and Order 29 rule 1 of the Whitebook** reproduced above to grant, discharge or deny injunctions. The Plaintiff and the 4th Defendant in this matter have graciously made concessions that the relevant considerations in granting an injunction are set out in the case of **American Cynamid Company v Ethicon Limited**¹. It is also trite law that the grant of an injunction is a discretionary remedy which is granted to maintain the status quo of the parties. The Supreme Court opined in the case of **Turkey Properties v Lusaka West Development Company**² that an injunction should not be used to the advantage of one party.

6.2 It is therefore common cause that the land in dispute is customary land situated in Malaila village under Headman Maliala. It is also common cause that the customary land is untitled and unsurveyed land belonging to a particular

chiefdom or area. The affidavit evidence on record reveals that the Plaintiff bought land from Kapious Chigariro. She did not disclose the area extent of the land she allegedly bought. I am at this juncture guided by the pronouncement of the Supreme Court in the cases of Sailas *Ngowani and Others v Flamingo Farms Limited and Still Waters Limited v Mponge District Council and Others*³ that land under customary tenure can only be alienated if consent is obtained from the traditional chief. Therefore, evidence adduced by the Plaintiff which is a contract of sale exhibit "CK1" clearly does not reveal that the vendor who allegedly sold the Plaintiff the land is a traditional leader. The Plaintiff in this respect does not satisfy the maxim that "*he who comes to equity must come with clean hands*" for this Court to grant the equitable relief of an injunction. Furthermore, I agree with the misgivings observed by counsel for the 4th Defendant that the Plaintiffs have not disclosed the area extent of the land she claims so that this Court can be on *terra firma* in granting the injunction.

- 6.3 Further, having had perused through the affidavit in opposition and skeleton argument of the Defendant, which said documents, I had no sight of seeing in granting the ex parte injunction. Also having considered the Supreme Court authority in the case of *Finsbury Investments Limited and Others v Antonio Ventriglia*⁴ wherein it was held that:

"An ex parte injunction is a temporary order and the Judge, who grants it, retains the discretion to dissolve it if, after hearing the

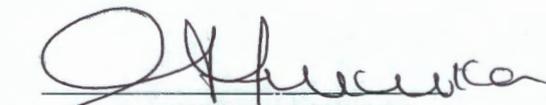
opposing side, it becomes obvious that it should never have been granted at the ex-parte stage or that its continuation is no longer necessary.”

It is my considered view that this is not a proper case for which this Court can exercise its inherent jurisdiction in granting an injunction.

6.5 The ex-parte Order granted on the 10th October, 2023 is hereby discharged.

6.6 Costs of this application shall be in the cause.

DELIVERED AT LUSAKA THIS 05TH DAY OF JUNE, 2024.


G.C. CHAWATAMA
HIGH COURT JUDGE