3rds.

IN THE SUPREME COURT OF ZAMBIA — APPEAL NO. 51/2003

HOLDEN AT LUSAKA — SCZ/8/110/2002
(CIVIL JURISDICTION)

B E T W E E N :

FORBES KAPEMBWA	**APPELLANT**
AND	
INDECO ESTATES DEVELOPMENT COMPANY LIMITED.	**1ST RESPONDENT**
ELIZABETH KALUBA KAYOYA	**2ND RESPONDENT**

Coram: Lewanika, DCJ, Mambilima and Silomba, JJS.
On the 3rd of June, 2003 and 27th May, 2004.

For the Appellant - Ms. I. E. Suba,
Kuta Chambers

For the 1st Respondent- No Apearance

For the 2nd Respondent- Mr. D. Makungo
Makungo and Company.

JUDGMENT

Mambilima JS, delivered the Judgment of the Court.

Authorities referred to:

(1) Benson Phiri vs Livingstone City Council, Appeal No. 221 of 2000.

(2) Edith Nawakwi vs Lusaka City Council and Bernadette Sikanyika, Appeal No. 26 of 2001.

This is an appeal against the decision of the Court below, refusing to grant an interlocutory injunction to the Appellant, to restrain the 1st Respondent from interfering with his occupation of Flat No. 19, Nottie Brodie, Livingstone and from evicting him from the same. In the main action, which the Appellant commenced by a Writ of Summons, he sought a declaration that he was entitled to purchase the house in question, having been a sitting tenant when the house became due for sale and another declaration that the purported sale of the flat in question to the 2nd Respondent was null and void. He also sought specific performance in relation to the property or in the alternative, specific performance in relation to Flat 13, which he was later offered by the 1st Respondent.

Pending the determination of the main suit, the Appellant was granted an ex parte Order of interim injunction in September 2001. This Order was discharged by the Judge in the Court below in April, 2002.

In his Ruling, the Judge noted that the Appellant was, by the injunction, seeking to protect his continued occupation of Flat 19, Nottie Broadie, Livingstone. He however found that there was no serious issue to be tried on the basis of affidavit evidence which was before him because it showed that the Appellant had contracted with the Respondent to purchase Flat 13 instead. The learned Judge was of the

view that the Appellant had not established a clear right to the relief sought.

On the Appellant's alternative prayer for specific performance, the learned Judge was of the view that damages would be an adequate remedy should the Appellant succeed to prove breach of contract. The Judge went further to state that the question of balance of convenience did not arise in this case since the Appellant would not suffer any irreparable damage. He discharged the ex parte Order after finding that this was not a proper case for the grant of an injunction.

The Appellant has appealed to this Court advancing four grounds of appeal, namely:

1. **that the Court below erred in law and fact by arriving at the decision that the Appellant herein would not suffer any irreparable damage by dissolving the Ex-Parte Interim Injunction.**

2. **the Court below erred in law and fact when he arrived at the conclusion that the eviction of the Appellant from the house in issue could be atoned for by a payment of damages.**

3. **the Court below erred in law and fact by not considering the authorities filed by the Appellant's Advocates.**

4. **the Court below erred in law and fact by considering the evidence on record favourable to the Appellant.**

Ms. Suba for the Appellant argued the first two grounds of appeal together. In support of these two grounds, she submitted, in her written heads of argument, that this Court has time and again, set out the principles which should be observed by Courts of law when considering applications for interlocutory injunctions. These are that firstly, triable issues should be established; secondly, the balance of convenience should fall in favour of the Applicant and; thirdly, the Applicant should show evidence of irreparable injury. Ms Suba argued that in this case, there is a triable issue to be determined. She referred us to the letter appearing on page 34 of the record of appeal, which is a provisional offer of House No. 19 Nottie Broadie, Livingstone, to the Appellant. On the balance of convenience, Ms. Suba submitted that the Appellant has been in possession of the property from 1998 and that there was evidence that he had been paying rent.

With regard to the question of irreparable damage, Ms Suba submitted that the Appellant would lose an opportunity to purchase the institutional house which had been offered to him as a sitting tenant. She argued further that having occupied the house since 1998, the

Appellant had developed an emotional attachment to it as well as the locality.

In response to Ms Suba's submissions on the first two grounds of appeal, Mr. Makungo stated, in his heads of argument, that the question in this case was the status of the Appellant with regard to Flat 19. He submitted that the letter containing the provisional offer at page 34 of the record of appeal was vitiated by the offer on page 39. Page 39 of the record of appeal shows a provisional offer to the Appellant of Plot 2244, House No. 13 Livingstone. Counsel also referred to the letter on page 44 in which the First Respondent was advising the Appellant that he had been offered Flat Number 13 and not 19.

We have considered the submissions by Counsel on the first two grounds of appeal. It is quite clear to us that the Appellant was first given a provisional offer for Flat 19 on 17th January, 2001. Being provisional, it was not a timed final offer. On 23rd March, 2001, the Appellant was given another Provisional offer for Flat 13. The last sentence of this provisional offer clearly stated that the "...earlier provisional offer given to you for House No. 2259 Flat No. 19 is hereby nullified". In the letter on page 44, to which we have been referred by Mr. Makungo, the first Respondent stated that the Appellant was offered to purchase Flat 13 and not Flat 19. On this evidence which was before the Court, we cannot fault the learned Judge for having found that the

Appellant's right to relief was not clear and that the Appellant would not suffer irreparable damage. The offer relied on was provisional and it was later revoked. We also agree with the Judge that the question of balance of convenience did not arise in this case. The first two grounds of appeal therefore fail.

The third and fourth grounds of appeal appear to be similar. In the third ground, the Appellant is complaining that the Court below did not consider authorities filed by Counsel which were favourable to his case while in the fourth ground, the complaint is that evidence favourable to him was not considered. On the third ground of appeal, Ms. Suba referred us to various authorities cited in the Court below and submitted that the Court failed to distinguish these authorities from the Appellant's case. She argued that these authorities were based on the Applicant's right to continue in possession on account of one's employment having been determined while the Appellant was enforcing the right to purchase a house as a sitting tenant. According to Ms. Suba, the relevant cases were **Benson Phiri vs Livingstone City Council**[1] the case of **Edith Nawakwi vs Lusaka City Council & Bernadette Sikanyika**[2], which involved sitting tenants whose right to purchase had accrued.

In support of the fourth ground of appeal, Ms Suba submitted that there was evidence on record that the Appellant had been allocated and

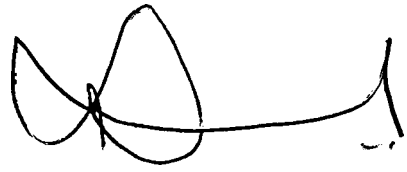
occupied the house in issue since 1998. She also referred to the provisional offer of the flat to the Appellant appearing on page 34. According to Ms Suba, the ruling of the Court flies in the teeth of this evidence. She went on to state that the second Respondent who was offered the house was no longer the sitting tenant of the flat in issue. Ms Suba submitted that had the Court taken this evidence into account, it would not have arrived at the decision that the Appellant had not raised any triable issues with regard to Flat 19.

In reply to these submissions by Ms Suba, Mr. Makungo stated that the authorities cited by the Appellant in the Court below are distinguishable from this case in that in the present case the Appellant's occupation of Flat No. 19 was neither on a written contract nor agreed upon between him and the first Respondent. He went on to state that even in the light of the policy on the sale of Government, Councils or Parastatal houses, the tenancy and or occupation thereof has to primarily be established otherwise persons would be taking up vacant properties without authority and claim them as the Appellant is trying to do.

We have considered the submissions by Counsel on the third and fourth grounds of appeal. Having agreed with the Judge in the Court below that the Appellant was not offered Flat 19, we do not find the submissions by Ms Suba to be advancing any case for the Appellant

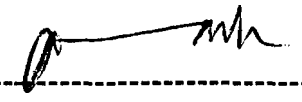
more so that she has completely ignored the glaring evidence on record that the provisional offer was withdrawn and the Appellant instead offered Flat 13. We do not agree that the Judge ignored favourable authorities or favaourable evidence. The affidavit evidence before the Court flies in the teeth of the Appellant's claim to Flat 19. The third and fourth grounds of appeal cannot also succeed.

We find the whole appeal to have no merit whatsoever. It is dismissed with costs to be taxed in default of agreement.



D. M. Lewanika
DEPUTY CHIEF JUSTICE

I. C. Mambilima
SUPREME COURT JUDGE



S. S. Silomba
SUPREME COURT JUDGE