IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

Appeal No.22/2018

B E T W E E N:

KALULUSHI MUNICIPAL COUNCIL APPELLANT

AND

LUNGA RESOURCES LIMITED RESPONDENT

CORAM: Mchenga DJP, Mulongoti and Lengalenga, JJA

On 14th May 2018, 24th May 2018, 27th June 2018, 21st November 2018 and 1st April 2019.

For the Appellant: I.K. Mulenga, Iven Mulenga and Company
For the Respondent: G. Kalandanya, GM Legal Practitioners

J U D G M E N T

Mchenga, DJP, delivered the judgment of the court.

Cases referred to:

1. Preston v Luck [1884] 27 CHD 497
2. Shell and BP Zambia Limited v Connidaris and Others [1975] Z.R. 174
3. Harton Ndove v Zambia Educational Publishing Company Limited [1980] Z.R. 184

Legislation referred to:

1. The Urban and Regional Planning Act, Act No.3 of 2015

Through this appeal, the appellant seeks to discharge an order of interlocutory injunction granted to the respondent, *inter partes*, by the High Court.

The brief history of the matter is that the respondent took out a writ of summons seeking reliefs, including; a declaration that Chibuluma Mines Plc was the legal and beneficial owner of lots of land within Farm 1848 Kalulushi, and that consequent to a lease agreement between them and Chibuluma Mines Plc, a declaration that they are in lawful occupation of those pieces of land; the payment of US$270,000.00, as damages for loss they have incurred as a result of the appellant's interruption with their operations and quiet enjoyment of the leased land; damages for the inconvenience caused by the appellant; and damages for trespass to land by the appellant.

The other reliefs sought are; an order of interim injunction restraining the appellant from interrupting with their operations, quiet enjoyment or allocating plots, issuing letters of offer, building permits or indeed allowing the undertaking of any building or construction and from trespassing on their leased portion of Farm 1848 Kalulushi; an order that any structures erected/constructed on their portion of the leased land, be demolished; and an order that any letter of offer or building permits relating to the portion of the farm leased to them are null and void.

According to the statement of claim and the affidavit in support of the application for an order of injunction, in August 2016, the respondent and Chibuluma Mines Plc, executed a lease agreement relating to portions of Farm 1848, Kalulushi. Under that lease, Chibuluma Mines Plc, who are the lawful and beneficial owners of the leased land, allowed them to carry out, *inter alia*, mining activities.

Following the lease, the respondent has taken occupation and started utilising the land, they have also entered into

joint venture agreements with other firms. As a result of those agreements, buildings were erected and they started operations. However, the appellant unlawfully and maliciously interfered with the operations, resulting in loss.

On the other hand, in their defence and affidavit opposing the application for an order of injunction, the appellant's position is that the lease agreement, entered into by the respondent and Chibuluma Mines Plc, is null and void. This is because in September 2015, Chibuluma Mines Plc signed a memorandum of understanding with the appellant, in which they surrendered the undeveloped portions of Farm 1848, Kalulushi, to the appellant, for the development of a shopping complex and residential neighbourhoods. The farm has since been re-planned and the plans have been approved by the Ministry of Lands.

Further, the developments that the respondent and their business partners have carried out, on the disputed land,

have been without the approval of the appellant, the planning authority under **The Urban and Regional Planning Act**. It is in enforcing that law, that the appellant visited and inspected the disputed land.

After considering the pleadings and evidence before him, the trial judge concluded that the memorandum of understanding between the appellant and Chibuluma Mines Plc, made specific mention to areas to which it applied. It did not make reference to land along Kalulushi/Sabina Road, the land which is the subject of the dispute between the appellant and the respondent. In his view, this raised questions of the ownership of the land claimed by both parties and he found that the respondent had established a clear right to relief which needed to be protected. Having found that the respondent may suffer injury, that may not be atoned for by damages, he granted the order of interim injunction.

Two grounds have been advanced in support of the appeal. They are as follows:

1. That the trial judge erred both in law and fact when he granted the respondent the order of interim injunction when there was affidavit evidence before the court showing that the respondent did not come to court with clean hands.
2. The trial judge erred both in law and fact when he held that the respondent had shown a clear right to relief and an interest which ought to be protected pending the determination of the case when there was evidence before court which showed that the respondent and its business partners had engaged in illegal development and use of the land in issue and could not therefore be shown any such clear right to relief.

In support of the first ground of appeal, Mr. Mulenga referred to **Halsbury's 4th Edition Vol 24 (Reissue) at page 540**, which discusses the need for the court to consider the conduct and dealings of parties, when considering the need

to protect the rights of an applicant. He argued that there was evidence that the respondent and its partners had occupied, developed and used the land in question, without approval. They did not come to court with clean hands because they had breached the provisions of **section 71(1) of the Urban and Regional Planning Act** by erecting permanent structures without planning permission.

Mr. Mulenga's submissions in support of the second ground of appeal, was premised on the cases of **Preston v Luck**[1], **Shell and BP Zambia Limited v Connidaris and Others**[2]. He submitted that for one to have a clear right to relief, they must show that there is a real prospect of the reliefs sought being granted. He argued that in this case, there are no real prospects of the reliefs sought being granted. There is evidence that mining is taking place on the land and structures were built on it without planning authority in contravention of **Section 71 of the Urban and Regional Planning Act**. The effect of the injunction is to stop the appellant from carrying out their statutory functions.

He also referred to **section 65 (1) and (2) of The Urban and Regional Planning Act** and submitted that having contravened the provisions of the Act, an enforcement notice was issued to halt the development and also demolish the structures thereon. This being the case, the respondent's claim for damages and loss occasioned as a result are unlikely to succeed. Neither are the claims for trespass and inconvenience likely to succeed.

Finally, Mr. Mulenga referred to the case of **Harton Ndove v Zambia Educational Publishing Company Limited**[3] and submitted that the grant of the injunction had the effect of granting the respondent an advantage. Instead of maintaining the status quo, it allowed them to continue utilising the land.

Mr. Kalandanya's response to the two grounds of appeal was that the respondent had established a clear right to relief and that they were likely to suffer irreparable damage, as found by the trial judge. He also submitted that failure to

obtain planning permission is not relevant to the determination of the application for the injunction. What was important, is whether the respondent is entitled to be in occupation.

He also submitted that with ownership of the land came the right to quiet and peaceful enjoyment. The respondent has established their right to be on the land and the appellant must not be allowed to evict them, which would curtail that right.

We have considered the submissions by counsel and the evidence on record and we will consider both grounds of appeal at the same time because they are interrelated.

In our view, the starting point is whether the respondent did establish a clear right to relief. The trial judge considered the import of the memorandum of understanding and the lease, respectively signed between Chibuluma Mines

Plc on the one hand and the appellant and respondent, on the other hand.

We have examined the documents and find that he cannot faulted for coming to the conclusion that on their face, both documents confer rights to the appellant and respondent, whose extent/validity can only be determined at trial. The right to relief that the trial judge found to have been established does not relate to the building, developments or the business activities, the respondent was carrying out, without planning permission, as Mr. Mulenga has suggested in his arguments. It was the right to be in occupation of the disputed land on the basis of the lease signed between them and Chibuluma Mines Plc.

Examination of the ruling, and in particular, the last paragraph, shows the scope of the injunction that the trial judge granted. It reads as follows:

> **"It follows that the Plaintiff's application for an interlocutory injunction succeeds subject to the Plaintiff complying with the relevant laws governing development/use of land. The defendant is accordingly**

> **restrained from disturbing the Plaintiff's operation or quiet enjoyment of the plaintiff's portion of Farm 1848 Kalulushi or from allocating any parts thereof or issuing letters of offer or building permits or allowing the understating of building or construction thereof or trespassing thereon".**

The order clearly mentions that "complying with the relevant laws governing development/use of land" is a condition the respondent must meet. It follows, that provisions like **Section 71 of the Urban and Regional Planning Act**, must be satisfied when the respondent decides to effect any developments to the land. It equally follows that any entry of the respondent's premises in lawful enforcement of that Act or any other law, has not been proscribed by the injunction.

Consequently, we find that the trial judge rightly found that the respondent had established that they had a clear right to relief. This right is connected with their claim that they be declared to be in lawful occupation of the disputed land by virtue of a lease executed with Chibuluma Mines Plc.

As regards the claim that the appellants did not come to court with clean hands on account of commencing construction without permission, we agree with Mr. Kalandanya's argument that that fact is immaterial. The injunction restrained the appellant "from disturbing the Plaintiff's operation or quiet enjoyment of the plaintiff's portion of Farm 1848 Kalulushi or from allocating any parts thereof or issuing letters of offer or building permits or allowing the understating of building or construction thereof or trespassing thereon". As previously mentioned, it was not concerned with the structure erected by the respondent but the appellant's decision to begin parcelling out plots for a shopping mall and housing in the disputed land.

This being the case, we are satisfied that the threshold set in the cases of **Preston v Luck**[1] and **Shell and BP Zambia Limited v Connidaris and Others**[2], for the grant of orders of injunction, was met.

As regards the respondent being placed in an advantageous position by the grant of the injunction, the trial judge found that the memorandum of understanding on which the appellant bases their claim, while specifically mentioning areas to which it applied, did not refer to the land along Kalulushi/Sabina Road, the land which is the subject of the dispute between the appellant and the respondent. In the circumstances, clearly, the balance of convenience lies with the respondent and the question of being advantaged by the grant of the injunction does not arise.

We find no merit in the appeal and we dismiss it with costs.

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C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT

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J.Z. Mulongoti
COURT OF APPEAL JUDGE

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F.M. Lengalenga
COURT OF APPEAL JUDGE