

**IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)**

APPEAL NO. 121 OF 2007

B E T W E E N:

**MUSA ZIMBA (Suing as Administrator of the
Estate of the Late Gibson Roberts Zimba)**

APPELLANT

AND

LUCY ZIMBA

1ST RESPONDENT

TAYANI ZIMBA

2ND RESPONDENT

DALISO ZIMBA

3RD RESPONDENT

Coram: Mumba and Mushabati, JJS and Kabalata, Ag. JS.

On 10th October, 2007 and 30th October, 2007.

For the Appellant : C.P.Chuula of Chuula and Company

For the Respondents : N. Chanda of Nicholas Chanda and Associates

J U D G M E N T

Mushabati, JS., delivered the judgment of the Court.

Cases referred to:

1. *Turnkey Properties Vs Lusaka West Dev. Co. Ltd and others (1984) ZR. 85*

Legislation referred to:

1. *High court Rules Cap. 27 – 0.27*
2. *Supreme Court Rules 1999 Edition – 0.39*

Other works referred to:

Practice Direction No. 23 /Practice Direction No. 1 of 1993

This is an appeal against the review order made by the High Court on 20th July, 2007.

The back-ground history of the case is that on 27th September, 2006 the respondent filed a notice of motion for the following relief's:

- (i) for an order of revocation of letters of Administration and or removal and revocation of grants/probate.
- (ii) In the alternative that the 1st Applicant do be ordered to be joined as Joint Administratrix to the estate
- (iii) For an order of appointment of a receiver pending grant;
- (iv) For an order that the appointment and granting of letter of the probate to the Respondent alone were defective in substance and same was obtained fraudulently and as such any such purported appointment be declared null and void.
- (v) An order of interim injunction restraining the Respondent either by himself, his agents or whosoever otherwise from distributing the estate and or tempering with the estate in any other way until after determination of the mater.

An ex-parte injunction was granted on 5th October, 2006 with a return date of 26th October, 2006 for inter-party hearing. For one reason or the other the inter-parte hearing was never heard.

On 19th July, 2007 the ex-parte injunction obtained on 5th October 2006 was discharged with yet another ex-parte order. This was exactly over 9 months since the dissolved injunctive order was obtained.

The respondents filed an application for review of the ex-parte order setting aside the ex-parte injunction obtained on 5th or 6th October, 2006. The learned trial judge, using the powers vested in him under **Order 39 r 1 of the High Court Rules (and not order 39 of Rules of the Supreme Court –White Book as indicated on the actual order)**, re-visited his ex-parte order, which set aside the ex-parte injunction.

It is against this order that this matter is before us. The appellant has filed six grounds of appeal. These are as follows;

1. **The Learned Judge misdirected himself in law and in fact in holding that there is a house in dispute when in actual fact there is no dispute over any house.**
2. **The Learned Judge erred in law and in fact by delivering his ruling merely two days after an Inter-Parte Application was made by the Respondents and before a return date could be given or indeed giving the Appellant an opportunity to file in his Affidavit in Opposition thus breaching all the Rules of Natural Justice.**
3. **The Learned Judge erred in law and fact by issuing an interlocutory Order of Interim Injunction without an undertaking as to Damages if it is to be found that the injunction was wrongly issued and thus prejudicing the Appellant herein.**
4. **The Learned Judge erred in law and in fact by considering and relying on affidavit evidence of both the 2nd and 3rd Respondents which respondents are not beneficiaries under the Estate of the late GIBSON ROBERT ZIMBA and thereby disregarding the evidence on record in the affidavit in support of misjoinder (which todate is unchallenged) Affidavit in Opposition to an Interlocutory Injunction and further affidavit in opposition to Interlocutory Injunction filed herein.**

5. **The Learned Judge erred in law and fact by reviewing his own order as no fresh evidence or facts have arisen since the Discharge of the Injunction to necessitate the Order for Review apart from the Respondents own admission (in the Affidavit in Support to Review) that she has been receiving rentals from Plot 10485 Lusaka since the demise of the late GIBSON ROBERT ZIMBA on 15th January, 2004 and sharing the same with non beneficiaries to the exclusion of the real beneficiaries and has also continued to distribute the same to non beneficiaries even after obtaining an Injunction refraining the Appellant from commencing the distribution of the Estate and also committing a criminal offence under Section 14 of the Intestate Succession Act, by depriving beneficiaries of their shares under the Estate.**
6. **The Learned Judge erred in law and fact by not considering the inconvenience the Interlocutory Injunction is causing on five of the six beneficiaries under the Estate-especially in terms of Medical Expenses on behalf of the Widow-EFLINA CHIYEWE ZIMBA, who in her own right is the majority beneficiary and is in urgent need of constant further medical treatment, thereby ignoring the evidence in the Affidavit in Opposition to Interlocutory Injunction, in the Further Affidavit in Opposition to the Interlocutory Injunction and the Affidavit in Support of Ex-parte Summons to discharge the interlocutory injunction.**
7. **The Learned Judge erred in law and fact by ruling that the Interlocutory Injunction will stay in place until the determination of the matter thus effectively denying the Appellant the opportunity to be heard inter-parte.**

8. **The Learned Judge erred in law and fact by attending to the Respondents Interlocutory Application when there are still two pending Interlocutory applications which were made by the Appellant at least nine months prior to the Respondents application and thus gravely prejudicing the Appellant.**
9. **Other grounds of Appeal as shall be filed by the Appellant in due course.**

In light of the view we are taking, we do not intend to delve much into the grounds of appeal, heads of argument and submissions by both counsel. We only intend to consider the propriety of the three orders made by the lower court.

Injunctions are discretionary remedies, which are granted to maintain status quo of the parties. An injunction, as observed in *Turnkey Properties Vs. Lusaka West Development Company Ltd and others (1)* should not be used to the advantage of one party hence **Order 37 r 5 of the High Court Rules, Cap. 27** requires that a reasonable notice be given to the opposite party when such an Order is obtained. When an ex-parte injunction or order is granted the other party must be afforded an opportunity to be heard. Practice Direction No. 23 which is Practice Direction No. 1 of 1993 dated 16th November, 1993 is very clear. The lower courts and advocates, as well, are required to familiarize themselves with this order.

It is surprising that an ex-parte injunction can remain in force for more than nine months without being heard inter-parte.

If any of the parties is aggrieved by continued maintenance of an ex-parte injunction the correct procedure to take is not to have such order discharged through an ex-parte order, as was the case here, but by making an appropriate application. The appellant in this case should have instead applied for an inter-parte order to have it discharged.

appellant a chance to be heard. The efficacy of the trial court's discharge order under **order 39 r 1 the High Court Rules** in this case was that the original ex-parte injunction, obtained on 5th or 6th October, 2006, was restored. Although the learned trial judge did not follow the right procedures we up-hold his decision to restore the discharged injunction because had he properly directed himself he could still have arrived at the same decision.

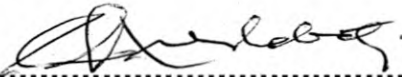
We are therefore, ordering that the inter-parte hearing of the injunction be heard without any further delay. As the notice of motion is also still pending determination on merit it is hoped that this will also expeditiously be dealt with.

The appeal before us has no merit and so it is dismissed.

Costs shall be in the cause.



.....
F.N.M. MUMBA
SUPREME COURT JUDGE



.....
C.S. MUSHABATI
SUPREME COURT JUDGE



.....
T. A. KABALATA
SUPREME COURT JUDGE

AG