

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

APPEAL NO. 25/2007

IN THE MATTER BETWEEN

MSANZYA PAUL ZULU

1ST APPELLANT

WEDSON WHITE PHIRI

2ND APPELLANT

AND

MRS ANNAH C. MWAPE

1ST RESPONDENT

LUSAKA CITY COUNCIL

2ND RESPONDENT

Coram: Lewanika, DCJ, Mumba, Chitengi JJS

10th April, 2007 and 10th April, 2008

For the 1st Appellant: In Person

For the 2nd Appellant: In Person

For the 1st Respondent: No Appearance

For the 2nd Respondent: No Appearance

J U D G M E N T

Mumba, JS, delivered the Judgment of the Court.

Case referred to:

1. Shell & BP (Z) Ltd Vs Conidaris and Others, (1975) Z.R. 174

At the hearing of the appeal, the late Deputy Chief Justice, Mr. Justice D.M. Lewanika was a member of the panel but he passed on before the judgment was ready for delivery. This judgment is, therefore, a judgment of the majority of the panel that heard the appeal.

This is an appeal against a ruling of the High Court refusing to grant an interim injunction. At the hearing of the appeal, the court was satisfied that notices of hearing were served on the 1st and 2nd respondents. The appellants informed the court that they relied on their written heads of argument which were on record.

The 1st and 2nd appellants brought an action against the 1st and 2nd respondents for vacant possession of plot 13 Block 31, Kabanana Site 07, Lusaka. The 1st appellant's claim was that by agreement in writing, he purchased the property from 2nd appellant in 1985 and paid the purchase price. He built a house up to roof level. He never obtained a certificate of title. The 1st respondent's claim was that she bought the property from 2nd appellant in December 2004 by agreement which was in writing. She paid the outstanding rates and followed the procedure with 2nd respondent and obtained a certificate of title in 2005. She started roofing the house which she found on the property. Her certificate of title to the property is dated 13th May, 2005.

In March 2005, the 1st appellant confronted 1st respondent claiming ownership of the property. The 1st respondent refused to vacate, the dispute culminated in the action by the 1st and 2nd appellants against 1st and 2nd respondents for vacant possession. The 2nd appellant supports 1st appellant's claims.

The appellants applied for an interim injunction seeking to stop the 1st respondent's further developments on the property and to stop 2nd respondent issuing a certificates of title to the 1st respondent. The learned trial Judge refused to grant an interim injunction on the grounds that the certificate of title had already been issued; the effect of the order sought would be to disposses 1st respondent of the property before ownership was determined and, finally, that the appellants had not alleged misrepresentation, fraud or mistake as required by law, on the certificate of title.

The appellants appealed and filed four grounds of appeal as follows:

- "1. The Judge erred in law and fact in that he touched and ruled on the evidence to be produced in the main mater whilst he was only required to decide on the question of an interim injunction.**

- 2. The Judge erred in law and fact in that he failed to take into consideration the appellant's verbal submissions in support of the application for an interim injunction.**

- 3. The Judge erred in law and fact in that he failed to take cognizance of the fact that the 2nd defendant who issued the certificate of title is a party to the proceedings and has not even either appeared or given an affidavit in opposition to the appellants' claim to the main matter, nor the appellants' application for an interim injunction.**

- 4. The Judge erred in law and fact in not recognizing that the appellants' claim in the main matter, the appellants are challenging the legality of the issuance of the certificate of title thereby alleging fraud."**

The appellants as well as the 1st respondent filed heads of argument and cited several authorities. In light of the view we take of this appeal, we do not find it necessary to tabulate the submissions which are on record. We have very carefully considered them; we have also considered the evidence on record and the ruling appealed against. Matters of injunctions in a case such as this one have been dealt with in numerous cases.

The evidence on record shows that the 1st respondent has what appears to be a certificate of title to the property which was obtained after taking procedural steps required by the 2nd respondent in matters of title to land under its authority. The 1st appellant appears not to have taken steps towards obtaining title to the property, he was only jostled into action after the 1st was already on the property. Clearly, the balance of convenience lies with the 1st respondent who is in occupation. The learned trial Judge rightly pointed out that after all, the 2nd respondent had already issued certificate of title and that no claim of misrepresentation, fraud or mistake was made by the appellants. Although the learned trial Judge went beyond the consideration for an injunction, we agree that an injunction cannot issue against the 2nd respondent because the certificate of title had already been issued. An injunction is intended to maintain the status quo not to change.

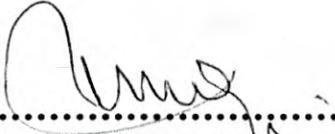
In the case of **Shell & BP (Z) Limited Vs Conidaris and Others**¹, cited by the 1st respondent, it was held, inter alia, that where any doubt existed as to the plaintiff's rights or, if the violation of an admitted was denied, the court would take into consideration the balance of convenience to the parties and the burden of showing the greater inconvenience was on the plaintiff. In this case, there

are some doubts as to the 1st appellant's claims, the doubts are fostered by the lengthy period of inactivity on his part.

We find no merit in this appeal, it is dismissed with costs.

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D.M LEWANIKA
DEPUTY CHIEF JUSTICE


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F.N.M MUMBA
SUPREME COURT JUDGE


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P. CHITENGI
SUPREME COURT JUDGE