**SCZ JUDGMENT NO. 25 OF 2014**

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**IN THE SUPREME COURT FOR ZAMBIA Appeal No. 39/2012**

**HOLDEN AT LUSAKA**

**(Civil Jurisdiction)**

**BETWEEN:**

**UBUCHINGA INVESTMENTS LIMITED APPELLANT**

**AND**

**TEKLEMICAEL MENSTAB 1ST RESPONDENT**

**SEMHAR TRANSPORT & MECHANICAL LIMITED 2ND RESPONDENT**

**CORAM:** Chibesakunda Ag CJ, Chibomba JS and Lisimba Ag JS

On 9th May, 2013 and 19th June, 2014

**For the Appellant :** Mrs. E. Chiyenge of Messrs C.C. Mwansa

 and Associates

**For the Respondents :** Mr. A. Roberts of Messrs Alfred Roberts

and Company

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 **JUDGMENT**

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**Chibesakunda, Ag CJ delivered the Judgment of the Court.**

***Cases referred to:***

1. ***Edward Zulu v Zimco Properties Limited Appeal No 126 of 1999 Unreported***
2. ***George Andries Johannes White v Ronald Mesterma and Others (1983) ZR 135***
3. ***ZCCM v Eddie Katalayi (2001) ZR 128***
4. ***Shell and BP Zambia Limited v Conidaris and Others (1975) ZR 174***
5. ***Cambridge Nutrition Limited v BBC [1990] 3 All ER 523***

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1. ***American Cyanamid v Ethicon Limited [1975] 1 All ER 504 HL***
2. ***Zambia State Insurance Corporation Limited v Dennis Mulikelela (1990-1992) ZR 18***
3. ***Preston v Luck (1884) 27 Ch D 497***
4. ***Hillary Bernard Mukosa v Michael Ronaldson (1993-1994) ZR 26***
5. ***Spiros Konidaris v Ramlal Dandiker Appeal No 157 of 1999 Unreported***
6. ***Trevor Limpic v Rachel Mawere and Others Appeal No 121 of 2006 Unreported***
7. ***RJR MacDonald Inc v Canada AG [1994] I SCR 311, 111 DLR (4th) 385***
8. ***Fellowes and Son v Fisher [1975] 2 All ER 829***
9. ***Series 5 Software v Phillip Clarke [1996] 1 AER 853***
10. ***Attorney General v Seong San Company Limited SCZ Judgment No. 16 of 2013***

***Legislation referred to:***

1. ***High Court Act Chapter 27 of the Laws of Zambia***
2. ***Lands Act Chapter 184 of the Laws of Zambia***
3. ***Lands and Deeds Registry Chapter 185 of the Laws of Zambia***

***Work referred to:***

1. ***Snell’s Equity 31st Edition***
2. ***Halsburys Laws of England Volume 24 4th Edition***
3. ***RSC White book 1999 Edition***
4. **McGill Law Journal**

This is an Appeal from a Ruling of the High Court, dated 12th December, 2011, granting an Interim Injunction to the Respondents (Plaintiffs in the Court below) restraining the Appellant (1st Defendant in the Court below) from evicting or interfering with the Respondents’ possession of Stand No. 12158, Mumbwa Road, Lusaka or tampering or removing improvements relating to the same property pursuant to Order 27 Rule 1 of the High Court Rules Chapter 27.

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The Respondents commenced action against the Appellant and two others (2nd and 3rd Defendants in the Court below) on 10th October, 2011 by way of Writ of Summons seeking the following reliefs:

1. ***A declaration that the Plaintiffs were innocent bonafide purchasers for value without notice having purchased Stand No. 12158 Mumbwa Road, Lusaka from the 2nd and 3rd Defendants who, unknown to the Plaintiffs, purported to be directors of the 1st Defendant.***
2. ***An Order that the Plaintiffs as innocent bonafide purchasers at equity be allowed to purchase the said property from the 1st Defendant at a price to be determined and assessed by the Court or in the alternative that the Plaintiffs be compensated the value of improvements on Stand No. 12158 Mumbwa Road, Lusaka estimated at K500,000.00 (then K500,000,000.00).***
3. ***An Order of Interim Injunction against the Appellant or its directors not to interfere with the Respondents’ possession of the property until such time as the Court assesses the true value of improvements made to the property by the Respondents so as to preserve the state of the property from being wasted, damaged or alienated.***
4. ***An Order that the 2nd and 3rd Defendants refund the Plaintiffs the contract sum plus damages for misrepresentation.***
5. ***Costs***

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 The history of this case is that the 1st Respondent had been approached, sometime in September, 2010, by two people who had represented themselves as Directors of the Appellant Company, and had made him an offer of sale for Stand No, 12158, Mumbwa Road, Lusaka. The pair also had, in their possession, a copy of the Certificate of Title for the said property. The 1st Respondent, upon seeing the property, had observed that, although it had an incomplete structure at wall plate level, it had been neglected and believed that it had been in that state for several years.

According to the 1st Respondent’s testimony, when a search was conducted at the Patents and Companies Registration Agency (PACRA), it was confirmed that the two who had approached him, purporting to be Sussannah Musonda Kaoma and Fitz Kaoma, were appearing on the Register of Directors and Shareholders of the Appellant Company. A further search was carried out at the Lands and Deeds Registry which confirmed that the property belonged to the Appellant Company and that there were no encumbrances.

 Satisfied that all the necessary investigations had been conducted as regards the Title, the 1st Respondent deposed that he proceeded to execute the Contract of Sale, which had been prepared by Lawyers, Messrs Chibundi and Company, on behalf of the two parties. The 1st Respondent paid the net sum of K45, 000.00 (K45, 000,000.00) through the Law Firm and immediately took possession

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of the property. He proceeded to build, on the existing structure, an office block with 11 offices complete with ceramic tiling, rest rooms and an ablution block. The 1st Respondent was in the process of building a workshop when the real Fitz Kaoma visited him, sometime in August, 2011. He realized then that he had been defrauded and subsequently, the two fraudsters were arrested on criminal charges.

 The 1st Respondent deposed that afterwards, the real Fitz Kaoma, acting on behalf of the Appellant Company, had offered to sell the property to him for K900, 000.00 (K900 million) but he felt that the offer was too high, considering the improvements that the 1st and 2nd Respondents had made to the property, which he estimated to have been in the range of K500, 000.00 (K500 million). The 1st Respondent deposed that Fitz Kaoma had then decided unilaterally to sell the property on the open market and had threatened to evict the Respondents without a Court Order.

 That is how the Respondents brought this action. The Respondents filed along with the Writ of Summons, ex parte Summons for an Order of Interim Injunction, the subject of this Appeal, which was granted and was subsequently confirmed after the inter partes hearing.

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The Appellant opposed the Application for an Interim Injunction and counterclaimed, in its Defence, seeking, among others, an Order of Injunction against the Respondents and the two fraudsters from interfering with the Appellant’s quiet enjoyment of the property. The Appellant was also seeking an Order for the Respondents to vacate the property. The Appellant was also seeking an Order giving it liberty to remove all or any structures constructed by the Respondents and that such costs should be borne by the Respondents and the two fraudsters jointly and severally.

Fitz Kaoma’s evidence was that the offer of sale was only made after the 1st Respondent had pleaded with him to sell the property and that when the 1st Respondent had declined to buy the property at K900, 000.00, he communicated the withdrawal of the offer. He contended that although the 1st Respondent had built additional structures on the property, the Respondents had no legitimate basis to construct the buildings or to claim the reliefs sought. Further, that in light of the circumstances of the case, the Respondents were not innocent bona fide purchasers for value. He deposed that contrary to the Respondents’ assertions, the property had never been neglected and that, in fact, the Appellant was about to start the second phase of construction, when it discovered the Respondents’ structures.

At the inter partes hearing, Mr. Roberts, Counsel for the Respondents, submitted that the Court was empowered under Order

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27 Rule 1 of the High Court Rules to grant an injunction where the subject property faced danger of being wasted, damaged or alienated. He submitted that in dealing with injunctions the Court ought not to delve into the actual merit of the claim as decided by this Court in the case of ***Edward Zulu v Zimco Properties Limited1*** but ought to be satisfied that the Plaintiff had an arguable claim on the balance of convenience. He submitted that it would be inequitable to disregard the substantial investment made by the Respondents to the property and far more inequitable to allow the Appellant to take over the property and sell it as that would unjustly enrich the Appellant. He submitted that, in any event, the Respondents’ claim was for compensation for the value of the improvements following the decision of the Supreme Court in ***George Andries Johannes White v Ronald Mesterma & Others2*** and approved in ***ZCCM v Eddie Katalayi3*** or in the alternative, the first option to purchase the property.

Mr. Roberts submitted that the purpose of the Respondents’ application was to preserve the state of the property until final determination because the Appellant wanted to remove the structures, the subject matter of the main trial. It was his submission that on the balance of convenience, the Respondents ought to continue to guard the status of the property.

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Counsel for the Appellant, Mrs. Chiyengi, submitted that the Supreme Court revisited the principles relating to interlocutory injunctions in ***Shell and BP Zambia Limited v Conidaris & Others*4**in that the Court would not grant an interlocutory injunction unless the right to relief was clear and that the injunction was necessary to protect the Plaintiff from irreparable injury. She submitted that the irreparable injury ought to be substantial and one that could never be adequately remedied or atoned for by payment of damages. It was Mrs. Chiyengi’s contention that the Respondents’ claim was not such as could not be adequately atoned for by damages and that, at any rate, it was Appellant who would be inconvenienced because the property had been occupied by the Respondents who were not entitled.

After examining the evidence, the learned trial Judge found that there was a serious question to be decided. In her view, the question to be decided was the value of the investment or improvement to the property. The learned trial Judge found on the facts that there would be no irreparable harm which would be suffered as a result of the Appellant’s actions and that since the Respondents’ claim was for compensation, it was clearly a case for which damages would be an adequate remedy. On the balance of convenience, the learned trial Judge considered the Appellant’s ability to pay and found that the balance tilted in favour of the Appellant. She, however, stated that

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this (the balance) ought to be viewed in light of her earlier finding on a serious question to be tried.

In considering her authority to grant or refuse to grant the application for interlocutory injunction, the learned trial Judge adopted a passage in ***Cambridge Nutrition Limited v BBC5*** which stated that the well-established principles on interlocutory injunctions, pronounced in the celebrated case ***American Cyanamid v Ethicon Limited6*** and approved in ***Shell and BP Zambia Limited v Conidaris and Others*4**, were:-

***“…no more than a set of useful guidelines which apply in many cases. It must never be used as a rule of thumb, let alone as a strait jacket. The American Cyanamid case provides an authoritative, most helpful approach to cases where the function of the Court in relation to the grant or refusal of interim injunctions is to hold the balance as justly as possible in situations where the substantive issues between parties can only be resolved by trial...”***

With this in mind, she came to a conclusion that the power to grant or refuse injunctions lay in Order 27(1) of the High Court Rules which gave the Court, after considering the principles, the final discretion, if it considered it just and convenient to do so.

In the final analysis, the learned trial Judge found that the property was in danger of being damaged, before disposal of the

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matter as the Appellant had indicated intention to raze the structures in order to build according to the approved plan. It was her view, if that happened, the Respondents would not recoup or realize their investment in the structures, and the whole exercise would be rendered academic. She, thus, held,

***“Consequently, using the provision under Order 27 Rule 1 of the Rules of the High Court, Cap 27 and indeed considering that an injunction is an equitable remedy, and that the discretion to grant the same reposes in the Judge, on the facts and evidence before me, I am of the considered view that this is a proper case in which to grant the injunctive relief sought by the Plaintiffs. Consequently, I confirm the earlier interim order of injunction granted ex parte on 10th October, 2011, until the final determination of the main cause or until further Order of the Court.***

***Further,***

1. ***During the subsistence of the Interim Order, no further construction shall be carried out by either party.***
2. ***The parties to this action shall find a valuer, accepted by both parties who shall value the property and the report shall be submitted to Court before the next hearing.***
3. ***The cost of valuation to be shared equally between the parties.***
4. ***I make no order as to costs.***

***Matter to come up on 18th September, 2012 at 10.00 hours.”***

This is the Ruling the Appellant appealed against before this Court. The Appellant raised the following four Grounds of Appeal:

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1. ***The learned trial Judge erred in law when she gave weighty consideration to the relief sought by the Respondents in their Statement of Claim and the question of the Appellant’s ability to pay the Respondents’ compensation but failed to give due weight to the principle, advanced by the Appellant, that they ought to have demonstrated a clear right of claim.***
2. ***The learned trial Judge erred in law when she failed to or did not give sufficient consideration to pertinent matters that were apparent on the pleadings, the Affidavit in Support of and Affidavit in Opposition to the Summons for Injunction and Counsel’s submissions, namely:***
3. ***The statutory protection availed to the Appellant as holder of the Certificate of Title over the property in issue (including its possessory and user rights) against adverse action in law or equity, in view of the undisputed facts of the case.***
4. ***The Respondents merely alleged in their Affidavit but did not exhibit any proof of:***
5. ***Having conducted due diligence to establish the status of the title to the property at the material time, and***
6. ***Having paid the alleged purchase price under the purported contract of sale.***
7. ***The Respondents, being non-Zambians, did not adduce any evidence to show that they were eligible to purchase land in Zambia and did not even claim such eligibility.***
8. ***The Respondents, who exhibited the contract of sale which the 1st Respondent purportedly entered into, made no attempt to address the question whether the***

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***purported contract of sale entitled them to construct the said structures on the property.***

1. ***The 2nd Respondent not having been privy to the purported contract, its locus standi to seek relief against the Appellant was not established.***
2. ***The learned trial Judge misdirected herself in law when she:***
3. ***Sustained an objection to the Appellant’s Counsel’s submissions on the need for the Respondents to show that they had a clear right to their claims and ruled that these were matters for determination in the main cause;***
4. ***Fell short of addressing the question of the structures constructed by the Respondents lacking planning permission; and***
5. ***Ruled in general terms that, “…under the Laws of Zambia, a non-Zambian can own land through a legally registered company, but indeed not in his personal name”, and failed to address herself to the point that the Respondents had not shown that they were at the material time entitled to own land in Zambia.***
6. ***The learned trial Judge erred in law and fact in her Ruling when she concluded, “…I find on the basis of the above, there is a serious question to be decided and that is the value of the investment put into the property, and this is what the Court in the main cause has been asked to determine…” and when she summarily determined matters in dispute in the pleadings by ordering that, “…The parties to this action shall find a valuer, accepted by both parties who shall value the property and report shall be submitted to Court before the next hearing…the cost of the valuation to be shared equally between the parties.” And when she***

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***went further and directed that, “…Matter to come up on 18th September, 2012 at 10.00 hours.”***

At the hearing of this appeal, both Counsel relied on their filed written Heads of Argument. Mrs. Chiyengi sought to augment the Arguments orally, which essentially, were a summary of the written arguments, save for the prayer for costs both here and in the Court below.

Her written submissions in Ground one were to the effect that as a principle of law, the Respondents ought to have demonstrated a clear right to the relief sought ***(Shell & BP Zambia Limited v Conidaris & others4)***. She submitted that the Respondents purported to base their claim to relief on a fraudulent contract of sale and that nowhere in the pleadings, affidavits or submissions in the lower Court, did the Respondents demonstrate that the said transaction, subsequent possession of the property and construction of structures could arguably give rise to the relief they were seeking, when the Appellant was, at all times, in possession of the Certificate of Title.

Mrs. Chiyengi submitted that the learned trial Judge erred when she found at page 28, lines 19-22, and page 29, lines 1-8 that the structures were a subject matter of the main cause, and would no longer be available for adjudication if removed, without first being satisfied that the Respondents had an arguable claim for compensation. Mrs. Chiyengi submitted that the learned trial Judge

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fell into error when she had earlier determined that damages would suffice and that the balance of convenience tilted in favour of the Appellant, and yet came to the conclusion that her finding was to be viewed in light of an earlier finding on a serious question to be tried.

It was Mrs. Chiyengi’s submission that while the Respondents had a clear right of claim for compensation against other parties to the action, who had defrauded them, they had not demonstrated any arguable claim against the Appellant, and therefore, there could be no serious question to be tried. She referred us, for this proposition, to the case of ***Zambia State Insurance Corporation Limited v Dennis Mulikelela7*** where this Court adopted with approval the principles in ***Shell & BP v Conidaris and others4*** and ***Preston v Luck8***.

On Ground two, Mrs. Chiyengi submitted that under Sections 34 and 35 of the Lands and Deeds Registry Act, Chapter 185, there was presumption of security of tenure enjoyed by the Appellant as Title holder against possessory and from adverse action of user rights. She argued that the Respondents, on the other hand, were non-Zambian and based on Section 3 of the Lands Act, Chapter 184, they, prima facie, could not own land. She submitted that the Respondents claimed to be innocent bonafide purchasers for value and without notice and yet they did not show that they were eligible to own land at the material time. We were referred to the case of ***Hillary Bernard Mukosa v Michael Ronaldson9*** as Mrs. Chiyengi submitted that the

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learned trial Judge erred when she held that ***“…a non-Zambian could own land through a legally registered company but indeed not in his personal name”***.

On Ground three, Mrs. Chiyengi argued that the structures for which the Respondents were demanding compensation were not wanted by the Appellant and, were illegal and thus liable to demolition. She submitted further that the issue of whether the Appellant ought to be compelled to compensate the Respondents for the unwanted illegal structures did not require trial to determine.

On Ground four, it was submitted that the learned trial Judge misdirected herself when she ordered the parties to have the property valued, to submit a report and to share the cost of the valuation when the Respondent had not raised any serious question for determination at trial. Besides, that the issue of valuation would only arise after determination of the main matter, and only after determination in the Respondents’ favour.

On the other hand, Mr. Roberts’ submissions on Grounds one and four, which he argued as one, were that the Respondents had a clear right to claim in equity. He submitted that under Section 13 of the High Court Act, Chapter 27, the Courts were empowered to administer both law and equity concurrently, and where there was conflict, equity prevailed over common law rules. It was his

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contention that the Respondent had an equitable right to compensation for improvements made to the property. He referred us to our decisions in ***George Andries Johannes White v Ronald Westerman & Others2, Spiros Konidaris v Ramlal Dandiker10*** and ***Trevor Limpic v Rachel Mawere and Others11***. Mr. Roberts submitted that the lower Court was right to order a valuation report as that would assist the Court in assessing and determining the value of the improvements.

Mr. Roberts submitted, orally, that the Court below was on firm ground when it elucidated the principles on granting interim injunctions. He submitted that the Lower Court properly applied the recent case of ***Cambridge Nutrition Limited v BBC5*** which revisited the ***American Cyanamid6*** case, when it found that the power to grant an injunction under Order 27 Rule 1 emanated from statutory powers to prevent a party from wasting, alienating or endangering property which was subject of a dispute. He argued that the principles laid out in the ***American Cyanamid6*** case, which was adopted with approval in ***Shell & BP Limited v Conidaris and others4*** over 38 years ago, would ordinarily apply to other applications for injunctions under the White book. He reminded this Court that the law was not static but progressive.

On Grounds two and three, Mr. Roberts submitted that the two grounds must fail as they were being raised at interlocutory stage. It

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was submitted that matters in the two grounds relating to due diligence search on the property, non-Zambians owning land in Zambia and the structures on the property in question were all to be determined at trial. He, further, submitted that the Appellant was raising new issues, which were not pleaded in the Appellant’s Defence and Counter-claim.

He further submitted that the Respondents claim, in the lower Court, was two-fold, firstly to be allowed to purchase the property as innocent bonafide purchasers at a price to be determined and assessed by the Court or secondly, that they be compensated for the value of the improvements. It was Counsel’s contention that the lower Court correctly applied Order 27 (1) of the High Court Rules because the Appellant, in its counterclaim, clearly wanted to be given liberty to remove all or any structures constructed by the Respondents. He argued that if the injunction was not sustained, the very subject matter of the action would be rendered an academic exercise. He also submitted that because the Appellant had neglected the property from the time it obtained the Certificate of Title on 19th December, 1996 and building plan approval in July 1996, the balance of convenience in granting the interim injunction ought to lie in favour of the Respondents.

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We have examined the record and the issues raised in the submissions along with the authorities cited, for which we are indebted to both Counsel. The facts for which there is no dispute are

that the Respondents bought and took possession of property belonging to the Appellant in a fraudulent transaction in which two people represented themselves to the Respondents as Directors of the Appellant Company when in fact not. It is not in dispute that the Respondents built structures on top of the existing one which the Appellant intends to demolish. It is also common ground that the property, Stand No. 12158, Mumbwa Road, Lusaka, belongs to the Appellant. The issue, here, is whether the lower Court was, under the circumstances, right to exercise its discretion to grant an Interim Injunction against the Appellant and for the reasons it did.

We have chosen, for purposes of this Appeal, to deal with Grounds one, two and three as one and Ground four separately. The gist of the Appellant’s contention is that the learned trial Judge ought not to have granted an Interim Injunction because the Respondent did not demonstrate a clear right to relief and as such, there was no serious question to be decided. Mr. Roberts argued, on behalf of the Respondents, that they had an equitable right to relief and that in the face of the Appellant’s threat to demolish the structures, the balance of convenience lay in their favour to preserve the property, the subject matter at trial.

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As has been noted, the Application for interim injunction was brought pursuant to Order 27 Rule 1 of the High Court Rules. We have examined Order 27 Rule 1 and have endeavoured to reproduce the relevant portion which states as follows,

***“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 fit…”***

Evidently, this provision does give the Court power to grant an injunction where property in dispute is in danger of being wasted, damaged or alienated by a party to an action. The Order is expressed in the widest terms because injunctions are equitable and temporary relief whose jurisdiction, to grant or not to grant, is left entirely to the discretion of the Judge (See Snells Equity paragraph 16-19 page 405). The question is whether this discretion was exercised fairly.

Our view is that the principles established in ***American Cyanamid6 case*** were an attempt, not to create rigid rules for the Court but to act as a mere guideline for purposes of ensuring that these wide discretionary powers are exercised in the fairest and most

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reasonable manner and at the same time to achieve the ends of justice.

Lord Diplock in ***American Cyanamid v Ethicon6*** put it this way:-

***“The Court no doubt, must be satisfied that the claim is not frivolous or vexatious. In other words, that there is a serious question to be tried…unless the material available to the Court at the hearing of the application for an interlocutory injunction fails to disclose that the Plaintiff has any real prospects of succeeding in his claim…the Court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.***

So in our view, the learned trial Judge made the right inquisition by following the three-stage test established in the ***American Cyanamid6*** case namely, (i) a serious question to be tried (ii) irreparable harm if relief denied and (iii) balance of convenience or inconvenience. As regards the first test the learned trial Judge correctly found on the evidence that there was a serious question to be tried at page 29 of the Record (R21 of the Ruling). However, we respectfully disagree with the learned trial Judge’s finding that the question to be decided was the value of or investment in the additional structures or improvements made to the property. Rather, it is the determination of whether the Respondents are, under the present circumstances, entitled to compensation or in the alternative, to purchase the property from the Appellant as prayed. In other words

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did the Respondents demonstrate a clear right to relief or even the likelihood of success at trial?

Mr. Roberts submitted that what the Respondents were seeking was equitable relief. He referred us to ***George Andries Johannes White v Ronald Westerman and Others2*** where, like here, it was found that the 2nd Defendant was not entitled to the ownership of the property because the 1st Defendant from whom he had bought the property had no title. Mainga J, stated in that case,

***“I am however satisfied on the evidence before me that the 2nd Defendant carried out some improvement on the Plaintiff’s property. It would be equitable if he was not compensated for such improvements.”***

We were also referred to our decision in the unreported case, ***Trevor Limpic v Rachel Mawere and Others11***, where we stated the following,

“***But before we leave this matter, we wish to say that from the pictures which were shown in the Motion that was made in this Appeal; the Appellant has expended a lot of money on the property in question. To allow the Respondents to take the property in question with the massive improvements made by the Appellant would be unjust enrichment of the Respondents. Equity will not allow that. We, therefore, order that the improvements be assessed by the Deputy Registrar and the Appellant be paid by the Respondents the worth of the improvements.”***

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We have revisited our decision in ***Trevor Limpic v Rachel Mawere and Others*11** and still approve of it. To us, the principle we pronounced in this case presents a clear arguable case or claim in satisfaction of the serious question test. We also note and agree with other authorities that the serious question test takes precedence over the balance of convenience test. In fact, the learned authors of **McGill Law Journal4** state as follows:-

***“The best test to adjudicate on an application for an interlocutory injunction is always whether the right the Applicant seeks to protect does indeed seem to exist; the balance of inconvenience test is merely second best.”***

This view seems to be taken from Lord Diplock in ***American Cyanamid*** case,

***“Unless the material available to the Court at the hearing of the application for an interlocutory injunction fails to disclose that the Plaintiff has any real prospects of succeeding in his claim…the Court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.”***

On account of what we have stated above we find no basis to interfere with the learned trial Judge’s finding that although the balance of convenience tilted in favour of the Appellant, there was a still a serious question to be decided.

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Of course, we emphasise, here, that it is not for us, and neither was it in the lower Court’s place, to determine the Respondents’ rights at interlocutory stage. That is a matter to be determined at trial. Suffice to say that in this particular case, the structures or improvements on the property are the main subject matter for which a Court can order that the *status quo* remains as it is until final determination. We are fortified in our position by what we stated in ***Shell and BP v Conidaris and Others4,***

***“As to whether the case is a proper one for the grant of an interlocutory injunction all the Court usually has to consider is whether the case is so clear and free from objection on equitable grounds that it ought to interfere to preserve property without waiting for the right to be finally established….”***

Further, that it is not necessary that the Court should find a case which would entitle the Plaintiff to relief at all events, it is quite sufficient for it (the Court) to find a case which shows that there is substantial question to be investigated. Furthermore, in some cases, even where the injury is capable of compensation in damages, an injunction may be granted if the act in respect of which relief is sought is likely to destroy the subject matter in question (Halsbury’s Laws of England at paragraphs 853 and 826 at pages 448 and 431).

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It is also trite law that it is no part of the Court function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.

Laddie, J held a similar view in ***Series 5 Software v Phillip Clarke14***

***“Applications for interlocutory injunctions cannot be mini trials of disputed issues. Rather, the Court would have to reduce the risk of granting a decision which will ultimately produce an unjust result.”***

For this reason, we shall refrain from commenting on Mrs. Chiyengi’s arguments, though with some force, that as non-Zambians, the Respondents were not entitled to own land under the Lands Act or on Mr. Roberts’ submission, which was equally forceful, that the Appellant was raising new issues not specifically pleaded in the Court below. This is because these are matters subject to the main trial.

Before we leave this subject, we would like to state that in as much as agree that the law is not static, we respectfully disagree with Mr. Robert that the ***American Cyanamid*** principles are only applicable to other applications for injunctions in the White book. To

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the contrary, the age-old ***American Cyanamid*** principles, approved in ***Shell and BP Zambia Limited v Conidaris and Others4***, are still good law. The passage referred to by the learned trial Judge in ***Cambridge Nutrition Limited v BBC5*** should not be seen as discrediting the ***American Cyanamid*** principles but rather as merely setting out the exceptions. For instance, the guidelines were said to be inappropriate where the injunction would have the effect of disposing of the dispute between the parties thus having a final effect as was the case in ***Cambridge Nutrition Limited v BBC6*** and ***RJR Macdonald Inc v Canada AG12*** or as Lord Denning put it, where there were other special factors such as the urgent need to reach a conclusion *(****Fellowes and Son v Fisher13***). Having digressed a little, Grounds one, two and three of the Appeal fail.

As regards Ground four, we have already held that it is not part of the Court’s duty at this stage to determine difficult questions of law which call for detailed arguments and mature considerations. It was therefore, a serious misdirection by the learned trial Judge to include in her Order, confirming the Interim Injunction granted on 10th October, 2011, the following:-

1. ***The parties to this action shall find a valuer, accepted by both parties who shall value the property and the report shall be submitted to Court before the next hearing.***

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***(iii) The cost of valuation to be shared equally between the parties.***

By so doing, the learned trial Judge strayed into determining matters that, clearly, ought to have been left to be decided at the main trial. Ground four succeeds.

In light of the above-stated, we uphold the Interim Injunction granted in the Court below but expunge from the Order parts (ii) and (iii) and reconfirm that there should be no further construction by either party until final determination of the matter. As this Appeal has failed on all grounds except one, we order each party to bear their own costs. Costs in the Court below shall be in the cause.

**…………………………………**

**L. P. CHIBESAKUNDA**

**ACTING CHIEF JUSTICE**

**………………………………… ….…………………………………**

**H. CHIBOMBA M. LISIMBA**

**SUPREME COURT JUDGE Ag. SUPREME COURT JUDGE**