IN THE SUPREME COURT OF ZAMBIA **APPEAL NO.190/2014**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

VDF PROPERTY MANAGEMENT LIMITED **APPELLANT**

AND

RONALD VAN VLAANDEREN **RESPONDENT**

Coram: Wood, Kajimanga and Kabuka, JJS.

On 9th August, 2016 and 24th August, 2016

For the Appellant : *Mr. E. B. Mwansa SC – EBM Chambers.*

For the Respondent : *Mr. S.L. Chisulo SC with Mr. A. Kasolo – Sam Chisulo and Company*

JUDGMENT

Wood, JS, delivered the Judgment of the Court.

CASES REFERRED TO:

1. American Cyanamid Co. v. Ethicon Ltd [1975] A.C.396
2. Attorney General v Marcus Kampumba Achiume (1983) Z.R. 1
3. John Musuaya Ngalula v Habib Industries Limited, Commissioner of Lands Lusaka City Council and The Attorney General (2010) Z.R. 162 Volume Two

4. Preston v Luck (1884) 27 Ch D 497.
5. Garden Cottage Foods Limited v Milk Marketing Board (1984) A.C. 130
6. Msanzya Paul Zulu and Wedson White Phiri v Annah C. Mwape and Lusaka City Council Appeal No. 25/2007

LEGISLATION REFERRED TO:

1. *Section 4 of the Statute of Frauds Act 1677*
2. *Order 5rule 20 (F) and (g) of Cap 27*

OTHER WORKS REFERRED TO:

1. *Order 29/1/2 Rules of the Supreme Court 1997*

This is an appeal against a decision of the High Court granting an injunction to the respondent relating to Lot No. 3293/M Lusaka restraining the appellant from developing the property until further order by the court.

According to the record of appeal, the appellant sometime in 1998 entered into an agreement with William Roy Needham Baker now deceased, for the purchase of two adjoining pieces of land from him from Farm No 487A Lusaka and Lot No. 3293/M Lusaka. The agreed sum of K6, 000.00 was to be paid over a period of time as

and when William Roy Needham Baker needed the money. The conveyance was rather protracted and complex as it involved marking off another Subdivision 4 of Subdivision H of Farm 487A Lusaka which was sold to Colm McDonough. Colm McDonough held on to the title deeds relating to the remaining extent of Subdivision H of Farm 487A Lusaka up until sometime in 2006 when he surrendered them to the deceased. Unbeknown to the respondent, the deceased entered into negotiations for the sale of a portion of Lot No. 3293/M Lusaka to the appellant. Unfortunately, the record of appeal does not have the complete copy of the contract of sale. It just has extracts which do not give the complete picture. The deceased wanted money from the appellant but the appellant was not willing to pay until the title deeds which were now in the possession of the respondent were released to it. Negotiations ensued and eventually the parties held a meeting at the offices of Mr. Adams Aziz Husein Dawood SC who was the 3rd defendant in the court below. The meeting was attended by the deceased, the respondent, Harry Valden Findlay representing the appellant together with Dessisslava Findlay who was the appellant's legal adviser as well as the 2nd defendant in the court below. Mr. Adams

Aziz Husein Dawood SC was also in attendance. The negotiations culminated in a rather unusual settlement. The respondent agreed to surrender the title deeds in his possession after receiving some comfort from Mr. Adams Aziz Husein Dawood SC the deceased's advocate, that his interests in relation to the property would be protected. The 2nd defendant also asserted that in order to fast track the change of ownership in favour of the appellant she would transfer the whole of Lot No. 3293/M Lusaka which included the respondent's portion of 1.0244 Hectares into the appellant's name and thereafter mark off and subdivide his portion from the whole Lot and pass them back to the respondent. It is not clear from the record why the parties did not follow the simpler and cost effective method of subdividing the various portions and thereafter marking them off from the parent deeds. After the title deeds were registered in the name of appellant issues of contract and size of land arose between the parties. The respondent was of the view that he was entitled to 1.0244 Hectares of Lot No. 3293/M Lusaka while the appellant believes the respondent is only entitled to 1.5 acres of the disputed piece of land. After sometime, the appellant embarked on the construction of a perimeter wall. The respondent felt that his

rights were threatened. He issued a writ claiming, *inter alia,* an injunction to restrain the appellant until further order or until judgment in this action whether by its respective servants or agents or any of them, or by its directors, officers, subsidiary companies, or any of them or otherwise howsoever from constructing the perimeter wall, or any building or fixtures or encroaching onto the subdivision on the disputed Lot No. 3293/M Lusaka. It is against this backdrop that the judge in the court below agreed with him and granted him an injunction. The judge took the view after considering the well known principles laid down in *American Cyanamid Co.v. Ethicon Ltd*[1] which are well summarized in O.29/1/2 RSC and have been repeated in numerous decisions of this court, that the respondent was indeed entitled to an injunction.

The grounds upon which the appellant has appealed to this Court are substantially that there was no serious question to be tried; there was no sufficient memoranda to support the respondent's claim or to properly describe the property in dispute; there was a delay which vitiated the respondent's claim; the status quo was not adequately addressed and should have been

maintained pending trial and that the injunction should not have been granted as the appellant was the registered proprietor of the disputed piece of land.

State Counsel Mwansa has with respect to the first ground of appeal argued that at the time the injunction was being heard, the 2nd and 3rd defendants had not entered any appearances to the writ of summons or participated in the application for the injunction. The allegations attributed to the 2nd and 3rd defendants were never addressed by these defendants as they had not participated at that stage of the proceedings. The court therefore fell into error when it held that the alleged meeting and utterances attributed to these defendants were never denied as this evidence was not before the court and it should not have been dealt with at that stage of the proceedings but should have been reserved for trial. We do not accept this argument because at the injunction stage the learned judge had to make an assessment on the basis of what was before her at the material time if there was a serious question to be tried. The injunction was against the appellant. Although the 2nd and 3rd defendant could have filed affidavits, their role at the injunction

stage was peripheral. In any event, the unsigned and unsworn affidavit of Harry Valden Findlay filed on 8th April, 2014 which should not have been considered in the first place, was defective and contrary to Order 5 rule 20 (f) and (g) of Cap 27, a point conceded to by Mr. Mwansa SC, does not categorically deny that the 2nd and 3rd defendants did not attend the meeting or make the alleged utterances. The appellant cannot rely on the case of *Attorney General v Marcus Kampumba Achiume*[2] to reverse the findings made by the learned judge at the injunction stage as they were not in any way perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts. The judge in our view very properly analyzed the evidence which was before her before reaching her conclusion that a case had been made out for an injunction pending the determination of the matter or further order. Under the first ground, State Counsel Mwansa has also argued that the court could not at the injunction stage, have considered that the respondent had established a right so clear and free from objection, that it ought to have interfered with the appellant's right as registered proprietor of the property. While we accept that a certificate of title is conclusive proof of title and is

not to be lightly tampered with, serious allegations of fraud have been made in this case and the affidavit of the respondent clearly shows in our view that he handed over the deceased's title deeds to the appellant and this is not denied by the appellant. Further, the statement of claim is alleging that the appellant's directors or officers acted fraudulently in procuring the certificate of title. The letter by the appellant's advocates dated 30th January, 2014 which admits that 1.5 acres of the disputed piece of land belongs to the respondent, lends credence to the respondent's assertion that he has some interest in the property which requires to be protected.

The second and third grounds of appeal were argued together. These two grounds of appeal essentially attack the finding by the learned judge that the schedule of cheques showing various payments did not adequately describe the property in detail in order to satisfy section 4 of the Statute of Frauds Act 1677 which requires that contracts relating to land must be in writing. We must here state Mr. Mwansa SC has in his arguments gone beyond what should have been argued at the injunction stage and has argued the merits of whether or not the document showing a schedule of

payments amounted to a memorandum or whether or not it related to Lot No. 3293/M Lusaka. There was no need for the court to attempt to decide the claim on the affidavits as is being argued by Mr. Mwansa SC. The schedule of payments refers to the purchase of approximately 3acres land from the deceased and there is an acknowledgement by the deceased of full and final payment for the section of land bordering *"...Plot Sub of Sub H comprising of 1 Hectare of land being parts of my two plots Lot No. 3293 and Subdivision 'H' of Farm 487A"*. Without commenting any further on the issues as they still have to be decided in the court below, the schedule and its contents and the other supporting documents were sufficient for the learned judge to make a preliminary view as to whether or not to grant the injunction regardless of the Certificate of Title that had been issued to the appellant. The argument being advanced by Mr. Mwansa SC that no cheques were exhibited is premature. We also reject the argument relating to the memoranda since it is going to the merits of the case.

The fourth ground of appeal was in connection with the delay by the respondent in bringing this matter to court. Again we have

to caution ourselves that this matter is yet to be tried. Be that as it may, the respondent cannot be blamed for all the delay associated with this case. To start with, there is evidence which suggests that the title deeds were with Colm McDonough for marking off his property. The title deeds were only returned to the deceased after a considerable period of time and the respondent only became aware after sometime that the appellant had title to the whole piece of land. There is also evidence which suggests that the appellant started and then stopped construction. As to whether or not the claim is time barred between the respondent and the 4th defendant or the appellant and the respondent is a matter for the court below to decide but should certainly not be decided at the injunction stage.

The fifth ground of appeal relates to maintaining the status quo. It seems to us that Mr. Mwansa SC is arguing that the status quo should be maintained by allowing the parties to do what they were doing before the injunction. In this case, the appellant was in the process of building a perimeter wall and maintaining the status quo would, according to Mr. Mwansa's interpretation, in effect

means allowing the appellant to continue building the perimeter wall. This is not what is meant by maintaining the status quo in the case of *John Musuaya Ngalula v Habib Industries Limited Commissioner of Lands Lusaka City Council and The Attorney General*[3] or the case of *Preston v Luck* [4] . Maintaining the status quo simply means maintaining the situation as it is now or as it was before a recent change. These two decisions both point to the principle that when deciding injunctions, the object is to keep things in status quo. In *Garden Cottage Foods Limited v Milk Marketing Board*[5]. Lord Diplock defined status quo in the following words:

> *"...In my opinion the relevant status quo to which a reference is made in American Cyanamid is the state of affairs existing in the period immediately preceding the issue of the writ claiming permanent injunction or, if there be unreasonable delay between the issue of the writ and the motion for an interlocutory injunction, the period immediately preceding the motion. The duration of that period since the state of affairs last changed must be more than minimal having regard to the total length of the relationship between the parties in respect of which the injunction is granted; otherwise the state of affairs before last change would be the relevant status quo."*

Contrary to what has been argued by Mr. Mwansa SC in the sixth ground of appeal, the injunction was not against the registered proprietor and holder of the certificate of title but against the continued building of the perimeter wall while the dispute between the parties remained unresolved. The appellant cannot rely on *Msanzya Paul Zulu Wedson and White Phiri v Annah C. Mwape and Lusaka City Council* [6] in support of the argument that the appellant had already been issued with a certificate of title and an injunction could not be obtained against it. The *Msanzya Paul Zulu* case should therefore be distinguished from the present case.

We do not see the need to repeat the arguments by Mr. Chisulo SC which have adequately covered the well trodden path on principles relating to injunctions and which we have dealt with above. We must however mention that even though Mr. Chisulo SC found it irresistible to argue the merits because Mr. Mwansa SC raised them in connection with whether or not the schedule of payments and acknowledgement amounts to a memorandum, the principles on injunctions preclude him from doing so as this is the preserve of the trial court.

When we heard oral arguments we were informed that the parties were still grappling with pleadings and not much progress has been made since the writ was issued on 28th March, 2014. The parties should have proceeded with their litigation in the court below as the appeal on the injunction was not a bar to doing so.

For the reasons we have stated this appeal is dismissed with costs against the appellant in this court to be taxed in default of agreement. We order that the matter be referred to the High Court for trial before another Judge.

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A.M.WOOD

SUPREME COURT JUDGE

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C. KAJIMANGA

SUPREME COURT JUDGE

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J.K. KABUKA

SUPREME COURT JUDGE