

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**

2006/HP/0973

(Civil Jurisdiction)

BETWEEN:

AFRICAN CROPS LIMITED

Plaintiff

AND

**MR. HAMUKOKA (MALE) & OTHER
UNKNOWN PERSONS**

Defendants

***BEFORE THE HONOURABLE MADAM JUSTICE P. K. YANGAILO THIS 1ST
DAY OF NOVEMBER 2017 IN CHAMBERS AT LUSAKA.***

For the Plaintiff: Mr. K. Musaila - Chonta Musaila & Pindani Advocates

For the Defendant: N/A

RULING

CASES REFERRED TO:

1. *Shell and B.P. (Z) Limited vs. Conidaris and Others (1975) ZR 174;*
2. *Turnkey Properties vs. Lusaka West Development Company Limited, B.S.K. Chiti (sued as Receiver) and Zambia State Insurance Corporation Limited (1984) ZR 85;*
3. *American Cyanamid Company vs. Ethicon Limited (1975) AC 396;*
4. *Hillary Bernard Mukosa vs. Michael Ronaldson (1993-1994) ZR 26; and*
5. *Msanzya Paul Zulu and Another vs. Mrs. Annah C. Mwape and Another - Appeal No. 25/2005.*

This is the Defendant, Leonard Hamukoka's application for an order of injunction directed at the Plaintiff herein to restrain it, whether by itself, its agents or servants or whosoever from interfering with, harassing the Defendants, or in any way disposing off any part of the property known as Farm No. 1629 situate in the Southern Province of the Republic of Zambia or otherwise dealing with the property in a manner likely to affect the Defendants herein with regard to their rights howsoever, in the said land or from disturbing the Defendants' quiet possession and enjoyment of their premises until after the trial of this action or until further notice. The Defendants' application is supported by an Affidavit filed into Court on 2nd October 2017, which was sworn by the Defendant, Leonard Hamukoka, who deposed *inter alia*, as follows: -

1. *That the Defendant and others herein are descendants of their fore fathers who had been resident of the contested premises herein way before the premises comprised in Farm No. 1629 were made subject of the Certificate of Title that was produced herein by the Plaintiff;*
2. *That the Defendant was born on 5th December, 1957 on the said premises while his mother was staying with his uncle called Mr. Nyoolwe Milandu who took occupation of the said premises in community with others way before he was born;*
3. *That his Grandmother named Kaangwe who was the mother to his uncle aforesaid and his mother died on the said premises sometime about the 1930's and her grave is still visible and tendered for at the said premises;*
4. *That by the time the Certificate of Title was issued on or about 12th December, 1959 in favour of one of the predecessors in title named*

therein, the Defendant was already born in 1957 and raised from the said premises by his mother;

5. That the community of the Defendants herein comprises of many people born from the said premises averaging in excess of 30 years in age who have lived continuously at the said premises without break;
6. That some of the landmarks to show their continued occupation of the said premises as a community include but not limited to graves of many of their beloved deceased buried at their burial site at the said premises, mango trees planted by their generation and the generation of their fore fathers which are still visibly at the said premises;
7. That the said premises also host some of the ancient grinding stones locally called mazhyiyo, used by their forefathers in grinding grain such as maize and millet;
8. That currently, the Plaintiff is cutting trees from the premises herein for use in preparing its tobacco for the market without any authority from the Defendants herein;
9. That the Plaintiff is busy extending its boundaries without the consent of the Defendants;
10. That as a community the Defendants have used this land to produce food inter alia through activities of gardening or otherwise general peasantry farming;
11. That most of them raised their monies through gardening and selling much of their produce to the neighbouring town of Choma;
12. That they have occupied as a community of people the said land for over 100 years without anyone disturbing their quiet enjoyment from the time they were made to understand, through the documents produced by the Plaintiff herein, that title was issued in favour of the first title holder of Farm No. 1629 in Mbalala of the Choma District of Zambia;
13. That it is only in recent times around 2010 or there about that they saw the Plaintiff aggressively taking steps to displace them herein

notwithstanding they have enjoyed uninterrupted customary tenure of the said property with the said Farm No. 1629 only as a neighbour from the time of issuance of Certificate of Title of the said neighbouring Farm;

14. *That without showing where the beacons of Farm 1629 herein, the Plaintiff proceeded to engage in acts of harassment of the Defendants herein and encroaching into the said land objections by the Defendants herein notwithstanding;*
15. *That on or about 1st March 2017, persons that introduced themselves as agents of the Plaintiff went to the premises saying that the Defendants should stop using the land because the said persons wanted to put solar panels at those premises;*
16. *That the Defendants refused to allow them to do as requested on account that the same was their traditional land which they hold under customary tenure;*
17. *That the Plaintiff by its conduct engaged in acts that were calculated to ensure that the Plaintiff attained a new set of conditions that would only favour its intentions to illegally grab the land herein without authority of the Defendants herein or at all;*
18. *That it has become apparent to the Defendants that unless restrained by an order of injunction, the Plaintiff shall continue to infringe upon the proprietary rights which are an incident of the ownership of the land on which the community of Defendants herein have and continued pursuant to customary tenure for over a period of 100 years now.*

I directed that the matter be heard *inter parte* on 27th October, 2017. The Plaintiff, on 25th October, 2017 filed into Court an Affidavit in Opposition to the Defendants' Affidavit in Support, and

which Affidavit in Opposition was sworn by one Robert Bones, an employee of the Plaintiff herein. He deposed, *inter alia*, as follows: -

1. *That the Plaintiff is the lawful owner of the property known as Farm No. 1629 situate in the Southern Province of the Republic of Zambia by virtue of a Certificate of Title issued under the hand and seal of the Registrar of Lands and Deeds Registry for a term of 99 years from the first day of August 1947;*
2. *That the Plaintiff's activities on its property are limited to the land comprised in the aforesaid Certificate of Title and has not at any time extended the boundaries of its property or encroached on land allegedly owned by the Defendants;*
3. *That the Defendants' Affidavit in Support is based on hearsay;*
4. *That as evidenced by the Certificate of Title aforesaid, the land comprised in the aforesaid Certificate of Title is not under customary tenure as alleged by the Defendants;*
5. *That examination of the beacons relating to the Plaintiff's property clearly shows that the Defendants have encroached the said property for a distance of well over 1.5 km from the Mbabala River where the said property's boundary is located per Certificate of Title aforesaid;*
6. *That all activities conducted on the Plaintiff's property are in exercise of the Plaintiff's legal rights as the registered proprietor thereof and on the other hand the Defendants have illegally removed the poles and barb wire fence installed on the said property as well as gum tree plantations established on the said property by the Plaintiff;*
7. *That any activities on the said property by the Defendants have been carried on without the Plaintiff's licence or consent.*

The Plaintiff also filed into Court skeleton arguments in opposition to application for an interim injunction which it relied on. In the said arguments it was submitted by the Plaintiff that this is not an

appropriate case for the grant of an interim injunction to the Defendants as the Defendants have not demonstrated any clear right to relief and there is serious doubt as to the Defendants' rights, regard being had to the contents of their Affidavit in Support of the application for an injunction. Further, the Plaintiff submitted that the Defendants have no legal interest in the property in question and therefore no legal rights are being violated or infringed, as the Plaintiff is the registered proprietor of the property in question. The Plaintiff also submitted that the Defendants have no arguable case against the Plaintiff as the Plaintiff's Certificate of Title is conclusive evidence of its title to the property herein.

The Plaintiff referred the Court to the case of **Shell and B.P. (Z) Limited vs. Conidaris and Others**¹, where it was held by the Supreme Court that: -

“A Court will not generally grant an injunction unless the right to relief is clear and unless the injunction is necessary to protect the Plaintiff from irreparable injury; mere inconvenience is not enough... Where any doubt exists as to the Plaintiff's rights or if the violation of an admitted right is denied the Court takes into consideration the balance of convenience to the parties. The burden of showing the greater inconvenience is on the Plaintiff.”

The Court was also referred to the case of **Turnkey Properties vs. Lusaka West Development Company Limited, B.S.K. Chiti (sued as Receiver) and Zambia State Insurance Corporation Limited**² where the Supreme Court stated, *inter alia*, that: -

“An interlocutory injunction should not be regarded as a device by which an Applicant can attain or create new conditions favourable only to himself... In applications for interlocutory injunctions the possibility of damages being an adequate remedy should always be considered.”

In the instant case, Counsel for the Plaintiff submitted that the Plaintiff has exhibited its Certificate of Title showing that the land in question was acquired legally. He submitted further that the Defendants have not demonstrated any clear right to relief as they have not produced any document of ownership of the property in question.

The Plaintiff also referred this Court to the case of ***American Cyanamid Company vs. Ethicon Limited***³, where it was held that:-

“The object of the interlocutory injunction is to protect the Plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the Plaintiff's need for such protection must be weighed against the corresponding need of the Defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the Plaintiff's undertaking in damages if the uncertainty were resolved in the Defendant's favour at the trial.”

The Plaintiff further referred this Court to the case of ***Hillary Bernard Mukosa vs. Michael Ronaldson***⁴, where it was held that:-

"An injunction will be granted only to a Plaintiff who establishes that he has a good arguable claim to the right he seeks to protect."

Lastly, this Court was referred to the case of ***Msanzya Paul Zulu and Another vs. Mrs. Annah C. Mwape and Another***⁵, where it was stated that: -

"...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."

At the scheduled hearing on 27th October, 2017, the Defendants and their Counsel were absent. No reason was advanced for their absence. Being satisfied that the Notice of Hearing issued on 10th October 2017, was served on the Defendants' Advocates on record Messrs. Mumba Malila & Partners, I proceeded with the hearing and took into consideration the Defendants' Summons for an Order of Interim Injunction together with their Affidavit in Support, which are on record. The Plaintiff's Learned Counsel Mr. Musaila submitted verbally that he would rely on the Affidavit in Opposition and Skeleton Arguments filed herein by the Plaintiff on 25th October, 2017. Mr. Musaila asked the Court to dismiss the Defendants' application with costs.

I have carefully considered the Defendants' application, all the affidavit evidence, submissions and skeleton arguments and even the exhibits which I found to be of great assistance to me in guiding me on the issue of the balance of convenience. In the case of

Turnkey Properties vs. Lusaka West Development Company Limited, B.S.K. Chiti (sued as Receiver) and Zambia State Insurance Corporation Limited², the Supreme Court held *inter alia* that an interlocutory injunction is appropriate for the preservation of a particular situation pending trial and that such injunction should not be regarded as a device by which an applicant can attain or create new conditions favourable only to himself. In the same case, the Court also discussed the issue of the balance of convenience which should be considered by the Court by determining where it lies or in whose favour the scale tilts and whether more harm would be done by granting or refusing to grant the injunction as was held in the case of **American Cyanamid Company vs. Ethicon Limited**³, where it was stated that the guidelines to be considered are whether the claimant has a strong or arguable case; the adequacy of damages as a remedy; the balance of convenience; and maintaining the *status quo*. In relation to the present case, the Plaintiff is a title holder, as evidenced by Certificate of Title issued on 1st August 1947, which title has never been challenged by the Defendants until now. It is quite clear from the Certificate of Title that the land in issue is not under customary tenure. Without delving into the main action and looking at the fact presented before me, I am of the considered view that there is a probability that the Defendants herein may not have a clear right to the reliefs sought, because the Certificate of Title issued as far back as 1947 has never been challenged. Further, the Defendants might be trying to use the injunction as a device by which they can create

new conditions favourable only to themselves. It is my considered view that the *status quo* should be maintained until the rights of the parties have been properly and finally determined by the Court and that this can be done by this Court not granting the order of interim injunction to the Defendants, as I find that granting the Defendants an injunction would be creating new conditions favourable to the Defendants. In such matters, it is better to delay a new activity rather than risk damaging an established one. The view that I take is fortified by the case of ***Msanzya Paul Zulu and Another vs. Mrs. Annah C. Mwape and Another***⁵, where the Court agreed that an injunction cannot issue against the 2nd Respondent because the Certificate of Title had already been issued and that an injunction is intended to maintain the *status quo* not to change. I am also of the view that in the present case, damages would not suffice as the injury, if any, to be occasioned to the Plaintiff who is the title holder, cannot be atoned for by an award of damages. Further, I find that the balance of convenience lies heavily in favour of my not granting the injunction sought.

I, therefore, decline to grant the injunction sought and I, accordingly, dismiss the Defendants' application. I make no order as to costs. Leave to Appeal is granted.

Delivered at Lusaka on 1st November, 2017.



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P. K. YANGAILO
HIGH COURT JUDGE