IN THE COURT OF APPEAL FOR ZAMBIA APPEAL NO. 170/2017
HOLDEN AT KABWE
(Civil Jurisdiction)

BETWEEN:

KINGDOM FOODS LIMITED	1ST APPELLANT
KANAWEJI ENTERPRISES LIMITED	2ND APPELLANT
CACTUS INVESTMENTS LIMITED	3RD APPELLANT
CACTUS PROPERTIES LIMITED	4TH APPELLANT
UZZIAH PROPERTIES LIMTIED	5TH APPELLANT
RICHARD KAFWIMBI (T/A KAFNET ENTERPRISES)	6TH APPELLANT
ALEX BANDA (T/A) ZIKUCHI ENTERPRISES)	7TH APPELLANT
ROBERT MWEWA (T/A ABANTU ELECTRICAL & HARDWARE)	8TH APPELLANT

AND

MERCANTILE PRINTERS LIMITED (IN LIQUIDATION)	1ST RESPONDENT
AIMEE SANGA THIJISSEN	2ND RESPONDENT

Coram: Mchenga DJP, Chishimba and Majula, JJA
On 23rd May, 2018 and 22nd August, 2018

For the Appellant: Mr. C. Kaela of GM Legal Practitioners

For the 1st Respondent: Mr. J. Kabuka of J. Kabuka and Company

For the 2nd Respondent: Mrs. Chabu of Lumangwe Chambers

JUDGMENT

MAJULA JA, delivered the Judgment of the Court.

in his capacity as joint liquidator of the 1st respondent. He deposed in the said affidavit that the application for the injunction against the 1st respondent, was misconceived in that it was placed under a creditors compulsory liquidation and Stand No. F/748/D1 was subsequently sold to the 2nd respondent for the purpose of settling a secured judgment debt.

After considering the evidence before her, the learned trial Judge held that the appellant had failed to demonstrate a clear right to relief and show prospects of success in that the tenancy agreements they were relying on, had since expired.

She further found that the appellant did not come to court with clean hands, as they were still owing rentals from the previous tenancy agreements, which also cast doubt on their capacity to pay damages or the purchase price. She accordingly declined to grant the injunction sought by the appellants.

Aggrieved with the Ruling of the Court below, the appellants appealed to this court advancing the following grounds of appeal.

Ground one

"The learned High Court Judge erred in law and in fact when she held that the application for an injunction was misconceived and unsustainable as against the 1st respondent when the subsisting tenancy agreements with the appellants are between the appellants and the 1st respondent and not the 2nd respondent with whom there are no subsisting tenancy agreements."

Ground two

"The learned High Court Judge erred in law and in fact when she held that the appellants did not exhibit a clear right to relief let alone a prospect of success when the affidavit evidence clearly shows that the appellants have a clear right to relief and a high chance of success. In effect the learned High Court Judge determined the matter in its finality before hearing the matter."

Ground three

"The learned High Court Judge erred in law and fact when she held that the tenancy agreements upon which the appellants relied on had expired when in fact the same had automatically been renewed by conduct of the parties."

Ground four

"The learned High Court Judge erred in law and fact when she held that the appellants did not come to court with clean hands due to failure to pay rentals when the appellants had demonstrated a justifiable reason of doing so."

Ground five

"The learned Hight Court Judge erred in law and fact when she held that the appellants did not show capacity to pay damages when the apellants were not given an opportunity to show such capacity."

All the parties filed written heads of argument which were complimented with brief oral submissions at the hearing of the appeal. In support of ground one, it was argued by Mr. Kaela, learned counsel for the appellant, that there are valid tenancy agreements between the appellants and the 1st respondent upon which the interlocutory injunction application was premised in the court below.

Counsel referred us to pages 121 to 211 of the record of appeal. He stressed that it is therefore the basis of the said tenancy agreements that the appellants commenced this action to challenge the sale of Stand F/748/D1 to the 2nd respondent. It was contended that the learned High Court Judge fell in error when she held that the 1st respondent has no interest in the matter.

Mr. Kaela then moved to ground two and submitted that a trial court must not attempt to determine an interlocutory matter with finality, before hearing the evidence at trial. According to counsel, the affidavit evidence discloses that the appellants have a good and arguable case, in that the tenancy agreements executed with the 1st respondent bestowed on them, the right of first refusal in the event of the sale of the property. He pointed out that this shows a clear right to relief which cannot be atoned for in damages.

Turning to ground three, the learned Counsel spiritedly argued that when a written contract expires but the parties continue performing the terms of the contract, then such a contract is deemed to have been renewed by conduct of the parties. Counsel stated that despite the expiration of the agreements, the appellants continued paying rent to the 1st respondent while occupying the subject property. By this conduct the tenancy agreements were automatically renewed.

With regard to ground four, it was argued that exhibit "ML5" of the application for injunction which is at page 121 of the record of appeal, reveals that the appellant had started paying the rental

arrears as per tenancy agreement into court. He stated that the 2nd respondent, however, decided to get the same money for her use notwithstanding the fact that the matter is yet to be determined. It was thus contended that or these reasons the appellants were justified to stop paying rentals into court and should not, therefore be said to have soiled hands as was held by the court below.

In respect of ground five, Counsel submitted that it was unjust for the court below to hold that the appellants have no capacity to pay damages for the purchase price when they have not been given a chance to do so. He therefore prayed that the decision of the learned Judge on capacity be quashed by this court.

Mr. Kabuka an behalf of the 1st respondent, countered the arguments by Mr. Kacha on ground one. He submitted that in support of its findings the trial court relied on the following established facts namely:

(i) That the property in question had at the time of adjudication been sold by the 1st respondent to the 2nd respondent;
(ii) That the 1st respondent no longer had any beneficial interest in the property; and
(iii) That the contractual term granting a tenant a right of first refusal contained in the Tenancy Agreement of August, 2003 was superseded by subsequent tenancy agreement of January, 2014 which did not have the said term.

According to Mr. Kabuka, the 1st respondent was therefore not in a position to either levy execution for rentals, arrears or otherwise interest with the appellant's occupation of the property which by way of injunctive relief.

Counsel observed that they affidavit evidence on record will reveal that the contract of sale relating to the property was executed on 16th May, 2016 and the purchase took possession of the property upon payment of the purchasing price in full on the same date. He noted that the affidavit evidence also discloses that a year prior to the contract of sale, all the appellants were individually notified of the change of ownership relating to the property.

Mr. Kabuka therefore implored us to uphold the decision of the court below where it stated that there was no existing tenancy relationship between the appellants and the 1st respondent.

In relation to ground two Mr. Kabuka submitted that it is an established principle of interlocutory injunctions that for a party to succeed, she/he must demonstrate a clear right to relief sought. He referred us to a quotation from the case of ***Shell & BP Zambia Ltd vs Conidaris & Others***[4] in which Baron DCJ said as follows:

> *"A court will not generally grant as interlocutory injunction unless the right to the relief is clear."*

It was thus contended that the court below properly applied the principles relating to it.

The kernel of the submission on ground three was that the appellant's allegation to the effect that they continued to pay rent to the 1st respondent after the sale of the property, is unfounded considering the property was sold to the 2nd respondent.

Mr. Kabuka stressed that following the sale of the property, the appellants were advised to renegotiate new tenancy agreement with the 2nd respondent to which they refused. Counsel argued that the Collective Cumulative Rental arrears at the material time stood at K223,000 of which the appellants only deposited K41,000.00 into court. Counsel therefore urged us not to interfere into the findings of fact of the court below as per guidance of the Supreme Court in ***Masauso Zulu vs Avondale Housing Project Ltd.***[1]

As regards ground five, Mr. Kabuka submitted that it is the duty of an applicant to make an undertaking to the court to pay damages to the other party which they may suffer in consequence of the injunction in the event that the applicant ultimately fails in the main action.

Counsel cited the case of ***Ndove vs National Education Company of Zambia***[1] in which the High Court refused to grant an interlocutory injunction to an unemployed student plaintiff on the consideration that he would not be in a position to repay his former employers damages in the event that he lost the main action.

In concluding, Mr. Kabuka called upon this court to uphold the Ruling of the court below and dismisses the appeal with costs.

On behalf of the 2nd respondent written head of arguments were filed on 19th February, 2018.

Counsel submitted that the Ruling of the lower court was based on proper evaluation of the evidence that was before it. Citing the case of ***Zulu vs Avondale Housing Project Limited***[2], Counsel argued that an appellate court should only reverse findings of fact made by a trial court if such findings were either perverse or made in the absence of any relevant evidence.

Counsel further observed that the grant of an injunction is discretionary and dependent upon the existence of a cause of action against a respondent in circumstances where there is an actual or threatened invasion of a claimant's legal or equitable right. He cited the authors of the book titled ***Commercial Litigation: Pre-Emptive Remedies*** by I. Goldmein, K Wilkinson and M. Kenshaw at page 38.

She pointed out that the various tenancy agreements which were executed with the 1st respondent all expired before June, 2016 when the property was sold to the 2nd respondent.

Counsel further argued that the 1st respondent was not obliged to sell the property to the appellants based on expired tenancy agreements and also in light of clause 17.6 which read as follows:

> *"If the landlord decided to sell this property, it shall be sold on the open market, however, the tenant may also bid. The landlord reserves the right to sell to the highest bidder without giving reasons or entering into undue explanations."*

Counsel further argued that the appellants were mere tenants at will after the expiration of the tenancy agreements whose tenancy could be determined by either party giving notice. For this proposition, Counsel cited the case of ***Hondling Xing Zing Building Company Limited vs Zamcapital Enterprises Limited*** [3].

Counsel therefore contended that the learned trial Judge was on firm ground to decline the injunction for the reasons that the tenancy agreements were expired.

Counsel for the respondent then moved to ground two and argued that contrary to the appellants assertion that the 1st respondent abrogated the tenancy agreements with impunity, it was in fact the appellants who abrogated the tenancy agreements by failing to pay rent on time even before the tenancy agreements expired. Citing the cases of ***American Cynamide Company vs Ehticon Limited***[4] ***Shell and BP Zambia Limited vs Conidaris***[5] and ***Preston vs Luck***[6]**,** Counsel argued that the appellant failed in the court below to demonstrate a clear right to relief or that there was a serious question to be tried at the trial.

As regards ground three, Counsel adopted her earlier submissions with respect to ground one, to argue that the appellants were tenants at will, whose stay was brought to an end when the 1st respondent notified them that the property had been sold to the 2nd respondent.

In ground four it was contended by the 2nd respondent that the trial Judge was on firm ground when she held that the appellants did not come to court with clean hands due to failure to pay rentals. He further argued that the appellants' insistence that the subsisting rent be paid into court and be retained by the court until the main matter is determined was tantamount to the appellants creating conditions that are only favourable to themselves contrary to the principle enunciated in the case of ***Turnkey Properties Limited v Lusaka West Development Company.***[7]

In respect of ground five it was submitted that the lower court was on firm ground when it held that the appellants did not show capacity to pay damages or the purchase price in that they defaulted on payment of rentals to the 1st respondent. She fervidly argued that the property was sold to the 2nd respondent at US$185,000 and if the appellants felt they had capacity, they should have paid an equivalent amount into court.

Counsel called upon this court to therefore dismiss the appeal with costs.

We have examined the record and the issues raised in the submissions along with the authorities cited, for which we are indebted to Counsel. The facts for which there is no dispute are that the appellants were tenants for the 1st respondent in respect of the property on Stand F/748/D1. It is also common ground that all the tenancy agreements expired prior to the commencement of the action

in the court below. The appellants were also defaulters in paying of rent to the 1st respondent.

The 1st respondent was put under compulsory liquidation with leave of court. The subject property was subsequently sold to the 2nd respondent in June 2016. After purchasing the property, the 2nd respondent demanded for rentals from the appellants. The appellants thereafter sought the intervention of the court for an order of interim injunction to restrain the respondents from interfering with their quiet possession. The issue, here, is whether the lower Court was, under the circumstances, right to exercise its discretion to decline granting an interim injunction applied by the appellants and for the reasons it did.

We propose to deal with ground one to four together as they are interrelated. The thrust of the submissions on behalf of the appellant in ground one is that the learned trial judge fell into error when she held that the application for an injunction was misconceived against the 1st respondent when there were allegedly subsisting tenancy agreements. In the written submissions on behalf of the appellants, it was stoutly argued that pages 121 to 211 of the record of appeal contain the written tenancy agreements that were executed between the appellants and the 1st respondent.

We have examined pages 121 to 211 of the record of appeal which *inter alia,* contains exhibits of tenancy agreements that were executed between the appellants and the 1st respondent aforesaid.

Without delving into the merits of the substantive matter our view is that it is evidently clear that all of them were expired prior to the sale of the property to the 2nd respondent which was in June 2016. According to the learned authors of **Megarry and Wade on the Law of Real Property** at p. 771, in paragraph 17.075, when a tenant holds over to property after a tenancy agreement has expired, the relationship becomes that of a tenancy at will which is liable to be determined by either party giving notice. We therefore find solidity in the counsel for the 1st respondent's submission that the appellants were notified of the termination of the tenancy at will after the property was sold to the 2nd respondent.

There is no doubt that **order 27 of the High Court Rules** grants the court discretion whether or not to grant an injunction. The question is whether this discretion was exercised judiciously in the circumstances of this case.

In the case of ***American Cyanamid v Ethicon***[3] Lord Diplock observed as follows:-

> ***"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.***

In our view, the learned trial Judge made the right inquisition by following the five-stage test established in the ***American Cynamid***[3] case namely,

> *(i) a serious question to be tried*
> *(ii) clear right to relief*
> *(iii) prospect of success*
> *(iv) irreparable harm if relief denied; and*
> *(v) balance of convenience or inconvenience.*

In relation to the criteria set above, we find that the learned trial Judge correctly came to the conclusion on the evidence before her that there was no serious question to be tried with little prospects of success in that the appellants were relying on expired tenancy agreements.

We do not agree with the learned counsel for appellants' submission that by considering whether the appellants had a clear right to relief, the trial Judge was effectively determining the matter with finality. We are fortified in our position by the observations of the Supreme Court in ***Shell and BP v Conidaris and Others.***[4]

> ***"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...."***

In light of what we have stated in the preceding paragraphs, grounds one to four of the appeal accordingly fail.

Ground five questions whether the learned trial Judge was on firm ground to hold that the appellants did not show capacity to pay damages when the they were not given an opportunity to show such capacity.

It was the applicant's duty to satisfy the court. We therefore, cannot fault the trial Judge for arriving at the finding as she did that the appellant were financially unsound. The trial Judge was on firm ground and justified in making the finding of financial incapacity taking into consideration all the circumstances of this case. We accordingly find that ground five is bereft of merit.

Having found that all five grounds of appeal to be destitute of merit, it follows that the entire appeal is dismissed.

Costs follow the event to be taxed in default of agreement.

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C.F.R. MCHENGA
DEPUTY JUDGE PRESIDENT

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F.M. CHISHIMBA
COURT OF APPEAL JUDGE

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B.M. MAJULA
COURT OF APPEAL JUDGE