

IN THE HIGH COURT OF ZAMBIA

2018/HP/2098

AT THE PRINCIPAL REGISTRY

HOLDEN IN LUSAKA

(Civil Jurisdiction)



BETWEEN:

ELIAS TEMBO

PLAINTIFF

AND

SPENCER ROY SIWALE

1ST DEFENDANT

LUSAKA CITY COUNCIL

2ND DEFENDANT

Before the Hon. Mrs. Justice C. Lombe Phiri in Chambers.

For the Plaintiff:

Mr R. Mainza -Messrs Mainza & Company

For the 1st Defendant:

Mr. N. C. Sitali -Messrs Ellis & Co

For the 2nd Defendant:

N/A

RULING

CASES REFERRED TO:

1. **Shell and BP Zambia Limited v Conidaris (1975) ZR 174**
2. **American Cynamid Company v Ethicon Limited [1975]**

**3. Turnkey Properties v Lusaka West Development Company Ltd.,
B.S.K. Chiti**

4. Zambia State Insurance Corporation Ltd. (1984) Z.R. 85 (S.C.)

This was the 1st Defendant's application for an interim injunction restraining the Plaintiff, whether by his servants, agents or whomsoever from disposing of, alienating, selling or making further developments on Stand No. 13257, until determination of the matter or further order of the Court. The application was supported by an Affidavit in Support and Skeleton Arguments which were augmented at the hearing of the application.

In the affidavit in support the 1st Defendant deposed that he is the registered lessee of Stand No. 13257, Lusaka. He produced a Certificate of Title exhibit RSS1. He deposed that the Plaintiff commenced construction of a structure that partially encroaches on Stand 13257, Lusaka. He produced photographs to demonstrate the said encroachment marked RSS2. He further deposed that the Plaintiff had continued to develop the structure despite protests from him, to the detriment of his interests in the said piece of land. He further deposed that the Plaintiff does not possess title for the property in issue. He also deposed that he had conducted investigations at Lusaka City Council which revealed that the Council had opened an Account in the Plaintiff's name under Stand No. 13257 which allows the Plaintiff to pay land rated for the property. The 1st Defendant deposed that he is unable to develop the portion of land that has been encroached on and has been deprived of enjoying quiet possession of Stand No. 13257.

In the Skeleton Arguments it was stated that the application was brought pursuant to Order 27 Rule 1 of the High Court Rules, Chapter 27 of the Laws of Zambia as read with Order 29 (1) of the Rules of the Supreme Court (Whitebook) 1999 Edition. Reliance was placed on the celebrated cases of **Shell and BP Zambia Limited v Conidaris (1975) ZR 174⁽¹⁾** and **American Cynamid Company vs Ethicon Limited [1975]⁽²⁾** to demonstrate the principle that a court ought only to grant an injunction where the right to relief is clear and where it is necessary to protect the Plaintiff from irreparable injury. It was submitted that the affidavit evidence before the Court shows that the 1st Defendant is the rightful owner of the property in question as he is in possession of a Certificate of Title in relation to the property. It was submitted that the 1st Defendant clearly possessed a clear right of relief as it was his property that had been encroached by the Plaintiff. In that regard reference was made to Section 33 of the Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia which provides that a Certificate of Title is conclusive evidence of interest in a claim over land. It was submitted that the 1st Defendant would suffer irreparable injury in the event that the injunction is not granted. Such damage may not be atoned for in damages. The Court was implored to maintain the status quo.

The Plaintiff in response to the application filed into Court an affidavit in opposition and skeleton arguments which were augmented at the hearing. In the affidavit in opposition to the injunction application it was deposed that the 1st Defendant acquired the Certificate of Title illegally as the 1st Defendant breached the procedure for acquisition of Land as set out in Circular No.1 of 1985. The Plaintiff then proceeded to depose as to the circumstances of the

offer of the said piece of land. It was deposed to that the Plaintiff has a superior interest in Stand No. 13257 having been offered the plot on 14th August, 2000 while the 1st Defendant was offered the land on 21st February, 2001. He further deposed that he believed the 1st Defendant's Title would be cancelled therefore he did not have any interest in the land. It was further deposed that no structure encroaches on Stand 13257 as the land was sold to the Plaintiff by one Lameck Phiri. An offer letter from Ministry of Lands and Applications for Land were exhibited in the affidavit.

In their arguments in opposition the Plaintiff basically restated what is settled law regarding the grant of interim injunctions. It was in summary submitted that the 1st Defendant had not demonstrated in his application how he acquired the Certificate of Title to the land in question. It was submitted that as the acquisition of the piece of land was irregular there was no prospects of success for the 1st Defendant at trial therefore the injunction sought at this stage should not be granted.

At the inter partes hearing of the Application the Counsel for the 1st Defendant relied on the Affidavits filed into Court and the accompanying arguments. His viva voce arguments in augmentation were merely to highlight what has already been submitted by was of emphasis. In opposing the Application Counsel for Plaintiff relied on what had been filed into Court by way of affidavit and skeleton arguments and relied entirely on them. He further prayed for costs for the application.

Leave was granted to the 1st Defendant to file arguments in reply. The gist of these arguments was that the Plaintiff had not demonstrated that he had Title to the land in question. It was submitted that the Letter of Offer does not grant title to land as title is only given by the Commissioner of Lands. Regarding the adequacy of damages it was submitted that the loss that could be occasioned to the 1st Defendant are unquantifiable. The Court was urged to grant the application with costs for the 1st Defendant.

It is trite law that the remedy of injunction is an equitable remedy where in the Court has discretionary powers to make an order that would tend to restrain a party from carrying out or continuing to carry out a certain action until such a time as the Court deems fit. Among the main reasons for the Court granting such an order is to maintain the status quo. In the case of **Turnkey Properties V Lusaka West Development Company Ltd., B.S.K. Chiti (Sued As Receiver)**⁽⁴⁾, and **Zambia State Insurance Corporation Ltd. (1984) Z.R. 85 (S.C.)**⁽⁵⁾ the following was held :

- (i) *An interlocutory injunction is appropriate for the preservation or restoration of a particular situation pending trial.*
- (ii) *It is improper for a court hearing an interlocutory application to make comments which may have the effect of pre-empting the decision of the issues which are to be decided on the merits to the trial.*
- (iii) *An interlocutory injunction should not be regarded as a device by*

which an applicant can attain or create new conditions favourable only to himself.

- (iv) *In applications for Interlocutory injunctions the possibility of damages being an adequate remedy should always be considered.*

The holding in Turnkey Properties was in line with what was held in the case of **Shell & B.P. Zambia Limited V Conidaris And Others (1975) Z.R. 174 (S.C.)** that:

- (v) *“A court will not generally grant an interlocutory 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. Irreparable injury means "injury which is substantial and can never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired.*
- (vii) *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”.*

I have carefully taken into consideration the facts before me in this application. The 1st Defendant has brought before the Court evidence that they hold a certificate of title and are in occupation of the property in question. The

Plaintiff has only brought to Court allegations of illegality in the acquisition of the land. I am of the considered view that on the face of it there are triable issues here. I find that the allegations of illegality raised by the Plaintiff are serious but go to the very root of the matter making them issues that should be determined at a full trial of the matter. That said I find that at the moment the balance of convenience lies with the 1st Defendant who has demonstrated that they hold a certificate of title for the land in question.

In view of foregoing, I find that the 1st Defendant has demonstrated before this Court sufficient grounds for this Court to grant an interim injunction against the Plaintiff to restrain him or his servants, agents or whomsoever from disposing of, alienating, selling or making any further developments on Stand No. 13257, Lusaka until further determination of this matter by the Court.

I further order costs for the 1st Defendant for this application.

Leave to appeal is granted.

Dated at Lusaka this 6th day of February, 2020.



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C. LOMBE PHIRI
JUDGE