

**IN THE HIGH COURT OF ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA  
(CIVIL JURISDICTION)**

**2019/HP/1219**



**BETWEEN:**

**ASADO ENTERPRISES LIMITED**

**AND**

**CRUSHED STONE SALES LIMITED**

**MAYBIN M. MWIINGA**

**PLAINTIFF**

**1<sup>ST</sup> DEFENDANT**

**2<sup>ND</sup> DEFENDANT**

**Before the Honourable Justice Mr. M. D. Bowa in Chambers this 10<sup>th</sup> Day of August 2020.**

For the Plaintiff:

Mr. P. Chileshe from Messrs. A. Mbambara  
Legal Practitioners.

For the 1<sup>st</sup> & 2<sup>nd</sup> Defendants:

Mr. M. Phiri from Messrs. Mwansa, Phiri,  
Shilima & Theu Legal Practitioners.

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## **RULING**

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### **Cases Referred to**

1. *American Cyanamid Company vs. Ethicon* (1975) A.C 396.
2. *Hilary Bernard Mikosa vs. Michael Ronaldson* (1993-1994) ZR 26
3. *Harton Ndove vs. Zambia Educational Company* (1980) ZR 1849
4. *Shell and BP v Conidaris and Others* 1975 ZR p174
5. *Communications Authority vs. Vodacom Zambia Limited* (2009) ZR 196
6. *Gideon Mundanda vs. Timothy Milwani and Others* (1987) ZR 29

*7. Mwenya and Another vs. Paul Kapinga. (1998) ZR 71*

This is the Plaintiffs application for an injunction filed into court on the 1<sup>st</sup> August 2019. The affidavit in support was sworn by Donald Mahoro the majority shareholder and Director in the Plaintiff Company. He deposed that the Plaintiff was offered plot 14129 Lusaka situate along Kafue road sometime in early 2019 after the Ministry of Lands successfully repossessed the stand from a company called Prince Construction Limited for failure to develop it. Further, that the offer from the Ministry of Lands followed a recommendation from the Ministry of Local Government in line with its policy of rezoning of land to the extent of 300 meters on either side of Kafue road, into a Commercial Development Corridor.

It was deposed further that the Plaintiff has since been issued with a Certificate of title No 56246 for the subject property a copy of which was exhibited "**DM1.**" In addition that at the time of taking possession of the property, only 3 families of squatters were found in occupancy and the Ministry of Local Government directed that the said squatters be compensated as per directive marked "**DM2.**"

The Plaintiff has since successfully compensated the squatters and erected a perimeter wall fence around the property. Exhibited **“DM3” “DM4”** and **“DM5”** was the proof of such compensation. To the Plaintiff's surprise, the 2<sup>nd</sup> Defendant has surfaced and now claims that the 1<sup>st</sup> Defendant had been in occupation of the land and was still processing ownership documents. It was the Plaintiff's position that there is absolutely no connection between the former registered owner Prince Construction Limited and the 1<sup>st</sup> Defendants. The Plaintiff further believed based on advice from their lawyers that one cannot acquire ownership by merely being in possession.

It was averred that the 2<sup>nd</sup> Defendant has now made it a habit to force his way onto the property to harass the Plaintiff's workmen on site. In addition that the Defendant's unwarranted and continued intrusion continues to disturb the Plaintiff's peaceful and quiet enjoyment of its property. All effort to try to reason with the 2<sup>nd</sup> Defendant has been in vain. The Plaintiff thus believes that the Defendants will not stop harassing them unless compelled to refrain from doing so through an order of injunction.

The Defendants filed an affidavit in opposition dated 22<sup>nd</sup> August 2019 sworn by the 2<sup>nd</sup> Defendant also holding the position of Director in the 1<sup>st</sup> Defendant Company. He averred that the 1<sup>st</sup> Defendant was the first Applicant for plot No. 14129 Kafue road Lusaka and made their application as far back as 1998 as per letter dated 12<sup>th</sup> of November 1998 exhibited "**MMM1.**" Several follow ups were made on this application and included a letter to the Commissioner of Lands dated 26<sup>th</sup> July 2006 exhibited "**MMM2.**" On 24<sup>th</sup> July **2000** the Defendants advocates at the time Messer's ML Mukande and Company wrote to the Lusaka City Council advising that the Commissioner of Lands had been written to expressing the 1<sup>st</sup> Defendants interest in plot No. A14768, 134768, C/476 & Q/4768, 4852 which included plot 14129 Lusaka.

It was averred further that on 15<sup>th</sup> August 2000, the Lusaka City Council wrote to the Commissioner of Lands recommending the 1<sup>st</sup> Defendant for title deeds to stand No. A/4768, B/4768, C/4768/H Q4768 and 4851 as they were numbered then, which included stand No. 14129 Lusaka, following the re-numbering of the plots along Kafue Road.

It was the 2<sup>nd</sup> Defendants further evidence that on the 11<sup>th</sup> of October 2007 the 1<sup>st</sup> Defendant wrote to the Ministry of Local Government enclosing an application for the title deeds to stand No. 14129 Kafue Road Lusaka. Exhibited **“MMM5”** is a letter proposed to indicate that the 1<sup>st</sup> Defendant had the first interest in the plot. Further that the 1<sup>st</sup> Defendant wrote to the Commissioner of Lands on 2<sup>nd</sup> April 2012 indicating it has offices on the stand and emphasized the need to be offered the stand as per exhibit **“MMM7.”**

Another letter was written to the Ministry of Mines advising that Prince Construction should not have been allocated stand No 14129, Lusaka as the 1<sup>st</sup> Defendant was the sitting tenant with mining rights. It was deposed that it was after this letter that Prince Construction Limited gave up its claim to the stand in issue in favour of the 1<sup>st</sup> Defendant. Further evidence of Prince Construction ltd giving up its claims to the stand was proposed to be exhibit **“MMM9”** dated 15<sup>th</sup> August 1997.

It was averred further that on the 7<sup>th</sup> May 2019 the 1<sup>st</sup> Defendant wrote to the Ministry of Local Government and Housing bringing to

their attention the status of the property which the 1<sup>st</sup> Defendant has been paying rates to the Council. Also exhibited was a letter written by the 1<sup>st</sup> Defendant's advocates to the Attorney General advising that the property should have been offered to the 1<sup>st</sup> Defendant and not the Plaintiff.

The Defendants believe that the Plaintiff was offered the property by mistake and/or fraudulently an account of the fact that;

- i. The property was on title in favour of Prince Construction Company Limited for 99 year lease.
- ii. The 99 year lease had not expired as presented in the lands register and as such the repossession was riddled with illegality since procedure was not followed.
- iii. The 1<sup>st</sup> Defendant pays Council rates for the property in question
- iv. The Plaintiff Company does not qualify to own land in Zambia as all its shareholders and Directors are not Zambians.
- v. The 1<sup>st</sup> Defendant was the first Applicant for the stand and being the first in que should have been offered the property.

- vi. The 1<sup>st</sup> Defendant has offices on site with 3 workers whose presence was fully known to the Plaintiff
- vii. The 1<sup>st</sup> Defendant had furniture such as tables, chairs, and cabinets on site, a fact known to the Plaintiff
- viii. It is the 1<sup>st</sup> Defendant that was duly recommended by the Lusaka City Council to be given the title deeds.

It was averred further that the 1<sup>st</sup> Defendant is not on the property as a squatter, nor illegally but has been there for over 50 years and had mining licences and structures on site. Proof of their presence of the land was inherent in the old structures on the stand as per photos exhibited **“MMM16.”** The Defendants thus argue that there is a clear relationship between the former registered owner Prince Construction Company Limited and the 1<sup>st</sup> Defendant as demonstrated in its exhibits.

It was contended further that the 2<sup>nd</sup> Defendants visits to the property has been necessitated by the fact that its offices are situated at the property and are awaiting the issuance of title deeds following the recommendation by Lusaka City Council. The Defendants refute that they were harassing the Plaintiffs workers

but that it was in fact the Plaintiff who has told the 1<sup>st</sup> Defendant's workers to stop going to the property. Furthermore, that the construction of the boundary wall fence by the Plaintiff has cut off the Defendants from their offices. The Defendants thus implored the court to discharge the exparte order granted earlier with costs.

The Plaintiff filed an affidavit in reply dated 4<sup>th</sup> September 2019.

The Plaintiff disputed that it had committed any fraud and averred that it qualifies to own land in Zambia as an investor in possession of an investor's license issued by the Zambia Development Agency.

Exhibited "**DNM1**" is a copy of the licence. The Plaintiff further disputed finding any offices on the property belonging to the 1<sup>st</sup> Defendant but rather what was described to be a dilapidated structure occupied by the 3 families of squatters who have since been compensated. That the said squatters proceeded to strip the structures of all the roofing sheets, windows and everything they could manage to carry upon being compensated.

The Plaintiff asserted further that the Defendants had not exhibited any offer letter for the subject property from the Commissioner of Lands. That the exparte injunction should be confirmed as such.



At the hearing which was held on the 13<sup>th</sup> of March 2020 both parties relied on their respective affidavits and filed skeleton arguments. I have carefully considered the application and arguments. The principles to be applied when a court is considering whether or not to grant an interim injunction are well settled. In the case of ***American Cyanamid Company v Eithicon***<sup>1</sup>, Lord Diplock set out the tests that a court should apply in exercising its discretion. Notably, that the court should address the question whether or not on the facts, an applicant has raised a serious question to be determined at trial; whether damages would be an adequate remedy and the Defendant is in a position to pay; and lastly where the balance of convenience lies.

The first test I must apply therefore is to ascertain if there is a serious question to be tried and a clear right of relief established on the facts. In applying this test the Supreme Court in the case of ***Hilary Bernard Mukosa vs. Michael Ronaldson***<sup>2</sup> went further and held that.

***"An injunction would only be granted to a Plaintiff who established that he had a good and arguable claim to the right he sought to protect."***

Further in the case of ***Harton Ndove vs. Zambia Educational Company***<sup>3</sup> Chirwa J held that:

***"Before granting an injunction, it must be shown that there is a serious dispute between the parties and the Plaintiff must show on the material before court that he has any real prospect of succeeding at trial"***

From the affidavit evidence before me, I find that the question of whether or not the Plaintiff's title deed was fraudulently obtained and who is entitled to be declared owner is a serious question to be tried. The Plaintiff claims ownership by virtue of the title deed issued in its name whilst the Defendants state the property should not have been offered to the Plaintiff because they were first in line to apply for it; that the previous owner gave up a claim to it to them and in any event the Plaintiff did not qualify to own land in Zambia amongst the many claims. These are no doubt serious issues worthy of consideration at trial. Granted that the Plaintiff has exhibited a title, I find that prima facie a clear claim of right to the declaration sought has been established.

The second question I must interrogate is whether damages would be an adequate remedy or if irreparable injury would result from

the court's refusal to grant an injunction. In the case of **Shell BP Zambia Limited v Conidaris and Others**<sup>4</sup> the Supreme Court defined irreparable injury to mean:

*"Injury which is substantial and can never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired."*

In the **Communications Authority vs. Vodacom Zambia Limited**<sup>5</sup> the Supreme Court suggested that in fact the issue of irreparable injury "is the first and primary element". The Court went on to hold that:

*"An injunction will not be granted where damages would be an alternative adequate remedy to the injury complained of the application later succeeds in the main action".*

If therefore, the Applicant can be adequately compensated by an award of damages and the Respondent would be in a position to pay the damages then an injunction should not be granted irrespective of how strong the Applicants case is. It is uncontroverted that the case before me centers on a land dispute. The Supreme Court in the case of **Gideon Mundanda vs. Timothy Milwani and Others** <sup>6</sup>

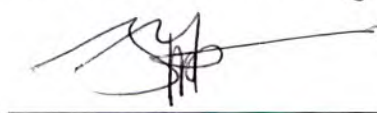
had occasion to comment on the issue of adequacy of damages in matters pertaining to level and held that:

***“The law takes the view that damages cannot adequately compensate a party for breach of contract for the sale of an interest in a particular house however ordinary.....”***

This position was also later affirmed by the court in the case of ***Mwenya and Another vs. Paul Kapinga.***<sup>7</sup>

I also find that the balance of convenience tilts in favour of the Plaintiff who presently has the title deed. I therefore find this is a proper case in which I can and should exercise my discretion to grant the injunction sought as I now do. The exparte order granted on the 8<sup>th</sup> August 2019 is hereby confirmed. Orders for directions will issue in the next 7 days to be complied with by the parties. Costs are for the Plaintiff to be taxed in default of agreement.

Dated at Lusaka this <sup>10<sup>th</sup></sup>..... of <sup>August</sup>..... 2020.



**JUDGE**