IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 116/2014**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

ALPHATECH ENTERPRISES LIMITED	**APPELLANT**
AND	
PRISCILA NYANGA	**1ST RESPONDENT**
WINSTON NYANGA	**2ND RESPONDENT**
ECM MINING LIMITED	**3RD RESPONDENT**

CORAM: **Wood, Kajimanga and Kabuka JJS on 9th August 2016 and 21st July 2020**

For the Appellant:	**Mr. V. N. Michelo of Messrs V.N. Michelo & Partners**
For the 1st and 2nd Respondents:	**Mr. E. C Banda SC, with Mr. T. Chibeleka, of ECB Legal Practitioners**
For the 3rd Respondent:	**N/A (Filed notice of Non-appearance)**

J U D G M E N T

Kajimanga, JS delivered the judgment of the court.

Cases referred to:

1. *Preston v Luck [1884] 27 Ch 497*
2. *Mwendalema v Zambia Railways Board (1978) Z.R. 65*
3. *Gideon Mundanda v Timothy Mulwani and 2 others (1987) Z.R. 29*
4. *Development Bank of Zambia and Livingstone Saw Milk Limited v Jet Cheer Development Zambia Limited (2000) Z.R.*
5. *Hillary Bernard Mukosa v Michael Ronaldson (1993-94) Z.R. 92*
6. *Turnkey Properties v Lusaka West Development Ltd and 2 others (1984) Z.R. 89*

7. *Zimco Properties Limited v LAPCO Limited (1988 – 1989) Z.R. 92*
8. *Sable Hand Zambia Limited v Zambia Revenue Authority (2005) Z.R. 109*
9. *Zambia State Insurance Corporation Ltd v Dennis Mulikelela (1990-1992) Z.R. 18*
10. *Ahmed Abad v Turning and Metals Limited (1987) Z.R. 86*
11. *Shell and BP Zambia Limited v Conidaris and Others (1975) Z.R. 174*
12. *American Cynamid Company Limited v Ethicon [1975] AC 396*
13. *Communications Authority v Vodacom Zambia Limited (2009) Z.R. 196*
14. *Behbehani and Others v Salem and Others [1989] 1 WLR 723*
15. *Bank Mellat v Nikpour [1985] FSR 87*
16. *Lloyds Bowmaker Ltd v Britannia Arrow Holdings Plc [1988] 3 All ER 1358*
17. *R v Kensington Income tax Comrs ex p Princess Edmond de Polignac [1917] 1 KB 486*
18. *Series 5 Software v Clarke and Others [1996] 1 All ER 870*

Legislation and other works referred to:

1. *Lands and Deeds Registry Act Chapter 185 of the Laws of Zambia; sections 33 and 54.*

Introduction

[1] The court regrets the delay in delivering this judgment. This is an appeal against the ruling of a judge of the High Court, (Kamwendo, J), discharging an *ex parte* order of interim injunction earlier granted to the appellant.

Background

[2] The background facts are that the appellant issued a writ against the appellants claiming:

i. **An order for specific performance of a contract of sale in respect of a portion of Stand 665 Itimpi, Kitwe measuring 100 by 75**

metres entered [into] between the appellant and the 1st and 2nd respondents on 23rd August 2011.

ii. **A declaration that the appellant is entitled to the piece of land bought from the 1st and 2nd respondents forming part of Stand 665 Itimpi, Kitwe measuring 100 by 75 metres.**

iii. **An order of injunction restraining the 1st and 2nd respondents from alienating the portion of Stand 665 Itimpi, Kitwe measuring 100 by 75 metres sold to the appellant by the 1st and 2nd respondents and a further order for an interim injunction restraining the 3rd respondent from clearing or developing the portion of Stand 665 Itimpi, Kitwe sold to the appellant by the 1st and 2nd respondents.**

iv. **Costs.**

[3] The appellant then applied for and obtained an *ex parte* order of interim injunction. The affidavit in support of the application disclosed that on 23rd August 2011, the appellant and the first respondent through the second respondent, with a power of attorney for the first respondent, entered into a contract of sale relating to a portion of Stand No. 665 Kitwe measuring 100 × 75 metres at a purchase price of K110,000.00 and the legal fees for the conveyance were paid to Messrs Freddie and Company. From 23rd August 2011 to the date of the application, the appellant had been awaiting the processing of the offer letter and certificate of title. On 1st October 2013, when the appellant

company wanted to move on site, they found that the land had been cleared in readiness for development. Upon enquiry, it was discovered that the land was being cleared by the third respondent. However, at the time of the sale, the first and second respondents did not mention of any encumbrance on the property nor did they explain how the third respondent company found itself on the said piece of land.

[4] The first and second respondents' affidavit in opposition disclosed that the contract alluded to by the appellant was actually not only in relation to Stand No. 665 Kitwe but was also in relation to Stand No. 8585 Kitwe. The actual value of Stand No. 665 Kitwe was pegged at K170,000.00 and the appellant offered the first and the second respondents Stand No. 8585 Kitwe at the agreed purchase price of K60,000.00 which formed part of the purchase price for Stand No. 665 Kitwe. Two separate contracts were drawn and executed for Stand Nos. 665 and 8585 Kitwe with the purchase price of K110,000.00 and K60,000.00 respectively. Pursuant to the foregoing, the appellant paid the first respondent the sum of K110,000.00 and

no money was exchanged in relation to Stand No.8585 Kitwe.

[5] The affidavit evidence also disclosed that when the first and second respondents took possession of Stand No. 8585 Kitwe, they were firstly approached by the neighbourhood committee which claimed that the land was meant for a local clinic. Later, they were approached by a Chinese national who claimed that the land belonged to him. Upon conducting a search at Ministry of Lands it was indeed discovered that the land belonged to Wang Qing Zhen. After this discovery, the first and second respondents rescinded the contract of sale but the appellant pleaded with them, promising an alternative plot. As at 27th September 2012, the appellant had not found alternative land to replace Stand No. 8585 Kitwe, prompting the first respondent to affirm the cancellation of the transaction and to refund the appellant the sum of K110,000.00. The appellant, however, refused to collect the refund but the first respondent is still willing and able to refund the money. Accordingly, the appellant is not entitled to an injunction on account of the foregoing.

[6] The third respondent's affidavit in opposition disclosed that the

entire Stand No. 665 Kitwe belongs to the third respondent, having purchased the same at K800,000.00 from the first and second respondents through their advocates, Messrs Freddie and Company, which firm incidentally is being said to have represented the appellant and possessed ostensible authority on behalf of the appellant even at the time the third respondent purchased the property. The third respondent took vacant possession as far back as August 2012 and a search conducted at the Lands and Deeds Registry did not reveal any encumbrance on the property. Restraining the third respondent would trigger astronomical damages and will have the effect of disrupting development over the whole Stand No. 665 Kitwe as the said property is one. Thus, this was not a proper case where an injunction could be granted.

[7] In the appellant's affidavit in reply, it was deposed that the first and second respondents were deliberately trying to mislead the court by creating fraudulent documents so as to defeat the course of justice and the exhibit marked "WN2" in the first and second respondents' affidavit was a forgery. The rescission of

the contract should be by way of a court order and cannot be done unilaterally and that the purported sale of the piece of land measuring 100 × 75 metres forming part of Stand No. 665 to the third respondent was fraudulent, null and void.

Consideration of the matter by the High Court and decision

[8] After considering the affidavit evidence and the arguments of the parties, the learned trial judge found that at the time the appellant was coming to court to obtain the injunction, the third respondent was already in possession of the whole premises; and that the holding of a certificate of title is a *prima facie* case of right to the land so demised. This, in his view, showed that there is no *status quo* to protect as the claimed land was already in the hands of the third respondent. He also observed that the issue of fraud which the appellant had alluded to in his affidavit in reply had not been pleaded in the writ of summons and statement of claim.

[9] It was the finding of the learned trial judge that damages would be an adequate remedy should the court find in the appellant's favour at the end of the trial as the cost of demolishing the

structures being built on the disputed piece of land is quantifiable. Having so found, he ruled that he would not consider the balance of convenience as it would be inappropriate in the circumstances to do so. He accordingly discharged the *ex parte* order of interim injunction earlier granted to the appellant.

The grounds of appeal to this court

[10] The appellant has now appealed to this court on three grounds as follows:

1. **The court below erred in discharging the interim injunction relating to a disputed piece of land and in so doing disturbed the status quo which was so essential in this case as the matter involves land.**
2. **The court below erred in delving into the main matter by pre-empting the possible decision of the court.**
3. **The learned trial judge erred in holding that damages would be an adequate remedy if the appellant lost the piece of land the subject of these proceedings.**

[11] All the parties filed heads of argument. At the hearing, the respective counsel for the appellant as well as the first and second respondents briefly augmented their written submissions. We will not reproduce their oral submissions here

because they were a repetition of the written heads of argument.

[12] In support of ground one, Mr. Michelo, the learned counsel for the appellant submitted that the purpose of an injunction is to preserve the *status quo* so that parties are left in the same position in which they were up to the time the court makes a decision on the matter. We were referred to the English case of *Preston v Luck*[1] in support of this argument.

[13] It was accordingly submitted that the discharging of the interim injunction was erroneous as the third respondent can dispose of the property the subject of these proceedings before conclusion of the matter and the proceedings will be made ineffectual.

[14] In arguing the second ground, counsel submitted that by talking about the contract being rescinded and of fraud not being pleaded, the court was delving into the merits and demerits of the matter. Reliance was placed on the case of *Mwendalema v Zambia Railways Board*[2] where Gardner, JS held that triable issues are not proper for determination in interlocutory proceedings.

[15] Regarding the third ground of appeal, it was submitted that the court below fell into serious error by holding that damages would be an adequate remedy when the appellant was claiming for specific performance of the contract of sale between the appellant and the first and second respondents. The appellant relied on the case of *Gideon Mundanda v Timothy Mulwani and 2 others*[3] where Gardner, JS held in relation to loss of land as follows:

> **"A judge's discretion in relation to specific performance of contract for sale of land is limited as damages cannot adequately compensate a party for breach of a contract for sale of land."**

[16] We were accordingly urged to grant the appellant an interlocutory injunction so as to maintain the *status quo.*

[17] In response, counsel for the first and second respondents, Mr. Chibeleka, submitted in respect of ground one that the court below was on firm ground in discharging the interim injunction granted to the appellant. We were referred to the case of *Development Bank of Zambia and Livingstone Saw Mills Limited v Jet Cheer Development Zambia Limited*[4] where we held that an

injunction is an equitable remedy and *"he who comes to equity must come with clean hands"* and that *"he who seeks equity must do equity"*. It was submitted that the record of appeal contains two separate contracts which were executed, showing that the appellant offered Stand No. 8585 Kitwe, purportedly belonging to Omega Leer Limited (appellant's sister company) at the agreed value of K60,000.00 which formed part of the purchase price for Stand No. 665 Kitwe. A search conducted at the Lands and Deeds Registry revealed that the said plot belonged to Wang Qing Zhen.

[18] It was contended that because of the failure of part of the consideration on account of the appellant's misrepresentation, the first and second respondents were entitled to rescind the contract and this negated the appellant's right to a good and arguable claim. Reliance was placed on the case of *Hillary Bernard Mukosa v Michael Ronaldson*[5] where we held that:

> **"An injunction will be granted only to a plaintiff who has established that he has a good arguable claim to the right he sought to protect."**

[19] We were also referred to the case of *Turnkey Properties v Lusaka*

West Development Ltd and 2 others[6] where we held that an interlocutory injunction is appropriate for the preservation or restoration of a particular situation pending trial and further that it should not be regarded as a device by which an applicant can attain or create new conditions favourable only to himself.

[20] Counsel submitted that no irreparable damage will be occasioned to the appellant which has failed to complete the conveyance. He called in aid the case of *Zimco Properties Limited v LAPCO Limited*[7] where we stated that the balance of convenience between the parties as to whether to grant an injunction will arise if the harm done will be irreparable and will not suffice to recompense the plaintiff for any harm which they may have suffered.

[21] It was also argued that due to the appellant's misrepresentation and or failure of part of the consideration, the first respondent cancelled the whole transaction and sold Stand No. 665 Kitwe to the third respondent as per the evidence on record. We were referred to section 33 of the Lands and Deeds Registry Act

Chapter 185 of the Laws of Zambia which provides as follows:

> **"A certificate of title shall be conclusive as from the date of its issue and upon and after the issue thereof, notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the President or otherwise which but for parts III to VII might be held to be paramount or to have priority; the registered proprietor in the land comprised in such certificate shall, except in cases of fraud, hold the same subject only to such encumbrances, liens estates or interest as may be shown by such certificate of title and any encumbrances, liens, estates or interest created after the issue of such certificate as may be notified on the folium of the Registrar relating to some and but absolutely free from all other encumbrances, liens, estates or interests whatsoever..."**

[22] We were also referred to section 54 of the Lands and Deeds Registry Act which states that:

> **"Every provisional certificate and every certificate of title, duly authenticated under the hand and seal of the Registrar, shall be received in all courts of law and equity as evidence of the particulars therein set forth or endorsed thereon, and of their being entered in the Register and shall, unless the contrary is proved by the production of the Register or a copy thereof certified under the hand and seal of the Registrar, or unless the rectification of a provisional certificate is ordered by the Court, be conclusive evidence that the person named in such provisional certificate or certificate of title or in any entry thereon, as seized or possessed of such land for the estate or interest therein specified as from the date of such certificate or**

as from the date which the same is expressed to take effect, and that such certificate has been duly issued."

[23] Counsel contended that the learned trial judge found as a matter of fact that the third respondent had already taken possession of Stand No. 665 Kitwe and further, that the holding of a certificate of title by the third respondent is prima facie right to ownership of land. The third respondent is the owner of Stand No. 665 Kitwe and this can be seen from the certificate of title in the record of appeal. It was submitted that it is from the foregoing and more so, the third respondent's certificate of title relating to Stand No. 655 Kitwe, that the learned trial judge held that there was no *status quo* to protect as the claimed land was already sold to the third respondent. Further, it was argued that the learned trial judge was on firm ground in relying on section 33 of the Lands and Deeds Registry Act and we were urged to dismiss ground one.

[24] In respect of ground two, counsel contended that this ground of appeal should be dismissed because the trial judge was merely making an observation on the issue of fraud which the appellant had alluded to in the affidavit in reply and was not delving into

the merits and demerits of the case. It was submitted that it is trite law that where fraud is an issue in the proceedings, a party wishing to reply on it must ensure that it is clearly and distinctly alleged and the case of *Sable Hand Zambia Limited v Zambia Revenue Authority*[8] was cited in aid.

[25] It was also contended that it is incumbent on the trial Judge to establish that a plaintiff has a good and arguable claim to the right that he seeks to protect. We were referred to the case of *Zambia State Insurance Corporation Limited v Mulikelela*[9] where we held that:

> **"A court will not grant an interlocutory injunction unless the court is satisfied of the facts before it that the plaintiff is likely to succeed in the relief sought."**

[26] Counsel submitted that it is the facts as presented that would influence the trial judge whether to grant the discretionary remedy of an injunction or not. We were further referred to the *Mwendalema*[2] case where it was held *inter alia*, that:

> **"In view of the non-disclosure of material facts by the appellant at the time of the ex parte application for an injunction, I would discharge the injunction."**

[27] It was further contended that the affidavit in support of summonses for an interim injunction and interlocutory injunction in the record of appeal does not include material facts that the subject property had already been sold to a third party or the fact that there was failure of partial consideration on the part of the appellant.

[28] In response to ground three, counsel submitted that the learned trial judge was on firm ground in holding that damages would be an adequate remedy if the appellant was successful in its claims. The case of *Ahmed Abad v Turning and Metals Limited*[10] was cited in aid, where it was held that an injunction is inappropriate when damages would be an adequate remedy. We were also referred to the cases of *Turnkey Properties*[6] and *Shell and BP Zambia Limited v Conidaris and Others*[11] on the same principle.

[29] The learned counsel for the first and second respondents concluded by submitting that the appellant has not demonstrated what irreparable damage it would suffer taking into account all the factors of this case. We were accordingly

urged to dismiss this appeal with costs.

[30] In the third respondent's heads of argument, it was submitted in response to ground one, that the learned trial judge was on *terra firma* when he discharged the *ex parte* order of interim injunction as the appellant had no good chance of succeeding at the hearing of the main matter. This conclusion, counsel argued, was arrived at on account of the fact that the appellant failed to show that it had a clear right to relief. We were urged to take judicial notice of the fact that from 19th October 2011 when the first and second respondents cancelled the contract of sale and cheques given to the appellant for refund of the purchase price which the appellant unreasonably refused, the appellant did nothing up to the 7th October 2013 when they saw that the third respondent had started carrying out development works and commenced this action. Counsel submitted that this fact should weigh against the appellant in terms of establishing a clear right to relief which was being sought.

[31] Further, that the appellant's right to the relief which they were seeking was not clear as the appellant claimed to have entered

into a contract of sale of a portion of Stand No. 665 Kitwe on 23rd August 2011 yet, the record indicates that the first respondent conducted a search at the Ministry of Lands and upon discovery that Stand 8585 Kitwe belonged to a third party by the name of Wang Qing Zheng he sent a letter of cancellation of the transaction to the appellant on 19th October 2011. The appellant did nothing to react to the cancellation of the transaction from that time up to 2013. That even when a letter of cancellation of the transaction was sent to them and a cheque enclosed therein to refund them in view of the encumbrance, the appellant unreasonably refused to collect the refund. On the other hand, the first and second respondents' position is that the contract of sale alluded to by the appellant was actually not only in relation to Stand No. 665 Kitwe but also in relation to Stand No. 8585 Kitwe and this point was not contested by the appellant in the court below. The third respondent's position was that the entire Stand 665 Itimpi belonged to it having purchased the same at K80,000.00 from the first and second respondents. To this end, the third respondent exhibited a certificate of title which operated to dismiss the appellant's

purported right to relief being sought in the main action.

[32] Counsel also argued that it is a matter too plain to contest that the legal owner of real estate in Zambia is such as is endorsed on a certificate of title as section 33 of the Lands and Deeds Registry Act, clearly states that a certificate of title is conclusive proof of ownership. In the circumstances, it was contended by the third respondent, the right to relief by the appellant was questionable from the very beginning. It was the third respondent which clearly demonstrated that *prima facie,* it was the rightful owner of the property in question. Reference was made to the *Shell and BP*[11] case where it was held that when any doubt exists as to the plaintiff's rights or if the violation of an admitted right is denied, the court is obligated to consider the balance of convenience to the parties; the burden of showing the greater inconvenience is on the plaintiff. Reliance was also placed on the case of *American Cynamid Company Limited v Ethicon*[12] where it was stated that:

> **"On an application for an interlocutory injunction the court must look at the respective situations of the two positions. The first question to ask is why the plaintiff should not be left to fight his action and get his relief by succeeding. The normal rule of English litigation is**

that a person gets no relief till he has gone to trial and persuaded the Court that he has been infringed. He is not entitled to an interlocutory injunction just because he has a strong case. He is only so entitled if it is shown that there could be injustice if the defendant is left unfettered and that there is a serious risk of irreparable damage to the plaintiff."

[33] Counsel therefore argued that there was no serious injustice that would have ensued if the third respondent was left unrestrained, hence the denial of the injunction by the trial judge.

[34] On the issue of irreparable injury, it was submitted that this was not a fit and proper case where damages cannot atone for the purported injury and that this point is tacitly conceded by the appellant in its pleadings in which the appellant very competently claimed that it paid the sum of K110,000.00 to the first and second respondents, an amount which by all mathematical accuracy is quantifiable. The case of *Communications Authority v Vodacom Zambia Limited*[12] was cited in support. The question, therefore, was: how can the plaintiff claim that the purported injury would be irreparable and also be in a position to precisely quantify the amounts paid

to the first and second respondents? According to counsel, the appellant can be refunded and in fact they were refunded but unreasonably refused to accept a refund, a decision which, it was submitted, was unreasonable on their part.

[35] It was also argued that the court below assessed that damages were an adequate remedy and there is nothing on record to counter this position. In other words, the court cannot grant an injunction now on the alleged ground that there is an irreparable injury and later be in a position to assess the damages for the same injury which is purported to be irreparable and cannot be atoned for in damages. As such, the appellant had moved the court below not on the basis of actual or perceived injury, but mere and premature apprehension. At present, the argument goes, there is neither injury being occasioned to the appellant by the third respondent nor reasonable cause for the appellant to believe that the third respondent may trespass or is actually trespassing on Stand 665 Kitwe.

[36] As to the balance of convenience, it was submitted that the

same did not lie in favour of granting this injunction. This is because the third respondent demonstrated to the court below through its affidavit in opposition that it is the legal owner of the land on which all development works alleged to be wrongful are being undertaken. Moreover, a certificate of title was exhibited and no allegation of fraud or sharp practice or indeed any other vitiating factor that could operate to impeach the third respondent's certificate of title was made by the appellant. Relying on the *Shell and BP*[11] case, it was contended that the present case does not qualify for the grant of an interlocutory injunction according to the test in the said case.

[37] Counsel went on to submit that it is a requirement of equity that all material facts that may aid the court in arriving at the just conclusion of the matter be disclosed. However, the third respondent contended, the appellant whilst knowing fully well that the first and second respondents had refunded it the purchase price of K110,000.00 regrading Stand No.8585 Kitwe on account of the encumbrance on the property, which refund it unreasonably refused to collect, chose not to say a word about

it when in fact this information could have helped the court below to appreciate the sequence of events leading to the first and second respondents to cancel the transaction. The *Mwendalema*[2] case and *Behbehani and Others v Salem and Others*[14] were cited in support. The cumulative effect of the foregoing authorities, according to the third respondent, is to render the appellant's appeal unmeritorious.

[38] It was argued that at all material times, the appellant knew the true state of affairs regarding the failure of their transaction with the first and second respondents or at least, they must be taken to have known the reason that led to the failure of the transaction having received the letter of cancellation of the same on 19th October 2011. Therefore, the non-disclosure of material facts by the appellant reacted against it resulting in the discharge of the *ex parte* order of injunction. Our attention was drawn to the cases of *Bank Mellat v Nikpour*[15], *Lloyds Bowmaker Ltd v Britannia Arrow Holdings Plc*[16] and *R v Kensington Income tax Comrs ex parte Princess Edmond de Polignac*[17].

[39] In response to ground two, it was submitted that the court

below merely took judicial notice of the fact that the appellant attempted to introduce the issue of fraud in its affidavit in reply which was not pleaded in the writ of summons and the statement of claim. That the court below was entitled to comment on the issue as the appellant had deliberately invited the court to consider it. The issue of fraud, it was contended, was deliberately concealed by the appellant and only emerged when the first and second respondents filed their affidavit in opposition to the application for interlocutory injunction.

[40] In response to ground three, it was argued that the court below had assessed that damages were an adequate remedy and there is nothing on record to counter this position. The case of *Series 5 Software v Clarke and Others*[18] was relied upon in support of the argument.

[41] The third respondent contended that the learned trial judge was on firm ground when he took into account the nature of the dispute before him which, in his assessment, was one where the cost of demolishing the structures of the disputed piece of land was clearly quantifiable and thus can be atoned for in damages.

We were urged to take judicial notice of the fact that from 19th October 2011 when the first and second respondents cancelled the contract of sale and cheque given to it for a refund, the appellant did nothing up to 7th October 2013 when they saw that the third respondent had started carrying out development works and commenced an action. In these circumstances, it was submitted, the appeal is unmeritorious on account that the interlocutory injunction was properly discharged and that it be dismissed with costs.

Consideration of the appeal by this court and decision

[42] In the first ground of appeal, the appellant assails the trial court's decision to discharge the interim injunction related to the land in dispute thereby disturbing the *status quo*. The argument being that discharging the interim injunction was erroneous as the third respondent can dispose of the property which is the subject of these proceedings prior to the conclusion of this matter thereby making the proceedings ineffectual.

[43] The position of the first and second respondents is that the lower court was on firm ground in discharging the interim

injunction. According to them, they were entitled to rescind the contract because of the appellant's failure of part of the consideration on account of misrepresentation. That this negated the appellant's right to a good and arguable claim. They contend that no irreparable damage will be occasioned to the appellant which has failed to complete the conveyance. Further, that the third respondent had already taken possession of the property in dispute and held a certificate of title. It was for this reason that the trial judge held that there was no *status quo* to protect as the land was already sold to the third respondent.

[44] For its part, the third respondent also contends that the trial judge made no error in discharging the *ex parte* order of interim injunction because the appellant stood no chance of succeeding at the trial as it had failed to show that it had a clear right to relief. It is contended, on the issue of irreparable injury, that this was not a proper case where damages could not atone for the purported injury and that this was tacitly conceded by the appellant in its pleadings to the effect that it paid K110,000.00

to the first and second respondents, an amount which is quantifiable. That the appellant can be refunded the said amount and was in fact refunded but it unreasonably refused to accept the refund. As regards the balance of convenience, the third appellant contends that this does not lie in favour of granting the injunction as the third respondent demonstrated through its affidavit evidence that it is the legal owner of the land in dispute.

[45] The principles governing the grant or refusal to grant interlocutory relief have been well settled and jurisprudence on the same abound. In the English case of *Preston v Luck*[1] for example, the court stated as follows:

> **"The object of an interlocutory injunction is to keep things in status quo, so that if at the trial the plaintiffs obtain a judgment in their favour, the defendants will have been prevented from dealing in the meantime with the property in such a way as to make the judgment in ineffectual."**

And in the Zambian case of *Shell & BP*[11] we stated that:

> **"A court will generally not grant an interlocutory injunction unless the right to relief is clear and the injunction is necessary to protect the plaintiff from irreparable injury, not injury which is substantial and can never be adequately remedied or atoned**

for by damages."

[46] The writ of summons and statement of claim in the record of appeal indicate that the appellant was seeking, among others:

> **"(iii) An order of injunction restraining the 1st and 2nd Defendants from alienating the portion of Stand 665 Itimpi, Kitwe measuring 100 metres by 75 metres sold to the plaintiff by the 1st Defendant and 2nd Defendant and a further order of an interim injunction restraining the 3rd Defendant from clearing or developing the portion of Stand 665 Itimpi, Kitwe sold to the plaintiff by the 1st and 2nd Defendant."** [Emphasis added]

The *ex parte* order of interim injunction which was discharged by the trial judge was couched in similar words.

[47] At page R6 of the ruling, the trial judge found as follows:

> **"Clearly at the time the plaintiff was coming to court to obtain the said injunction, the third defendant was already in possession of the whole premises. The holding of a certificate of title is a prima facie case of right to the land so demised. This in my view shows that there is no status quo to protect, as the claimed land is already in the hands of the third defendant."**

[48] We are unable to fault the trial judge for arriving at this conclusion as it was a correct finding. The affidavit evidence deployed before the trial judge reveals that the contract for the

sale of a portion of the property in dispute was entered into between the appellant on the one part and the first and second respondents on the other part on 23rd August 2011. This contract was rescinded by the first and second respondents in 2012 and a refund of the purchase price was made to the appellant which it declined to receive. The third respondent took possession of the property in August 2012 having purchased it in its entirety from the first and second respondents. According to the Lands Register in the record of appeal, the third respondent obtained the certificate of title relating to the said property on 6th November 2012.

[49] The record of appeal shows that the appellant commenced this action in the court below on 7th October 2013, the same date when the *ex parte* order of interim injunction was granted by the trial judge. As can be noted in paragraph 46 of this judgment, the injunction sought by the appellant was to restrain the first and second respondents from alienating the portion of the property sold to the appellant. No one can quarrel with the trial judge for discharging the injunction because as he

aptly found, the third respondent was already a holder of a certificate of title relating to and was already in possession of the property at the time the appellant went to court to obtain the injunction. The alienation that the injunction was intended to prevent had already occurred. We are therefore, in agreement with the trial judge that there was no *status quo* to preserve.

[50] The injunction sought by the appellant was also intended to restrain the third respondent from clearing or developing the portion of the property allegedly sold to the appellant. In view of the conclusion we have reached in the preceding paragraph, we find it unnecessary to take this issue any further. Suffice it to add that it would be unrealistic to restrain the third respondent from clearing or developing the portion of Stand No. 665 Kitwe allegedly bought by the appellant when the former is a holder of a certificate of title relating to the entire piece of land. The view we take is that the affidavit evidence deployed before the trial judge by the appellant does not demonstrate that its right to the relief sought is clear nor that the appellant has a good arguable claim. For these reasons, we do not find any merit in ground

one.

[51] The appellant's grievance in ground two is that the lower court was in error in delving into the main matter. The basis of the grievance is that by talking about the contract being rescinded and of fraud not having been pleaded, the trial judge delved into the merits and demerits of the matter.

[52] According to the first and second respondents however, this ground of appeal should be dismissed because the trial judge did not delve into the merits and demerits of the matter as he merely made an observation on the issue of fraud which the appellant had alluded to in the affidavit in reply. The third respondent's contention is that the lower court cannot be faulted as it merely took judicial notice of the fact that the appellant attempted to introduce the issue of fraud in its affidavit in reply which was not pleaded in the writ of summons and statement of claim.

[53] This ground has been triggered by the following observation made by the trial judge at page R6 of his ruling:

"I have also observed that the issue of fraud which the plaintiff

has alluded to in the affidavit in reply has not been pleaded in the writ of summons and statement of claim."

[54] We fully agree with the respondents that by commenting on the issue of fraud which the appellant brought out in its affidavit in reply, the trial judge did not delve into the merits or demerits of the matter. It was merely an observation he made that the appellant had not pleaded the issue of fraud in its writ of summons and statement of claim. We think it appropriate to add that in any event, the observation made by the trial judge was not part of the *ratio decidendi* of his decision to discharge the injunction. It was *obiter dicta.* We equally find no merit in ground two.

[55] Ground three attacks the trial judge for deciding that damages would be an adequate remedy if the appellant lost the piece of land in dispute. The appellant contends that the lower court's holding was in appropriate considering that it was claiming for specific performance of the contract.

[56] The first and second respondents agree with the trial judge's holding, adding that the appellant has not demonstrated what

irreparable damage it would suffer taking into account all the facts of this case. For its part, the third respondent contends that the lower court had assessed that damages were an adequate remedy and there is nothing on record to counter this position. That in the trial judge's assessment, the nature of the dispute was one where the cost of demolishing the structures on the disputed land was clearly quantifiable and this can be atoned for in damages.

[57] The thrust of the appellant's contention is that the trial judge should not have held that damages were an adequate remedy in circumstances where there is a claim for specific performance. We earlier agreed with the trial judge's finding that at the time the appellant commenced this action the property in dispute had already been conveyed to the third respondent which was in possession of a certificate of title relating thereto. We have no hesitation in stating that on the facts of this case, a claim for specific performance cannot succeed.

[58] Furthermore, the undisputed affidavit evidence indicates that

the appellant was refunded the purchase price which it declined to accept. In the circumstances, we agree with the first and second respondents that the appellant has not demonstrated what irreparable damage it would suffer taking into account all the facts of this case. Consequently, ground three suffers the same fate as other grounds; it is also dismissed.

Conclusion

[59] The net result is that all three grounds of appeal have failed. The lower court's decision to discharge the *ex parte* order of interim injunction is consequently upheld. We award costs to the respondents which shall be taxed in default of agreement.

A. M. WOOD
SUPREME COURT JUDGE

C. KAJIMANGA
SUPREME COURT JUDGE

J. K. KABUKA
SUPREME COURT JUDGE