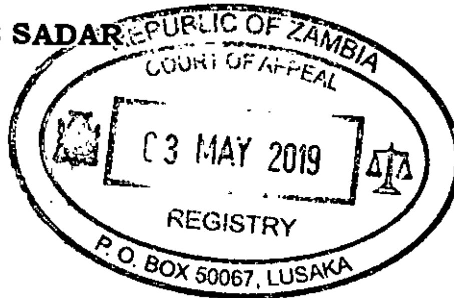
**IN THE COURT OF APPEAL FOR ZAMBIA** **APPEAL No. 134/2018**
**HOLDEN AT NDOLA**
(Civil Jurisdiction)

BETWEEN:

**AIYUB ISMAIL SADAR** **1ST APPELLANT**
**NAJMUNNISA AIYUB SADAR** **2ND APPELLANT**




AND

**BRIGHT SICHINGA** **1ST RESPONDENT**
**BRIAN MWEEMBA** **2ND RESPONDENT**
**THE ATTORNEY GENERAL** **3RD RESPONDENT**

**CORAM: CHISANGA JP, KONDOLO SC, MAJULA, JJA**

**On 20th February 2019 AND 3rd May, 2019**

*For the Appellants* : *Mr. K. Wishimanga of Messrs AM Wood & Co. Legal Practitioners*

*For the 1st Respondent* : *Mr. J. Katati of Messrs Dove Chambers XXXXXXXX*

*For the 2nd Respondent* : *No Appearance*

*For the 3rd Respondent* : *Ms. D.M. Mwewa Acting Senior State Advocate*

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# J U D G M E N T

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**KONDOLO SC, JA delivered the Judgment of the Court**

CASES REFERRED:

1. **Mwenya and Another v Kapinga (1998) ZR 17**

2. **American Cyanamid Company v Ethicon Limited (1975) 1 ALL ER 504**
3. **Shell and BP Zambia Limited v Conidaris and Others (1974) ZR 174**
4. **Paul Msanzya & Wilson Phiri v Annie C. Mwape & LCC – Appeal No. 25 of 2007**
5. **VDF Property Management Limited -v- Ronald Van Vlaanderen – Appeal No.190/2014**
6. **Garden Cottage Foods Limited v Milk Marketing Board (1984) A.C. 130**

This is an Appeal against the Ruling of the High Court dated 7th June, 2018 which confirmed the *ex-parte* order of injunction granted to the 1st Respondent (The Plaintiff in the Court below).

The Pleadings show that on 19th December, 2012 the 2nd Respondent (the Defendant in the Court below) and the 1st Respondent (Plaintiff in the Lower Court) Plaintiff as vendor entered into a contract of sale where the 2nd Respondent was to sell to the 1st Respondent ***"All that piece of land in extent of size 5 (FIVE) acres more or less being a subdivision of Stand No. 5622/M, Lusaka"*** at the purchase price of ZK190,000. The 1st Respondent paid the sum of ZK177,000 leaving a balance of ZK12,000. The 1st Respondent lodged a Caveat on 25th March, 2015 and claims that he was granted an interlocutory Injunction on 1st April, 2015 and another Order of interim injunction was granted against the 2nd Respondent and the two Appellants on 2nd February, 2018 restraining them from carrying on any construction works or any activity on L/5622/M/B Lusaka.

The 2la Respondent pleaded that he was selling the property as administrator of the Estate of the late Patrick Mweemba but didn't know that

he needed the express consent of the beneficiaries of the estate allowing him to sell the land. When his mother and siblings heard that he was selling the land they refused to give the necessary consent, thus frustrating the contract. He notified the 1st Respondent accordingly and offered to refund his monies but he insisted on buying the property.

The 2nd Respondent entered into a Contract of Sale with the Appellants on 20th March, 2015 for "land in extent 1.8694 more or less being subdivision B of the remaining extent of Lot No. 56223/M, Lusaka". The Appellants in the lower Court argued that they conducted a search and they did not see any caveat registered by the 1st Respondent nor did they see any encumbrance that could prevent them from proceeding with the sale thus, they were bona fide purchasers for value. In any event, they had been issued with a Certificate of Title. They further pointed out that the 1st Respondent had only bought 5 acres of the available 10 acres and they were sold subdivision B which was about 5 acres whereas the land sold to the Plaintiff was not marked off. In short, the land the Plaintiff was claiming was still there and still vested in the 2nd Respondent. The Appellants also argued that the 1st Respondent had withheld the material fact that he had not paid for the entire Lot No. 56223/M, Lusaka but just a part of it and the failure to do that should have resulted in the interim injunction being discharged.

The above arguments were essentially what the Parties argued before the trial Judge when she heard the *inter-partes* hearing of the application for interim Injunction, and an *ex-parte* Order having been granted earlier. The 1st Respondent filed his Affidavit in support of the application together with

skeleton arguments as did the Appellants in opposition. At the hearing, learned Counsel for the 2nd Respondent withdrew the Affidavit in opposition and adopted the Appellants' Affidavit in opposition. The Attorney General had, earlier-on, been joined to the proceedings but filed no Affidavit in opposition and didn't attend the hearing and has to date not filed a Defence.

After considering the pleadings and arguments of the parties, the learned trial Judge stated that the 1st Respondent had established that there was a serious question to be tried and that the he had good prospects of success. She arrived at this conclusion because, according to her, the main issue in this case was to determine who between the 1st Respondent and the Appellants, had a superior interest in the land over which they were both claiming ownership. She concluded that this was an issue which could only be settled at trial.

The trial Court also found that the 1st Respondent had a clear right to relief because he had entered into a Contract of Sale with the 2nd Respondent and even paid for the said land and that this was not controverted by any of the other Parties. She further held that the issue of frustration of contract raised by the 2nd Respondent was also an issue that required to be settled at trial.

The trial Court disagreed with the argument that an injunction could not be granted against the holder of a Certificate of Title and stated that the law was clear that a Certificate of Title could be vitiated for good reasons. She referred to the 1st Respondent's claim that the Appellants had purchased and developed the property whilst an interim injunction was in effect and stated

that this, together with the claim that the 1st Respondent had paid for the property before the Appellants, were such grounds upon which a Certificate of Title could be vitiated.

The trial Judge also dismissed the argument that the interim Injunction be discharged for failing to disclose material facts. She found that the 1st Respondent had disclosed that he bought a piece of land from the 2nd Respondent over which a dispute had arisen with the Appellants because the piece of land he was claiming was much smaller than the 5 acres sold to him.

The trial Court made a finding that if the Injunction was discharged, the 1st Respondent would suffer irreparable injury because as decided in the case of **Mwenya & Randee v Kapinga (1)**, *"the law takes the view that damages cannot adequately compensate a Party for breach of the Contract for Sale of an interest in a particular piece of land or of a particular house however ordinary."*

The Court proceeded to confirm the Order of interlocutory injunction earlier granted to the 1st Respondent. The Appellants now contest the Ruling and have filed 5 Grounds of Appeal as follows;

1. The learned trial Judge misdirected herself in law and in fact when she proceeded to grant the 1st Respondent injunctive relief contrary to established principles and law as governing the grant of such injunctive relief;
2. The learned trial Judge misdirected herself in law and in fact when it sustained the injunction against the Appellants notwithstanding the

fact that there had been only partial disclosure of material facts by the 1st Respondent.

3. The learned trial judge misdirected herself in law and in fact when it granted the interim injunction against the Appellants contrary to the evidence on Record indicating that the 1st Respondent did not have a clear right of relief against the Appellants.
4. The learned trial Judge misdirected herself in law and fact when she proceeded to sustain the injunction contrary to the law and evidence that the alleged injury suffered by the 1st Respondent could be atoned of material facts by the 1st Respondent.
5. The learned trial Judge misdirected herself in law and in fact when she proceeded to sustain the injunction contrary to the law and evidence on Record that the injury that would be suffered by the Appellants if the injunction were granted could not be atoned for in damages
6. The learned trial Judge misdirected herself in law and fact when she proceeded to grant the 1st Respondent injunctive relief against the Appellants as title holders, contrary to the balance of convenience herein as established by law.

At the hearing the Appellants' and the 1st Respondent's Counsel both relied on their filed Heads of Argument.

We have considered the contents of the Record of Appeal, the lengthy Heads of arguments and the submissions of the parties which we shall not rehash save for the salient arguments as we see them.

We note that Ground one is a general ground which seems to cover all the other grounds. Attending to the other grounds shall automatically cover ground one as they are basically a rendition of the ingredients a Court should consider when deciding whether or not to grant an injunction.

We are reminded from the onset and agree with the trial Judge that *"an injunction is an equitable remedy, whose discretion to grant reposes in the trial judge."* Bearing that in mind, we would only depart from the Judge's decision where the trial Judge has quite obviously veered away from the applicable principles as we understand them.

With regard to Ground 2 which argues that the injunction should not have been granted because the 1st Respondent did not disclose to the Court that what had been sold to him was a 5 acre subdivision of Lot No. 5622 situate in Lusaka and what had been sold to the Appellants was subdivision B of the remaining extent of Lot 5622/M situate in Lusaka which was also approximately 5 acres.

The trial Court considered this argument and found that the information alleged to have been withheld would not have affected her decision because she understood the 1st Respondent's argument as being that he was sold the particular 5 acres which was later sold to the Appellants. We agree with this observation because according to the Certificate of Title issued to the Appellants, subdivision B which was sold to them is 2.03349 hectares which is the equivalent of 5 acres[1]. The remaining extent is less than 5 acres and in

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[1] Certificate of Title

fact the contract of sale between the 2nd Respondent and the Appellants indicated that what was being sold to them was not 2.03349 hectares but 1.8694 hectares. This ground of appeal therefore fails.

Ground 3 was premised on the argument that the 1st Respondent did not have a clear right of relief against the Appellants. The trial Judge explained that neither the Appellants nor the 2nd Respondent had disputed that the 1st Respondent had paid the 2nd Respondent for 5 acres of land which he was claiming was the land that was sold to the Appellants. The trial Judge found that there was thus a clear right to relief which could only be settled at trial. We further observe that the Appellants submissions under this head to the effect that the land that was sold to the 1st Respondent was actually the other half of the subdivision has been addressed by our observations under ground 2. This ground fails for those reasons.

Ground 4 attacked the trial Judge for finding that the alleged injury suffered by the 1st Respondent could not be atoned by damages when the evidence showed that it could. It was submitted that the 1st Respondent had not shown what irreparable damage he would suffer and for which he cannot adequately be compensated for. In the face of the authority of **Mwenya and Randee v Kapinga (1)** cited by the Respondents and the Court, this argument hits a brick wall and crumbles because the position of Zambian law is that it is presumed that irreparable injury arises from loss of land, "no matter how ordinary". This ground is dismissed.

Ground 5 is the flip side of Ground 4 where it is now argued that the trial Judge erred by proceeding to grant the injunction when it was clear that the Appellants would suffer irreparable injury if it was granted.

The reasoning under this ground was that the 1st Respondent would not be prejudiced if the Appellants were allowed to continue building because if the land was rightly his, the 1st Respondent would take it together with whatever structures the Appellants risked building on the land. This argument presumes that the 1st Respondent is interested in inheriting the Appellants' buildings and that they will be suitable for the 1st Respondent's plans for the land.

The purpose of granting the injunction was to preserve the *status quo* and at that point the only injury the Appellants could suffer would be the inconvenience and losses associated with suspending their construction work. On the strength of authorities such as **American Cyanamid Company v Ethicon Limited (2)** and **Shell and BP Zambia Limited v Conidaris and Others (3)** inconvenience does not amount to irreparable damage. This ground fails.

Ground 6 attacked the grant of the interim injunction on the ground that the Appellants, as Title holders, could not be injuncted on the authority of the case of **Paul Msanzya & Wilson Phiri v Annie C. Mwape & LCC (4)** in which it was held that an injunction could not be granted against the Respondent because he had been issued with a Certificate of Title.

The trial Court however stated that the said Judgement later stated that an injunction is intended to maintain the *status quo* and not to change it. Her reasoning was that an injunction could be granted even where a Party was in possession of Title Deeds if the evidence before the Court disclosed a possibility that the said Title could be vitiated. In this instance she stated that the Record showed that the sale occurred whilst the matter was before Court and there was a dispute in relation to the size of the plot.

The facts in the case of **VDF Property Management Limited -v- Ronald Van Vlaanderen (5)** were similar to the facts in *casu*. In the cited case, during the course of a land dispute the Parties entered into negotiations which culminated in the Title Deeds being registered in the name of the Appellant therein. According to the background provided in the Judgement;

> ***"After the title deeds were registered in the name of appellant issues of contract and size of land arose between the parties. The respondent was of the view that he was entitled to 1.0244 Hectares of Lot No. 3293/M Lusaka while the appellant believes the respondent is only entitled to 1.5 acres of the disputed piece of land. After sometime, the appellant embarked on the construction of a perimeter wall. The respondent felt that his rights were threatened. He issued a writ claiming, inter alia, an injunction to restrain the appellant until further order or until judgment in this action whether by its respective servants or agents or any of them, or by its directors, officers, subsidiary companies, or any of them or otherwise howsoever from constructing the perimeter wall, or any building or fixtures or encroaching onto the subdivision on the disputed Lot No. 3293/M Lusaka. It is against this backdrop that the***

***judge in the court below agreed with him and granted him an injunction."***

Later on, in the Judgement and of relevance to the matter before us, the Supreme Court further remarked;

***"Further, the statement of claim is alleging that the appellant's directors or officers acted fraudulently in procuring the certificate of title. The letter by the appellant's advocates dated 30th January, 2014 which admits that 1.5 acres of the disputed piece of land belongs to the respondent, lends credence to the respondent's assertion that he has some interest in the property which requires to be protected ..........***

***Contrary to what has been argued by Mr. Mwansa SC in the sixth ground of appeal, the injunction was not against the registered proprietor and holder of the certificate of title but against the continued building of the perimeter wall while the dispute between the parties remained unresolved. The appellant cannot rely on Msanzya Paul Zulu Wedson and White Phiri v Annah C. Mwape and Lusaka City Council in support of the argument that the appellant had already been issued with a certificate of title and an injunction could not be obtained against it. The Msanzya Paul Zulu case should therefore be distinguished from the present case."***

***"The fifth ground of appeal relates to maintaining the status quo. It seems to us that Mr. Mwansa SC is arguing that the status quo should be maintained by allowing the parties to do what they were doing before the injunction. In this case, the appellant was in the process of building a perimeter wall and maintaining the status quo would, according to Mr. Mwansa's***

***interpretation, in effect means allowing the appellant to continue building the perimeter wall.***

***This is not what is meant by maintaining the status quo in the case of John Musuaya Ngalula v Habib Industries Limited, Commissioner of Lands Lusaka City Council and The Attorney General or the case of Preston v Luck 4. Maintaining the status quo simply means maintaining the situation as it is now or as it was before a recent change. These two decisions both point to the principle that when deciding injunctions, the object is to keep things in status quo. In Garden Cottage Foods Limited v Milk Marketing Boards (6). Lord Diplock defined status quo in the following words:***
***"...In my opinion the relevant status quo to which a reference is made in American Cyanamid is the state of affairs existing in the period immediately preceding the issue of the writ claiming permanent injunction or, if there be unreasonable delay between the issue of the writ and the motion for an interlocutory injunction, the period immediately preceding the motion. The duration of that period since the state of affairs last changed must be more than minimal having regard to the total length of the relationship between the parties in respect of which the injunction is granted; otherwise the state of affairs before last change would be the relevant status quo."***

On the basis of the cited authority, the trial Judge was on firm ground when she considered the elements she highlighted in deciding to grant the injunction. We wish to add that the print out from the Lands and Deeds Registry showed that a Caveat registered by the 1st Respondent on 25th March,

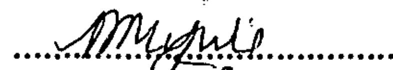
2015 had not been lifted at the time the property was assigned to the Appellants on 22nd July, 2016[2].

Having considered all the circumstances in this matter we cannot fault the trial Judge for granting the injunction to the 1st Respondent as he had and still has a *prima facie* right to protect which right can only be determined at trial.

This Appeal is dismissed with costs to the 1st Respondent.

**F.M. CHISANGA**
**JUDGE-PRESIDENT**

**M. M. KONDOLO SC**
**COURT OF APPEAL JUDGE**



**B. M. MAJULA**
**COURT OF APPEAL JUDGE**

[2] Lands Printout, Record of Appeal page 83.