

**IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA  
(Civil Jurisdiction)**



**2007/HP/0840**

**IN THE MATTER OF:**

**ORDER 113 RULE 1 OF THE RULES  
OF THE SUPREME COURT 1999**

**AND IN THE MATTER OF:**

**AN APPLICATION FOR SUMMARY  
POSSESSION OF FARM NO. 445a  
MACHA MISSION**

**BETWEEN:**

**BRETHREN IN CHRIST**

**PLAINTIFF**

**AND**

**SAMSON MUCHIMBA AND OTHERS  
PERSONS UNKNOWN**

**1<sup>ST</sup> DEFENDANTS**

**GIDEON MULEYA AND OTHERS**

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

**BEFORE THE HON. MRS JUSTICE S. M WANJELANI IN CHAMBERS ON  
THE 10<sup>TH</sup> DAY OF APRIL, 2018**

*For the Plaintiff: Mr. C. Sianondo, Messrs Malambo and Company*

*For the Defendant: Mr. H. Chizu, Messrs. Chanda Chizu & Associates*

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**JUDGMENT**

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**Case referred to:**

1. *Lumanyando and Others v Chamuka & Others* (1988 – 1989) ZR 1994
2. *Namung'andu v Lusaka City Council* (1978) ZR 35
3. *Peter Militis v Wilson Kafuko Chiwala* (2009) ZR 34.
4. *Chikuta V Chipata Rural Council* (1974) ZR
5. *Newplast Industries V Commissioner of Lands* (2001) ZR 51

6. *Kariba North Bank V Zambia State Insurance Corporation Limited*(1980)ZR 94
7. *Anderson Kambela Mazoka and Others Vs Patrick Levy Mwanawasa, Electoral Commission of Zambia and Attorney General* (2005) Z.R. 138 (S.C.)
10. *National Milling Company Limited V. A. Vashee* (2000) ZR 98

**Legislation referred to:**

1. *High Court Act Cap 27 of the Laws of Zambia*
2. *The Lands ( Conversion of Titles) Act No. 20 of 1975*
3. *The Lands Act, Cap 184 of the Laws of Zambia*
4. *Arbitration Act No. 19 of 2000*
5. *Supreme Court Rules*

The Plaintiff commenced this action on 10<sup>th</sup> September, 2007 by way of Originating summons pursuant to **Order 113 Rule 1** of the **Supreme Court Rules**, claiming that it was entitled to possession of Farm No.445a, Macha Mission and seeking for the determination of the following questions:

1. *That the Defendants are squatting on the Plaintiff's land and therefore liable to be evicted;*
2. *An Order that the Defendants be evicted from the land forthwith; and*
3. *Costs*

On 26<sup>th</sup> October, 2007, a Judgment in Default was entered in favour of the Plaintiff and on 4<sup>th</sup> March, 2008, the Plaintiff was granted Leave to issue the Writ of Possession with the Praecipe Writ of Possession being issued on 7<sup>th</sup> March, 2008. The Writ of Possession was renewed on 4<sup>th</sup> March, 2010, but an Ex-parte Order to Stay Execution was granted on 28<sup>th</sup> September, 2010 pursuant

to an application by **Gideon Muleya**, as an Intervener. Additional Parties were joined to the proceedings on 5<sup>th</sup> October, 2011 and the Judgment in Default as well as the Writ of Possession were set aside and the matter ordered to proceed to trial.

When the matter came up for a Status Conference before this Court on 5<sup>th</sup> October, 2016, Counsel for the Plaintiff sought leave that the matter proceeds as though commenced by Writ of Summons in view of the contentious matters that had arisen and Counsel for the Defendants agreed. When the matter came up for trial on 9<sup>th</sup> May, 2007, both Counsel agreed that the various Affidavits should stand as pleadings and in this vein the matter proceeded to trial. The Plaintiff called one witness while the Defendants called four witnesses.

PW1 was **Thuma Hamukangandu**, the Chief Executive Officer of the Plaintiff Church. He testified that according to what his father, who was born in Macha, in January 1914, told him, the Macha Mission Land was given to the Brethren in Christ Church (BICC) by Chief Macha through the Northern Rhodesian Government and there were no natives when the land was allocated. He added that as a Member of the Church he took an interest to learn more about the matter and learnt that the Church had Sikalongo, Macha, Nalubamba and Gundu farms and that in relation to Macha, Headman Sibajane told him that at the time the land was given to the Church, there was no one living there and the Chief could not have displaced them.



In his further testimony, PW1 informed that in the 1990's people who were workers started settling on the property without an agreement and some of them included Evangelists for the Church such as Kalaluka. He added that he also learnt that the Church land had graveyards as the people who came from distant places to access the medical services had no means to repatriate the deceased family members hence the Church allocated some land for the graveyards.

He further stated that Samson Muchimba, was a Headmaster at the Mission and when he retired, he did not want to go back to where he had come from and the Mission allowed him to stay on the Mission land and when he died, he was buried at the same graveyard within the Mission land.

With regard to exhibit marked **"RMM"** attached to the Affidavit dated 8<sup>th</sup> October, 2010, PW1 stated that it was a document giving BICC entitlement to the land and it was issued in 1931.

In responding to the Defendant's Affidavit in opposition, PW1 informed the Court that Mulako and Kalaluka villages were outside the Mission land, adding that he grew up in Sikufweba village in Chief Macha which was a boundary to the Mission land.

In his continued testimony PW1 informed the Court that he had interaction with the Defendants when the Bailiffs went to evict the latter and that prior to that they had a meeting with the squatters to leave the land. He added that Mr. Gideon Muleya was allowed some time as he had a lot of investments but instead the latter,

opted to get an injunction. PW1 stated that Mr. Gideon Muleya told him that he realized that he had been cheated and asked if the Church could help him by selling him the land or whatever action the Church could consider as he could not start afresh, but PW1 told him that they could not deal with the matter outside the Court action and further advised him to put the proposal in writing so that PW1 could present it to the Church but this was not done.

In relation to Mr. Muleya, PW1 testified that the latter was a businessman who used to live in Mulako Village across a stream and as the river used to be full during the rainy season making it impossible for him to continue his business, he requested for a portion of the Church land to put up a store. PW1 added that it was on a rent basis but Mr. Muleya never paid anything and started selling beer and alcohol contrary to the agreement. It was his testimony that the Church did not give any of the Defendants the land which they occupy and the Church needed the land for educational and health purposes as it had started a University to serve the community and the country as a whole.

In cross examination, PW1 started that he was born on 5<sup>th</sup> August 1965 and mentioned a number of villages including Hamonde, Chisembwa, Mulako, Hakusenkwe that were not part of the land in contention. He added that the Kalaluka he knew was an Evangelist who worked with the Missionaries and that he lived in the area. He started that **Clause 12** of the Lease in relation to the natives had to be considered and that the land was given by Chief Macha and demarcated by beacons. It was his contention that there were no



natives at the time the land was given to the Church and that Kalaluka and Mulako villages were outside the Church land.

PW1 started that Mr. Muleya had been on the land from the 1990s and he had put up some developments such as houses, dip dank, shop and restaurant and had a number of livestock. He conceded that Mr. Muleya was also assisting the community in conjunction with the Church by offering his services, including when he assisted during the reconstruction of the Hospital dam wall when it broke and a borehole for the community.

He added that the items that Mr. Muleya was supposed to sale were not itemized but alcohol and tobacco were prohibited and that they had talked to him several times about it. PW1 further stated that the Church had a 99 years Lease though it was not before Court and that they had been paying rent.

In re-examination, PW1 told the Court that the Lease document has a title number which signified that it was a final document. He added that Mr. Muleya was only permitted to build a shop and restaurant and the other developments were without consent.

He added that Mr. Muleya was benefiting from the services that he was providing to the community and was not the only one, and further that the land was not for free and had not paid anything for the 30 years he had been on the land.

He further clarified that according to the Diagram Number of the document showing 1920, Mr. Kalaluka would have been 5 years old

at the time and could not have assisted in acquiring the land. He concluded by stating that the relationship between the Church and the 86 families has been antagonistic.

DW1 was 78 year old **Hanyenzu David Muchimba Kalaluka**, deponent to the Affidavits dated 8<sup>th</sup> July 2015 and 16<sup>th</sup> December, 2010 which he sought to be admitted as part of his evidence.

He added that he represented the 83 other families and stated that his great grandfather from his mother's side, the Sikabanze Muchimba clan lived in the area from as far back as the 1800. He stated that this was based on information from his mother and her family who were there when the founder of the Macha Mission Frances Davidson, arrived in 1906. He added that his mother was accepted at the Mission when she was about 8-10 years old while his father came from Mongu in 1919 and he was used by the Missionaries as a preacher in 5 Chieftdoms because of his ability to read and write. He stated that his parents were sent to various places but their base was where the Church is and as the family grew they built a home in Kalaluka village within the Mission land in 1940. He further stated that his father contracted pneumonia in 1969 and died at Macha Hospital while the family was in Kalaluka village. He added that the Church recognized his parents as evidenced in the publications exhibited to his Affidavit and that his mother died in Kalaluka village in 1984 leaving behind 8 children and several grandchildren as well as other relatives. He consented that before his parents died they lived peacefully within the Church and there was no intention to move. He insisted that he was not a



squatter but an indigenous person of the area as they were already there when the Church was established.

In his further testimony, DW1 told the Court that at a meeting called by the Coordinating Committee on 10<sup>th</sup> April, 2006, the people told the Committee that they were not squatters as they had been present before the arrival of the Missionaries and that the issue had never arisen prior to 2006. He stated that a Mr. Kalabo informed the meeting that only the people that had gone there between 1990 and 2006 were squatters and it was resolved that his family was not affected and further that he was protected by *Clause 12* of the Lease. He contended that he had never been served with any document by the Church to show their exclusive right and a hearing. He concluded by stating that given the historical background, the matter ought to be dismissed.

In cross examination, DW1 stated that he could not remember where their first born was born but that the village was established in 1940 though he did not have his National Registration Card. He further stated that his parents married between 1925 and 1926, but did not know the name of his mother's village.

He conceded that not all the 83 families were in the same situation as he was and that most of them went to the area after 1940 except for the Mizinga family. DW1 stated that it was the Mission that had allocated the land and that they had lived there by virtue of his father having been given the land and that his mother's village, Mwadula was outside the land. He added that his father was not



born on the Mission land, but that his mother joined him after they got married. He stated that his father did not pay for the land that he was given.

In re-examination, DW1 informed the Court that some people had shifted to other villages following the evictions fearing being killed and that the people who conducted the evictions uprooted trees despite the Church assuring them that they would not be evicted. He stated that all documents were kept by the Church for safe keeping and that the residents were there before the arrival of the Missionaries.

**DW2** was **Gideon Muleya**, who deposed to the Affidavits dated 28<sup>th</sup> September, 2010 and 8<sup>th</sup> July 2015 which he tendered as part of his evidence. He further stated that the Church and the Chief asked him to move his business onto the Church land so that he could continue providing his services to the community even when the stream was full. He stated that he was involved in grocery business but later put up a hammer mill on the 8 hectares of land he was given in 1971, as well as a butchery and a workshop for carpentry. He added that in 1992, he added a Sunflower grinding structure and that when his sister's husband died, he built her a home and he has 18 children for whom he had built houses to live in. He contended that he was asked to provide a service to community as well as the patients of the Mission and he had sunk 2 boreholes and a dip tank as well as fencing the 8 hectares he was given.

It was his evidence that they had lived peacefully until he was told that people were going to demolish his structures and he had not been given any document by the Church to this effect. He added that the people only got things from his shop as the place was electrified. He conceded that he had been given the land with conditions but he did not see the condition of not selling alcohol or tobacco. He contended that the Advisory Committee had requested him to put up a tuck shop in the hospital premises where he was paying rent but found that the Committee had locked up the place. He added that Chief Macha had written that he should be given title to the land and contended that he was not a squatter as the Chief had given him the land so that he could provide a service to the community, and he had invested in the land for about 38 years. He contended that if the Church wanted to evict him, they needed to pay him whatever he had invested on the land, and that he had requested the Church to sell him the land.

In cross-examination, he conceded that the land belonged to the Church and that Mulako village was outside the Church land and that prior to moving to that land, he was based in Mulako village.

He conceded that there were conditions on what he could sale and stated that he had stopped selling alcohol and tobacco and that he was aware that the Church had title to the land.

In re-examination, DW2 stated that he sought to buy the land from the Church when he realized that the Church was planning to evict him from the said land.

**DW3** was **David Muchimba** aged 91 years who testified that he worked in various Government Departments and finally as a Local Court Justice for 27 years before retiring in 2002.

He testified that he was born in 1926 at Macha Mission of the Brethren Church at Mizinga village and his father was an evangelist Simon Mizinga who was staying on the Mission land and he was an indigenous person of Macha area in Lupata village inside the Mission.

DW3 testified that his father was educated at the Mission and as a result of being literate, he became an evangelist and assisted in preaching in schools and at the Mission and in 1947, he became headman of his village which is within Mission land.

He further testified that his father retired in 1971 but the Mission had no money to pay his pension and the Bishop said he could continue to live on the land he was occupying with his children. He contended that at the time his father died, DW3 had 9 children who also had children all living in Mizinga village. He added that he had heard that Simon Muchimba had been sued but no one represented them and they had not been aware of the action until a Judgment was passed and the Church started carrying out the evictions. He argued that they were protected by *Clause 12* of the Lease as natives as they had been in the area for over 100 years and that the Mission found them there. He added that he knew DW2, Muleya, as a businessman who supplied to the Mission School and hospital.



He concluded that the Mission had not paid the pensions and they could not be evicted as they were protected indigenous people who had developed the Mission.

In cross examination, DW3 stated that his father used to go to work at the Mission but was coming from Lupata village which was outside the Mission land. He conceded that he had no document to show that his father was given the land in lieu of pension and that at the time he was being given the land, it belonged to the Mission. He added that Kalaluka went to the Mission as a student, then became a teacher and a preacher.

**DW4** was **Thuma Alexander Muleya**, a headman from Mizinga village selected in 2012 after a family meeting and a grandchild to Simon Mizinga, the father to DW3. He stated that there were 133 families within the Mission land but that they were not squatters as the Missionaries found them there as explained to him by his father.

In cross examination, he stated that he was not aware that Lupata village was outside the Mission land and if he had been aware, he would not have been claiming the land.

At the close of the case, the Parties filed detailed written submissions which I shall not reproduce but refer to where necessary. The gist of the Plaintiff's submissions was that some of the witnesses such as Daniel Muchimba (**DW1**) conceded in cross examination that his father was coming from Lupata village, which was outside the Mission land and only went to the Mission Land for

work while Mr. Kalaluka went there as a student and could not have owned the said Land. In addition DW1 did assert that his father's village was established in 1940, a period after the Title was already in existence. In this vein reliance was placed on the case of **Lumanyando and Others v Chamuka & Others**<sup>(1)</sup> where the Supreme Court guided that:

***"No right by adverse possession can be acquired if Land become the Subject of Certificate of Title"***

Reference was also made to the case of **Namung'andu v Lusaka City Council**<sup>(2)</sup>, the Court held that:

***"Squatters build on their own risk, and if the owner of the land withdrew their permission or licence or if they decide to demolish a structure built in the absence of any permission or other lawful relationship the squatter losses though very much regrettable are not recoverable in a Court of law."***

In relation to DW2, it was submitted that while he was allowed to build a shop, he went beyond and built his family homestead on the Mission land covering 8 hectares of Land and did attempt to procure himself a Certificate of Title as evidenced under exhibit "**GM2**" in the Affidavit of 28<sup>th</sup> September, 2010 and thus should compensate the Church on mesne profit principles.

It was contended that the Defendants' occupation of the land had caused the Plaintiff to lose the benefit of the use of the land to

which the Plaintiff ought to be compensated in line with the holding in the case of **Peter Militis v Wilson Kafuko Chiwala**.<sup>(1)</sup>

The gist of the Defendants' submissions contend that the following issues require determination:

- 1. Whether the Originating process under Order 113 rule 1 is appropriate for the determination of the matter.*
- 2. Whether the Plaintiff is the proper party to sue.*
- 3. Whether the lease the Plaintiff relied on is in fact the certificate of title.*
- 4. Whether a lease which has an arbitral clause arbitral clause does not prevent the Plaintiff from suing in court before going to arbitration.*
- 5. Whether the Defendants or interveners are recognized and protected under the same lease as natives.*
- 6. Whether indeed the defendants or interveners are squatters.*
- 7. Can the Plaintiff claim possession under order 113 together with other extra claims or reliefs?*

In the submissions in Reply the Plaintiff averred that that **Order 113** is usually used as a summary procedure where the other party is not heard but only visited by the consequences of Judgment, whereas by deeming the matter as though commenced by Writ of Summons, the Defendants were heard by the Court. With regard to the Plaintiff being the wrong party to sue, it was further submitted that exhibit marked as "**HDKM2**" in the Affidavit of **DW1** filed on 16<sup>th</sup> December 2016 indicated that it is the "*Brethren in Christ*



Church" which has been incorporated as a "Registered Trustee" and thus competent to maintain an action. It was argued further that the Defendant never applied to set aside the proceedings but instead proceeded to participate in the proceedings.

I have carefully considered the evidence on record and the Parties' submissions.

The Defendant asserts that the mode of commencement was wrong considering that there are contentious issues and thus the Court has no jurisdiction in line with the **Chikuta V Chipata Rural Council**<sup>(4)</sup> case. **Order 113** pursuant to which the action was commenced is headed "*Summary Proceedings for Possession of Land*" and provides as follows:

***1. Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this Order".***

At the time the Plaintiff commenced the action, the relief sought was to evict the persons it referred to squatters from its property and this **Order** has been consistently used in our jurisdiction to remove squatters. I therefore find that the mode of commencement was appropriate as the matter could at the time summarily be

deposed off on Affidavit evidence and indeed it was dealt with in that manner resulting in the Judgment in Default and the Writ of Possession being granted to the Plaintiff as the Record shows.

The matter became contentious at the point when the Interveners applied and were joined to the proceedings and their Affidavits revealed that the issues raised could not be resolved through Affidavit evidence hence the need for a trial. In my view, this case can be distinguished from the **Chikuta V Chipata Rural Council** case and the **Newplast Industries V Commissioner of Lands**<sup>(5)</sup> in that there mode of commencement for possession of land from squatters where contentious issues may arise has not been specifically provided for in a statute. Further **Order 2 Rule(3) of the Supreme Court** provides as follows:

***“The Court shall not wholly set aside any proceedings or the writ or other originating process by which they were begun on the ground that the proceedings were required by any of these rules to be begun by an originating process other than the one employed.”***

This Court therefore directed that the matter be deemed as though it was commenced by Writ of Summons and the Parties agreed.

During the hearing, the Parties informed the Court that they wanted the Affidavits already on record to stand as pleadings and that is how the Matter proceeded. I therefore do not see any basis for the Defendant to claim that the matter was improperly commenced. Furthermore, the Defendants were at liberty to file any

documents even if the Plaintiff did not, as they were aware that the matter was deemed to have been commenced by way of Writ of Summons and the necessary steps should have been taken to ensure that they had all the relevant process on hand for their defence.

The Defendants further assert that the Lease exhibited by the Plaintiff is not a Certificate of Title and the mode of holding land in "*fee sample*" was abolished hence the Plaintiff has no exclusive claim to the land in question. A perusal of the repealed the **Land (Conversion of Titles) Act**, shows that holding land in "*Fee simple*" was indeed abolished. However, the Leaseholders did not lose their right in the land as Sections 5 and 6 of the said Act stated:

***Every piece or parcel of land which immediately before the commencement of this Act was vested in or hold by any person***

***a) absolutely, or as a fee hold or in fee sample, or in any other manner implying rights in perpetuity, or...***

***is hereby converted to a statutory leasehold and shall be deemed to have been so converted with effect from the first day of July, 1975."***

***6. Any person whose rights over and interests in any land have been converted into statutory leasehold under section five, as from date of commencement of this Act, hold such land, as if he has been granted a lease thereof by the President for a term of one hundred years***



***commencing the first day of July 1975, at such rent and on such terms and conditions and with such covenants as may be prescribed.***

In relation to Certificates of Title, Section 11 of the same Act provided:

***"(1) For the avoidance of any doubt, it is hereby declared that it shall not be necessary for the Registrar to issue or for any person to obtain a Provisional Certificate or a Certificate of Title to evidence any rights and interests in the land having been converted into rights and interest under a statutory lease..."***

In addition, although the above referred to Act was repealed by the **Lands Act**, this latter Act in section 30 provides:

***" Subject to the other provisions of this Act, nothing in this Act shall affect any estate, right or interest legal or equitable, in or over any land which was at any time before the commencement of this Act created, granted, recognised or acknowledged".***

Given the above provisions of the repealed and the replacement Acts, it is clear that the Plaintiff did not lose its right in the land as it was merely converted from "*Fee Simple*" to "*Statutory Leasehold*". I have further not seen any evidence of Re-entry by the Commissioner of Lands to show that the land had reverted to the

President. In the premise, I find that the land as described in the Lease marked as exhibit "**MK1**" belongs to the Plaintiff.

The Defendants further averred that they are protected by *Clause 12* of the said Lease as natives. The evidence of PW1, DW2, DW3 and DW4 show that their forefathers got to the land through working for the Mission and in fact DW3 stated that Lupata village is outside the Mission land. Further DW2, Mr. Muleya did state that he was asked to establish a shop and restaurant to service the Mission community and the hospital, but he went further to put up a homestead and other developments. In addition, he attempted to obtain title as evidenced by the letter from the Chief and he admitted that he had tried to buy the land from the Mission. All these factors point to the fact that the Defendants and their forefathers were not the "natives living on the land" at the date of execution of the Lease for them to qualify for protection under *Clause 12* of the said Lease.

With regard to the assertion that the matter should have been referred to arbitration, it is my considered view that the Clause related to resolving any dispute arising from the provisions of the Lease between the Parties to the Lease, that is the British Southern African Company and the Church. Clause 12 relating to the Natives was just one of the provisions in the Lease, requiring the Plaintiff to respect the rights of the natives, if any, living on the property at the time but it did not, clothe the natives, with any right to dispute resolution through arbitration as they were not party to the Lease

agreement between the Plaintiff and the British South African Company.

As already found herein, the Defendants were not natives as envisaged in Lease, hence the issue of the arbitration clause does not arise. Furthermore, **Section 10** of the **Arbitration Act** states:

***(1) A court before which legal proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so request at any stage of the proceedings and notwithstanding any written law, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.***

The above provision makes it implicitly clear that the Court has jurisdiction to hear a matter subject to an arbitration agreement unless a Party to the agreement requests the Court to refer the matter to arbitration. No such request was made by any Party to stay these proceedings so that the matter could be referred to arbitration.

The Plaintiff, in the submissions has made a claim that DW2, Mr. Gideon Muleya, should pay rentals for the shop and mesne profits for the land he occupied without consent since 1979 and the other Defendants should pay mesne profits as they were trespassers *ab intio*. As alluded to earlier, the Parties decided that the Affidavits should stand as pleadings. Thus they are bound by what is contained therein. The Plaintiff had merely sought an eviction Order



against the Defendants and costs. The importance of pleadings has been alluded to in a number of authorities including in the case of **Kariba North Bank V Zambia State Insurance Corporation Limited**<sup>(6)</sup> cited by the Defendant and **Anderson Kambela Mazoka and Others Vs Patrick Levy Mwanawasa, Electoral Commission of Zambia and Attorney General**<sup>(7)</sup> where it was stated that:

*"The function of pleadings, is to give fair notice of the case which has to be met and to define the issues on which the court will have to adjudicate in order to determine the matters in dispute between the parties. Once the pleadings have been closed, the parties are bound by their pleadings and the court has to take them as such".*

I therefore find that the Plaintiff cannot claim the rentals and mesne profits as these were not pleaded and the Defendants did not have an opportunity to respond to them. These claims are accordingly dismissed.

The final issue to deal with is the contention by the Defendants that the "*Brethren In Christ Church*" is not the proper party to sue but the "*Registered Trustees*" as shown in exhibit "**HDKM2**". In response, the Plaintiff submitted that it is the "*Brethren In Christ Church*" which has been incorporated as "Registered Trustee" and thus competent to maintain an action, and that further, the Court has the discretion to substitute a party to the proceedings in terms of **Order 15 Rule 6(1) of the Rules of the Supreme Court**.

I have perused the exhibit "**HDKM2**" which is a Certificate of Incorporation showing that the *"Trustees of the Brethren In Christ Church have been registered as a Corporate Body under the name of the Registered Trustees of the Brethren In Christ Church..."* Thus the name that ought to have appeared as the Plaintiff should have been the *"Registered Trustees of the Brethren In Christ Church"*. However, in my view, the Plaintiff name as it appears is one and the same entity as the *"Registered Trustees"*.

I have considered whether, if my view was erroneous, the *"defect"* was fatal, whether it went to the root of the claim and whether the Defendants would suffer any injustice if the matter was determined as it is. In my view, it is not fatal because the defect, if any it is curable as the Court has the discretion to substitute a party to the proceedings in line with the provisions of Order **14 Rule 5(3)** of the **High Court Rules**. All that would be required would be to amend the Plaintiff name but the claim would remain the same in substance. The Supreme Court has stated a number of cases including the case of **National Milling Company Limited V. A. Vashee**<sup>(8)</sup> that the Rule *"specifically prohibits the defeasance of suits for misjoinder or non-joinder"*.

Further **Section 13 of the High Court Act** gives the Court the authority to grant Orders that it deems fit for full determination of matters before it and provides as follows:

***"In every civil cause or matter which shall come in dependence in the Court, law and equity shall be***



administered concurrently, and the Court, in the exercise of the jurisdiction vested in it, shall have the power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as shall seem just, all such remedies or reliefs whatsoever, interlocutory or final, to which any of the parties thereto may appear to be entitled in respect of any and every legal or equitable claim or defence properly brought forward by them respectively or which shall appear in such cause or matter, so that, as far as possible, all matters in controversy between the said parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided; and in all matters in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail."(underline for emphasis only)

As alluded to earlier, the Plaintiff would merely have to an application for substitution of Parties and the same substantive issues would require to be resolved. In view of the foregoing facts and authorities, the fact that the matter has been in the Courts from 10<sup>th</sup> September, 2007 and the stage of the proceedings. It would be greater injustice to dismiss the matter on a technicality and this has been frowned upon in various Supreme Court authorities. I therefore invoke the powers vested in this Court pursuant to **Section 10 of the High Court Act** and grant the Order



of substitution of the Plaintiff to read "*the Registered Trustees of the Brethren In Christ Church*", henceforth. The Plaintiff's Counsel is further directed to draw up the Order of Substitution of the Parties, within ten days of this Judgment.

On the totality of the facts, evidence and authorities cited herein, I find that the Plaintiff has proved its claim on a balance of probabilities and is entitled to possession of its land. I hereby grant the Order of eviction as prayed with costs.

Leave to appeal is granted.

**Delivered at Lusaka this 10<sup>th</sup> day of April, 2018.**



S. M. Wanjelani

**HIGH COURT JUDGE**