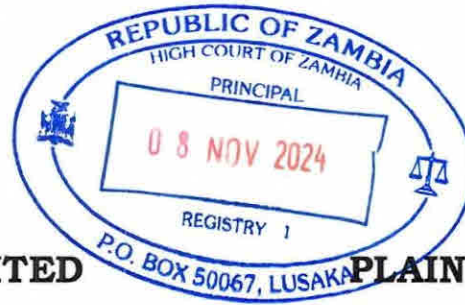


**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**

2017/HP/0523

(Civil Jurisdiction)

BETWEEN:



AFRICAN CROPS LIMITED PLAINTIFF

AND

MR. HAMUKOKA (MALE) & OTHER DEFENDANTS
UNKNOWN PERSONS

BEFORE THE HONOURABLE LADY JUSTICE P. K. YANGAILO, IN OPEN COURT, ON THE 18TH APRIL AND 8TH NOVEMBER, 2024.

For the Plaintiff: Mr. F. Mudenda – Messrs. Chonta, Musaila & Pindani Advocates.

For the Defendants: Mr. L. M. Chikuta – Messrs. L M Chikuta Legal Practitioners.

JUDGMENT

CASES REFERRED TO:

1. *Zulu v Avondale Housing Project* (1982) Z.R. 172;
2. *Galunia Farms v National Milling Company Limited and Another* (2004) Z.R. 1 (SC);
3. *Finance Bank Zambia Limited and Four Others v Zambezi Portland Cement Limited – Appeal* No. 144 of 2015
4. *Anti-Corruption Commission v Barnet Development Corporation Limited* (2008) 1 Z.R. 69;

5. *David Nzooma Lumanyenda and Gooding Kafuko Muzumbwa v Chief Chamuka and Kabwe Rural District Council and Zambia Consolidated Copper Mines Limited (1989) Z.R. 196;*
6. *Davison Mkandawire and Others v Julia Malembeka – CAZ Appeal No. 47 of 2019;*
7. *Rosemary Phiri Madaza v Awadh Karen Coleen (2008) Z.R. 12;*
8. *Benson Munganama v Fridah Ngoma and another – SCZ No. 186 of 2015;*
9. *Banda and Another v Mudimba (2011) ZMHC 75;*
10. *Zambia Railways Limited v Pauline S Mundia, Brian Sialumba (2008) Z.R. 287 Vol. 1 (SC);*
11. *Tembo v Nyanga and others – Appeal No. 305 of 2021;*
12. *Attorney General v Kakoma (1975) Z.R. 212;*
13. *Kajimanga v Chilemya – SCZ Appeal No. 50 of 2014; and*
14. *Shell and B.P Zambia Limited v Conidaris and Other (1975) Z.R. 174.*

LEGISLATION REFERRED TO:

1. *The Companies Act, Chapter 388, Volume 21 of the Laws of Zambia (Repealed);*
2. *The Lands and Deeds Registry Act, Chapter 185, Volume 12 of the Laws of Zambia;*
3. *The Public Health Act, Chapter 295, Volume 17 of the Laws of Zambia;*
4. *The English Limitation Act of 1939; and*
5. *The Lands Act, Chapter 184, Volume 12 of the Laws of Zambia.*

OTHER WORKS REFERRED TO:

1. *Frederick Mudenda, Land Law in Zambia: Cases and Materials, (UNZA Press, 2007);*
2. *Bryan Garner, Black’s Law Dictionary 8th Edition, Thomson West Publishing Company (2004);*
3. *Hodge M. Malek; Phipson on Evidence, 17th Edition, (Thomson Reuters Legal) Limited 2010;*
and
4. *Patrick Matibini, SC, Zambian Civil Procedure: Commentary and Cases; (Lexis Nexis, 2017).*

1. INTRODUCTION

1.1 This suit was launched by African Crops Limited, the Plaintiff herein, against Mr. Hamukoka and unknown others, the Defendants herein. The Plaintiff, who is the registered proprietor of Farm No. 1629, situated in Southern Province (“Subject Property”) alleges that the

Defendants have illegally and without any justification whatsoever, been encroaching and pegging the Subject Property with a view to subdivide it for their benefit. It thus seeks an injunction compelling the Defendants to vacate the Subject Property and Damages for trespass.

1.2 The Defendants, on the other hand, claim that their predecessors and Defendants have been on the Subject Property for over a hundred years and derive the continuous occupation of the Subject Property by their successive ancestors who never left occupation of the same. They have thus counter claimed an Order for cancellation of the Certificate of Title in respect of the Subject Property and a Declaration that the Subject Property falls under Customary Tenure.

1.3 Accordingly, this Judgment is in respect of the various claims by the Plaintiff and Defendants.

2. BACKGROUND

2.1 The genesis of this Suit is that the Plaintiff, who is the registered proprietor of the Subject Property has for many years been struggling to remove the Defendants who are illegally occupying parts of the Subject Property. The Defendants insist that they have a right to remain on the Subject Property, where their ancestors lived for over hundred years.

2.2 It is against this backdrop that the Plaintiff launched this Suit by way of Writ of Summons, on 11th January, 2016, with claims for the following reliefs: -

- a) *An injunction compelling the Defendants to vacate Farm No. 1629, and to remove all pegs installed thereon;*
- b) *An injunction restraining the Defendants from pegging, encroaching, entering, damaging and/or trespassing on Farm 1629;*
- c) *Damages for trespass to Farm No. 1629;*
- d) *Interest;*
- e) *Further or other relief the Court may deem fit; and*
- f) *Costs.*

3. PLEADINGS

3.1 By the Statement of Claim filed on 11th January, 2016, the Plaintiff averred, *inter alia*, that it is a company incorporated under **The Companies Act**¹ and is the registered proprietor of the Subject Property, while the Defendants are individuals residing in or around Mbabala, in the Southern Province of the Republic of Zambia.

3.2 The Plaintiff averred that it is the lawful owner of the Subject Property by virtue of a Certificate of Title issued under the Hand and Seal of the Registrar of Lands and

Deeds Registry, for a term of 99 years, from the 1st day of August, 1947, and utilises the Subject Property for its business activities.

3.3 It was further averred that the Defendants, some of whom are subjects of Chief Singani, have illegally and without any justification been pegging the Subject Property with a view to subdivide it for their benefit. In an attempt to resolve the Defendants' alleged illegal activities, a meeting was held on 1st March, 2017, which was attended by the following: -

a. Chief Singani

b. Ant Ford

c. Rod Mackay

d. Oliver Muoba (Lands Department Choma)

e. Hamish Ross

f. Deumpie Cloete (Security)

g. Kelas (Buffalo Security)

b) Representatives of the Defendants illegally pegging the land.

3.4 It was stated that at the said meeting, Chief Singani asked the Plaintiff's representatives for land to be given to his subjects, including the Defendants, but the Plaintiff's

representatives explained that they had no authority to grant the said land to the Defendants.

- 3.5 The Plaintiff averred that the illegal pegging of the Subject Property has continued with the Defendants now having encroached the Subject Property for a distance of over 1.5 KM from the Mbabala River where the Subject Property's boundary is located.
- 3.6 It was further averred that the Plaintiff has previously fenced the Subject Property with poles and barbed wire, which have been illegally removed by the Defendants. The Plaintiff has also previously established gum tree plantations on the Subject Property but the Defendants have unlawfully destroyed them.
- 3.7 Despite the Plaintiff's efforts to stop the Defendants from pegging trespassing and/or encroaching on the Subject Property, the Defendants have refused and/or neglected to stop their illegal activities. Consequently, the Plaintiff has suffered damage and loss.
- 3.8 By the Defendants' Defence and Counter-Claim, filed on 29th September, 2017, the Defendants averred that they are the residents at the Subject Property that falls within what the Plaintiff refers to a Mbabala. The Defendants state that their continuous stay at the Subject Property is based on customary tenure for the family heritage dating to as far back in years as to the late 1800s. It was averred

that their continuous occupation of the Subject Property is based on their successive ancestors who never left occupation of the premises through to the Defendants' time.

- 3.9 The Defendants deny that the Plaintiff is the lawful owner of the Subject Property by virtue of the Certificate of Title purportedly issued in respect of the Subject Property on the basis that the said issuance of title was made in error, if at all it truly covers the Subject Property, as the Defendants or their predecessors (their forefathers) were known by the various title holders to have been in actual occupation of the Subject Property at all material times of the existence of the said Certificate of Title.
- 3.10 The Defendants stated that some of their ancestors were residents of the Subject Property while working with the British South African Company (BSA) in construction of the rail line, at the time the said rail line was passing between Kalomo and Monze, in the years round 1900 to 1908.
- 3.11 The Defendants asserted that the Plaintiff has continued, without asserting its rights against some if not all of the Defendants herein, to encroach and/or evict some of the Defendants, put paddocks and drill boreholes on the Subject Property that has at all material times of the purported Certificate of Title been known to the

Defendants and/or their predecessors to be under customary tenure.

3.12 It was further asserted that prior to the said encroachment, the contested Subject Property has never been used for the business of the Plaintiff or has it ever been encompassed in any kind of fencing by any proprietors of the Subject Property. The Defendants also asserted that upon request of the late Mr. Zaloumis, who was using the neighbouring farm before the Plaintiff, a compound was authorised by the elders of the Defendants' community, in consultation with some of the Defendants herein who were of age at the material time, to move the compound from where it was to where it currently is, on the understanding that it would remain the property of the community under customary tenure.

3.13 The Defendants affirmed that Mr. Zaloumis did not object to the conditions nor did he indicate to the Defendants and/or their predecessors that the said land formed part of the Subject Property. Further, it was affirmed that the late Mr. Zaloumis was a person that did not mind using land under customary tenure in support of any of his businesses that he ran from buildings constructed on customary land.

3.14 The Defendants deponed that had it been known to them or their predecessors that the Subject Property was

allegedly made subject of a Certificate of Title, they would have objected to it. It was further deponed that the Defendants only came to know of the alleged Certificate of Title in March of 2017. The Defendants also deponed that they and their predecessors had used the Subject Property without interruption for agricultural activities of a varying range up until the unauthorised interference by the Plaintiff.

3.15 The Defendants averred that they are all subjects of Chief Singani (also referred to as Chief Chooma), in whose chieftom the Subject Property belongs and that they are beneficiaries entitled under customary tenure who with the consent of Chief Singani, arranged for a survey of the Subject Property.

3.16 It was averred that at the time of the survey, the Defendants had no knowledge of the Plaintiff purporting to be the owner of the Subject Property. The Defendants admitted that a meeting was held on 1st March, 2017, between the Defendants' group and the white farmers, but denied that the meeting was aimed at any illegal pegging of the Subject Property.

3.17 The Defendants stated that they were informed by Mr. Hamish Ross that the Defendants needed to relocate to pave way for Mr. Hamish Ross to put up a solar power

station for their use in their farms and for fear that the Defendants would start killing Mr. Hamish's animals.

3.18 It was asserted that Chief Singani did not at any time ask for the alleged representatives of the Plaintiff to give him the said Subject Property, but that it was instead the Plaintiff's agents that asked the Chief to allow them to have a portion of land within the contested premises for their use after Chief Singani refused to allow them to grab the traditional land which had since time immemorial continuously been under the occupation of the Defendants herein and/or their predecessors in land tenure.

3.19 The Defendants deposed that at the said meeting, the Chief demanded that the Plaintiff's agents leave the Defendants alone as the Subject Property was in as far as he was concerned part of the customary land for which his chieftom had control for a long time and the Defendants and/or their ancestors have always been in occupation of the Subject Property for over a hundred years now continuously.

3.20 The Defendants admitted that they pegged a portion of the Subject Property but denied that it was illegally done as it was done in the belief that the Subject Property was theirs and that there were no competing interests in the Subject Property. The Defendants denied that they had committed any encroachment but that it was in fact the Plaintiff that

is currently illegally engaging in acts of encroachment by putting up unauthorised developments at the Subject Property.

3.21 The Defendants averred that there are some landmark features that express the long history by the Defendants' community's continued occupation of the Subject Property such as the ancient graves of known ancestors/forefathers buried in the area; the stone made grain grinding machines, the mango trees grown before the Subject Property was surveyed and before the Certificate of Title was issued in respect of the Subject Property.

3.22 It was averred that the Subject Property has never formed part of the wire fencing ever made in respect of the Subject Property from time immemorial up until around 2010, when the Defendants noticed confusion relating to encroachment by the Plaintiff. It was further averred that the Defendants occupy the Subject Property not as squatters, but as beneficiaries, owing to the aforesaid history of customary tenure of over hundred years uninterrupted occupation.

3.23 The Defendants asserted that the Plaintiffs and/or their agents have forcefully and without asserting their rights against the locals been in the habit of shifting the wire fence for the neighbouring farm herein thereby encroaching into the Defendants' land.

3.24 The Defendants further asserted that contrary to the Plaintiff's allegations, it is the Defendants that have suffered damage and loss and not the Plaintiff herein, on account of the unlawful conduct by the Plaintiff. Therefore, it was averred that the Plaintiff is not entitled to recover from the Defendants.

3.25 By the Defendants' Counter-Claim, the Defendants repeated the contents of their Defence and averred, *inter alia*, that at the time that the Subject Property was being converted into statutory tenure, the community of the Defendants as a people was already in actual occupation of the said Subject Property.

3.26 It was averred that it has come to the knowledge of the Defendants herein that the community had allowed Mr. Zaloumis to build the dwelling structures that are now being claimed by the Plaintiff as forming part of the Subject Property contrary to the agreement with Mr. Zaloumis.

3.27 The Defendants further averred that the late Mr. Zaloumis, who was in occupation of the said neighbouring farm now belonging to the Plaintiff, had been known to hold developmental projects including that involving infrastructural development on customary land without converting the land to statutory leasehold.

3.28 It was asserted that if at all the demised premises form part of the Plaintiff's Subject Property, which is denied, the

Plaintiff and/or its predecessors in title concealed the fact that the land formed part of the Subject Property.

3.29 The particulars of concealment were set out as follows: -

- a) The Plaintiff and/or its predecessors in title did not reveal their interest to the community of the Defendants.
- b) The actual documents alleging title to the Subject Property was only shown to the Defendants through the Affidavit in Support of the Injunction.
- c) The Plaintiffs deliberately or otherwise neglected, omitted or ignored without any notice given to the Defendants to bring an action within the first 12 years from the alleged acquisition of title now produced by the Plaintiff.

3.30 The Defendants averred that the premises where they lived as a community for many years had been encroached by the Plaintiff without any lawful justification without an attempt to assert its rights against the Defendants. It was further averred that the Defendants have derived their livelihood from the premises for many years which have since stopped on account of the Order of Injunction by the Plaintiff against them. The Defendants also averred that the Plaintiff is currently putting up materials to set up a

wire fence around the Subject Property and in the process harassing the Defendants.

3.31 The Defendants asserted that the Certificate of Title for the Plaintiff herein was obtained in error and is liable to be cancelled if it affects the land of the Defendants. Consequently, the Defendants claim for the following: -

- i) *An order for cancellation of the Certificate of Title over the premises herein contested in the event that this Court finds that the said Certificate of Title includes the property herein contested, for fraud and illegality or otherwise for having been issued by mistake.*
- ii) *A declaration that the land occupied by the Defendants herein falls under customary tenure and not statutory tenure.*
- iii) *An Order of interim injunction restraining the Plaintiff in the meantime whether by itself or by its servants or agents or otherwise howsoever from interfering with, harassing the Defendants, or in any way disposing off any part of the property herein or otherwise from dealing with the said land in any manner likely to affect the Defendants herein with regard to their rights, howsoever, in the said land.*
- iv) *Damages for inconvenience resulting for loss of use of land herein for agricultural activities.*

v) Costs.

vi) Any other relief the Court may deem fit.

3.32 By the Plaintiff's Reply and Defence to Counter-Claim, the Plaintiff averred, *inter alia*, that the Subject Property is not under customary tenure as it is State Land. It was further averred that no error was made in the issuance of the Certificate of Title relating to the Subject Property and that all the Plaintiff's activities have been conducted openly on the land which is the subject of the Plaintiff's Certificate of Title.

3.33 As to the Defendants' Counter-Claim, the Plaintiff asserted that that the matters pleaded therein do not show sufficient ground of action against the Plaintiff. Further, the Plaintiff denies that the Defendants have suffered any damage or loss and that the Defendants are entitled to any of the reliefs claimed in the Counter-Claims.

4. EVIDENCE AT TRIAL

4.1 At trial, **PW1** was **Anthony Neil Ford**, a farmer residing in Choma. By his Witness Statement which was admitted into evidence, PW1 testified, *inter alia*, that the land along the Mbabala River, which forms part of the Subject Property has been illegally pegged by the residents of Mbabala and Choma. He stated that the Plaintiff had previously fenced the said area with normal bush poles

and barn wire, but that everything had been stolen. He further stated that the Plaintiff tried to plant gum trees in the area in the past, but that they had all been pulled up.

4.2 It was his testimony that on 1st March, 2017, he attended a meeting which was held at the Subject Property where the following were present: -

a. Chief Singani

b. Rodney Ian Mackay

c. Oliver Muoba (Lands Department Choma)

d. Hamish Ross

e. Deumpie Cloete (GM Clo-cor Security

f. Kelas Nalikena (Clo-cur Security Buffalo Section Leader)

g. Representatives from the people illegally pegging the land.

4.3 PW1 avowed that at the said meeting, Chief Singani asked for a portion of land to be given to his subjects and PW1 and his colleagues explained that they needed to take the matter up with the Plaintiff as they were not the owners of the land.

4.4 It was PW1's testimony that there was a lot of aggression shown by the people who had been pegging the land which

the Chief claimed. The Chief asked for all pegging of land to cease until the land owner reverted. However, as of 20th March, 2017, the pegging was still taking place against the wishes of the Chief.

- 4.5 In cross examination, PW1 was referred to page 2 of the Plaintiff's Bundle of Documents, containing a diagram of the Subject Property and he identified the area in which the Mbabala River passes. PW1 stated that the said River is not Chikaka River. He stated that there was a wire fence along the boundary of the River, but that it was no longer there.
- 4.6 PW1 asserted that the Defendants have occupied the parcels of land along the River, but that he had not ascertained the sizes of the parcels of land between the River and the stretch of land nor the sizes of the parcels of land along the River. He stated that he had not provided documents to show where the Defendants had encroached.
- 4.7 PW1 testified that the Plaintiff was not the first holder of the Subject Property. He stated that he had not brought any evidence to show that the first holders of the Subject Property had alleged that the land which the Defendants occupied was part of the Subject Property.
- 4.8 It was PW1's testimony that the Plaintiff did not inform the Defendants that the Subject Property had become state

land and was the subject of a Certificate of Title. PW1 denied that the Defendants only became aware of the said Certificate of Title in these proceedings.

- 4.9 PW1 conceded that he had not provided proof that the Subject Property had been fenced nor that the Plaintiff had planted gum trees, which had been pulled out. He stated that despite his name not appearing on the list of attendees he had provided in his Witness Statement, he was in attendance.
- 4.10 PW1 testified that he could not recall that at the meeting, Hamukoka stated that some animals had been struck by lightening nor that Hamish Ross stated that those animals were actually on the land that the Plaintiff want to chase the Defendants from.
- 4.11 PW1 affirmed that he does not own the Subject Property but that he has leased it from its owners. He stated that there was once a farmer called Zaloumis, whose farm was neighbouring the Subject Property. He further stated that he was not aware that Zaloumis asked the Defendants to put their houses on parcels of the Subject Property and that Zaloumis bought a piece of the Subject Property to erect houses on it.
- 4.12 PW1 stated that he had not placed any documents on record to show that he had been authorised to complain by the Plaintiff. He conceded that he had no proof of the

pegging or the continued pegging by the Defendants, nor that he reported the Defendant's aggression to the police.

4.13 In re-examination, PW1 stated that he never met Mr. Zaloumis and that PW1's farm workers live on the Subject Property.

4.14 **PW2** was **Tonny Luyanga Mwanalushi**, who is a Land Surveyor. By his Witness Statement, which was admitted into evidence, PW2 testified, *inter alia*, that he is a registered Land Surveyor. He stated that in February, 2023, he carried out a boundary verification relating to the Subject Property on behalf of the Plaintiff herein.

4.15 PW2 avowed that all survey records used in the survey were approved and retrieved from the office of the Surveyor General. He stated that the survey included the search for beacons and comparison of data. He further stated that the results of the survey are contained in his Survey Report, shown at page 1 of the Plaintiff's Supplementary Bundle of Documents.

4.16 PW2 set out the results and findings of the survey, which included the following: -

- (i) *The Subject Property was bounded by Mbabala River, Farm No. 212, Farm No. 59a/A, Farm No. 1630/A, Farm No. 1630 and Chikaka River.*

(ii) *Built structures near Mbabala River, Farm No. 22, Farm No. 59a/A and Choma Namwala Highway was found within the Subject Property and hence, the Remaining Extent of Farm No. F/CHOM/3156517.*

4.17 In cross examination, PW2 testified, *inter alia*, that he was retained by the Plaintiff and that the statutory fees were paid. He stated that the survey was done after he had been retained and that he was not informed of the matter before Court when he was retained.

4.18 PW2 avowed that the survey did not involve all the Parties herein. When referred to page 2 of the Plaintiff's Supplementary Bundle of Documents, containing an image extracted from Google Maps, PW2 stated that he added the information on the image from Google Maps by labelling it and that it was not possible for him to edit the Google Map image.

4.19 PW2 asserted that the beacons that he went to verify did not give him the information and that the information did not come from his client. He stated that he did not interview any of the locals but came to know that the area is known by the locals as no man's land. PW2 further stated that the Plaintiff did not guide him on how to do his work.

4.20 It was PW2's testimony that the Plaintiff has tasked him to verify the boundaries and after he did so, he thought it

prudent to include further information on Google Maps to make it easier for anybody to understand his findings. He stated that the right side is where the Subject Property was located and that the Choma Namwala road passes through the Subject Property. PW2 also stated that there was no wire fence around the Subject Property.

4.21 PW2 affirmed that he had gone to the Ministry of Lands to get the relevant information relating to the boundary lines of the farms in that area. He stated that he saw mango trees on the Subject Property but did not see any graves as graves are located in particular places. He further stated that he saw people working in the fields. He also stated that he was dealing with a company and not an individual.

4.22 When referred to page 3 of the Plaintiff's Supplementary Bundle of Documents, PW2 stated that the Subject Property was consolidated and then subdivided.

4.23 PW2 testified that he was not aware that the locals engaged someone to show them the beacons before this matter commenced and that the beacons were not there. He stated that he needed implements to verify the boundaries without which he could not work as one would not be able to locate the beacons.

4.24 It was PW2's testimony that there was nothing to show that the locals were made aware of the Certificate of Title relating to the Subject Property. He stated that the

boundary of the farm is the River and that beacons cannot be placed in a River. He further stated that he observed the gardens in the parcels on the edges. PW2 also stated that he did not engage any Court official when he went to verify the beacons on the Subject Property.

4.25 In re-examination, PW2 testified, *inter alia*, that the River is actually the boundary and as beacons cannot be placed in a River, an indicatory beacon is placed on a place where the River will not affect the beacon. Therefore, the line on the sketch on pages 2 to 3 of the Plaintiff's Bundle of Documents is merely indicatory.

4.26 **PW3** was **Robert John Bones**, who is an Accountant. By his Witness Statement, which was admitted into evidence, PW3 testified, *inter alia*, that the Plaintiff is the lawful owner of the Subject Property by virtue of the Certificate of Title issued under the Hand and Seal of the Registrar of Lands and Deeds. He stated that the Plaintiff acquired the Subject Property from Gamamwe Development Company Limited, in or about 2009, at the consideration of US\$125,000.00, as confirmed by the Lands Register printout, produced at pages 11 to 18 of the Plaintiff's Bundle of Documents.

4.27 PW3 avowed that the Subject Property is used for business activities in accordance with the Certificate of Title and the said activities have been conducted openly. He stated that

the Defendants, some of whom are subjects of Chief Singani, have illegally and without any lawful justification whatsoever been pegging the Subject Property with a view to subdivide the land for their benefit.

4.28 PW3 testified that the Defendants have encroached the said Subject Property for a distance of approximately 1.5 km from the Mbabala River where the Subject Property's boundary is located as per Certificate of Title aforesaid. It was asserted that the Plaintiff has previously fenced the said Subject Property with poles and barb wire, which have been illegally removed by the Defendants. He affirmed that the Plaintiff has also previously established gum tree plantations on the said Subject Property, but they Defendants have unlawfully destroyed the same.

4.29 PW3 testified that the Plaintiff's efforts to stop the Defendants from pegging, trespassing and/or encroaching on the said Subject Property have been futile, as the Defendants have refused and/or neglected to stop their activities. He stated that the Defendants' activities on the Subject Property have been carried on without the Plaintiff's license or consent.

4.30 In cross examination, PW3 testified, *inter alia*, that he is an employee of the Plaintiff. He conceded that he had not provided proof of his employment before Court. He further conceded that there was no resolution giving the company

authority to be a Plaintiff herein, which has been placed before this Court. He stated that he knew that Mr Ford and Mr. Hamish actually met with the Defendants.

4.31 PW3 testified that the Plaintiff retained the Surveyor and that the Defendants were not engaged when the Surveyor was engaged. He stated that he agreed with the Surveyor's Report and that the farms had been consolidated then subdivided. He further stated that when the Plaintiff was purchasing the Subject Property, the previous owner told them that there was no problem with the Subject Property that they were purchasing. He also stated that the Plaintiff went to the Ministry of Lands and that there was no document showing how the locals were dealt with.

4.32 PW3 affirmed that there was no document before Court to show that, as purchaser of the Subject Property, the Plaintiff interacted with the locals, as its first interaction was with the vendor. When referred to page 2 of the Plaintiff's Bundle of Documents, PW3 stated that the document showed that the diagram was made in 1951. He also stated that he did not know whether the Ministry of Lands compensated those that occupied the Subject Property in the 1800's.

4.33 PW3 asserted that all the parcels of land have a frontage to Mbabala River. He stated that the Surveyor was paid for the works done. He further stated that the Plaintiff was

instructed by the Court to get a Surveyor to verify the boundaries and that there was no separate Order by the Court.

4.34 PW3 deponed that the Defendants asserted that there were graves on the Subject Property, but that he did not know anything about the graves. He stated that he did not know that Mr. Ford was chasing the locals because they were evading his land. He reiterated that the Plaintiff purchased the Subject Property.

4.35 In re-examination, PW3 stated that there are staff houses on the Subject Property.

4.36 This marked the close of the Plaintiff's case.

4.37 **DW1** was **Leonard Hamukoka**, a Peasant Farmer, residing at Sibanyati Village, Choma, Southern Province. By his Witness Statement, which was admitted into evidence, DW1 testified, *inter alia*, that the Defendants were at all material times residents of the Subject Property and some only left after they were forcefully evicted by the Plaintiff's agents, following the Order of Injunction. He stated that the Plaintiff has continued to oppress the remaining Defendants by use of live guns, causing death of the Defendants' dogs.

4.38 DW1 stated that the Subject Property contains the graves of their ancestors, who died between 1920 and 2017, from

whom the Defendants derived their customary tenure. He further stated that the Defendants have continued to bury their deceased within the Subject Property.

4.39 DW1 affirmed that the Certificate of Title was issued in error as the Defendants' predecessors have been residents of the Subject Property from time immemorial and have never been offered alternative land to reside on by all successive governments of the Republic of Zambia or Northern Rhodesia. He stated that without asserting its rights, the Plaintiff has continued to encroach on the Defendants' land by placing paddocks and drilling boreholes on the Subject Property.

4.40 It was asserted that before the encroachment by the Plaintiff, the Plaintiff had never used the Subject Property for its business or at all. DW1 stated that the Subject Property has since time immemorial never been fenced and that there was no way that the Defendants would have imagined or thought that the Subject Property was subject of a Certificate of Title. He further stated that the structures built on a portion of the Subject Property and occupied by the Defendants were built as a consequence of the community living under customary tenure.

4.41 DW1 testified that the Defendants' and their predecessors' occupation of the Subject Property dates back to a time period before any of the neighbouring farms, including

before the Subject Property was alienated. He stated that some of the evidence to this effect is the grain grinding machine or instruments; the mango trees grown before the land was surveyed and Certificate of Title issued; and DW1's grandmother's grave, who died in 1930, which is still there and kept as a heritage for his children.

4.42 DW1 stated that the only encroachment and wire fencing beyond the border of the Subject Property was in the direction on the North-west side of the Subject Property, in the direction of the Mbabala River, where some of the residents of Sibanyati are domiciled, contrary even to what the Plaintiff has put in the diagram on page 3 of the Plaintiff's Supplementary Bundle of Documents. Under the circumstances, DW1 stated that the Defendants are not occupying that parcel of land of the Subject Property as squatters but as beneficiaries entitled under customary tenure.

4.43 DW1 asserted that the Plaintiff is claiming for land which includes parcels of land outside the purported Subject Property, which land is for all purposes and intents in Sibanyati Village, such as the land overlooking the Mbabala River. He stated that according to the Plaintiff's evidence, the Subject Property which it owned by virtue of the Certificate of Title produced is no longer in existence, as the same has been subdivided and that therefore, the

Plaintiff has failed to show that it is entitled to the relief sought by it.

4.44 DW1 deponed that at the meeting, the farmers attempted to ask for a piece of land to, among others, settle their retirees, which the Defendants rejected. DW1 stated that without the authority of the Defendants, the Plaintiff has resorted to use of force in evicting the Defendants. He also stated that the Plaintiff and/or its predecessors in title concealed the existence of a Certificate of Title relating to the Subject Property.

4.45 It was DW1's testimony that the Plaintiff and/or its predecessors in title deliberately or otherwise neglected, omitted or ignored to bring any cause of action against the community of the Defendants herein within the first 12 years from the alleged acquisition of the title produced by the Plaintiff herein.

4.46 DW1 avowed that the Defendants have used the Subject Property to derive a livelihood for many years, which have been affected by the Order of Injunction. It was asserted that the Plaintiff has proceeded to erect wire fence closing out parcels of land not forming part of the diagram that it produced for the Subject Property, which is no longer in existence.

4.47 DW1 affirmed that it was the Defendants' prayer that the Certificate of Title issued in respect of the Subject Property,

in so far as it purports to deprive them of their land in Sibanyati village, should be cancelled. DW1 stated that the whole eastern side of the parcel of land at all material times had been known to the Defendants to not form part of any farm, while the property along the western side along Mbabala River is only bounded by the Subject Property and the River.

4.48 DW1 testified that the Plaintiff should not be entitled to claim the land between Mbabala River, which is outside the diagram produced as the same continues to form part of customary tenure and beacons do not go into the River. He stated that the Defendants use those parcels not only for residence but also for the gardens. DW1 also stated that the beacons that the Plaintiff is indicating to be existent, have never been seen by the Defendants as forming part of the Subject Property or at all.

4.49 In cross examination, DW1 testified, *inter alia*, that he left the Subject Property in 2019, after he and his family heard gun shots and moved across Mbabala River. He stated that there are 10 to 12 people still living in the area. He further stated that he and his family went across Mbabala River where they asked for a place to settle down. DW1 also stated that he did not know whether the Subject Property was known as crown land before independence.

4.50 DW1 avowed that he had seen the parcels of land between the River and the Subject Property and that some of the locals live on the said Subject Property. DW1 conceded that the Certificate of Title relating to the Subject Property was issued before he was born. He stated that there was no village register before the Court. DW1 further stated that the Defendants are located on the eastern side of the Namwala road and not on the Subject Property. He also stated that according to the diagram on page 3 of the Plaintiff's Supplementary Bundle of Documents, the road going to Namwala shows that the road passes through the Subject Property.

4.51 In re-examination, DW1 testified that he denies the contents of the Surveyor Report, with respect to the Subject Property.

4.52 That marked the close of the Defendants' case.

5. WRITTEN SUBMISSIONS

5.1 By the Plaintiff's Submissions, filed on 2nd May, 2024, the Plaintiff's Counsel submitted, *inter alia*, that there four issues for determination in this matter as follows: -

- a) Who bears the burden of proof.
- b) What is the effect of issuance of a Certificate of Title in law.

- c) Whether or not the Defendants can in law acquire part of the Plaintiff's Subject Property by adverse possession.
- d) Whether or not the Defendants have proved their Counter-Claim against the Plaintiff Company to the requisite standard.
- 5.2 In addressing the first issue on who bears the burden of proof, Counsel cited the case of **Zulu v Avondale Housing Project**¹ as follows: -
- “I think that it is accepted that where a Plaintiff alleges that he has been wrongfully or unfairly dismissed, as indeed in any other case when he makes an allegation, it is generally for him to prove those allegations. A Plaintiff who has failed to prove his case is not entitled to judgement, whatever may be said of the opponent's case.”***
- 5.3 Counsel also cited the case of **Galunia Farms v National Milling Company Limited and Another**², in support of the submission that the burden of proof lies with the Plaintiff herein to prove each and every claim pleaded in its Statement of Claim as against the Defendants to the requisite standard on a balance of probabilities.
- 5.4 On the issue raised by the Defendants' Counsel, suggesting that the Court process commenced without authority, Counsel submitted that when this action was commenced, **The Companies Act**¹ was the applicable law.

Counsel urged this Court to follow the Supreme Court decision in ***Finance Bank Zambia Limited and Four others v Zambezi Portland Cement Limited***³, wherein it was held that the common law defence of commencing action without authority was no longer available by virtue of **Section 23** and **Section 24** of the repealed ***Companies Act***¹.

- 5.5 On the second issue of the effect of the issuance of a Certificate of Title, Counsel cited **Section 33** of ***The Lands and Deeds Registry Act***² and stated that it provides that a Certificate of Title is conclusive evidence of ownership and can only be cancelled for fraud. Counsel also cited the case of ***Anti-Corruption Commission v Barnet Development Corporation Limited***⁴, in support of the submission that the Certificate of Title issued in relation to the Subject Property is conclusive evidence of the Plaintiff's ownership of the Subject Property.
- 5.6 In submitting on the third issue of whether the Defendants can acquire part of the Plaintiff's Subject Property by adverse possession, Counsel stated that the only evidence of the Defendants' alleged occupation of the Subject Property is DW1's testimony that he and his predecessors had been on a portion of the Plaintiff's Subject Property as far back as 1800. DW1 stated that he was born in 1957 and that he is 66 years old. However, Counsel contends that the Certificate of Title relating to the Subject Property

was issued in 1951, which was way before DW1 was born and is effective for 99 years.

5.7 Counsel cited **Section 35** of **The Lands and Deeds Registry Act**² and the Supreme Court case of **David Nzooma Lumanyenda and Gooding Kafuko Muzumbwa v Chief Chamuka and Kabwe Rural District Council and Zambia Consolidated Copper Mines Limited**⁴, in which the Supreme Court held that: -

“No right of adverse possession can be acquired if land becomes the subject of a certificate of title.”

5.8 Based on the foregoing authorities, Counsel submitted that the Defendants have not adduced any credible evidence to prove their claims to the requisite standard that their ancestors lived on the Subject Property or occupied the Subject Property in issue under customary tenure as far back as the late 1800's. It was further submitted that the Defendants have not provided proof that there exists within the Subject Property a legally recognised cemetery as required by **Section 91** and **92** of **The Public Health Act**³.

5.9 Counsel further submitted that the Defendants cannot claim the Plaintiff's action herein is statute barred and cited from the learned author of **Land Law in Zambia: Cases and Materials**¹, wherein **Section 4 (3)** of **The**

English Limitation Act⁴ was cited in support of the foregoing submission as follows: -

“No action shall be brought by any person to recover any land after the expiration of 12 years from the date on which the right of action accrued to him or, if it is first accrued to some person through whom he claims, to that person...”

5.10 Further to the foregoing, Counsel submitted that the Defendants had not pleaded the defence of limitation of action or that the action is statute barred as required by law. The case of **Davison Mkandawire and Others v Julia Malembeka and Another**⁶ was cited in support of the foregoing.

5.11 Counsel submitted that the diagram in the Plaintiff’s Certificate of Title, issued in relation to the Subject Property, contains a diagram that clearly shows that on the northern direction, that is across the Mbabala River lies the Native Reserve XIII ILA TONGA. He stated that it is these Natives Reserves where the natives were assigned following the promulgation of the Northern Rhodesia (Crown Lands and Natives Reserved) Order-in-Council, 1928. Counsel added that at independence, the Northern Rhodesia (Crown Lands and Natives Reserves) Order-in-Council, 1928, became known as the Zambia (State lands and Reserves) Order 1928 to 1964. Further, Counsel stated that **Section 32 of The Lands Act**⁵ repealed the

Zambia (State lands and Reserves) Order 1928 to 1964 and that **Section 2** of **The Lands Act**⁵ defines ‘customary area’ to mean as follows: -

“Notwithstanding section thirty-two, the area described in the schedules to the Zambia (State lands and Reserves) Order 1928 to 1964 and the Zambia (Trust land) Orders, 1947 to 1964.”

5.12 Based on the foregoing, Counsel submitted that according to DW1’s testimony, he left the Subject Property in 2019 and went to the customary area formerly known as Native Reserve XII ILA TONGA. In view of the foregoing, Counsel urged the Court to find that the Defendants cannot at law acquire part of the Plaintiff’s Subject Property by adverse possession.

5.13 On the issue of whether or not the Defendants have proved their Counter-Claim against the Plaintiff Company to the requisite standard, Counsel submitted that the Defendants are not entitled to any of their claims in the Counter-Claim as they have failed to prove them. It was further asserted that the defence of fraud was not clearly and distinctly alleged or pleaded as required by law. The case of **Rosemary Phiri Madaza v Awadh Karen Coleen**⁷ was cited in support of the foregoing.

5.14 Counsel further submitted that as the Plaintiff bought the Subject Property from Gamamwe Development Company

Limited, in terms of **Section 58** of **The Lands and Deeds Registry Act**², a purchaser for valuable consideration from a registered proprietor is not required to investigate how the proprietor acquired title. It was Counsel's submission that despite the Defendants alleging that the Certificate of Title was issued by mistake, no evidence was adduced by the Defendants to support the allegation.

5.15 It was contended that the Defendants' claim for a declaration that the land that they occupy falls under customary tenure and not statutory tenure cannot be made on the basis that it is a discretionary remedy and that the Defendants have not sufficiently challenged the fact that the portions of land that they occupy are within the Subject Property.

5.16 Finally, it was submitted that on the basis of the evidence and authorities on Record, the Court must find that the Plaintiff has proved its claims herein.

5.17 By the Defendants' Submissions filed on 17th May, 2024, the Defendants' Counsel submitted, *inter alia*, that with respect to *locus standi*, the Court should note that the Plaintiff appears to lack it due to the fact that they have not shown that they possess it. Counsel gave a definition of the term of "*Locus Standi*" according to **Black's Law Dictionary**² as follows: -

“The right to bring an action or to be heard in a given forum.”

5.18 Based on the foregoing, Counsel submitted that the general position with regard to *locus standi* is that a company does have the capacity to sue as was provided for under **Section 22** of ***The Companies Act***¹. It was therefore submitted that the Plaintiff needed to show that it possesses the requisite *locus standi*, that is, it must have a right or an entitlement to be able to bring the action for it to be heard.

5.19 It was submitted that while the dealings of companies differ, this action requires the approval of the Board of Directors. It was asserted that the lack of authority is compounded by the fact that although the Plaintiff was shown to be the registered owner of the Subject Property, the evidence of the Land Surveyor was to the effect that the Subject Property was consolidated with other neighbouring farms and the new consolidated property was numbered F/CHOM/315617. It was asserted that the Surveyor testified that the new title and diagrams for the consolidated property issues once a consolidation is done.

5.20 It was argued that the Plaintiff has failed to show to this Court who the registered owners of Farms No.1628, 1630/A and 1630 were, thus it was inviting this Court to make a finding of fact speculatively that the eventual owner of the consolidated Farm No. F/CHOMA/3156517

was the Plaintiff. It was further asserted that the Plaintiff had failed to show who the registered owner of the remaining extent is.

5.21 Counsel contended that a general search made under **Section 22** of **The Lands and Deeds Registry Act**² is not proof of ownership of the Subject Property. The case of **Benson Munganama v Fridah Ngoma and another**⁸ was cited in support of the foregoing.

5.22 Counsel cited **Section 33** and **Section 34** of **The Lands and Deeds Registry Act**² and submitted that the Certificate of Title produced in relation to the Subject Property is no longer conclusive evidence that the Plaintiff is the beneficial owner of the Subject Property herein based on the fact that the Subject Property had been subjected to consolidation with other farms whose owners had not been mentioned. Consequently, it was argued that the Plaintiff had failed to show that it is entitled to sue the Defendants under the circumstances for lack of *locus standi*. Accordingly, it was submitted that this action is liable to be dismissed with costs.

5.23 Counsel submitted that no evidence had be laid before the Court to show that the person referred to by PW3 as the owner of the Subject Property, Mr Brick Bank, had authorised the Plaintiff to bring the suit before this Court. Counsel asserted that the Plaintiff was motivated by its

desire to conceal the true status of ownership of among others the Subject Property herein to secure a decision in the Plaintiff's favour at all costs.

- 5.24 Counsel cited a number of cases on *locus standi* and submitted that the Plaintiff's Witnesses hid the fact that the Subject Property was consolidated into F/CHOM/3156517 and that it was further subdivided to leave the remaining extent of F/CHOM/3156517.
- 5.25 On whether the Plaintiff is a *bona fide* purchaser for value without notice, the Defendants' Counsel submitted that under cross examination, PW3 stated that the Plaintiff did not make any inquiries to ascertain why the Defendants were in occupation of the Subject Property prior to its purchase. Consequently, the Plaintiff cannot be said to be a *bona fide* purchaser for value without constructive notice of the rights of the Defendants herein. The case of ***Banda and another v Mudimba***⁹ was cited in support of the position of the law regarding a *bona fide* purchaser.
- 5.26 Counsel submitted that the interest of the Defendants to the portion of the Subject Property is not derived from prescription but from customary tenure, which right was never extinguished by the creation of the Subject Property.
- 5.27 On cancellation of the Certificate of Title, the Defendants' Counsel cited **Section 3 (4)** and **Section 8** of ***The Lands Act***⁵, in support of his submission that a person is not a

squatter if they derive their interest under customary law, in priority to one held under a Certificate of Title. He argued that the law against right by prescription does not cover those claiming under customary tenure, which tenure is recognised at law.

5.28 It was asserted that there is need for the approval of the Chief and the local authorities. It was further asserted that the law recognises the right that is possessed by a party with regard to the use and the aspect of occupation of land under customary tenure that could be claimed by a person. Counsel submitted that the rights claimed by the Defendants are valid and as such, request for a cancellation of title especially considering that the Defendants were not consulted by any person representing the Plaintiff.

5.29 Counsel cited the case of ***David Nzooma Lumanyenda and Goodwins Kafuko Muzumbwa v Chief Chamuka and Kabwe Rural District Council and Zambia Consolidated Copper Mines Limited***⁵ and stated that this case has a qualification in that a person can continue to rely on ***The Limitation Act***⁴ if he can show that he or his predecessors in title have acquired rights by adverse possession for a period of 12 years to the granting of the provisional certificate. Counsel asserted that as there was continuous and uninterrupted occupation of the Subject Property from the 1800's, the Defendants and their

predecessors had been in occupation of the Subject Property for more than 12 years prior to the grant of the first Certificate of Title herein.

5.30 On the aspect of statute bar, the Defendants' Counsel submitted that the Defendants did plead in paragraph 8(c) of their Defence that the Plaintiff deliberately neglected to bring an action within the first 12 years from the alleged acquisition of the Certificate of Title. Counsel further submitted that this matter is statute barred having been brought 12 years after the first grant of the Certificate of Title herein, against a people that actually had a legal right to be in such occupation. **Section 4 of *The Limitation of Actions Act***⁴ was cited in support of the foregoing.

6. CONSIDERATION AND DECISION OF THE COURT

- 6.1 I have considered the pleadings and evidence adduced before me, as well as the Submissions by Counsel and List of Authorities cited, for which I am grateful.
- 6.2 The Plaintiff claims for an Order of Injunction compelling the Defendants to vacate the Subject Property, and to remove all pegs installed thereon; an Injunction restraining the Defendants from pegging, encroaching, entering, damaging and/or trespassing of the Subject Property; Damages for trespass to the Subject Property; Interest; and further or other relief the Court may deem fit; and Costs.

6.3 On the other hand, the Defendants deny the Plaintiff's claim and assert that their right to the Subject Property is derived from customary tenure. Consequently, the Defendants have Counter Claimed for an Order for cancellation of the Certificate of Title in the event that this Court finds that the said Certificate of the Title includes the portion of the Subject Property contested, for fraud and illegality or otherwise for having been issued by mistake; a Declaration that the land occupied by the Defendants herein falls under customary tenure ad not statutory tenure; an Order of Interim Injunction restraining the Plaintiff in the meantime whether by itself or by its servants or agents or otherwise howsoever from interfering with, harassing the Defendants, or in any way disposing off any part of the Subject Property herein or otherwise from dealing with the said Subject Property in any manner likely to affect the Defendants herein with regard to their rights, howsoever, in the said Subject Property; Damages for inconvenience resulting in loss of use of Subject Property herein for agricultural activities; Costs; and any other relief the Court may deem fit.

6.4 It is settled law that a person who commences a civil action must prove his case against the Defendant in order to succeed in his claim. To that effect, the learned authors of *Phipson on Evidence*³, in **paragraph 6-06**, at **page**

151, state the following regarding the burden of proof in civil cases: -

“So far as the persuasive burden is concerned, the burden of proof lies upon the party who substantially asserts the affirmative of the issues. If, when the evidence is adduced by all parties, the party who has the burden has not discharged it, the decision must be against him.”

6.5 Additionally, the standard to which a Plaintiff should prove his case was discussed by the Supreme Court in ***Zambia Railways Limited v Pauline S Mundia, Brian Sialumba***¹⁰ as follows: -

“The standard of proof in a civil case is not as rigorous as the one obtaining in a criminal case. Simply stated, the proof required is on a balance of probability as opposed to beyond all reasonable doubt in a criminal case. The old adage is true that he who asserts a claim in a civil trial must prove on a balance of probability that the other party is liable...”

6.6 It is important to note here that a Counter-Claim is in its nature a cross suit, an independent cause of action from that of the Plaintiff. The same expectation of the Plaintiff to prove its claim against the Defendant becomes the position and expectation of the Defendant to prove the Counter-Claim against the Plaintiff.

6.7 The facts in this case are that the Plaintiff is the registered owner of Farm No. 1629 (Subject Property), situated in the

Southern province of the Republic of Zambia and that the Defendants are individuals residing in or around Mbabala River in the Southern Province of the Republic of Zambia.

- 6.8 The Plaintiff alleges that the Defendants have illegally and without any justification been pegging portions of the Subject Property with a view to subdivide the land for their benefit.
- 6.9 On the other hand, the Defendants allege that their right to the Subject Property is derived from customary tenure and from the continuous occupation of the premises by their successive ancestors who have never left occupation through to the Defendants' time. The Defendants further allege that the Certificate of Title issued in relation to the Subject Property has no legal basis as the Subject Property now forms part of the remaining extent following the consolidation of the Subject Property to other portions of land and subsequent subdivision. It is further alleged that the Plaintiff has no *locus standi* to commence this action as no resolution was produced to authorise the Plaintiff to commence this action.
- 6.10 On my analysis of the facts and evidence on record, I find that the following are the issues for determination in this matter: -
- i. Whether the Plaintiff herein has *locus standi* to commence this action.

- ii. Whether this action should be dismissed for being statute barred.
- iii. whether the Plaintiff has proved that it is the registered owner of the Subject Property and that the Certificate of Title issued with respect to the said Subject Property is valid.
- iv. Whether the Defendants have proved that they acquired a right to the Subject Property by way of customary tenure and consequently are entitled to the reliefs sought in their Counter-Claim.
- v. Whether the Plaintiff has proved that it is entitled to the claims as set out in the Statement of Claim.

6.11 I shall address the issues in the manner that I have identified them above, starting with whether the Plaintiff herein has *locus standi* to commence this action. By the Defendants' submissions, the Defendants' Counsel alleged that while the dealings of companies differ, the commencement of this action required the approval of the Board of Directors of the Plaintiff, which the Plaintiff has not shown. Counsel asserted that the Plaintiff had failed to show that the Board approved the commencement of this action and therefore, it lacks the requisite *locus standi*. Consequently, it was asserted that this action is liable to be dismissed with costs.

6.12 On the other hand, the Plaintiff asserted that the common law defence of commencing action without authority was no longer available by virtue of **Sections 23** and **24** of the repealed **Companies Act**¹.

6.13 To address this legal issue, I shall begin by quoting from the learned author of **Zambian Civil Procedure: Commentary and Cases**⁴, who states as follows at **page 59**: -

“A principle of law which is now entrenched to require elaboration is the corporate existence of a company as a distinct legal person. Thus, upon the issuance of the certificate of incorporation, a company becomes a body corporate. It can sue and be sued in its corporate name. By virtue of its corporate nature, a company has the capacity to sue or be sued in its corporate name.” (Court’s emphasis)

6.14 Additionally, **Section 22** of the repealed **Companies Act**¹, which Act was applicable at the commencement of this action, provides as follows: -

“A company shall have, subject to this Act and to such limitations as are inherent in its corporate nature, the capacity, rights, powers and privileges of an individual.” (Court’s emphasis)

6.15 Further, in the case cited by the Plaintiff’s Counsel of **Finance Bank Zambia Limited and Others v Zambezi Portland Cement Limited**³, the Supreme Court in

interpreting **Sections 23** and **24** of the repealed **Companies Act**¹ stated as follows: -

“When these two sections are read together it becomes apparent that the Companies Act has changed the common law position on commencement of actions without authority. It is no longer a valid argument to argue that a writ has been issued without authority because Section 23 does not make such an action invalid.”

6.16 Fortified by the foregoing authorities, which are based on the repealed **Companies Act**¹, which Act was applicable at the time this action was commenced, it is evident that as the Plaintiff is an incorporated entity, it has the capacity to sue on its own behalf and in its own name. Further, the said Act does not prescribe any requirement for an incorporated entity to provide proof of a Board Resolution authorising it to commence legal action against another party. Therefore, I find that the Plaintiff herein has the *locus standi* to commence this action against the Defendants. Accordingly, the Defendants’ contention that the Plaintiff did not provide proof of a Board Resolution to commence the proceedings herein lacks merit and is consequently dismissed.

6.17 I now turn to consider the second legal issue of whether this action ought to be dismissed for being statute barred. The Defendants have alleged that the Plaintiff deliberately neglected to bring an action against them within the first

12 years from the acquisition of the Certificate of Title and that therefore, this action is statute barred and ought to be dismissed. The Defendants based their contention on **Section 4 of The Limitations of Actions Act⁴**, which provides as follows: -

“No action shall be brought by any person to recover land after the expiration of twelve years from the date on which the right accrued to him, or if it first accrued to some person through whom he claims to that person.”

6.18 On my analysis of the evidence on Record, I note that the Certificate of Title to the Subject Property was issued to the Plaintiff on 18th September, 2010, and that this action commenced on 29th March, 2017. It is therefore clear that the Plaintiff commenced this action within the 12-year period from the date the Certificate of Title was issued and that therefore, this action is not statute barred.

6.19 I wish to state further that **Section 34 of The Lands and Deeds Registry Act²** ousts any provision of the rule of law or equity in relation to the rights of a registered title holder to advance right to such land in a Court action. The said **Section 34 of The Lands and Deeds Registry Act²** provides as follows: -

“(1) No action for possession, or other action for the recovery of any land, shall lie or be sustained against the Registered Proprietor holding a Certificate of Title for the estate or interest in respect to which he is

registered, except in any of the following cases, that is to say:

...

(2) In any case other than as aforesaid, the production of the Register or of a copy of an extract therefrom, certified under the hand and seal of the Registrar, shall be held in every court of law or equity to be an absolute bar and estoppel to any such action against the Registered Proprietor of land the subject of such action, and in respect of which a Certificate of Title has been issued, any rule of law or equity to the contrary notwithstanding." (Court's emphasis)

6.20 The import of the foregoing provision, as it relates to the provisions of ***The Limitation of Actions Act***⁴, was aptly considered in the case of ***Tembo v Nyanga***¹¹, in which it was held as follows: -

"It would thus appear safe to conclude that going by the foregoing provision (Section 34 of the Lands and Deeds Registry Act), the rights of a registered title holder to defend his occupation of such registered land at any opportune time is supreme, subject only to the Constitution. ... It is our firm view that such registered proprietor can also defend his ownership of the subject land from any purported threats to his subsisting title, and this he can do at any time without limitations as to time. For these foregoing reasons, we agree with the lower court that a Certificate of Title is an exception to the

provisions of Section 4(3) of the English Statute of Limitation.” (Court’s emphasis)

6.21 Therefore, the Defendants’ claim that the Plaintiff’s action is statute barred lacks merit and is accordingly dismissed. Further, the Defendants’ allegation that this action is statute barred due to the fact that no action was brought by the Plaintiff’s predecessor in title to challenge their occupation of the portion of the Subject Property is also dismissed on the basis that the said predecessor also held title to the Subject Property as a registered proprietor even though he is not a party to these proceedings.

6.22 I now turn to consider the third legal issue of whether the Plaintiff has proved that it is the registered owner of the Subject Property and that the Certificate of Title issued with respect to the said Subject Property is valid. The Plaintiff has asserted that it is the registered owner of the Subject Property and has produced a copy of a Certificate of Title issued with respect to the said Subject Property.

6.23 On the other hand, the Defendants allege that the Certificate of Title relating to the Subject Property is no longer effective owing to the fact that the Subject Property was consolidated with other pieces of land in the area and was subsequently subdivided leaving the Subject Property forming part of the remaining extent. Therefore, it is alleged that the Certificate of Title relating to the Subject Property is no longer valid and consequently, this matter

ought to be dismissed as the Subject Property no longer exists under that title.

6.24 From the foregoing, it is clear that the Plaintiff and the Defendants have advanced directly conflicting statements. The Supreme Court in the case of **Attorney General v Kakoma**¹², guided as follows regarding conflicting statements: -

“A court is entitled to make findings of fact where the parties advance directly conflicting stories, and the court must make those findings on the evidence before it and having seen and heard the witnesses giving that evidence.”

6.25 Guided by the foregoing authority and on my analysis of the evidence on Record, I note that the Defendants relied on the testimony of PW2, a Surveyor appointed by the Plaintiff to verify the beacons of the Subject Property, who by his Report and testimony stated that the Subject Property was consolidated with other pieces of land in the area and was subsequently subdivided leaving the Subject Property forming part of the remaining extent. In cross examination, PW2 stated that new Certificates of Title do issue following a consolidation and subsequent subdivision of land.

6.26 On my analysis of the Defendants’ allegation and the testimony of PW2, I find that no cogent evidence has been led to sufficiently demonstrate that the Subject Property

was consolidated with other pieces of land in the area and was subsequently subdivided leaving the Subject Property forming part of the remaining extent.

6.27 In my view, to show that the Subject Property had been consolidated, subdivided and now formed part of the remaining extent, the Defendants or the Surveyor ought to have produced evidence of the said consolidation and subdivision such as the source documents from which the Surveyor made such a determination, and the new survey diagrams from the office of the Surveyor General.

6.28 Further, from my analysis of the documents on pages 18 and 19 of the Supplementary Bundle of Documents, depicting a map showing measured ground distances and another map depicting the General Plan of the Subject Property, I note that both refer to Farm No. 1629, the Subject Property herein. Therefore, in the absence of convincing evidence to the contrary, I am of the view that the Certificate of Title issued in relation to the Subject Property is still effective and shall be considered in the determination of this action. Consequently, the Defendants' claim that the Subject Property was consolidated, then subdivided and now forms part of the remaining extent, is dismissed.

6.29 I now turn to consider the fourth legal issue of whether the Defendants have proved that they acquired a right to the

Subject Property by way of customary tenure and consequently, are entitled to an Order of the reliefs sought in their Counter-Claim. These reliefs sought include an Order for cancellation of the Certificate of Title, for fraud and illegality or otherwise for having been issued by mistake.

6.30 The Defendants contend that their right to the portion of the Subject Property on which they reside is derived from customary tenure. The Defendants further allege that they and their ancestors have lived continuously on the Subject Property since the 1800's through to the time of the Defendants.

6.31 It is trite that land in Zambia is held by the President on behalf of the people of Zambia and is administered by the Commissioner of Lands. This is state land for which a Certificate of Title will be issued to prove title and ownership thereto. The other type of land is one held under customary tenure.

6.32 The learned author Frederick S. Mudenda, in his book, ***Land law in Zambia: Cases and Materials***¹, stated at ***page 12, paragraph 1.2.4*** that: -

“The law that existed in Zambia before the advent of colonialism was the (unwritten) indigenous law of the tribes. This is generally referred to as customary. ...As regards land law, customary law as a source of law still plays a vital role in the settlement of land disputes that

may arise under land held under customary tenure.”

(Court’s emphasis)

6.33 Additionally, ***The Lands Act***⁵ recognises customary land tenure in a number of provisions. **Section 7** of ***The Lands Act***⁵ provides as follows: -

“Notwithstanding subsection (2) of section thirty-two but subject to section nine, every piece of land in a customary area which immediately before the commencement of this Act was vested in or held by any person under customary tenure shall not be so construed as to infringe any customary right enjoyed by that person before the commencement of this Act

(2) Notwithstanding subsection thirty-two, the rights and privileges of any person to hold land under customary tenure shall be recognised and any such holding under the customary law applicable to the area in which a person has settled or intends to settle except for a right or obligation which may arise under any other law.” *(Court’s emphasis)*

6.34 From the foregoing, it is obvious that conferring of rights on customary land rests on the traditional leadership of the area in which such customary land is situate. Therefore, for the Defendants to succeed in their claim to the portion of the Subject Property on which they reside, they must demonstrate that their right to the said land is derived from customary tenure.

- 6.35 To demonstrate that their right to the portion of the Subject Property is derived from customary tenure, the Defendants stated that they were subjects of Chief Chooma or Singani and their ancestors had been in continuous occupation of the Subject Property from as far back as the late 1800's.
- 6.36 At trial, DW1 stated that the Subject Property contains the graves of their ancestors who died between 1920 and 2017, from whom the Defendants derived their customary tenure. He also alluded to the stone made grain grinding machines, the mango trees grown before the Subject Property was surveyed and before the Certificate of Title was issued in respect of the Subject Property. The Defendants also produced images allegedly depicting, a grave site, mango trees and stone grinding machines in their Bundle of Documents.
- 6.37 On my analysis of the Defendants' evidence in this regard, I find that the Defendants have not led sufficient evidence from which this Court can determine that the portion of the Subject Property on which they reside is land that is held under customary tenure. In my view, merely stating that the Subject Property was continually held by the Defendants' ancestors and was passed on to them without leading further evidence to substantiate the assertion does not prove that the portion of the Subject Property that they occupy is held under customary tenure.

6.38 Further, the Defendants have not led evidence to demonstrate that they are indeed the subjects of Chief Singani or Chooma and that the portion of the Subject Property on which they reside forms part of Chief Singani's or Chooma's Chiefdom.

6.39 I note further, that Defendants have not led any evidence to support their claim for the cancellation of the title of the Subject Property on the basis of fraud or mistake as alleged. **Section 34 (1) (c) of *The Lands and Deeds Registry Act*²** provides as follows on the instances in which a Certificate of Title can be cancelled: -

“(1) No action for possession, or other action for the recovery of any land, shall lie or be sustained against the Registered Proprietor holding a Certificate of Title for the estate or interest in respect to which he is registered, except in any of the following cases, that is to say:

(c) the case of a person deprived of any land by fraud, as against the person registered as proprietor of such land through fraud, or against a person deriving otherwise than as a transferee bona fide for value from or through a person so registered through fraud;”

6.40 The import of the foregoing provision was discussed in the case cited by both Counsel for the Parties herein of ***Anti-Corruption Commission v Barnet Development Corporation Limited***⁴ as follows: -

“Under Section 33 of the Lands and Deeds Registry Act, a certificate of title is conclusive evidence of ownership of land by a holder of a certificate of title. However, under section 34 of the same Act, a certificate of title can be challenged and cancelled for fraud or reasons of impropriety in its acquisition.” (Court’s emphasis)

6.41 Further, the Supreme Court in the case of ***Kajimanga vs. Chilemya***¹³ held as follows: -

“1. A Certificate of Title is conclusive evidence of ownership of the property to which it relates. It can only be nullified if fraud in acquisition is proved.

2. An allegation of fraud must not only be clearly and distinctly alleged but it must also be clearly and distinctly proved by evidence. The standard of proving an allegation of fraud is higher than the civil law standard of proof.” (Court’s emphasis)

6.42 Based on the foregoing authorities, as no evidence of fraud, mistake or impropriety in the acquisition of the Certificate of Title has been led by the Defendants, the Certificate of Title produced by the Plaintiff in relation to the Subject Property is not liable for cancellation. Accordingly, I find that the Defendants’ claim that their interest to the portion of the Subject Property on which they reside is derived from customary tenure lacks merit and is accordingly dismissed.

6.43 Consequently, as the Defendants' Counter-Claims stem from the now failed claim of right to the Subject Property, it follows that the Defendants' Counter-Claims consisting of an Order for cancellation of the Certificate of Title for fraud, illegality or mistake; a Declaration that the land occupied by the Defendants herein falls under customary tenure and not statutory tenure; an Order of Injunction restraining the Plaintiff whether by itself or by its servants or agents or otherwise, howsoever, from interfering with, harassing the Defendants, or in any way disposing off any part of the Subject Property herein or otherwise from dealing with the said land, Damages for inconvenience resulting in loss of use of land herein for agricultural activities and Costs, are also dismissed.

6.44 I now turn to consider the final legal issue of whether the Plaintiff has proved that it is entitled to the claims as set out in the Statement of Claim. Having determined that the Defendants have failed to successfully challenge the validity of the Certificate of Title issued to the Plaintiff herein, it follows that the Plaintiff is the registered beneficial owner of the Subject Property.

6.45 The Plaintiff has alleged that the Defendants have been trespassing on the Subject Property by encroaching, entering, damaging and installing pegs on portions of the said Subject Property.

6.46 According to the case of ***Shell and B.P. Zambia Limited v Conidaris and Other***¹⁴, it was held, *inter alia*, that: -

“Trespass to land is an unlawful entry on land in the possession of another.”

6.47 Based on the foregoing authority, in order for the tort of trespass to arise, there must be an unjustifiable interference with the possession of land of another. Accordingly, for the Plaintiff to be awarded the damages it claims, it must prove on a balance of probabilities that the Defendants trespassed and unjustifiably interfered on the Subject Property.

6.48 On my analysis of the evidence on Record, I find that by their own admission, the Defendants have asserted in their Defence that they have been residing on portions of the Subject Property and been installing pegs thereon. Therefore, I am satisfied that the Plaintiff has proved to the required standard that the Defendants have trespassed on the Subject Property by encroaching and installing pegs on the said Subject Property. However, I note that the Plaintiff has not led any evidence to prove that the Defendants have caused any damage to the Subject Property. Therefore, this contention is dismissed.

6.49 Based on the foregoing, I find that the Plaintiff is only entitled to damages for trespass to the Subject Property. The said damages shall be assessed and determined by the

Deputy Registrar. The sum determined shall carry interest at average short term bank deposit rate from the date of the Writ to the date of this Judgment and thereafter, interest will accrue at current Bank of Zambia lending rate up to the date of payment.

6.50 The Order of Injunction entered against the Defendants on 30th June, 2017, is accordingly confirmed.

7. CONCLUSION

- 7.1 In conclusion, the Plaintiff herein has the *locus standi* to commence this action against the Defendants. Accordingly, the Defendants' contention that the Plaintiff did not provide proof of a Board Resolution to commence the proceedings herein lacks merit and is accordingly dismissed.
- 7.2 The Defendants' claim that the Plaintiff's action is statute barred lacks merit and is accordingly dismissed. Further, the Defendants' allegation that this action is statute barred due to the fact that no action was brought by the Plaintiff's predecessor in title to challenge their occupation of the portion of the Subject Property is also dismissed.
- 7.3 The Defendants' claim that the Subject Property was consolidated then subdivided and now forms part of the remaining extent, is dismissed.

- 7.4 The Defendants' claim that their interest to the portion of the Subject Property on which they reside is derived from customary tenure lacks merit and is accordingly dismissed.
- 7.5 As the Defendants' Counter-Claims stem from the now failed claim of right to the Subject Property, it follows that the Defendants' Counter-Claims are dismissed in their entirety.
- 7.6 The Plaintiff is entitled to damages for trespass to the Subject Property. The said damages shall be assessed and determined by the Deputy Registrar. The sum determined shall carry interest at average short term bank deposit rate from the date of the Writ to the date of this Judgment and thereafter, interest will accrue at current Bank of Zambia lending rate up to the date of payment.
- 7.7 The injunction entered against the Defendants on 30th June, 2017, is accordingly confirmed.
- 7.8 Costs are for the Plaintiff, to be taxed in default of agreement. Leave to appeal is granted.

**SIGNED, SEALED AND DELIVERED AT LUSAKA, THIS 8TH DAY
OF NOVEMBER, 2024.**



**P. K. YANGAILO
HIGH COURT JUDGE**