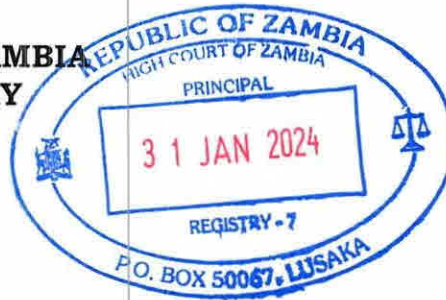


II
IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil jurisdiction)



2018/HP/2031

BETWEEN:

HYBRID POULTRY FARM ZAMBIA LIMITED

PLAINTIFF

AND

THE ATTORNEY GENERAL

1ST DEFENDANT

LUBONA MEAT PRODUCTS LIMITED

2ND DEFENDANT

JAMES KATOBA

3RD DEFENDANT

Before the Hon. Mr. Justice M.D. Bowa on the 31st January 2024

For the Plaintiff: Mr. R Peterson of Chibesakunda and Company

For the 1st Defendant: Mr. N Mwiya Acting Assistant Snr State Advocate

For the 2nd & 3rd Defendant: Mr. C Sianondo Malambo and Company.

JUDGMENT

Cases referred to:

1. *Chona v Evergreen Farms Limited* 1996 /HP/2727 (unreported)
2. *Re Ellenborough Park* (1955) 3 ALL ER 667
3. *William David Carlisle Wise vs. EF Harvey Limited* (1985) Z.R 159
4. *Anderson Kambela Mazoka & 2 others v Patrick Mwanawasa and 2 others* (2005) ZR 138
5. *Becoms Limited v Aon Zambia Limited and Goldman Insurance Limited* (2012) 2 ZR 1
6. *Saeli Rick Kaluluka vs Lusaka City Council and Afdus Transport* (2011) 3 ZR 312

7. *Afropo Zambia Limited v Chate and Others (Appeal 160 of 2013)*
8. *Jere v Shamayawa & AG (1978) ZR 204*
9. *Finsbury Investment Limited and Antonio Ventriglia and Others (selected judgment No 42 of 2016)*
10. *Wilson Masauso Zulu v Avondale Housing Project Limited (1982) ZR 175*
11. *Bachhhaj Nahar vs Nilima Mandal and Another Civil appeal no 5798-5799 of 2008 SCI*
12. *Sarup Gupta (dead) by LRs., vs. Bishun Narain Inter College [AIR 1987 SC 1242]*
13. *Standard Chartered Bank Zambia PLC vs Singogo Appeal number 212 of 2016*

Other Materials:

1. Land Law Cavendish Publishing Limited, London 1994
2. Halsbury's Laws of England 3rd edition volume 3
3. Clarke and Lindsell on Torts 20th edition Sweet and Maxwell 2010 at page 1245 para 19-45

1.0 Background

- 1.0 The Plaintiff Hybrid Poultry farms Limited commenced this action by writ of summons and statement of claim dated 23rd November 2018. The Plaintiff's suit resides in its contention that the 2nd and 3rd Defendants had created an obstruction on a public road preventing the Plaintiff access to its farm situate in the Central Province of the Republic of Zambia.

1.2 The Attorney General is brought into the action on account of the Plaintiff's desire to have title to the affected property redrawn to take into account the claimed public road. The Plaintiff's endorsed claim in the originating process is therefore set out in the following terms.

(a) An injunction to restrain the 2nd and 3rd Defendants by themselves or their servants or agents from restricting or otherwise obstructing the right of way of the Plaintiff their servants or agents or otherwise to farm 3273 and farm Number 1833 across Farm No. 3272 via Kasavassa road.

(b) A declaration that Kasavassa Road is a public road.

(c) An order directing the Defendants to take such steps as may be necessary to produce an amended title to Farm No 3272 Central Province and such amended title shall be based upon a diagram correctly representing the boundaries and beacons of such land taking into consideration the Kasavassa Road.

(d) Any other relief

(e) Costs

1.3 The 2nd and 3rd Defendant filed their defence and a counterclaim dated 6th of December 2018 disputing that the Plaintiff is entitled to the claims sought. In the counterclaim, the 2nd and 3rd Defendants claim for the following.

(a) Damages for trespass.

(b) Damages for mental anguish.

(c) Possession of encroached land

(d) An injunction restraining the Plaintiff whether by its servants or agents or otherwise howsoever from entering or using or from driving or parking any motor vehicle upon farm 3272.

(e) Interest

(f) Costs

1.4 The 1st Defendant was granted leave to enter appearance and file its defence out of time. By its defence the State through the Attorney General contend that Kasavassa road is a public road and therefore any member of the public has the right of access to the said road. The State however dispute there is need to undertake another survey of the property or to produce an amended certificate of title as claimed by the Plaintiff.

1.5 The Plaintiff's reply and Defence to counterclaim was filed into court on 19th of February 2019. The 2nd and 3rd Defendants reply to the defence to the counter claim was filed into court on the 19th July 2019. The matter was referred to mediation with the

consent of the parties. The parties failed to resolve the dispute and the matter was referred back to court for trial.

2.0 **The Trial.**

Trial proceeded on the 22nd of February 2022.

2.1 The Plaintiff's case

2.2 PW1 was Mr. Aaron Banda the Production Controller for the Plaintiff farm. He testified that he had been working for the Plaintiff for 23 years as at the date of his testimony. He explained that Hybrid Poultry farm is a breeding company for chickens that produces day old chicks that are sold on the Zambian market. Further that the day-old chicks are bred at various locations around the country one of which was farm 1833 situated in Central province.

2.3 He testified further that the company embarked on an expansion programme because of a growing demand for day old chicks both in the country and regionally. Therefore, in 2008 the Plaintiff acquired farm 1833 for development to meet the prevailing demand. Upon acquisition of the farm and obtaining

title, the Plaintiff started building poultry houses for the breeding stock. That the farm is in production and currently servicing about 55% of the Zambian market. The excess is exported into East Africa and some parts of Southern Africa. The farm has therefore been operating in this manner since 2008 to date.

2.4 He testified further that the farm is situate in Central province and is accessed via the Kasavassa road being the only access that the Plaintiff uses to reach the farm. He explained that to get to the farm from Lusaka, one has to drive 130 Km along Great North road heading north and take a right turn off the highway. This is the start of the Kasavassa road which he maintained is a public road According to the witness, the maintenance of the road is done by the Kabwe City Council and the Road Development Agency.

2.5 He added that the Plaintiffs then cover 20 Km on the gravel road and take a left turn off Kasavassa road via farm 3272 into its farm 1833. Further that this is the only road that the Plaintiff

are currently using and had been doing so from 2008 translating into 14 years of usage at date of his testimony.

2.6 It was Mr. Banda's further testimony that on 8th of November 2018, the Plaintiff was served a letter by the 2nd Defendant who are the occupiers of farm 3272 with whom the Plaintiff's share a boundary. The letter was signed by the 3rd Defendant Mr. James Katoba and is exhibited at page 16 of the Plaintiff's bundle of documents.

2.7 In that letter, the 2nd Defendant demanded that the Plaintiff should stop using Kasavassa road within 14 days from date of the letter. According to Mr Banda, this demand if met would have an adverse effect on the Plaintiff's business. That the Plaintiff would not be able to send the raw materials used for growing the chickens. This would also mean that the products coming from the farm would not be sold off to the Zambian market or let alone be exported.

2.8 When referred to the Defendant's pleading that suggested that the farm can be accessed through farm 3273 and the back route of farm 1833, his response was this was not practical. Firstly,

because farm 1833 is behind the Plaintiff's farm and there is no public road that can be used. There is further no public road in farm 3273 which means that the 2 alternatives mentioned cannot be used to access the farm.

2.9 In terms of the demand by the 2nd Defendant that the Plaintiff should re-align its boundaries, it was Mr. Banda's testimony that the eastern part of the farm requested to be re-aligned was actually done. He testified that the verification was done by the Survey department in 2018 in the presence of the Plaintiff's representatives and other parties as per paragraph 15 of the 2nd and 3rd Defendant's defence. That this verification actually showed the Plaintiff had encroached on farm 3272. He added that the Plaintiff acknowledged that it needed to position the beacons where they were supposed to be.

2.10 When referred to the 1st Defendant's supplementary bundle, Mr. Banda testified that he was able to identify farms 3272, 3273 and 1833 from the map shown to him. He testified that farm 3272 is owned by the 3rd Defendant, whilst farms 1833 and 3273 are owned by Hybrid Poultry as at 2011. When referred to

page 4 of the 2nd and 3rd Defendant's bundle, he testified that the access road to farm 1833 runs along the boundary fence marked A-C on the exhibited diagram.

2.11 He disputed the assertion by the 2nd and 3rd Defendant in paragraph 16 of their defence that the Plaintiff was not threatened with the obstruction of the road. That the letter to the Plaintiff he referred to earlier was proof of such threat.

2.12 He further did not agree that Kasavassa road is not a public road. He explained that when the Plaintiff obtained title in 2008, the said road was the access road that they were pointed to for public usage. He further disputed the suggestion in paragraph 19 of the 2nd and 3rd Defendant's defence that the present suit was triggered by the 3rd Defendant's refusal to sanction a land swap that the Plaintiff desired.

2.13 When cross examined by counsel for the 1st Defendant, Mr. Banda confirmed that he did testify that there was a boundary verification done in 2018. He confirmed that there was no re survey done on farm 3272 but merely a boundary verification exercise.

2.14 Cross examined by counsel for the 2nd and 3rd Defendant, Mr. Banda testified that personnel from the Plaintiff company attended the verification. He confirmed that in paragraph 7 of the reply to the 2nd and 3rd Defence and counterclaim, was an averment from the Plaintiff that it denied being present at the verification exercise undertaken. He agreed that this was a different position than his testimony in court.

2.15 When referred to the affidavit in reply to the affidavit in opposition for the application for an injunction, the witness confirmed that he was the one that swore the affidavit. He agreed as a correct position the averment in the affidavit that there is a rail line called Kasavassa siding and along it is the Kasavassa road used by road users. Further that the 2 farms have to cross the rail line to get to Kasavassa road. He confirmed the positioning of Kasavassa road, the rail line and the boundaries of the 3 farms represented on page 13 (a) of the 2nd and 3rd Defendants bundle of documents as being correct.

2.16 He further accepted that he did not have another map to show a different position. He agreed that according to the map,

Kasavassa road did not pass through farm 3272, the farm owned by the 3rd Defendant. Pressed further, he agreed that he recalled testifying that Kasavassa road was from points A-C on diagram represented on page 4 of the 2nd and 3rd Defendants bundle of documents. However he agreed that according to the earlier map referred to on page 13 of the same bundle, there is no indication of Kasavassa road passing through farm 3272 to reach farm 1833 .

2.17 Questioned further, it was Mr. Banda's testimony that the Plaintiff does not use farm 3273 to access farm 1833 but acknowledged that it is the Plaintiff's farm.

2.18 When referred to page 30 of the 2nd and 3rd Defendants bundle, Mr. Banda acknowledged that he was familiar with the area depicted in the captured image. He agreed that there are houses after the gate. Further that the gate is an entrance for farm 3272 which belongs to the 3rd Defendant. He stated that it was correct that to access farm 1833, the Plaintiff does drive through the 3rd Defendant's farm. He further agreed that the Plaintiff had

been using this farm to access its farm. Further that this was what the 3rd Defendant had been protesting.

2.19 Pressed further, Mr. Banda agreed that by placing a gate where it has been positioned, the Plaintiffs were restricting entry into Hybrid Poultry farm because it is private property. He agreed that the 3rd Defendants farm was equally a private farm and in that sense was also entitled to restrict entry into his property. He agreed that the boundary fence is not along the road but away from it. He could not recall when the boundary exercise was done. He further testified that he did not recall Mr. Katoba protesting against the verification as he did not interact with him over this issue.

2.20 Questioned further and referred to page 38 of the 2nd and 3rd Defendants bundle of documents, the witness confirmed that there is a poster in the picture with an arrow pointing to the right and another for a farm entrance to the left. He testified that these are farm entrances to the Hybrid farm and staff houses. He agreed that this poster was inside the 3rd

Defendants farm. He agreed that the roads depicted are utilized by the Plaintiff.

2.21 Cross examined further, it was Mr. Banda's testimony that he was unable to confirm whether or not the 3rd Defendant had ever permitted the Plaintiff to use his land. He agreed that the 3rd Defendant did write a letter stating he was going to close the roads. The Plaintiff did not respond to the letter.

2.23 In further cross examination the witness testified that he had no recollection of a resurvey being done. He did not agree that it was because of this that the Kasavassa road did not end up falling into the 3rd Defendants farm.

2.24 When referred to the affidavit in support of interim injunction that he confirmed was sworn by the Plaintiff's director, Mr Banda acknowledged that the director averred that Katoba farm was resurveyed and a new diagram created which saw the kasavassa road being left out from the survey. He further agreed that the Plaintiff had wanted to buy the 3rd Defendant's farm but that the parties did not agree to a sale.

2.25 The 1st Defendant's case

2.26 DW1 was Kabelenga Favoured a Geometrics Engineer at the Surveyor General Office. At date of his testimony he had worked for the department for 10 years. He testified that he was in charge of quality control and numbering of properties in the country. His office also ensures that all the surveying records and documents lodged with the Surveyor General are examined before approval is made.

2.27 It was his evidence that the issue in the present matter had been referred to his office. After checking the records, he was in a position to confirm that the office of the Surveyor General was engaged through the provincial office in Kabwe to verify the boundaries of farm 3272 situate in Central Province. The verification was carried out using the approved survey documents being survey record number 119/64. He explained that this was because the properties were surveyed in 1964.

2.28 He testified further that 3 properties namely 3272, 3273 and plot 490/M were surveyed. That pages 1 and 2 of the 1st Defendants supplementary bundle shows the general plan on which these properties were surveyed in 1964. It was his further

testimony that in August 2018, a request was made to the 1st Defendant through the Surveyor General's Kabwe office to have the property boundaries for the farm verified.

2.29 He confirmed that the exercise was carried out and boundaries were verified and shown to the owners of farm 3272 and representatives of the owners of farms 961 and 1833. A survey report was issued and is on pages 1 and 2 of the 1st Defendant's bundle of documents. He confirmed that the boundary beacons were located. Some were found intact whilst others had been disturbed and were replaced.

2.30 It was also established that there was an existing boundary which created an encroachment on the same farm. The owners of the farm were notified of the encroachment by copies of the same letter.

2.31 In relation to the 1964 survey map, it was DW1's testimony that the property were surveyed but the access roads to the properties were not provided. He explained that there were a number of properties formatted in the same manner around

the country. Title deeds were then issued to people that proceeded to develop their land.

2.32 It was his further testimony, that in paragraph 6 of its defence the 1st Defendant states that the main kasavassa road passes through peoples farms and is a public road. Further that any member of the public has the right of access to the road. He explained that kasavassa road is one of the roads that branches off from the Great North Road and passes through private property.

2.33 It was his evidence that kasavassa road passes through farms 1457, 3245 and crosses property 490/M . It was his further testimony that the only way to have access to farm 3272 and 3273 is by passing through property 490/M and this is done by the use of existing roads. He testified that as a part of the report prepared, the office had attached a google earth image which is able to help to point out the features as they are on the ground. These features include the existing roads that he alluded to.

2.34 He testified that on page 1 of the 1st Defendant's supplementary bundle of documents is the map depicting the existing

kasavassa road which runs from North to South. Another existing road visible is the one that runs from points marked A to C and also passing in farm 1833.

2.35 He added that in paragraph 8 of its defence, the State avers that there is no need to undertake another survey as suggested in paragraph 21 of the statement of claim as the boundaries of the properties have never been altered since 1964.

2.36 He explained that there are situations in which titles may be amended but there was no such need in the present case. Further that this is also because the survey that was done was a verification and it had no effect on the boundaries. He stated that the intention when a verification is done is not to create new boundaries. That new boundaries can only be created if the Surveyor General had instructed to carry out a resurvey.

2.37 When cross examined by counsel for the 2nd and 3rd Defendant, DW1 testified that it was correct to state that as far as Surveyor General was concerned, the surveys remain as they are. It was his testimony that kasavassa road does not pass through farm 3272.

2.38 He confirmed that on page 11 and 12 of the 2nd and 3rd Defendants bundle of documents are print outs from Ministry of Lands for farm L/490. According to the print out, it belonged to Rhodesia Railways Limited. He explained that farm 490/M shares a boundary with the other properties that he mentioned. He could not confirm whether the 2 roads shown in the 2nd and 3rd Defendant's bundle of documents is reflected in the google map in the 1st Defendants supplementary bundle.

2.39 He testified that there is no depiction of a road reserve on the diagram for farm 3273 on page 8 of the 1st Defendants bundle of documents. He agreed that farms 3272, and 3273 are captured on page 2 of the 1st Defendant's supplementary bundle of documents. Further that they are bordered by farm 1833. He agreed that it was possible for farm 1833 to be accessed from farm 3273 if the owner permits it.

2.40 When referred to page 20 of the 2nd and 3rd Defendants bundle of documents, he testified that the Lands print out exhibited was for property 1833. Entry 41 shows that the property belongs to Hybrid Poultry farms. Further that the certificate of

title on page 1 of the Plaintiff's bundle for farm 3273 shows that the owners of the farm are Hybrid Poultry farms Zambia Ltd. He therefore agreed based on the documents shown to him that both farm 1833 and 3273 are owned by Hybrid Poultry farms. He agreed that he had stated earlier that it was possible for farm 1833 to be accessed from 3273 if the owner permits it.

2.41 When cross examined by the Plaintiff's advocate he confirmed that on page 22 of the 2nd and 3rd Defendants bundle is a cadastral boundary verification report for farm F/3272. He agreed that he did state that the last paragraph confirmed the encroachment of farm 1833 into 3272. That the encroachment was in respect of a boundary at points B.C.

2.42 He agreed that farms 3272, 3273 and 1833 all existed and had been surveyed in 1964. He confirmed that from the data plan of 1964 is a layout of farms 3272, 3273 and lot 490/M. He testified further that the properties were surveyed without road access and surrounded by already existing farms which included farms 3245, 1457, farm 961, 1831 and farm 1833. He stated that there are a number of other properties which were surveyed

without road access that depended on existing access roads. In the present case, that as indicated in the 1st Defendant's report one of the existing access roads passes on the boundary between farms 961, farm 1831 and farm 3272 which goes all the way to farm 1833.

2.43. The 2nd and 3rd Defendants case

2.44 DW2 was James Katoba the 3rd Defendant and director of Lubona meat products, the 2nd Defendant herein. He testified that he purchased farm 3272 in early 2018 from the Kateya family. 2 months after he acquired the property, he received a call from Mr. Mwelwa Chibesakunda of Chibesakunda and Associates. Mr. Chibesakunda requested to meet with him. He expressed interest to purchase the farm from him.

2.45 Mr. Katoba told him the property was not for sale but that he could consider selling as he was a businessman. An offer was made of K300,000 which he declined to accept as he had purchased the property for K600,000. Mr. Chibesakunda thought that sum was too high and dared DW2 to prove he had paid that amount and that he would then be willing to offer

K1000,000. Mr. Katoba felt belittled for being asked to prove the purchase price he had paid for the farm. After 2 days, He sent Mr. Chibesakunda a text telling him he was not interested in the sale of the farm.

2.46 After a while, he received a call from the director of the Plaintiff company a Mr. Phiri. Mr Phiri stated he called to inquire whether his land was for sale. His response was that he could consider selling if he received a good offer. This was followed by an exchange of emails over a potential sale. Proposals for a land swap and top up of cash of K1000,000 were made. The land offer was for a plot in the industrial area near Zambia bottlers.

2.47 He considered that property closet to Lusaka might be the appropriate one for his business. However after viewing the property, Mr Katoba believed the plot did not suit his plans because it was in the middle of a housing area. He had wanted to set up chicken houses and start processing chicken products. He told the Plaintiff through Mr. Phiri that the plots offered were not convenient. He counter proposed that they pay

him 8 million kwacha or find him land in Chisamba with the same acreage as the one they wanted to buy from him.

2.48 Mr. Phiri then called him and in what Mr. Katoba considered was a disrespectful conversation that followed stated he did not think his proposed investment made sense. He further suggested that the Plaintiff was not going to allow him to conduct his proposed business on his farm because their biggest hatchery was next to his farm.

2.49 His response to Mr. Phiri was that he had acquired the land legitimately and the Plaintiff could not question how he used it. later, Mr. Katoba wrote a letter to Hybrid asking the Plaintiff to stop trespassing on his farm and to move their fence which was encroaching on his land. No response was offered.

2.50 He engaged surveyors from the Surveyor General's Office to carry out a boundary verification. This was done in the presence of representatives of farm 961, farm 1861, farm 1833 and 3273. Hybrid poultry was represented by a Mr. Ian and the farm owners for the other farms. The boundary verification showed that the eastern side bordering 1833 had been encroached into.

2.51 The exercise also confirmed that there was no marking indicating a road in his farm .On page 22 of the 2nd and 3rd Defendant's bundle was confirmation that the exercise was undertaken in August 2018. This was therefore before he wrote the letter to Hybrid poultry farm dated 8th November 2018.

2.52 He later received a call from Mr. Banda from the Plaintiff company stating he had some documents he wished to pass on to him. Mr. Banda turned up at his office in the company of lawyers from Chibesakunda and Company and served him with court documents that he refused to sign for.

2.53 It was his evidence in response to the averment in paragraph 15 of the statement of claim, that farm 3272 was never resurveyed. That what he requested from the Kabwe Surveyor General's Office was boundary verification. It was his further evidence that Kasavassa road does not fall within his farm. That it lies after the rail crossing and starts from Great North Road and goes up to Chibombo. He stated that it is the main road being used by the entire population. He testified further that farms 961,3272 and 3273 has the railway line running in front

of the farms. That it is after the railway that kasavassa road is positioned and diagram 13(a) of the 2nd and 3rd Defendant's bundle of documents confirms this. He added that it is evident from the diagram that the road does not get into any of the farms 961,3272 and 3273.

2.54 His reaction to the suggestion that he has closed kasavassa road was that he had done no such thing. He stated that his farm was on the other side of the road. He could not possibly close a Gazzetted road leading to Chisamba and one that did not lead into his farm.

2.55 He testified that he wrote the letter on page 16 of the Plaintiff's bundle of documents following the advice he received from the Surveyor Generals office. He was therefore informing the Plaintiff he wanted to fence his farm following the revelation of the encroachment on the eastern side and secondly, to inform them to stop trespassing in his farm.

2.56 He referred the court to pages 29-39 of the Defendant's bundle of documents showing roads inside his farm leading to the

workers estates. He testified that on pages 30 is a picture showing the housing estate for workers at Hybrid.

2.57 He explained that the workers have to pass through his farm from their housing estate to get to work through the gate at page 29. That they also use farm 3272 to access 3273 to dispose of mortalities. He added that on page 38 is a picture of the roads. One leads to the gate on page 29 and the other to the gate on page 30. Further that a poster was erected to show where the 2 roads intersect. He repeated that these roads are in his farm 3272. It was therefore not true as allegedly by the Plaintiff in paragraph 14 of the defence to counterclaim that the roads do not pass through his farm. It was his further evidence that the realignment of the boundaries has not been done .

2.58 DW2 testified further that farm 3273 is owned by the Plaintiff. That according to diagram 13 (a) farms 1833,1831,3272 are neighbours. He testified that farm 1833 can easily be accessed by passing through 3272 or 3273 and 1831. He testified that he had not permitted the Plaintiff to use his farm.

2.59 According to the him, the options open to access 1833 are via 1831 or 3273 along the rail siding. He added that on page 4 of the Defendant's bundle is a diagram of his farm. That it does not show any markings of a road in the farm and depicts how the farm sits with others in the area.

2.60 In cross examination by learned counsel for the 1st Defendant he agreed that according to the testimony of DW1, farms 3273, 3272 and 1833 were surveyed without access roads. Further that the witness also testified that the only access road to 1833 is the one bordering the area marked A,B,C running through his farm as presented in the 1st Defendant's supplementary bundle of documents. He agreed that the road does not go beyond farm 1833. He denied having any knowledge that the road was meant to be accessed by other farmers before he bought the land.

2.61 When cross examined by learned counsel for the Plaintiff, he agreed that there is nothing in the photograph on page 37 that confirms the person in the image is a Hybrid Poultry Farm employee. He agreed that there are no co-ordinates on the

diagram he referred to on page 4 of the 2nd and 3rd Defendants' bundle of documents. He further agreed there was nothing in the photographs he relied on to confirm that the images depicted Hybrid Poultry farm houses.

2.62 He confirmed that he bought the property in January 2018 and that he did want to close the road in issue in November 2018. He agreed that in between January and November 2018, the Defendant had been using the road and had done so even before then. He did not agree that farm 1833 can only be accessed by passing through his farm. He agreed that the Surveyor General's report on page 22 of the 2nd and 3rd Defendant's Bundle of documents did not say anything about a road.

2.63 Questioned further he agreed that there were no coordinates shown on the photos before court to confirm that the 2 roads fall in his farm. He accepted that he had made a claim for mental anguish in his counterclaim. Further that he had not presented any document from a therapist to confirm this condition.

2.64 In answer to a point of clarification raised by the court, it was his testimony that he did not know how long the road depicted as running along points A-C in the 1st Defendant's supplementary bundle of documents had been in existence.

2.65 In re-examination, he testified that he could tell the person in the photograph at page 37 of the 2nd and 3rd Defendants bundle of documents is the Plaintiff's employee from the fencing in the image.

3.0 Submissions

3.1 The Plaintiffs final submissions were filed into court on the 17th February 2022. It was the Plaintiff's submission that the rights and obligations arising under land law are unique in their nature and therefore can apply to a particular piece of property regardless of when the property was acquired or who owns it. Reliance for this proposition was placed on the learned author of "**Land Law**" **Cavendish Publishing Limited, London 1994** who at page 2 observes:

"Land Law rights even if created by a contract are capable of affecting other people, not simply the parties to the contract. In

other words, “Land Law rights are capable of attaching to the land itself so that any person who comes into ownership or possession of the land may be entitled to enjoy the rights it gives or be subject to the obligations it imposes. This is the ‘proprietary’ nature of Land Law rights and it is completely different from the merely personal’ obligations which an ordinary contractual relationship establishes. In fact one way of describing what land law is about is to say that it is the study of the creation and operation of proprietary rights, being rights which become part of the land and are not personal to the parties that created them.”

3.2 Reference was made to the case of **Chona v Evergreen Farms Limited** in which the court held:

“A legal right will bind every transferee of the land over which it exists and as such the person to whom the legal right is entitled to may exercise it against any near owner of the land.”

3.3 It was submitted in light of the above, that attached to the ownership of Farm 3272 and 1833 are some rights and obligations that existed before the Plaintiff and Defendant acquired these properties and that the rights will still exist after they dispose of the properties. It was submitted as such that

among the rights that can be attached to a piece of land is an easement.

3.4 It was submitted that the evidence led before the court confirms the right of way to access farm 1833 is via an access road that runs through the boundary of Farm 3272. It was submitted that the court should grant the right of way by way of easement. Reliance was placed on the case of **Re Ellenborough Park**² that considered the criteria for determining whether an alleged right is capable of amounting to an easement. It was held that the following characteristics must exist.

(a) There must be a dominant and servient tenement

(b) The dominant and servant tenement must not be owned and occupied by the same person.

(c) The easement must accommodate the dominant tenement, and

(d) The easement must be capable of forming the subject of the grant.

3.5 It was argued that the all the above conditions exist in the present case. Reference was made to the case of Chona v Evergreen Farm Limited (supra) argued to be on all fours with the matter in casu wherein the court was able to accept that

the Plaintiff acquired an easement by prescription at common law and granted a right of way it established existed through the Defendant's farm.

3.6 It was submitted that the evidence on record will show that as early as 1964 the boundary marked A-C on page 8 of the 1st Defendant's bundle and boundary marked A-C on page 1 of the 1st Defendant's supplementary bundle of documents has always been an access road. Further that the occupants of farm 1833 had always used the road to access the main road even before the Plaintiff acquired it.

3.7 It was argued further that in terms of the Land Survey Act, the Surveyor General's office have the mandate to carry out land surveys, verifications, issue diagrams and resolve all issues relating to boundaries and positioning of property. It was submitted that in the case at hand, the Surveyor General did conduct a boundary verification on farm 3272 which revealed only that there was an encroachment as shown on page 1 of the 1st Defendant's bundle.

3.8 Reference was made to the evidence of DW1 who testified that there are a lot of properties in the country whose title deeds do not contain access road. Further that such properties rely on the already existing roads or the boundaries of the properties as access roads.

3.9 The Plaintiff suggested that the question for determination before the court is whether there is need to re-align the boundaries of farm 3272. It was submitted that the Plaintiff's position is that there was no need to realign the boundary for Kasavassa road. However, that there is such need to realign farm 3272 in order to accommodate the access road that passes through the boundary of the said farm in order to avoid future disputes.

3.10 The Plaintiff accordingly prayed that the court grants the order directing that the boundaries on Farm 3272 be re-aligned in order to consider the access road. In addition, that as there is no dispute between the parties that Kasavassa road is a public road, the court should declare it as such.

3.11 The 2nd and 3rd Defendant filed in their submissions on the 25th February 2022. Reliance was placed on the case of **William David Carlisle Wise vs E.F Harvey Limited**³ in which it was held that “*pleadings serve the useful purpose of defining the issues of fact and of law to be decided. They give each party distinct notice of the case intended to be set up by the other; and they provide a brief summary of each party’s case from which the nature of claim and defence may be easily apprehended.*”

3.12 To make the point on the of the binding nature of pleadings, reliance was placed on the case of **Anderson Kambela Mazoka & 2 others v Patrick Mwanawasa and 2 others**⁴ in which the Supreme Court held 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 closed, the parties are bound by their pleadings and the court has to take them as such.”

3.13 Reference was also made to the case of **Becoms Limited v Aon Zambia Limited and Goldman Insurance Limited**⁵ in which the Supreme Court reasoned that:

“It is settled practice that in civil matters, parties are bound by their pleadings.

3.14 Based on the above, the 2nd and 3rd Defendants submit that there is no doubt that the Plaintiffs case as pleaded related to the alleged annexing of the Kasavassa road as part of the 3rd Defendants farm. That the court in determining the matter should have total regard to the pleadings that related to the Kasavassa road and nothing more.

3.15 It was argued further that the Plaintiff is not at liberty to depart from its pleadings and the reliefs sought from court. Thus that the Plaintiff cannot through its submissions vary its pleadings to suit its case by stating than an access road is the road in question. It was submitted that the evidence on record show that kasavassa road being a public road is totally outside Farm 3272 belonging to the 3rd Defendant. That on this account alone, the matter should be dismissed.

3.16 It was argued further that there is no case which the Plaintiff is presenting before the court as kasavassa road neither passes through the farm used and owned by the 2nd and 3rd Defendants

nor has the Plaintiff been prevented from or threatened to stop using the said road. That the issue in the submission of the access road being used “from time memorial” as stated in the submissions, was a matter of concern to the Defendants as it was a departure from the pleadings with no amendment having been done. That the right of easement did not arise in the Plaintiff’s pleadings at all.

3.17 Further that in its defence to counterclaim the Plaintiff in paragraph 7 denies that the access claimed runs through the katoba farm. Therefore, that there is no way the issue can arise in the matter.

3.18 It was submitted that the above notwithstanding, in the case of **Saeli Rick Kaluluka vs Lusaka City Council and Afdub Transport⁶**, the court pronounced itself on the claim for a right of way through an easement as follows:

“It is now settled that four essentials must be satisfied before there can be an easement. First there must be dominant tenement, and servient tenement. Third, the dominant tenement and severment tenement must not be owned by the same person. Fourth, the

easement must be capable of forming the subject matter of a grant...all easements

“lie in grant.” That is, no right can exist as an easement, unless it could have been granted by deed... section 2 of the Prescription Act of 1832, which applies in this country by virtue of the English Law (extent of Application) Act provides that an easement (other than that of light) can be claimed where it is actually enjoyed without interruption for a period of at least twenty years.”

3.18 It was submitted that contrary to the contention that the Plaintiff had been using the land for 14 years, the evidence on record shows that the Plaintiff's farm was acquired on 22nd February 2008. That the action was however commenced on 23rd November 2018. Consequently that the Plaintiff had only owned the farm for 10 years which is far less the required period to acquire an easement as stated in the case referred to above. Further that the use of the 3rd Defendants land does not qualify as an easement as the right was never given to the Plaintiff.

3.19 The Defendants further distinguish the cited *Mark Chona* case (supra) from the present matter arguing that in the former there was witness testimony to the effect that people had been

passing on the road subject to the dispute for 26 years when the Defendants arrived at the scene. That it was on the basis of the over 20 year usage that the court arrived at its finding. However that in the present case, the Plaintiffs claims 14 years of usage shy of the 20 required for one to claim a right.

3.20 It was argued further that the assertion that the previous owners always used the boundary marked A-C as an access road arose for the first time in submissions. In addition that there was no evidence on record to the effect that the access road existed before the Plaintiff acquired the property. That no evidence was led from the previous owners and therefore the court cannot be called to assume that the right of easement existed previously.

3.21 It was submitted as established and beyond question that the Plaintiff has been using the 3rd Defendant's land to access farm 1833. In addition, that the Plaintiff has failed to prove it has any lawful reason to access its farm using the 3rd Defendant's land. It therefore follows that the Plaintiff continues to trespass on farm 3272.

3.22 Conversely that the 2nd and 3rd Defendants have proved that the farm can be accessed via farm 3273 which is owned by the Plaintiff itself and that there is a gate leading to that farm. It was submitted further that as one of the orders sought was to compel the Surveyor General to perform an act, the action should have been commenced by Judicial Review rendering the originating process conceptually flawed.

3.23 The learned author of **Halsbury's Laws of England 3rd edition volume 3 at page 739 and para 1205** was relied on to cement the position on trespass. The passage reads:

"Every unlawful entry by one person on land in possession of another is trespass for which an action lies although no actual damage is done. A person trespasses upon land if he wrongfully sets foot on, rides or drives over it, or takes possession or pulls down or destroys anything permanently fixed."

3.24 It was the Defendant's contention that having established that the entry on the 2nd and 3rd Defendant's land was not lawful, an action for trespass was properly before the court. Further that as it has been established that the Plaintiff continues to trespass on the 3rd Defendant's property and encroached on his

land, an order for an injunction prohibiting the persistence of this action should be granted. The Plaintiff also submitted that the 3rd Defendant is entitled to damages for mental anguish arising from the deprivation of peace of mind. The 2nd and 3rd Defendants invite the court to conclude that this case was really about a powerful corporation trying to arm twist a private citizen that had refused to sell his land to it.

3.25 The 1st Defendant in its submissions dated 29th of March 2022 more or less supported the position advanced by the 2nd and 3rd Defendant arguing that the issue of an easement was not pleaded and as such that the Plaintiff's case should be dismissed.

3.26. In its submissions in reply dated 17th March 2022, the Plaintiff maintains that it had adhered to the rules by limiting itself to what was pleaded in the statement of claim and defence to counterclaim. That any evidence that was led during the trial and falls outside the pleadings that was not objected to should therefore form part of the evidence before this court. The court

was referred to the case of **Afrope Zambia Limited v Chate and Others**⁷ where it was held that:

“Where a party refers to evidence not pleaded, the proper course is for the other party to object immediately to this reference, there upon it would be the duty of the court to decide whether or not it is necessary to grant an adjournment to the party and whether to allow an amendment of the pleadings subject to an order for costs against the Defendant.”

3.27 Further reliance was placed on **Jere v Shamayawa & AG**⁸ in which the Supreme court held:

“Where the defence not pleaded is led in by evidence and not objected to by the other side, the court is not precluded from considering it.”

3.28 It was argued that the 2nd and 3rd Defendant did not object to any evidence that was tendered on behalf of the Plaintiff so the court is not precluded from using it. It was suggested that the 2nd and 3rd Defendant actually raised the issue argued in the submissions and the court overruled the objection. That the Defendants cannot therefore in their submissions raise matter overruled in court. That what the 2nd and 3rd Defendant are trying to achieve is for the court to disregard the evidence led

by PW1 and DW1 pertaining to the access road as it is detrimental to its case.

3.29 Section 13 of the High Court rules and the case of **Finsbury Investment Limited and Antonio Ventriglia and Others**⁹ was cited to argue that all actions in the High Court are judge driven and that in order for the court to determine all issues in dispute, it ought to consider the cases presented by all the parties through their pleadings, bundles of documents and the evidence presented at trial. It was argued that this is a proper case in which the court can apply section 13 of the High Court Act to fully determine the matter.

3.30 That the evidence led before the court shows that in as much as the pleadings refer to the kasavassa road, the dispute extends to the access road that leads to farm 1833 and as such that this issue should be addressed. A failure to do so would leave the Plaintiff with no access route to its property. The Plaintiff buttressed its submission with the case of **Wilson Masauso Zulu v Avondale Housing Project Limited**¹⁰ wherein the Supreme Court held that:

“The trial court has the duty to adjudicate upon every aspect of the suit between the parties so that every matter in controversy is determined in finality. A decision which because of uncertainty or want of finality leaves the doors open for further litigation over the same issues between the same parties can and should be avoided.”

3.31 The Plaintiff urged the court to fully consider all matter in dispute and in controversy between the parties to avoid leaving the doors open for further litigation and reiterated its prayer for the grant of the reliefs sought.

4.0 **Court’s determination**

4.1 I have carefully considered the evidence before me and the parties respective submissions. The evidence before the court was lengthy but in my estimation, really centered on 2 underlying questions notably.

- (i) What is the status of the Kasavassa road ?
- (ii) Whether there is a legal basis to consider any claim relating to the access road off the Kasavassa road leading to the Plaintiff’s farm 1833 through farm 3272.

4.2 I formulate these questions for determination based on the direction that this case took as it unfolded. There is no question that the Plaintiff's claims centered on the Kasavassa road. By its pleadings and flow of evidence led, the Plaintiff believed that the kasavassa road off Great North road is a public road and presented to be the access road that the Plaintiff uses to reach its farm 1833. The Plaintiff contended that the road runs adjacent to and does not fall in the Katoba farm. However that a resurvey carried out by the Surveyor General resulted in the road falling in the redefined boundaries of the Katoba farm 3272.

4.3 The 2nd and 3rd Defendant's demand and maneuvers to prevent the Plaintiff from using the road led to the suit by which the Plaintiff claims for amongst other things, a declaration that the Kasavassa road is a public road and consequently that they be allowed unrestricted use of the road and access to their farm.

4.5 However during the trial and presentation of the Defendant's case, it became apparent that the Kasavassa road is indeed a public road but that it does not pass through the Defendant's

farm 3272 at all. The 2nd and 3rd Defendant's bundle of documents and exhibit 13(a) conclusively show that the kasavassa road is on the side of kasavassa siding rail line and falls outside farm 3272. Further that one actually has to cross the rail line from the said road to get into 3272. DW1 a surveyor from the Ministry of Lands confirms that this a public road and the 2nd and 3rd Defendant do not dispute this fact.

4.6 The Plaintiff in its final submissions in paragraph 40 submit the following:

"... My Lord it is the Plaintiff's position that with regards to the kasavassa road, there is no need to re-align the boundaries with regards to farm 3272. However, there is need to re-align the boundaries of farm 3272 in order to accommodate the access road that passes through the boundary of farm 3272 and in order to avoid future disputes pertaining to the same. We therefore humbly submit that the Honourable court grants an order directing that the boundaries on farm 3272 be re-aligned in order to consider the access road."

4.7 This submission I find, is a clear acknowledgment that the kasavassa road does not as initially presented, fall in farm 3272 which was the basis for the prayer for re-alignment of the boundaries of farm 3272 in the first place. It is a statement that the Kasavassa road is not an issue at all in this case.

4.8 The Plaintiff then turns its attention to the access road off kasavassa road that it uses to access their farm. They argue through their submission that farm 3272 must be realigned to take into account this access road and that the court should also grant it an easement granting the right of usage of the said road.

4.9 Opposition is raised by the 2nd and 3rd Defendant about this shift of position. The right to an easement they argue, was never pleaded in this case. That the Plaintiff's case was always about the kasavassa road and nothing else. The shift in focus was therefore a breach of the rules on pleadings and as such that the court cannot consider this prayer. This was a position supported by the 1st Defendant in their submissions.

4.10 For the avoidance of doubt, I am prepared to find and declare that the kasavassa road is a public road and that it does not fall in farm 3272. I further agree as shown above, that the Plaintiff's claim was centered on the kasavassa road. There was no express pleading relating to a right of easement in the originating process and introduced only through the Plaintiffs' final submissions.

4.11 The Defendant's argue that the proper course the Plaintiff should have taken was to pray for an amendment of its pleadings which in terms of order 18 of the High Court rules could have been done at any stage of the proceedings. Therefore the second question I invariably pose is whether there is any basis on which the court can make any pronouncement on the claims relating to the access road reflected as being alongside points A,B,C in the google map on page 1 of the 1st Defendant's supplementary bundle of documents.

4.12 The Plaintiffs submission on this question leaning on the case of Jere vs Shamayawa & Attorney General (supra) is that the court is not precluded from considering evidence not pleaded if

no objection is raised. Further that in fact, the court did earlier consider an objection raised by the Defendants on this issue and overruled it.

4.13 I was further implored on the strength of the case of Wilson Masauso Zulu vs Avondale Housing Project Limited (supra) and order 13 of the High Court Rules to determine all issues in dispute in finality. That the access road is by all indications the issue in controversy in this case and the justice of the matter demands that the court makes a pronouncement on it. A case is made out of the dire consequences of denying the Plaintiff access to its farm on its business and the supply of chicks to the Zambian Market and for export respectively.

4.14 I have gone through the record of proceedings and there is no record of any objection having been raised as argued by the Plaintiff. However, the flow of the evidence on the record does turn on and focusses on the access road presented to be the only way that the Plaintiff can access its farm. There was indeed evidence from DW1 that suggested that the affected properties having been surveyed in 1964 had no access roads factored in.

Further that property owners depended on existing roads to access their farms. The road in issue was submitted to be one such road.

4.15 Therefore, irrespective of the fact that there was no specific prayer for an easement pleaded, there was evidence that was led centering on the road that the court cannot disregard and must make a pronouncement on. Worthy of note, the 2nd and 3rd Defendants' own counterclaim of trespass is based on their assertion that the Plaintiff is unlawfully driving through their farm their using the same road. The court cannot possibly resolve the dispute without considering the evidence on the road that has graced the record.

4.16 Persuasion is sought from Indian jurisprudence in the case of **Bachhhaj Nahar vs Nilima Mandal and Another Civil appeal**¹¹ by which the Indian Supreme court observed the following.

“The relevant principle relating to circumstances in which the deficiency in, or absence of, pleadings could be ignored, was stated by a Constitution Bench of this Court in Bhagwati Prasad vs. Shri Chandramaul- AIR 1966 SC 735. (AIRp. 738 para 10)

" 10 ...If a plea is not specifically made and yet it is covered by an issue by implication, and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon it if it is satisfactorily proved by evidence. The general rule no doubt is that the relief should be founded on pleadings made by the parties. But where the substantial matter relating to the title of both parties to the suit was touched, though indirectly or even obscurely in the issues, and evidence has been led about them then the argument that a particular matter was not expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case. What the Court has to consider in dealing with such an objection is : did the parties know that the matter in question was involved in the trial, and did they lead evidence about it? If it appears that the parties did not know that the matter was in issue at the trial and one of them has had no opportunity to lead evidence in respect of it, that undoubtedly would be a different matter. To allow one party to rely upon a matter in respect of which the other party did not lead evidence and has had no opportunity to lead evidence, would introduce considerations of prejudice, and in doing justice to one party, the Court cannot do injustice to another."

4.17 The court went on to state that this principle was reiterated by its decision in **Sarup Gupta (dead) by LRs., vs. Bishun Narain Inter College**¹² wherein the court held:

"It is well settled that in the absence of pleading, evidence, if any, produced by the parties cannot be considered. It is also equally settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. The object and purpose of pleading is to enable the adversary party to know the case it has to meet. In order to have a fair trial it is imperative that the party should state the essential material facts so that other party may not be taken by surprise. The pleadings however should receive a liberal construction, no pedantic approach should be adopted to defeat justice on hair splitting technicalities. Sometimes, pleadings are expressed in words which may not expressly make out a case in accordance with strict interpretation of law, in such a case it is the duty of the court to ascertain the substance of the pleadings to determine the question. It is not desirable to place undue emphasis on form, instead the substance of the pleadings should be considered. Whenever the question about lack of pleading is raised the enquiry should not be so much about the form of pleadings, instead the court must find out whether in substance the parties knew the case and the issues upon which they went to trial. Once it is found that in spite of deficiency in the pleadings, parties knew the case and they proceeded to trial on those issue by producing

evidence, in that event it would not be open to a party to raise the question of absence of pleadings in appeal." (emphasis added)

4.18 I would wholesomely adopt the reasoning of the court in the above authorities and conclude that all the parties knew the case turned on the access road and rights or lack thereof of its usage. The evidence led clearly demonstrates this. The court is thus not precluded from making a determination on the access road despite the acknowledged lack of express pleading on the issue of the right of easement.

4.19 What then is to be said about the access road? A number of significant observations and findings are apparent. The genesis of the problem resides in the State's revelation through DW1 that there are properties surveyed in 1964 in Zambia that had no access roads provided for. A failure to co-operate between neighbours or to grant easements makes access a clear challenge as evident in the present case.

4.20 Exhibit 13(a) of the 2nd and 3rd Defendant's bundle of documents clearly shows that the access road falls in farm 3272. It is also not disputed that this is the road that the

Plaintiff uses to access its farm 1833. Although the Plaintiff insists it has no other way of accessing its farm there is undisputed evidence that it also owns from 3273.

4.21 The Plaintiff offers no viable explanation why it cannot use its own farm 3273 to access 1833 off the kasavassa road and across the rail line. DW1 from the Surveyor General's office quite clearly stated in his evidence that access through this farm is possible. My intelligent guess is that the Plaintiff has not made any provision for a road through its farm 3273 and has depended on the convenience of the existing access road.

4.22 There is evidence that the Plaintiff has owned its farm 1833 since 2008. Further that the 3rd Defendant acquired title for his farm 3272 in 2018 and started to make demands about closing access in October of 2018. This appears to have been after a fall out between the parties relating to a potential sale of farm 3272 to the Plaintiff.

4.23 As the access road falls in the 3rd Defendant's land the question is, is the Plaintiff entitled to have continued unrestricted access? This brings me back to the unavoidable legal question

of whether the Plaintiff has any legal basis to claim such right. Such right in the present circumstances is the right to an easement. In the Bachhaj Nahar v Nilima Mandal case (supra) the Court commented inter alia that:

“ a suit for enforcement of an easementary right relates to a right possessed by a dominant owner/occupier over a property not his own having the effect of restricting the natural rights of the owner/occupier of such property...easements can be acquired by different ways and are of different kinds, that is easement by grant, easement of necessity, easement by prescription etc. a dominant owner seeking any declarations or injunctive relief relating to an easementary right shall have to plead and prove the nature of easement, manner of acquisition of the easementary right and the manner of disturbance or obstruction to the easementary right.

The pleadings necessary to establish an easement by prescription are different from the pleadings and proof necessary for easement of necessity or easement by grant. In regard to an easement by prescription, the Plaintiff is required to plead and prove that he was in peaceful, open and uninterrupted enjoyment of the right for a period of twenty years (ending within two years next before the institution of the suit). He should also plead and prove that the right claimed was enjoyed independent of any agreement with the owner

of the property over which the right is claimed as any user with the express permission of the owner will be a licence and not an easement.”

4.24 In *Saeli Rick Kalaluka v Lusaka City Council Afduls Transport* (supra) the conditions to satisfy for the grant of an easement were considered. The Tribunal commenting on an easement claimed by prescription observed:

“In practice, many easements are in fact established by long user. Thus the presumption always is therefore that a grant was once made. Section 2 of the Prescription Act of 1832 which applies in this country by virtue of the English (Extent of Application) Act provides that an easement (other than that of light) can be claimed where it is actually enjoyed without interruption for a period of at least twenty years. The Appellant has had ownership of this property in question for a period of less than twenty years. Therefore, apart from the 1st Respondent being incompetent to grant an easement, the Appellant also does not qualify to acquire an easement pursuant to section 2 of the prescription Act of 1832.”

4.25 Turning to the present matter, there is no question that the 3rd Defendant is competent to grant an easement. It is common cause that no such easement has been granted. The Plaintiff

has only been in occupation of the land and used the access road from 2008 which is about 16 years at date of judgment. This is less than the 20 years required to render applicable section 2 of the Prescription Act of 1832 applicable to Zambia by the English Law Extent of Application Act.

4.26 There was further no evidence led on how long the previous owners had used the access road and or of how long it has been in existence. There is therefore no basis on which the court can grant an easement. I would decline to grant the prayer for the above reasons.

4.27 It follows that there is no basis to order the re-alignment of farm 3272. I agree that the exercise undertaken by the Surveyor General in 2018 following a request from the 2nd and 3rd Defendant, was a boundary verification and not a resurvey. The property was already surveyed so no changes were made on the beacons as they existed save to confirm the encroachment into farm 3272 by the Plaintiff.

4.28 I would in the circumstances dismiss the Plaintiffs claim in this regard that I find in any event, can still access farm 1833 by

using its farm 3273. It is not inconceivable that being a commercial entity with the level of business it professes to have that extends to an export market, the Plaintiff is in a position to meet the costs of clearing and creating an access road through its farm and for its own use.

4.29 The Defendant's counterclaim

4.30 The Defendants counterclaim damages for trespass for the asserted unlawful use of its road by the Plaintiff. There is no doubt as stated earlier, that the road in issue resides in the 3rd Defendant's property. The witnesses testimonies and attendant google maps and photographs exhibited in the Defendants bundle of documents sufficiently demonstrate this.

4.31 However, I find that it would be wholly unjust to grant damages for trespass. The learned author of **Clarke and Lindsell on Torts 20th edition Sweet and Maxwell 2010 at page 1245 para 19-45** opine that:

"It is a defence to an action of trespass to show that the defendant is on the land with the leave and licence (express or implied) of the owner"

4.32 I am persuaded to find on the facts, that the Defendant's had granted the Plaintiff an implied licence to use the road. The 3rd Defendant acquired the property in early 2018 and did not raise any issue with the Plaintiff about the usage of the road. There are in the Defendants bundle of documents documented exchange of emails in which consideration was being made for the sale of the property and no issue made about any trespass.

4.33 It is clear to me that the shift of position occurred when there was a fallout between the parties leading to the demand for the stop of usage being made in October 2018. An injunction was sought and granted upon commencement of this action. The Plaintiff therefore had a right to use the access road by virtue of the 3rd Defendant's licence and that the status quo was maintained through the injunction granted by the court. I would decline to grant the damages for trespass for the above reason.

4.34 There was further no evidence led on the claim for mental anguish that require to be specifically pleaded and proved. In

the case of **Standard Chartered Bank Zambia PLC vs Singogo**¹³ the Supreme court observed inter alia that

“although damages for mental anguish, distress and inconvenience may be awarded in appropriate cases... an award of such damages should only be considered where they are pleaded and proved”

4.35 The prayer in this case invariably fails on account of the lack of such proof. I would dismiss the Plaintiffs counterclaim in that regard accordingly. I am not persuaded to conclude that the Plaintiffs action was initiated primarily to muscle the 3rd Defendant as a result of the fallout between the parties over the sale of farm 3272. This was really a dispute about the access road to farm 1833 through farm 3272 and nothing else.

5.0 **Conclusion**

5.1 The long and short of my judgment is that the Plaintiff's claims are dismissed with the exception of the prayer for a declaration that I now make that the kasavassa road is a public road. The 2nd and 3rd Defendants claim succeeds to the extent that I declare that the 2nd and 3rd Defendants are entitled to possession of its encroached land that was not disputed. I

would further grant them a permanent injunction restraining the Plaintiff whether by its servants or agents from entering or using or driving or parking any motor vehicle upon farm 3272.

5.2 This injunction is to take effect within 90 days of this judgment to enable the Plaintiff to make alternative arrangements for access to its farm 1833. The prayers for damages for trespass and mental anguish fail.

Costs are for the Defendants to be taxed in default of agreement.

Leave to appeal by either party is granted.

Dated at Lusaka this ^{31st}.....day of ^{January}.....2024.


HON. JUSTICE M.D BOWA