

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



2022/HP/A022

BETWEEN:

ANGLICAN DIOCESE OF LUSAKA**APPELLANT**

AND

**RICHARD DAKA (RCZ REPRESENTATIVE)
QUELANI PHIRI (RCZ REPRESENTATIVE)**

1st RESPONDENT**2nd RESPONDENT**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 25th DAY OF
SEPTEMBER, 2023.**

For the Appellant : Mr. J. Zimba & Ms. S. Simukonda, Makebi Zulu Advocates
For the Respondents : Ms. M. Mwandenga, Messrs M. Z. Mwandenga & Company

J U D G M E N T

CASES REFERRED TO:

1. *Edington v Fitzmaurice (1885) 29 CHD 459*
2. *Miller v Minister of Pensions 1947 2 ALL ER 372*
3. *Mutambo and Five other v The People 1965 ZR 15*
4. *Harry Mwanga Nkumbula and Simon Mwansa Kapwepwe v United National Independence Party 1978 ZR 388*
5. *Khalid Mohammed v The Attorney General 1982 ZR 49*
6. *Secretary General of the United National Independence Party v Elias Marko Chisha Chipimo 1983 ZR 125*
7. *R v Governor of Brixton, Ex-parte Osman (No 3) 1992 1 ALL ER 121*
8. *Zambia Democratic Congress v The Attorney General SCZ No. 37 of 1999*
9. *Rosemary Chibwe v Austine Chibwe, SCZ No. 38 of 2000*
10. *Wesley Mulungushi v Catherine Bwale Mizi Chomba 2004 ZR 96*
11. *Sablehand Zambia Limited v Zambia Revenue Authority 2005 ZR 109*
12. *Ministry of Home Affairs and Attorney General v Lee Habasonda and others SCZ No. 23 of 2007*
13. *City Express Service Limited v Southern Cross Motors 2007 ZR*

14. *Attorney General v The Law Association of Zambia 2008 Vol 1 ZR 21*
15. *Zambia Railways Limited v Pauline S. Mundia, Brian Sialumba 2008 Vol 1 ZR 278*
16. *Nevers Mumba v Mumbi Lungu SCZ No. 200 of 2014*
17. *BJ Poultry Farms Limited v Nutri Feeds Zambia Limited Appeal No. 166 of 2015*
18. *Jimmy Kalunga & Another v Stanbic Bank Zambia Limited Appeal No. 6 of 2017*
19. *Crossland Mutinta and another v Donovan Chipanda SCZ No 58 of 2018*
20. *Duncan Mpempeta v Charles Lundofo Appeal No. 195 of 2020*

LEGISLATION REFERRED TO:

1. *The Subordinate Court Act, Chapter 28 of the Laws of Zambia*
2. *The Land (Perpetual Succession) Act, Chapter 186 of the Laws of Zambia*
3. *The Societies Act, Chapter 119 of the Laws of Zambia*

OTHER WORKS REFERRED TO:

1. *Black's Law Dictionary, Eighth Edition, by Bryan A. Garner*
2. *Black's Law Dictionary, 9th Edition, by Bryan A. Garner, Thomas Reuters 2009*
3. *The Law of Evidence in Zambia, Cases and Materials by John Hatchard and Muna Ndulo, Multimedia Publications Lusaka and James Curry London, 1991*
4. *Zambian Civil Procedure: Commentary and Cases Volume 1, by Dr. Patrick Matibini, Lexis Nexis, 2017*

1. INTRODUCTION

1.1 This is an appeal against the Judgment of the Subordinate Court of the First Class sitting at Luangwa District in the Lusaka Province, which was delivered on 30th September, 2021. Before that Court, the 1st and 2nd Respondents, Richard Daka and Quelani Phiri, were the 1st and 2nd Plaintiffs respectively, while the Anglican Diocese of Lusaka, the Bible Gospel Church in Africa (BIGOCA), Andreyana Nyirenda and Luangwa Town Council were the 1st, 2nd, 3rd and 4th Defendants respectively.

- 1.2 The Anglican Diocese of Lusaka (Anglican Diocese) is the Appellant in this matter. Before the Subordinate Court, Richard Daka and Quelani Phiri had sued as representatives/elders of the Reformed Church in Zambia, by Writ of Summons which was filed on 16th March, 2021 and was amended on 5th May, 2021 claiming:
- i. A declaration of ownership of a plot in Indeco Compound for the Reformed Church in Zambia (RCZ) Luangwa Section.*
 - ii. An Order of interim injunction restraining the Defendants whether by themselves, agents, servants or whomsoever be from occupying, selling, developing and encroaching on the said plot until the final determination of this matter by the Honourable Court.*
 - iii. Compensation for the inconvenience caused by the Defendants, by their actions as the Plaintiffs (church) cannot do any further developments on the said plot.*
 - iv. Costs of and incidental to the suit.*
 - v. Any other relief that the Court may deem fit.*
- 1.3 Before the Subordinate Court, Quelani Phiri testified on behalf of Richard Daka and Quelani Phiri, and they called Two (2) witnesses, while the Anglican Diocese of Lusaka called Three (3) witnesses, and BIGOCA called One (1) witness. Andrey Nyirenda testified and called no witnesses, while Luangwa Town Council called Two (2) witnesses.
- 1.4 In a Judgment that was delivered on 30th September, 2021, the trial Magistrate found that Andrey Nyirenda was not offered any land on the property in dispute, and as such, he was

illegally on the land. Therefore, Richard Daka and Quelani succeeded on a balance of probabilities against him for the parcel of land that measured 7.2 x 6.77 metres. With regard to the Anglican Diocese of Lusaka and BIGOCA, the trial Magistrate found that the land was un-surveyed when it was offered to them, and they were asked to regularise the same by applying for it at the Ministry of Lands.

- 1.5 The trial Magistrate stated that Richard Daka and Quelani Phiri on behalf of the Reformed Church in Zambia, by virtue of the letter that was exhibited as 'RD6' had a recommendation from the Council Secretary to the Commissioner of Lands for the creation and numbering of the plot. Thus, they had an equitable interest in the land. It was also the trial Magistrate's finding, that Richard Daka and Quelani Phiri had moved the Court to the site to show him the extent of the land that the Reformed Church in Zambia claimed.
- 1.6 However, the Anglican Diocese of Lusaka, BIGOCA and the Luangwa Town Council did not move the trial Court to show it the extent of the land for the Anglican Diocese of Lusaka and BIGOCA, which was fatal. The trial Magistrate noted that there was a recommendation from the Luangwa Town Council to the Commissioner of Lands for the creation and numbering of the Anglican Diocese of Lusaka's land.
- 1.7 The further finding was that contrary to the evidence that was tendered, that the Anglican Diocese of Lusaka had had its' application for regularisation and the site plan approved by the

Lusaka Province Planning Authority, no such approval had been produced.

- 1.8 The trial Magistrate also found that there were no documents for BIGOCA in the form of site plans or recommendations for the creation and numbering of its' land. It was noted that the Anglican Diocese of Lusaka, BIGOCA and Luangwa Town Council did not show the Court the land and its' dimensions, but that there was just a recommendation for the creation and numbering of the land for the Anglican Diocese of Lusaka to the Ministry of Lands.
- 1.9 On the other hand, Richard Daka and Quelani Phiri had produced a site plan though one that was tampered with, and the trial Magistrate was satisfied, that it was upon the basis of the said site plan, that the recommendation letter 'RD6' was generated. Thus, the Court believed Richard Daka and Quelani Phiri's evidence as to the extent of the land that the Reformed Church in Zambia claimed. The trial Magistrate opined that this was more so, as they had demonstrated that the Reformed Church in Zambia, was the first to be allocated the land by the Luangwa Town Council way back in 2005.
- 1.10 Richard Daka and Quelani Phiri as representatives of the Reformed Church in Zambia were accordingly awarded the land in extent of 90 X 82.5 metres.

2. EVIDENCE BEFORE THE SUBORDINATE COURT

- 2.1 The evidence as adduced by Richard Daka and Quelani Phiri was that Richard Daka, stated that Quelani Dickson Phiri, would testify on his behalf. In that respect Quelani Dickson

Phiri, relied on the affidavit verifying the facts, and applied for the Court to be moved to the site for his testimony. At the site, he showed the Court a beacon on the left front of the Reformed Church in Zambia (the Church) which is close to the road that goes to the Luangwa Town Civic center.

- 2.2 He also pointed to the middle of the Anglican Diocese of Lusaka's gate, as the spot where the second beacon was supposed to be, and testified that it might have been removed when the gate was being constructed. Quelani Phiri further testified that Luangwa Town Council was represented by Mr. Alex Nyondo, the Assistant Planner who captured the beacon sometime between 2019 and 2020 before it was removed, and that the distance between the first beacon on the west, and the one that was removed was 90 meters.
 - 2.3 His evidence was also that on the opposite side of the removed beacon, about Twelve (12) meters away, was another beacon. He stated that there was supposed to be a road in between the Two (2) beacons, going towards the southern direction, passing through where BIGOCA had constructed the Church. Quelani Phiri added that the distance between that beacon, and the one north close to the road to Civic Centre was 82.8 meters. He had also pointed at the south of the Church on the eastern direction, and testified that there was a beacon that had been removed, and the distance between the southern beacon was 84.6 meters.
 - 2.4 It was stated that south of the plot, was a playpark with a wire fence as a demarcation, the remnants of which were at some
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point still visible and captured by Luangwa Town Council. This witness further testified that the distance between the removed beacon on the south, but west of the Church, to the one on the north close to the road going to Civic Centre was 88.2 meters. He told the Court below that the unfinished house at the back-south corner of the plot was for Andreyana Nyirenda.

- 2.5 Quelani Phiri explained that the extent of the land that had been encroached by Andreyana Nyirenda, was 7.2 x 6.77 meters. Further in his evidence, Quelani Phiri had testified that the Anglican Diocese of Lusaka was the first to encroach by 60 x 38.5 meters, followed by BIGOCA on a piece of land behind the Anglican Diocese, measuring 20.5 meters from the wall fence.
- 2.6 He stated that the Anglican Diocese of Lusaka had erected about four (4) pillars going to the south, but they did not measure the distance to the east because of the removed beacon. The testimony was that Andreyana Nyirenda was the third to encroach on the plot.
- 2.7 Quelani Phiri stated that they were the first to be allocated the piece of land by Luangwa Town Council on 3rd January, 2005 after applying in 24th April, 2004.
- 2.8 When cross examined by Counsel for the Anglican Diocese of Lusaka and BIGOCA, Quelani Phiri testified that they had no documents to show the extent of their land, but that the beacons confirmed the demarcation. He stated that this meant that Luangwa Town Council approved the land. Quelani Phiri maintained that the Anglican Diocese of Lusaka was the first to

encroach on their land, and they advised it on the encroachment. He stated that they moved to the land in 2005.

- 2.9 In cross examination by Andrey Nyirenda, Quelani Phiri stated that Andrey Nyirenda's encroachment was by 7.2 x 6.77 meters, and they informed him to stop developing on the plot, but he refused. The evidence given was that Quelani Phiri last talked to Andrey Nyirenda on 25th December, 2020, and he denied knowing Ackson Moda or that Andrey Nyirenda told him that Ackson Moda gave him the go-ahead, and that anyone who was objecting to his building should face him.
- 2.10 When cross-examined by Counsel for Luangwa Town Council, Quelani Phiri testified that the land belonged to Luangwa Town Council, and that they applied for the land from the said Council, for special user plots. He stated that the document 'RD2' which allocated the Reformed Church in Zambia the plot, had conditions. However, they did not meet all of them. Quelani Phiri testified that they had an unmarked site plans which they produced, and that it was authorised by the Luangwa Town Council, and the dimensions on the site plan were put there by them.
- 2.11 Quelani Phiri denied adjusting the site plan, testifying that it was not their habit. He added that he came to know the extent of the land after the Anglican Diocese of Lusaka went there in 2005, and that the beacons were put by the Ministry of Lands and Natural Resources, but Luangwa Town Council was the intermediary. That was how Luangwa Town Council became involved in the matter. His evidence was also that another

- officer from Luangwa Town Council, Mr. Nyondo, confirmed the beacons in 2020, especially those that had been tempered with.
- 2.12 He stated that 'RD2' showed that they were allocated the plot, although the extent was not indicated. It was also Quelani Phiri's evidence that the first encroachment was in 2005, but they delayed to take the matter to Court, because they did not want to rush to Court. The second reason that was advanced, was that Luangwa Town Council whom they expected to resolve the issue, delayed to do so.
- 2.13 In that respect Quelani Phiri's testimony was that they met with Luangwa Town Council several times, expecting them to resolve the issue of custodianship of the land, and that the last meeting was in 2020, but there was no resolution. His testimony was further that the Council Secretary authored the letter marked as 'RD5', and they had no problem with it. Quelani Phiri explained that the effect of that letter, was that the rear part of the Anglican Diocese of Lusaka's land, was for the Reformed Church in Zambia, and that the Anglican Diocese of Lusaka was to remain where it was.
- 2.14 Quelani Phiri disputed that there was an agreement to that effect, and he disputed 'RD5', clarifying that if they had said that they had no issue with 'RD5', it was an oversight. It was also Quelani Phiri's testimony that 'RD5' was dated 6th January, 2020, and that it had conditions in paragraph 6. His evidence was that they could identify the site plan dated 13th January, 2020, and that it was the same one on which they put dimensions.

- 2.15 He denied submitting it to Luangwa Town Council, alleging that as they were in the process of doing so, BIGOCA had also encroached, and that was how they went to the Council Secretary who advised him, to obtain a Court injunction.
- 2.16 The other evidence that was given by Quelani Phiri before the Court below, was that they did not pay anything to Luangwa Town Council for submission of the site plan. He testified that before any construction is done, a permit from the Council is needed, but they did not get one. It was also his testimony that they claimed the piece of land that the Anglican Diocese of Lusaka built on, because it was their land, and Luangwa Town Council was aware of that.
- 2.17 In re-examination, Quelani Phiri clarified that they engaged Mr. Nyondo to make a site plan for them, but they did not collect it for onward submission to Luangwa Town Council. He stated that BIGOCA had also encroached, and that the site plan was unsubmitted.
- 2.18 With regard to 'RD5' concerning the meeting, that they had with the Anglican Diocese of Lusaka, Quelani Phiri clarified that the Council Secretary had indicated that all the land for the Reformed Church in Zambia should be surrendered to them, and further that Luangwa Town Council was going to compensate the Anglican Diocese. However, the issue of compensation was not captured in the letter.
- 2.19 The other witnesses who were called by Richard Daka and Quelani Phiri were William Chola and Gertrude Zulu. William Chola testified that he was a congregant of the Church since
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1998 when he went to Feira, while Gertrude Zulu began congregating with the church in 2001. They testified that they used to congregate at Luangwa Primary School, but they were later told to start paying for using the school.

- 2.20 That was how they decided to look for land to build a church. In that respect, evidence given was that they applied for land at Luangwa Town Council in 2004, which they were allocated in 2005 in Indeco compound in Moda's area.
- 2.21 The Two (2) witnesses stated that they started congregating at that land under a tree, and later, they molded blocks and built around the frames. It was testified that the elders of the Reformed Church in Zambia used to follow up the land issue at Luangwa Town Council, and later the said elders told the congregants that the beacons were being tempered with by the Anglican Diocese of Lusaka, which had encroached on their piece of land.
- 2.22 Gertrude Zulu added that they were later informed by the elders that they were advised to refer the matter to his Royal Highness Chief Mphuka, and she accompanied them. It was her testimony that the Chief told them that he had no authority to decide on the matter, and he had referred them back to Luangwa Town Council. Then at Luangwa Town Council, they were advised to reconcile with the Anglican Diocese of Lusaka.
- 2.23 Her evidence was that Luangwa Town Council sent Two (2) of its officers, Mr. Sakala and Mr. Nyondo to conduct a physical check of the land and capture the beacons. Thereafter, they followed up with Luangwa Town Council, but they were told to

- leave the Anglican Diocese of Lusaka where it was, and that they would be given alternative land. Gertrude Zulu also testified that they were advised to submit a site plan for the land with the Anglican Diocese of Lusaka in its' current position.
- 2.24 That was how they engaged Mr. Nyondo to draw up the site plan, but before it could be signed by the Council Secretary, BIGOCA also encroached on the land. She testified that BIGOCA informed them that Luangwa Town Council had sent them to scout for beacons, but they informed BIGOCA that it was the responsibility of the Council to do so. Gertrude Zulu's evidence was also that Luangwa Town Council advised them that they would be called, but as they were waiting, Andrey Nyirenda also encroached on their land.
- 2.25 When they saw that the encroachments were becoming rampant, they decided to reclaim the whole area from Luangwa Town Council, and they did so in writing. She stated that Luangwa Town Council informed them that it did not know Andrey Nyirenda, and that they should sue in Court.
- 2.26 In cross examination, by Richard Daka, William Chola stated that they were the first to occupy the land. He told the Court that there was a playpark on the southern side, and then the Anglican Diocese of Lusaka also went to the land.
- 2.27 When cross examined by Counsel for the Anglican Diocese of Lusaka and BIGOCA, William Chola, stated that Luangwa Town Council showed them the piece of land, but did not tell them the extent of the land. His evidence was that the elders of the
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- Reformed Church in Zambia, informed them about the encroachment of the land.
- 2.28 William Chola when cross examined by Counsel for Luangwa Town Council stated that he did not recall the year the elders informed them of the encroachment on the land. He testified that he did not know whether the site plan was submitted to Luangwa Town Council. He also did not know why it was produced through a Notice to Produce, who altered it, and that altering a public document was an offence.
- 2.29 In re-examination, William Chola clarified that he was not only told of the encroachment by the elders, but that he saw the said encroachment.
- 2.30 In cross examination by Richard Daka and Quelani Phiri, Gertrude Zulu stated that the Council Secretary told them to leave the Anglican Diocese of Lusaka, and that they would be given alternative land. However, they had not been given the land.
- 2.31 It was Gertrude Zulu's testimony when cross examined by Counsel for the Anglican Diocese of Lusaka and BIGOCA, that she was not among the people that applied for the land, but that the said people showed her the extent of the land. Gertrude Zulu testified that this was an old matter, and that it did not start when the Anglican Diocese of Lusaka built a wall fence. Her evidence was that the beacons were placed by the Ministry of Lands and Natural Resources after they were called by Luangwa Town Council.
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- 2.32 It was further her testimony, that Luangwa Town Council knew the extent of the land, and that they were asked to make a site plan because of the encroachments. Further, Luangwa Town Council failed to resolve the dispute, hence the advice to take the matter to Court. Gertrude Zulu added that paragraph 5 of 'RD5' was to the effect that the dispute was resolved.
- 2.33 In cross examination by Counsel for Luangwa Town Council, Gertrude Zulu stated that they were offered the land in 2005, and if there were conditions, the elders would have been told, but she did not know if they were met. She stated that she had no proof that Luangwa Town Council gave them alternative land. It was also her testimony that they did not pay for the site plan and she did not know that it was not submitted to Luangwa Town Council.

EVIDENCE BY THE ANGLICAN DIOCESE OF LUSAKA

- 2.34 The witnesses that were called by the Anglican Diocese of Lusaka were Adalisa Sakala, Reverend Father Zacchaeus Zulu and Joseph Mwale.

ADALISA SAKALA

- 2.35 Adalisa Sakala told the Court below that he went to Luangwa in 2004, where he later with others, organized and started a branch of the Anglican Church. His evidence was that they used to congregate at a house. Then later, in 2007, Luangwa Town Council advertised plots and they applied for one for the Church.
- 2.36 He testified that after successful interviews in March, 2008, they were offered a plot in May, 2008 through an offer letter. It

was stated that they paid the developmental charges in instalments, and finished the same in 2009. Then in 2008, the Council showed them the land, in Indeco area, which measured 50 x 75 meters, and had Two (2) beacons. Adalisa Sakala's evidence was that the left side was the Church, and on the right, was Faith Pentecostal Church, while at the back was BIGOCA, and as the Anglican Diocese of Lusaka, they were in the middle.

- 2.37 It was also his testimony that he told Richard Daka about the offer of the land, and if anything, they should move together and he was also shown the beacons. Then they built a small structure, and started congregating from there. Adalisa Sakala explained to the Court below that in 2010, the Reformed Church in Zambia built a toilet on their land, and they approached them and they admitted the encroachment.
- 2.38 The evidence was further that they decided to wait for Luangwa Town Council to handle all the logistics, and only then, would they demolish the toilet.
- 2.39 In cross examination, by Richard Daka, Adalisa Sakala testified that he was only shown Two (2) beacons instead of four (4). He stated that he failed to show him the other Two (2), because there were some logistics that Luangwa Town Council was still putting in place.
- 2.40 In cross examination, by the Quelani Phiri, Adalisa Sakala stated that he was shown the Two (2) beacons which were on the road going to Civic Centre, and he showed Richard Daka

the Two (2) beacons at the rear of the Anglican Church facing BIGOCA.

2.41 In re-examination, Adalisa Sakala's testimony was that the Two (2) beacons were enough to show the extent of the land as they measured the length between them. He also stated that apart from BIGOCA, the beacons also demarcated the Word Faith Church. He added that the toilet was on their land.

REVEREND ZACCHAEUS ZULU

2.42 Reverend Zacchaeus Zulu on the other hand testified that he went to Luangwa in January, 2012, and that it was Adalisa Sakala that briefed him about the land that was given to the Anglican Diocese of Lusaka by Luangwa Town Council, which measured 50 x 75 meters. He stated that he was shown the front points as the back points were not visible, and that there was One (1) beacon in the front, while the other was a shrub.

2.43 His evidence was that in the week of 27th August, 2012, Luangwa Town Council engaged the Ministry of Lands and Natural Resources to mark the roads. In that respect, he was called to the site to witness the changes that the surveyor was making to the beacons. Reverend Zacchaeus Zulu testified that the new beacons were related to the roads, and on 28th August, 2012, he wrote to the Council seeking an explanation why the changes had affected the size of the land.

2.44 Reverend Zacchaeus Zulu also testified that the District Planning Officer advised them to pay extra fees of K6,000.00 so that they could relocate to other land near the hospital which fees were paid. He stated that the matter pended because they

had also paid fees on the plot they were occupying. Thus, he was surprised when the Court visited the site, as the beacons shown to the Court had names of individuals or initials and not marks.

- 2.45 He stated that the earlier beacons had numbers but they could not recall them. It was also Reverend Zacchaeus Zulu's testimony that the Reformed Church in Zambia built a toilet which they agreed would be demolished when it was full.
- 2.46 In cross examination by Richard Daka, Reverend Zacchaeus Zulu's testimony was that Adalisa Sakala showed him the beacons in January, 2012, which were on the road going to Civic Centre.
- 2.47 The evidence that Reverend Zacchaeus Zulu gave, when he was cross examined by Counsel for BIGOCA, was that all the beacons had numbers, and if they were not there, the Ministry of Lands and Natural Resources was able to detect the beacons and numbers. It was also his testimony that the beacons in contention were the beacons for the road, and not the Churches. He stated that tempering with a beacon includes adding something that is not supposed to be there.
- 2.48 He further stated that when the marking off the road beacons was complete, it rendered the original beacons obsolete. Reverend Zacchaeus Zulu also testified that the beacons purported to be for the church, were actually for road infrastructure.
- 2.49 In re-examination, he stated that the Ministry of Lands and Natural Resources removed the initial beacons when they were
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putting beacons for the road markings, as the extent of the land was not clear. However, the beacons were later removed.

JOSEPH MWALE

- 2.50 Joseph Mwale, a Minister from the Anglican Diocese of Lusaka, told the Court that he was posted to Luangwa on 13th April, 2018, and he found hand over notes from his predecessor Justin Lungu. His evidence was that he was shown the boundaries of the land for the Anglican Diocese of Lusaka, and was told that the Reformed Church in Zambia had built a toilet on their land.
- 2.51 It was also his testimony that they also dug a toilet some meters from the one that was built by the Reformed Church in Zambia, and whilst working on it, in early July, 2018, the Reformed Church in Zambia accosted him, telling him that they were constructing a toilet on their land. Joseph Mwale stated that the Reformed Church in Zambia engaged the village chairman, Ackson Moda, and in the same month, the three (3) parties met.
- 2.52 He stated that Ackson Moda requested that the boundaries be revisited, but there was an offer letter from Luangwa Town Council, which meant that the land was in its' hands, and not the Village chairman. Joseph Mwale testified that the Church insisted on the boundaries being revisited, and the village Chairman did the measurements, and the toilet still remained on their land. He explained that they agreed to construct a toilet on their land because the Reformed Church in Zambia's toilet was on the Anglican Diocese of Lusaka's land.

- 2.53 However, they did not do so, as they were stopped on the basis that they were digging on the wrong site. The evidence that was further given by Joseph Mwale was that they constructed a pre-school on the boundary that was shown to them by the village Chairman, but which the Reformed Church in Zambia contended was on their boundary. Then the headman, in the absence of the Reformed Church in Zambia, gave them a go-ahead to construct the pre-school.
- 2.54 Joseph Mwale stated that after completion, they applied to Luangwa Town Council for approval to construct a wall fence, but the same was declined because Luangwa Town Council told them that the Reformed Church in Zambia had argued that the boundary was not clear. He explained that they were told to wait as Luangwa Town Council would carry out investigations. Then thereafter, Luangwa Town Council asked them to provide a site plan because the data base was showing that the land was unplanned.
- 2.55 Joseph Mwale testified that they engaged a surveyor from Luangwa Town Council, but the Reformed Church in Zambia told them that the boundary and site plan had already been done for the Reformed Church in Zambia. He therefore agreed with their site plan, and did another one for the Anglican Diocese of Lusaka.
- 2.56 The evidence that was further given by Joseph Mwale was that the site plan showed Two (2) places of worship, that is, one on the western side for the Reformed Church in Zambia, and the other on the eastern side for the Anglican Diocese of Lusaka.
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He added that it was approved. He stated that they applied to erect a wall fence which was approved, and they built a 1.5 meters high wall fence. However, the Reformed Church in Zambia told the Luangwa Town Council, that the Anglican Diocese of Lusaka had encroached on their land, and the Anglican Diocese of Lusaka was summoned.

2.57 Thus, they stopped constructing, and they met with the Reformed Church in Zambia and the Luangwa Town Council, in a meeting that was headed by the District Planning Officer and others, who included Mr. Nyondo and Mr Sakala. It was his testimony that it was discovered that the encroachment was by Three (3) meters. Joseph Mwale stated that the Reformed Church in Zambia was told to consider what was already done, but it demanded that the wall fence be demolished, and remained adamant, even after the District Planning Officer's suggestion that Three (3) meters be added on the western part of its' land.

2.58 It was also Joseph Mwale's evidence that the District Planning Officer asked them to agree to the Reformed Church in Zambia's demands, and therefore the wall fence was demolished, and they built anew in line with the new boundary. He stated that in 2019, the District Planning Officer asked them to apply for normalization of the land, which they did at Eight Thousand Kwacha (K8,000.00). Joseph Mwale testified that apparently the documents had been approved by the planning authority, and they were at the Ministry awaiting numbering.

- 2.59 In cross examination by Richard Daka, Joseph Mwale stated that he was accosted by the said Richard Daka, and another member when constructing the wall fence. His evidence was that the second time, Richard Daka was with the District Planning Officer. It was testified that Joseph Mwale knew the beacons for the road, and not for the church, and that he only knew the site plan that was approved by the Luangwa Town Council. He explained that the site plan was at the Ministry of Lands and Natural Resources, and that he knew the plot because he had an offer letter from Luangwa Town Council.
- 2.60 When cross examined by Quelani Phiri, Joseph Mwale denied being a surveyor, and that the construction was stopped until the matter was resolved. He stated that they applied to Luangwa Town Council for a wall fence to be erected, and the Reformed Church in Zambia was also engaged. Joseph Mwale further denied that Quelani Phiri had asked Luangwa Town Council who had approved the construction of the wall, and yet Quelani Phiri was told to halt the construction.
- 2.61 His evidence was that the site plan was revealed when the District Planning Officer asked for it, but he did not remember the District Planning Officer questioning Mr. Sakala over the site plan. Joseph Mwale's testimony was that they only constructed the wall fence after the site plan was approved.

EVIDENCE BY BIGOCA

AUGUSTINE MUMBA

- 2.62 Augustine Mumba on behalf of BIGOCA, testified that the said BIGOCA applied for land in 2009. Then on 26th August, 2009, Mr. Rodrick Zulu, the lead representative was interviewed. It was stated that BIGOCA was given an offer letter on 22nd September, 2009, and they paid the service charges amounting to Two Thousand Five Hundred Kwacha (K2,500.00).
- 2.63 Also, in his testimony, Augustine Mumba testified that on 1st October, 2009, he was shown the piece of land in Indeco compound by the District Planning Officer, Mr. Siampondo, whose extent was 66 x 62 meters, and it had no beacons. When he had asked about the beacons, he was informed by Mr. Siampondo that there were no beacons, as the land used to be traditional land.
- 2.64 Mr Siampondo had further informed him that Luangwa Town Council obtained it as state land in 2007, and currently it was state land that was meant for churches, and was managed by Luangwa Town Council. Augustine Mumba also testified that they first built a shelter then later, a small church. Thereafter, Luangwa Town Council advised them to provide a site plan, and then beacons were put up.
- 2.65 It was his evidence that in 2012, Protacio Phiri, who assisted in putting up beacons, told him that he had put up beacons for the road on their plot, as a road passed through their Church. He stated that Luangwa Town Council confirmed the said road, which also went through to Child Fund, which had also purchased a plot.
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- 2.66 However, Augustine Mumba was later told that Child Fund had relocated to Mphuka, and the road was no longer relevant. He testified that on 11th November, 2019, they wrote to Luangwa Town Council requesting them to put up beacons. It was stated that Luangwa Town Council invited them to their office, where they found the Committee for Headman Ackson Moda, and the committee for the Reformed Church in Zambia.
- 2.67 Augustine Mumba's testimony was that there, he was informed that there was a dispute over the land, and that previously there was a dispute between the Reformed Church in Zambia and the Anglican Diocese of Lusaka. He also testified that he was informed that the land for the Reformed Church in Zambia extended to their land, and that was the reason why Luangwa Town Council had declined to put beacons for them.
- 2.68 He stated that no resolution was made in the meeting, as the elders for the Reformed Church in Zambia were not present in the meeting. The evidence that was further given, was that in January, 2020, they received a letter from Luangwa Town Council, which stated that it had been resolved that part of their land in extent of 45 x 40 meters, was for the Reformed Church in Zambia.
- 2.69 That was how their pastor Felix Phiri and brother Zuze Mwanza, approached the Council Secretary complaining about the decision that was communicated in the letter, as no resolution was reached when the parties sat to discuss. However, the Council Secretary informed them that the decision that had been reached was final. Augustine Mumba

did not know the extent of the land that they had remained with.

- 2.70 In cross examination by Richard Daka, Augustine Mumba stated that they found the Reformed Church in Zambia at their plot in 2009. His evidence was further that they sent Zuze Mwanza and James Mwale to the Reformed Church in Zambia over the land dispute, and they referred them to Luangwa Town Council.
- 2.71 When cross examined by Quelani Phiri, Augustine Mumba stated that in 2020, he found the village headman's committee and the Reformed Church in Zambia's committee at Luangwa Town Council. He stated that at one time, they sent people to Luangwa Town Council over the land dispute, but Luangwa Town Council referred those people to the Reformed Church in Zambia. He stated that he recalled writing to Luangwa Town Council on 11th November, 2019, so that it could go and put up the beacons.
- 2.72 Then in January, 2021, they received a letter from Luangwa Town Council which stated that 45 x 40 meters of their land belonged to the Reformed Church in Zambia.

ANDREYA NYIRENDA'S EVIDENCE

- 2.73 On the part of Andrey Nyirenda, his testimony was that in a year that he did not recall, he asked for a piece of land from Ackson Moda, the Chairman. He was given land neighbouring the Reformed Church in Zambia. He also stated that he was shown the extent of land, without it being measured, but stones

were placed. His further evidence was that he built a house on the land in 2017.

- 2.74 Then after he completed the said house, the Church approached him, stating that he had built on its' land. Further in his testimony, Andrey Nyirenda testified that he requested for proof of ownership of the land from the Reformed Church in Zambia, but none was provided. He stated that in the same year, the Reformed Church in Zambia, dug a trench near his house, and informed him that they wanted to erect a wall fence. That was how Andrey Nyirenda had informed Ackson Moda who advised him to leave the Reformed Church in Zambia.
- 2.75 In cross examination by Richard Daka, he stated that nobody stopped him from building the house. He also reiterated that he had asked the Reformed Church in Zambia, for documentation for their land. His evidence was that he refused to speak to Richard Daka's superior on 25th December, 2019, because he needed to know the extent of the Reformed Church in Zambia's land.
- 2.76 When cross examined by Quelani Phiri, Andrey Nyirenda's testimony was that he reaffirmed that no one rebuked him when he started building. He denied writing a letter to the Reformed Church in Zambia over the plot, but recalled writing the letter that he was shown. He stated that the letter was written by someone from Luangwa Town Council on his behalf, who told him that it was a go ahead, as he was also given land. Andrey Nyirenda also stated that he did not recall going with Quelani Phiri to Luangwa Town Council to make submissions.

EVIDENCE BY LUANGWA TOWN COUNCIL

2.77 The Two (2) witnesses who were called by Luangwa Town Council were Alex Nyondo, a Principal Planner at the said Luangwa Town Council and Manjimela Kundezyi.

ALEX NYONDO

2.78 Alex Nyondo's evidence was that he had worked for Luangwa Town Council for Three (3) years, at the time of his testimony. He explained that in November, 2004, the Reformed Church of Zambia applied for a special residential plot at the Luangwa Town Council. Thus, interviews were conducted, and the application was successful.

2.79 He stated that Luangwa Town Council issued a demand notice to the Reformed Church in Zambia to pay for the land which the said Reformed Church in Zambia had identified, which was near Indeco Settlement Area. Alex Nyondo explained that Luangwa Town Council, issued an offer letter to the Reformed Church in Zambia which had conditions. He named those conditions as, the Reformed Church in Zambia to produce eight (8) site plans for the unnumbered land, and four (4) blocks of building plans for the proposed development.

2.80 However, the Reformed Church in Zambia did not do so, until 2019, when a dispute arose between it, and the Anglican Diocese of Lusaka. He stated that in that regard, the Anglican Diocese of Lusaka was erecting a wall fence, and the said dispute was reported to Luangwa Town Council. Thus, Luangwa Town Council went on site to appreciate the said dispute, and engaged both churches on the way forward.

- 2.81 Alex Nyondo's testimony was that both parties were advised to produce site plans, so that the process of acquisition of the land could be completed. It was his evidence that at that stage, it was termed as regularization, because they had both already built on the land. He went on to state that in the same year, the Anglican Diocese of Lusaka submitted its' application for regularization, and it was approved by the Luangwa Town Council.
- 2.82 Alex Nyondo also testified that the approved application, a recommendation, extract of minutes and eight (8) site plans were sent to the provincial planning authority in Lusaka for final approval. He stated that the Reformed Church in Zambia also approached Luangwa Town Council, and it was advised for a second time, to produce eight (8) site plans. It was further his testimony, that the Reformed Church in Zambia was also advised to engage a registered surveyor to do the same, and they engaged him, and he made eight (8) site plans.
- 2.83 Alex Nyondo told the Court below that before he printed the site plans, he had shared them with Richard Daka, who gave him the go ahead, as a true reflection of their expectations. Thereafter, the Reformed Church in Zambia was asked to pay for the site plans, and it approved them. The evidence that was further given, was that the site plans were presented for endorsement at the Luangwa Town Council, which was done.
- 2.84 He stated that the site plans that had been produced by Luangwa Town Council were prepared by him, and that paragraph 5 of the letter exhibited as 'RD5', was based on the

site plan that he had prepared. Alex Nyondo's continued testimony, was that the said letter informed BIGOCA not to erect anything on the land behind the Anglican Diocese of Lusaka's land, which measured 27 x 40 meters.

- 2.85 Further, the letter indicated that there was a general plan for all the areas in Luangwa, and that the said land was a play park. However, since the Anglican Diocese of Lusaka was the first to submit site plans for the land, and they were approved, and were sent to Lusaka.
- 2.86 Alex Nyondo added that he was aware that the Reformed Church in Zambia rejected the site plans. He explained that if there are no site plans, the Luangwa Town Council cannot place beacons. Alex Nyondo denied showing the Reformed Church in Zambia, the beacons in 2020.
- 2.87 When cross examined by Richard Daka, Alex Nyondo stated that the Reformed Church in Zambia applied for special plots in 2004. His evidence was that the Anglican Diocese's site plan was not approved by the Council Secretary, and he had it. He also testified that the Reformed Church in Zambia was asked to prepare eight (8) site plans. Alex Nyondo reiterated that he shared the site plan with Richard Daka, after he had called him to settle the bill for printing.
- 2.88 His evidence further in cross examination, was that Richard Daka did not get an unsigned copy of the site plan after it was printed. He stated that he took the site plans to Luangwa Town Council after the Reformed Church in Zambia assigned him to prepare them.

- 2.89 In cross examination by Quelani Phiri, Alex Nyondo testified that the offer letter to the Reformed Church in Zambia, indicated that the land was unplanned, and the said Reformed Church in Zambia, was requested to produce eight (8) site plans, clearly indicating the proposed dimensions, but they did not do so.
- 2.90 His evidence was that the Reformed Church in Zambia, was never shown the boundaries of the land, and that it was not the Luangwa Town Council that took them to the plot. He also stated that Luangwa Town Council briefed him that the Reformed Church in Zambia had complained over the beacons being tempered with, and that the said Church was asked to pay Five Hundred Kwacha (K500.00) for replacement of the beacons. His evidence was that Luangwa Town Council sent Shatel, a surveyor, to put up the beacons.
- 2.91 Alex Nyondo stated that they had a meeting with the Reformed Church of Zambia and Andrey Nyirenda without the District Planning Officer, and that the outcome of the meeting, was that Luangwa Town Council was to find alternative land for BIGOCA, while the Reformed Church in Zambia was to compensate the said BIGOCA for the land, measuring 27 x 40 meters, which was given to it.
- 2.92 Alex Nyondo could not remember the Council Secretary having stated that the Reformed Church in Zambia would be given land or that the Anglican Diocese of Lusaka should give back the land to the Reformed Church in Zambia.
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- 2.93 He reiterated that the Reformed Church in Zambia asked him to prepare a site plans, so that the 27 x 40 meters could be included. However, BIGOCA had complained after the same was done, and he had sent BIGOCA to the Reformed Church in Zambia to settle the matter. Alex Nyondo denied having stated that the issue of the site plans should be temporarily halted after the complaints by BIGOCA.
- 2.94 He could not recall having stated that Mr Sakala told BIGOCA to go and complain to Luangwa Town Council, but that Quelani Phiri first told Mr Sakala to prepare the site plans. He did not know why Mr Sakala did not prepare the site plans, but Alex Nyondo did not recall the Reformed Church in Zambia showing him the wire fence for the play park. It was also his evidence, that he did not know who shared the boundary with the play park, or that he captured the beacons that Quelani Phiri showed him.
- 2.95 In re-examination, Alex Nyondo stated that it was the Anglican Diocese of Lusaka that had an approved site plan. He clarified that before he printed the site plan for the Reformed Church in Zambia, he had sent it for approval via WhatsApp Messenger to Richard Daka. He also stated that he found out about the Reformed Church in Zambia's dimensions from his predecessors.
- 2.96 Alex Nyondo also clarified that Luangwa Town Council did not take Richard Daka to the plot, but that it was the Reformed Church in Zambia that identified the land, and that was why the offer letter came with conditions. He stated that even at the
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time of his testimony, there were no beacons on the plot. The clarification that was further given, was that the issue of compensating BIGOCA was not as a result of the site plan.

MANJIMELA KUNDEZYI

- 2.97 Manjimela Kundezyi, a Senior Buildings Inspector at Luangwa Town Council, stated that the Reformed Church in Zambia, had no recognized boundaries, as per the offer letter that was given to them. This witness' further evidence was that the Reformed Church in Zambia had a fraudulent site plan, and it allowed an unauthorized person to alter a document.
- 2.98 He asked the Court to declare that the Reformed Church in Zambia proceeded to build on Luangwa Town Council property without obtaining permission from the Luangwa Town Council, contrary to **Section 49 (1) and (2) of the Urban and Regional Planning Act No 3 of 2015**. Further, that the said structures be demolished at the Reformed Church in Zambia's cost.
- 2.99 Manjimela Kundezyi further testified that in the site plan that had been produced by the Reformed Church in Zambia, in the Notice to Produce, had writings in pen. However, as Luangwa Town Council, they did not use pens to determine the boundary and extent of the land, but rather a table of coordinates, determined the extent of the land.
- 2.100 His evidence was further that the scale, that gave the exact distances, was done by a computer, and not by hand. He stated that any writing on a site plan is misleading.
- 2.101 In cross examination by Richard Daka, Manjimela Kundezyi testified that he went to Luangwa in April, 2020. In respect of

his duties, he named these as inspecting buildings, with the first stage in that process, being to ascertain boundaries using coordinates, provided that there were boundaries. He stated that on the land in dispute, there were beacons. Manjimela Kundezyi added that the Reformed Church in Zambia had a right to ask for beacons from Luangwa Town Council.

2.102 He stated that he did not know the Reformed Church in Zambia's complaint. It was also Manjimela Kundezyi's testimony that he did not know whether Luangwa Town Council used computers in 2004, but stated that the beacons were in existence before computers.

2.103 When cross examined by Quelani Phiri, Manjimela Kundezyi's evidence was that he took over notes from his predecessors, but he did not know how inspectors operated in 2008 and 2009. He also did not know who inspected the Anglican Diocese of Lusaka's building, or when it was approved. He added that a scale assists in knowing the extent of the land, and one could not know the measurements without a computer.

2.104 Manjimela Kundezyi's testimony was also that, only an author of a site plan, could alter it, and that such was also done by the final authority. He added that any alterations thereafter would be misleading.

3. GROUNDS OF APPEAL

3.1 Being dissatisfied with the Judgment of the Subordinate Court, the Anglican Diocese of Lusaka, filed a notice of intention to appeal with six (6) grounds of appeal as follows:

- i. *The Court erred in law and fact when he entertained this action brought by the Plaintiffs who had and have no capacity to bring the said action;*
- ii. *The Court erred in law and in fact when he held that the site plan produced by the Plaintiffs was not fraudulently produced, but was merely produced to just guide on how the Plaintiffs extent was supposed to be, when there was no evidence to this effect;*
- iii. *That the learned trial Magistrate misdirected himself in law and fact when he held that the Plaintiffs had proved their case on a balance of probabilities, thus not meeting the legal standard for a Judgment at law;*
- iv. *The Court erred in law when he held that because the Anglican Diocese of Lusaka and BIGOCA did not move the Court to visit the site, he was unable to establish if the said Anglican Diocese of Lusaka and BIGOCA had land on the alleged site;*
- v. *The learned Trial Magistrate erred in law when he delivered a Judgment that did not contain either legal authorities or analytical reasons for the holdings, thus not meeting the legal standard for a Judgment at law; and*
- vi. *The Court erred in law when it held that because the Anglican Diocese of Lusaka and BIGOCA did not move the Court to visit the site, it was unable to establish if the said Anglican Diocese of Lusaka and BIGOCA had land on the alleged site.*

4. ANGLICAN DIOCESE OF LUSAKA'S HEADS OF ARGUMENT

- 4.1 The Anglican Diocese of Lusaka filed the following heads of argument on 1st March, 2023.

GROUND ONE

THE COURT ERRED IN LAW AND FACT WHEN IT ENTERTAINED THIS ACTION WHICH WAS BROUGHT BY RICHARD DAKA AND QUELANI PHIRI WHO HAD AND HAVE NO CAPACITY TO BRING THE SAID ACTION

- 4.2 In arguing this ground, it is stated that it is trite law, that both natural persons and unnatural persons, can sue and be sued in their capacity. That this position is supported by the learned author of *Zambian Civil Procedure: Commentary and Cases Volume 1, by Dr. Patrick Matibini, Lexis Nexis, 2017 at page 47* where he states that:

“As a general rule, both natural and corporate persons (for example companies and corporations) have the capacity to sue and to be sued.”

- 4.3 The submission is that in this case, the issue arises from a dispute of extension of property between Two (2) churches, and a church is an unincorporated association, that is registered under **Section 7(1)(2) and (3) of the Societies Act Chapter 119 of the Laws of Zambia**. That the provisions of that law, is:

***“7. (1) Upon due application being made by any society for registration, the Registrar shall, subject to the provisions of this Act, register such society.
(2) Upon due application being made by any society for exemption from registration, the Registrar may-***

(a) with the approval of the Permanent Secretary and subject to the provisions of this Act, grant such exemption; or

(b) refuse the application;

and if such exemption is not granted, the Registrar shall treat the application as an application for registration and shall, subject to the provisions of this Act, register the society.

(3) On registering, or exempting from registration, a society, the Registrar shall issue to such society a certificate in the prescribed form which shall be prima facie evidence of registration or exemption, as the case may be.”

- 4.4 The Anglican Diocese of Lusaka states that from the cited provision, its' view is that such a society does not attain legal personality. It is argued that for a society to attain legal personality, it has to further register under the ***Land (Perpetual Succession) Act, Chapter 186 of the Laws of Zambia***. Thus, the Anglican Diocese of Lusaka strongly understands that the provisions in the ***Land (Perpetual Succession) Act*** as providing that once an association has been granted a certificate of registration, such association becomes a body corporate.
- 4.5 Further, that the provision makes it clear, that by becoming a body corporate, the association assumes its own legal personality, having the power to sue, and to be sued in its'

name. It is therefore submitted, that it is only the registered trustee or trustees of the body corporate, that are clothed with the power to represent such body corporate when suing or when sued.

- 4.6 Further in submission, it is stated that the record shows that the Richard Daka and Quelani Phiri, commenced this action in their personal capacity, as elders of the Reformed Church in Zambia (the Church) Luangwa Section, but there was no evidence that was led in the Court below, to show that they were trustees of the Church.
- 4.7 The Anglican Diocese of Lusaka contends that the record also shows that the Reformed Church in Zambia, is duly registered under the ***Land (Perpetual Succession) Act***, as evidenced by the exhibit marked 'JZ1'. Premised on that, the submission is that the Richard Daka and Quelani Phiri did not, and do not have the locus standi to sue on behalf of the Reformed Church in Zambia.
- 4.8 Reliance is placed on the case of ***Secretary General of the United National Independence Party v Elias Marko Chisha Chipimo*** ⁽⁶⁾ where Silungwe C.J held that:

“The Secretary - General of UNIP is not a corporation sole and so he cannot sue or be sued as such. He can, however, be sued in a representative capacity by name, not by the title of the office he holds...”

- 4.9 On the basis of the above, the submission is that the Court below erred in law and fact, when it held that the Richard Daka and Quelani Phiri, had authority to proceed with the action,

when there was no evidence to show that they are registered trustees of the Reformed Church in Zambia.

GROUND TWO

THE COURT BELOW ERRED IN LAW AND IN FACT WHEN IT HELD THAT THE SITE PLAN THAT WAS PRODUCED BY RICHARD DAKA AND QUELANI PHIRI WAS NOT FRAUDULENTLY PRODUCED BUT WAS MERELY TO JUST GUIDE ON HOW THE REFORMED CHURCH IN ZAMBIA'S EXTENT OF LAND WAS SUPPOSED TO BE WHEN THERE WAS NO EVIDENCE TO THIS EFFECT

4.10 With regard to ground two, the Anglican Diocese of Lusaka relies on the cases of *Ministry of Home Affairs and Attorney General v Lee Habasonda and others* ⁽¹²⁾ and *Rosemary Chibwe v Austin Chibwe* ⁽⁹⁾. The submission is that, those cases are very instructive that the Court's findings must be based on the evidence on the record. It argued that in this matter, the use of the words, 'it is possible', 'I do not think' and 'if', reveals a position of speculation.

4.11 The Anglican Diocese of Lusaka goes on to submit that the word 'possible' means 'that may exist or happen, but that it is not certain or possible'. Further, the words 'I do not think' point to speculation, as the same is not supported by any evidence. On the aspect of speculation, the Supreme Court case of *Wesley Mulungushi v Catherine Bwale Mizi Chomba* ⁽¹⁰⁾ is called to aid as authority, where it was held that:

"Our concern is: where did the learned judge get the evidence that the Respondent did not own the

property in the absence of her own testimony? Since, we have not come across any evidence by the Respondent that she did not own the property, we can safely say that the learned judge seriously misdirected himself by taking into consideration evidence that was not before him.”

4.12 The submission is that similar to that case, the learned trial Magistrate in this case, came to a finding that the tampered diagram was merely trying to show the extent of the Reformed Church in Zambia’s property, which finding was not supported by law or any evidence before the Court. The case of ***R v Governor of Brixton, Ex-parte Osman*** ⁽⁷⁾ is also cited, as having held that the Courts must generally not act upon speculation.

4.13 Thus, the Anglican Diocese of Lusaka contends that the Court below, erred in law and fact, when it speculated that the diagrams that were submitted by Richard Daka and Quelani Phiri, were meant to merely show the parties and the Court, the extent of the Reformed Church in Zambia’s land, in the absence of testimony or evidence to this effect. The argument is that in fact, the acceptance by Richard Daka and Quelani Phiri that they had written into a government public document was evidence enough to show or indicate fraud.

GROUND THREE

THE LEARNED TRIAL MAGISTRATE MISDIRECTED HIMSELF IN LAW AND IN FACT WHEN HE HELD THAT RICHARD DAKA AND QUELANI PHIRI HAD PROVED THE

CASE ON A BALANCE OF PROBABILITIES WHEN THERE WAS NO EVIDENCE TO CLEARLY ESTABLISH THEIR CASE

4.14 In relation to ground three, the Anglican Diocese of Lusaka, states that it is a trite principle of law, that the standard of proof in civil matters is on balance of probabilities. The English case of *Miller v Minister of Pensions* ⁽²⁾ is relied on as authority in that respect. Further reliance is placed on the Supreme Court decision in the case of *Zambia Railways Limited v Pauline S. Mundia, Brian Sialumba* ⁽¹⁵⁾ where it was held that:

“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 assents a claim in a civil trial must prove on a balance of probability that the other party is liable.”

4.15 Other cases cited as having espoused the above principles are, *BJ Poultry Farms Limited v Nutri Feeds Zambia Limited* ⁽¹⁷⁾ and *Jimmy Kalunga & Another v Stanbic Bank Zambia Limited* ⁽¹⁸⁾.

4.16 The submission is that in this matter, Richard Daka and Quelani Phiri, claimed that the Luangwa Town Council had given the Reformed Church in Zambia, land measuring 90 x 80.5 meters in extent, and which land extended to the land on which the Anglican Diocese of Lusaka, has since built a church and a community school.

- 4.17 The argument by the Anglican Diocese of Lusaka is that Richard Daka and Quelani Phiri did not bring to Court any documentary evidence, that was given to them by the Luangwa Town Council, that showed the extent of the land that they were given. It is submitted that Richard Daka and Quelani Phiri's contention, was that the extent of the land was measured, and sold to them by one Mr. Alex Nyondo an Assistant Planner at the Luangwa Town Council, and they even produced a diagram which showed the extent of their land in pen (the diagram subject of ground 2)
- 4.18 That in their examination in chief, Richard Daka and Quelani Phiri's testimony, was that it was the right diagram to show the extent of their land. However, when asked in cross examination if the produced diagram was authorised by the Luangwa Town Council, both Richard Daka and Quelani Phiri had answered in the negative. Further, in cross examination, Richard Daka and Quelani Phiri had admitted, that it was them that had written on the diagram, and not the Luangwa Town Council.
- 4.19 The argument is that from that evidence, the probability of that fact that the Reformed Church in Zambia, could have been given a lesser piece of land, than that, which it claimed, is more probable, as there is no documentary evidence to establish the claim. It is submitted that this is reinforced by the fact that when Alex Nyondo was called to the stand, he did not give any testimony in support of Richard Daka and Quelani Phiri's allegation that they were given land in extent of 90 x 80.5 meters.

4.20 It also stated that it was Alex Nyondo's testimony, that Richard Phiri and Quelani Phiri had in fact to date not formally processed their land. That this witness in contradicting, Richard Daka and Quelani Phiri's claim, on behalf of Luangwa Town Council, at trial, produced the authorised surveyed diagrams for the area, which clearly, showed that there was no encroachment by the Anglican Diocese of Lusaka.

GROUND FOUR

THE COURT ERRED IN LAW AND IN FACT WHEN IT HELD THAT HEARSAY EVIDENCE IS ADMISSIBLE IN CIVIL MATTERS

4.21 As regards this ground, the Anglican Diocese of Lusaka argues that the Honourable Magistrate, in his Judgment at page 144 of the record of appeal, addressed the issue of hearsay evidence, that was raised in the Anglican Diocese of Lusaka, BIGOCA and Luangwa Town Council's submissions. Thus, in addressing the same, he stated as follows:

“The first aspect I would like to address before I delve into the main issues, is one where the defence counsels for the 1st, 2nd and 4th Defendants in some instances argued that certain evidence for the plaintiff was hearsay. I must mention that in civil matters there is no much restrictions as to admissibility of evidence. Thus, even hearsay evidence as long as it is relevant, and it is from a competent source.”

4.22 **Black's Law Dictionary, 9th Edition, by Bryan A. Garner, Thomas Reuters 2009 at page 790** is referred to as defining *hearsay* as:

“Traditionally, testimony that is given by a witness who relates not what he or she knows personally, but that is therefore dependent on the credibility of someone other than the witness. Such testimony is generally inadmissible under the rules of evidence.”

4.23 The Anglican Diocese of Lusaka states that it is its' understanding, that the rule against hearsay, is a general law, that falls under the umbrella of evidence in the practice of law, in both civil and criminal practice. Reliance is placed on the decision by the Supreme Court, in the case of ***Mutambo and 5 others v The People*** ⁽³⁾, stating that they qualified what amounts to hearsay, when they held that:

“Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence not the truth of the statement, but the fact that it was made.”

4.24 Relating the same to this case, it is argued that the record shows that the evidence that was received, was evidence to establish the truthfulness of the statement, and that in itself, made it inadmissible.

4.25 Further reference is further made to *The Law of Evidence in Zambia, Cases and Materials by John Hatchard and Muna Ndulo, Multimedia Zambia and James Currey, 1991*, with the Anglican Diocese of Lusaka submitting that the learned authors at page 257, give exceptions to the rule against hearsay. In that regard, the contention is that there is no mention of hearsay evidence, being cardinal in criminal matters, and not in civil matters. It is further stated that in fact, one of the exceptions provided in the book, that falls under the civil proceedings, is the exception relating to the 'declarations' by a testator as to their will.

GROUND FIVE

THE LEARNED TRIAL MAGISTRATE ERRED IN LAW AND IN FACT WHEN HE DELIVERED A JUDGMENT THAT DID NOT CONTAIN ANY LEGAL AUTHORITIES OR ANALYTICAL REASONS FOR THE HOLDINGS CONTAINED THEREIN, THUS NOT MEETING THE STANDARDS FOR A JUDGMENT AT LAW

4.26 With regard to ground five (5), the Anglican Diocese of Lusaka argues, that it is trite, that a Judgment should contain, the facts in issue, the law, the evidence, and the findings of the Court, premised on the evidence before it. In support of its' argument, the case of *Minister of Home Affairs, Attorney General v Lee Habasonda and others* ⁽¹²⁾ is called to aid as authority. The contention is that the above authority has been confirmed in several recent cases.

4.27 The submission is that a perusal of the Judgment of the lower Court, reveals that the Court did not base its' findings on the evidence before it. Further, the Judgment did not contain any analysis of the evidence, and the Court's application of the facts to support the findings of the Honourable Magistrate. The submission is further that additionally, the Court did not cite any precedents, books, or other authorities to support its' findings and decisions.

GROUND SIX

THE COURT ERRED IN LAW AND IN FACT WHEN IT HELD THAT BECAUSE THE ANGLICAN DIOCESE OF LUSAKA AND BIGOCA DID NOT MOVE THE COURT TO VISIT THE SITE, IT WAS UNABLE TO ESTABLISH IF THEY HAD LAND ON THE ALLEGED SITE

4.28 In arguing ground six, the Anglican Diocese of Lusaka states that the Court erred in law and in fact when it held that:

“I now revert back to the main discourse on the 1st and 2nd Defendant as I said above, the 4th Defendant never moved the court to the site to show the dimensions and extent of the land for the parties which I said was fatal. Equally, 1st and 2nd Defendants also never moved the court to the site to show dimensions and extent of their land...for the 1st Defendant, due to failure to show me their parcels of land and the glaring shortcoming irregularities as espoused above, I am unable to establish if they have land at the alleged site.”

- 4.29 The submission is that the above finding by the Court below was not based on any precedent of law, and in this regard, the case of **Rosemary Chibwe v Austin Chibwe** ⁽⁹⁾ is cited as authority.
- 4.30 Pushing the submission further, the Anglican Diocese of Lusaka argues that the record shows that it produced various evidence on record, in support of their case. It is stated that the said evidence includes an offer letter, receipts for the statement of land, approved diagrams from the Luangwa Town Council and various testimonies from its' witnesses.
- 4.31 The argument is also that in support of the Anglican Diocese of Lusaka's case, the Luangwa Town Council, further produced diagrams according to their records for the land, that was allocated to the Anglican Diocese of Lusaka. The submission is that there were the same diagrams, as those that were given to the Anglican Diocese of Lusaka, upon the land being surveyed. Thus, the lower Court should have considered that evidence, to establish what extent of land the Anglican Diocese of Lusaka was given.
- 4.32 It is further argued that under **Order III Rule 2 of the Subordinate Court Act, Chapter 28 of the Laws of Zambia**, the Subordinate Court, is clothed with the power to make any interlocutory order for the purpose doing justice. The contention by the Anglican Diocese of Lusaka is that the power, included, making an order to move to the Court to the site, when the Anglican Diocese of Lusaka, BIGOCA and the Luangwa Town Council were making their case.

4.33 It submits that the Court clothed with the powers in **Order III Rule 2**, had the discretionary powers to move to the site if it saw it proper for doing justice.

5. RICHARD DAKA AND QUELANI PHIRI'S HEADS OF ARGUMENT

GROUND ONE

5.1 In response to ground One, Richard Daka and Quelani Phiri state that in a well-reasoned ruling, the Learned Magistrate concluded that:

“Since as stated above that both plaintiffs have authority to represent the RCZ Trustees I find that they have capacity to represent the RCZ trustees and I allow them to proceed in my discretion, the preliminary issue is dismissed. Costs in the cause.”

5.2 Therefore, the contention is that, had the Anglican Diocese of Lusaka been dissatisfied with that Ruling, it ought to have appealed to the High Court, within Fourteen (14) days from 30th July, 2021. That this would have been in keeping with **Order XLIV Rule 3 of the Subordinate Court Rules, Chapter 28 of the Laws of Zambia.**

5.3 Richard Daka and Quelani Phiri state that the Court proceedings in the Court below, do not indicate whether the Anglican Diocese of Lusaka and its' co-Defendants appealed the said Ruling. However, from the Court proceedings, it is clear that the matter proceeded before the Learned Magistrate, until the Judgment complained of. The argument is further that in the Judgment complained of, the lodging of an appeal was

conditional on the payment of the sum of Five Thousand Kwacha (K5,000.00), and the appeal was to be filed within Thirty (30) days.

- 5.4 Richard Daka and Quelani Phiri submit that if the Anglican Diocese of Lusaka, was and is, disenchanted by the Ruling of 30th July, 2021, it cannot and should not be allowed to use the Judgment of 30th September, 2021, to grumble about the Ruling of 30th July, 2021.

GROUND TWO

- 5.5 On this ground, Richard Daka and Quelani Phiri argue that from the excerpt reproduced in the Anglican Diocese of Lusaka's heads of argument, it is clear why the Learned Magistrate concluded as he did, that they did not fraudulently produce the said site plan. They state that in that regard the Learned Magistrate stated that:

“Thus, I cannot impute fraud on this document if they were just guiding on how their extent of the land was supposed to be as it was not yet created and numbered. For this reason, I find that this argument also lacks merit and I dismiss it.”

- 5.6 It is Richard Daka and Quelani Phiri's position, that from that reasoning, much more that the plot in issue was yet to be created and numbered, there was absolutely no need for evidence to be adduced to the effect that the said site was just a guide on the extent of the land in question. Further, based on the evidence before him, the Learned Magistrate made the

conclusion that he made, which Richard Daka and Quelani submit, was on *terra firma*.

GROUND THREE

- 5.7 In respect of this ground, Richard Daka and Quelani Phiri state that in crafting this ground of appeal, the Anglican Diocese of Lusaka, appears to have ignored the fact that the Judgment complained of, is replete with a summary of the testimonies of the witnesses, who appeared in the Court below. They cite instances of what the Learned Magistrate stated in his Judgment such as:

“This is the who [sic] of the evidence before me in this matter...”

“I have critically considered the evidence before me.”

“Plaintiff in their evidence both documentary and oral stated that in 2005, they were issued with an offer letter. The said letter was marked ‘RD2’...”

- 5.8 It is stated that from these few excerpts, it is clear that the Learned Magistrate had the benefit of both the oral and documentary evidence when crafting his Judgment. They go on to cite some passages from the Judgment that show that in coming up with the Judgment complained of, the trial Magistrate properly identified the issues for determination, and thereafter embarked on an analysis of the evidence and the matters that were raised by the parties, particularly by the Anglican Diocese of Lusaka, BIGOCA, Andrey Nyirenda and the Luangwa Town Council.

GROUND FOUR

- 5.9 Richard Daka and Quelani Phiri in response to this ground, state that the Anglican Diocese of Lusaka has alleged an error of law, which they define as an erroneous determination of legal rules governing procedure, evidence or the matters at issue between the parties.
- 5.10 In this regard, they state that what this Court must determine, is whether the alleged error in law, is material to the determination of the outcome of the appeal. Richard Daka and Quelani Phiri submit that the error is harmless, and define *harmless error* in accordance with ***Black's Law Dictionary, Eighth Edition, by Bryan A. Garner*** as:
- “An error that does not affect a party’s substantive rights or the cases’ outcome. A harmless error that is not grounds for reversal.”***
- 5.11 Richard Daka and Quelani Phiri submit that the resolution of this ground in favour of the Anglican Diocese of Lusaka, will not affect the outcome of the appeal, as it merely raises an issue of academic interest. They state that in any event, exceptions abound to the rule against hearsay. They also argue that Courts of law are not established to resolve academic issues, which is best left to Moot Courts at law schools.
- 5.12 Further in argument, Richard Daka and Quelani Phiri contend that the Anglican Diocese of Lusaka ought to have pointed out the offending evidence that they claim was hearsay, or made such the subject of a ground of appeal. That as the Anglican Diocese of Lusaka, has not pointed out the evidence that it alleges was hearsay evidence, it wishes the Court to speculate

which evidence was hearsay. They state that the Court must generally not act on speculation.

- 5.13 It is also their argument, that this Court should disapprove or frown upon being called upon to engage in an academic exercise, relying on the cases of ***Zambia Democratic Congress v The Attorney General*** ⁽⁸⁾ and ***Attorney General v The Law Association of Zambia*** ⁽¹⁴⁾. The submission is further that it is not every real or perceived wrong sentence in a Judgment, that must inform the formation of a ground of appeal.
- 5.14 Richard Daka and Quelani Phiri in that regard, contend that a ground of appeal must be formulated on the basis that should it be upheld, the Judgment appealed against, will be adversely affected or nullified, reversed, varied or set aside. They state that ground four (4) has no merit whatsoever.

GROUND FIVE

- 5.15 On this ground, Richard Phiri and Quelani Daka state that from the outset, it must be made clear that contrary to the argument by the Anglican Diocese of Lusaka, the Learned Magistrate in the Judgment, gave summaries of the testimonies of the witnesses, interspaced with facts in issue, the law and findings of the Court premised on the evidence that was before him. An instance is given where the trial Magistrate stated that:

“The only argument to consider is the extent and boundaries of land for the plaintiff as this is the bone of contention in this matter.”

- 5.16 This it is submitted, is clear evidence that the learned Magistrate identified and properly so, the ‘bone’ of contention

in this matter. Richard Daka and Quelani Phiri then state that the trial Magistrate went on to make findings of fact, and gave reasons for the position that he took. They further state that the trial Magistrate, thereafter went into an analysis of how the dispute started, how it evolved, which also revealed his reasoning before arriving at the conclusion, that has motivated the Anglican Diocese of Lusaka to launch this appeal.

- 5.17 It is also submitted that the resolution of the dispute before the Court below, was highly dependent on the determination of facts, and as such, it was not absolutely necessary for the Court to cite legal authorities to justify the facts that it so found. Richard Daka and Quelani Phiri state that the Judgment had all the necessary ingredients of a Judgment.

GROUND SIX

- 5.18 In response to the last ground of appeal, Richard Daka and Quelani Phiri argue that the record shows that in the Court below, the Anglican Diocese of Lusaka, who is the Appellant in this appeal, was the 1st Defendant, and the 2nd Defendant, was the Bible Gospel Church in Africa (BIGOCA). The argument is that from the documents that were availed to Richard Daka and Quelani Phiri, there is no indication that BIGOCA is a party to this appeal. Thus, they state that this ground is misconceived.
- 5.19 It is further their argument, that more importantly, it seems certain that the Anglican Diocese of Lusaka, is intent on grumbling about the fact that the Learned Magistrate could not establish if the Anglican Diocese of Lusaka and BIGOCA had

land on the alleged site, because it did not move the Court to visit the site.

- 5.20 The submission is that the Anglican Diocese of Lusaka has reproduced the excerpt clearly showing that the Learned Magistrate was simply saying that the Anglican Diocese and BIGOCA did not adduce evidence to show or tending to show that they had land at the alleged site. That it was against that background, that the Court's conclusion must be based on evidence adduced before it.
- 5.21 In that regard, the Supreme Court's decision in the case of ***Rosemary Chibwe v Austin Chibwe*** ⁽⁹⁾ is relied on. Richard Daka and Quelani Phiri argue that even if there was no case law or authority cited in that regard, it is not fatal, because the Court's conclusions must be based on the evidence on record. They state that in this case, there was no evidence that could lead the Learned Magistrate to conclude that the Anglican Diocese of Lusaka (and BIGOCA) had land at the alleged site.
- 5.22 It is also Richard Daka and Quelani Phiri's argument that instead of making arguments as to why the Anglican Diocese of Lusaka is grumbling about the Court below, allegedly erring in law when it held that because the said Anglican Diocese of Lusaka (and BIGOCA) had land on the alleged site, the Anglican Diocese of Lusaka, makes arguments that it produced evidence in the form of an offer letter, receipts for payments of land, approved diagrams from Luangwa Township Council, and also testimonies from witnesses.

- 5.23 The submission is that such arguments do not aid the Anglican Diocese of Lusaka in grumbling about the conclusion that was reached by the Learned Magistrate, that the failure by the Anglican Diocese of Lusaka (and BIGOCA) to move the Court below to the alleged site was fatal.
- 5.24 With regard to the Anglican Diocese of Lusaka calling to aid **Order III Rule 2 of the Subordinate Court Act**, Richard Daka and Quelani Phiri state that the arguments in that regard are irrelevant to ground 6 of the appeal. The irrelevance in this regard, is stated as lying in the fact that the Anglican Diocese of Lusaka, is not grumbling about the fact that the Learned Magistrate failed to use his discretion under **Order III Rule 2** *‘to move to the site if it saw it proper for doing so.’*

6. ANGLICAN DIOCESE OF LUSAKA’S SUBMISSIONS IN REPLY

GROUND ONE

- 6.1 The Anglican Diocese of Lusaka in reply, states that in as much as it is true, that if it was unhappy, it should have appealed against the lower Court’s Ruling of 30th July, 2021, it is also true that a point of law can be raised at any stage of the proceedings. Called to aid as authority is **Order 14A of the Rules of the Supreme Court of England 1965, 1999 Edition**, stating that the wording of that provision, is clear that an issue of law can be raised at any stage, including the appeal stage.
- 6.2 The argument is also that this has been reiterated in a number of cases, including **City Express Service Limited v Southern Cross Motors** (13). It is contended that the issue raised in

ground one, is a point of law, and the capacity of a party to sue and be sued, hinges on points of law, which can be raised at any stage of the proceedings.

GROUND TWO

- 6.3 Referring to Richard Daka and Quelani Phiri's arguments in opposition under this ground, it is maintained that the lower Court's reasoning was premised on pure speculation, and not any evidence that was on record. The submission is further that the Anglican Diocese of Lusaka states that as a matter of fact, there was admission by Richard Daka and Quelani Phiri in the Court below, that they indeed tampered with a public document.
- 6.4 It is stated that the admission was not supported by any legal reason, and therefore it should have been used by the Court to infer malicious intention on the part of Richard Daka and Quelani Phiri, and not speculate that they might have simply wanted to show the extent of their property. The Anglican Diocese of Lusaka reiterates that the reasoning and holding of the Court as cited, goes against the principles of law that were stated in the case of *Ministry of Home Affairs and the Attorney General v Lee Habasonda and others* (12).

GROUND THREE

- 6.5 In reply on this ground, the Anglican Diocese of Lusaka argues that the evidence before the Court below that was placed by Richard Daka and Quelani Phiri, did not meet the standard of proving civil cases, which standard has been guided by a plethora of cases. The contention is that the Court was faced

with overwhelming evidence, that contradicted Richard Daka and Quelani Phiri's evidence on the extent of the land.

- 6.6 An example is given, that the evidence in the form of the diagrams from Luangwa Town Council, showed the extent of each party's land. It is also argued that there was no documentary evidence to support Richard Daka and Quelani Phiri's allegation that the land for the Reformed Church in Zambia measured approximately 90 x 80.5 meters.
- 6.7 However, there was evidence from the Luangwa Town Council and the Anglican Diocese of Lusaka on record that clearly contradicted that evidence.

GROUND FOUR

- 6.8 In replying to this ground, the Anglican Diocese of Lusaka states that the record of appeal shows at page 44, particularly in paragraph 6, that the Anglican Diocese of Lusaka, in its' submissions, stated that the evidence of the Reformed Church in Zambia, particularly that of the first and second witnesses was hearsay evidence. That premised on that submission, the Court below, began by addressing the issue of hearsay evidence before getting into the main issues.
- 6.9 The further submission by the Anglican Diocese of Lusaka is that the admission of hearsay evidence in this matter by the lower Court was a grave error, as this means that it considered the evidence of these witnesses in making its' determination.
- 6.10 With regard to the argument that Richard Daka and Quelani Phiri did not know what evidence was being referred to, the Anglican Diocese of Lusaka, submits that had Richard Phiri

and Quelani Phiri gone through the record and the Judgment, they would have known why the lower Court addressed hearsay evidence in its' Judgment.

GROUND FIVE

- 6.11 The Anglican Diocese of Lusaka, on this ground, once again relies on the case of *Minister of Home Affairs, Attorney General v Lee Habasonda and others* (12). It contends that the Judgment of the Court below, failed to take and analyse the evidence on record, to make certain findings. The argument is that the starting point, is that there was evidence on record that the Anglican Diocese of Lusaka had been given an offer letter for the property in Luangwa.
- 6.12 Further, it was Richard Daka and Quelani Phiri's own testimony that sometime during the period that the Anglican Diocese of Lusaka had begun to build a wall fence, that they had approached it, contending that it had built on part of the wall fence on the Reformed Church in Zambia's land. That was how the parties then agreed on the boundaries, and the Anglican Diocese of Lusaka then moved their wall fence.
- 6.13 The submission is also, that there was further evidence on record that was produced, in the form diagrams by both the Anglican Diocese of Lusaka and the Luangwa Town Council, on which the lower Court did not make any findings of fact, or analyse in its' Judgment. The Anglican Diocese of Lusaka, argues that had the Court considered all this evidence on record, it would have established that the Anglican Diocese of

Lusaka and the Reformed Church in Zambia, share boundaries on the piece of land, on the site.

- 6.14 That the simple question was to determine the dimensions of each property. Therefore, this ground of appeal could be argued along with ground 3 of the appeal.

GROUND SIX

- 6.15 The reply on this ground, is that the analysis and holding of the Court below, covered both the Anglican Diocese of Lusaka and BIGOCA. However, the arguments that have been placed before this Court are for the Anglican Diocese of Lusaka, and not BIGOCA, who is not a party to the appeal. It is stated that BIGOCA has been referred to, only because the finding of the Court was grouped in that manner.
- 6.16 The other arguments are, that moving into Richard Daka and Quelani Phiri's speculative statement, which is that, a perusal of that excerpt clearly shows that the Learned Magistrate was simply saying that the Anglican Diocese of Lusaka (and BIGOCA) did not adduce evidence to show or tending to show that they had land at the alleged site, it is submitted that this was not the case.
- 6.17 The Anglican Diocese of Lusaka argues that the Court's exact words in the Judgment were:
- 'Equally, 1st and 2nd Defendants also never moved the court to the site to show dimensions and extent of their land.'***
- 6.18 The Anglican Diocese of Lusaka contends that this does not refer to documentary or testimonial evidence that the Anglican

Diocese of Lusaka could not have produced evidence to show that it had a piece of land. It goes on to argue that if that was the Court's position, as speculated by the Richard Daka and Quelani Phiri, it would have been its' strongest contention that the Court fell into grave error, as there was an offer letter in support of the Anglican Diocese of Lusaka, diagrams to support their piece of land from them, which were supported by diagrams from the Luangwa Town Council, testimonies by witnesses and further testimony by Richard Daka and Quelani Phiri themselves, which the Court did not analyse to making the finding that the Anglican Diocese of Lusaka did not have a piece of land on the site.

6.19 With regard to the relevance of **Order III Rule 2 of the Subordinate Court Act**, the submission is that the Court being fully aware of the nature of the case, and the alleged fatality in not being moved to the site, has the power under **Order III Rule 2 of the Subordinate Court Act**, to do justice and move the Court to the site, when the Anglican Diocese of Lusaka was making its' case.

6.20 The contention is that Richard Daka and Quelani Phiri have contradicted themselves on this ground, as on the one hand they speculate that the Court meant that there was no evidence on record to show that the Anglican Diocese of Lusaka had land on site, while on the other hand, they contend that not moving the Court to the site was fatal, but that the powers of the Court under **Order III Rule 2** are irrelevant.

7. SUBMISSIONS AT THE HEARING

SUBMISSIONS BY COUNSEL FOR THE ANGLICAN DIOCESE OF LUSAKA

- 7.1 When the appeal came up for hearing on 4th April, 2023, Counsel for the Anglican Diocese of Lusaka, relied on the documents that were filed in support of the appeal. In augmenting ground one, he stated that the question was one relating to Richard Daka and Quelani Phiri's capacity to commence the proceedings in the Court below. Counsel stated that in any given matter, capacity is a threshold issue and, arises as a point of law.
- 7.2 Further in submission, Counsel argued that capacity goes to jurisdiction, and therefore lack of capacity, meant lack of jurisdiction, and that jurisdiction is everything. Reliance was placed on the case of ***Crossland Mutinta and another v Donovan Chipanda*** ⁽¹⁹⁾, observing that the Supreme Court in that matter, stated that out of nothing comes nothing.
- 7.3 It was also Counsel's submission, that Richard Daka and Quelani Phiri had argued that the issue of capacity could not be raised at this stage. However, the view that Counsel took, was that it was his understanding, that there is no estoppel when it comes to raising a point of law. It therefore followed that a point of law, could be raised at any time, even on appeal, as seen from the authorities that had been cited.
- 7.4 He went on to state that this was confirmed in the cases of ***Duncan Mpempeta v Charles Lundofo*** ⁽²⁰⁾ and ***Nevers Mumba v Mumbi Lungu*** ⁽¹⁶⁾.

- 7.5 In augmenting ground five (5), Counsel submitted that they had cited the case of ***Minister of Home Affairs and Attorney General v Lee Habasonda and others*** ⁽¹²⁾. He referred to the writings of *Lord Barrows* of the UK Supreme Court, in his speech of 21st May, 2021, titled *Judgment Writing, a Personal Perspective*. It was stated that *Lord Barrows* opined that a Judge must write the law, and not his opinion. Further, common sense in a Judgment, must be supported by legal reasoning. Counsel submitted that the Judgment of the lower Court was devoid of any ratio, in so far as a Judgment should be set out.
- 7.6 Ms Simukonda, also in augmenting, stated that with regard to ground one, they had raised the issue of capacity premised on the parties that were involved in the matter. In that respect, her submission was Richard Daka and Quelani Phiri commenced the action as elders of the Church, while being fully aware that the Reformed Church in Zambia is registered under the ***Land (Perpetual Succession) Act***.
- 7.7 She stated that as a result of the said registration, the Church acquired the status of being a body corporate, as evidenced by the certificate of incorporation which was at page 22 of the record of appeal. Her argument was that in the Court below, no evidence was led to show that Richard Daka and Quelani Phiri had authority to sue as representatives of the Church. On that basis, her prayer was that ground One of the appeal should succeed, as it had merit.
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- 7.8 With regard to ground five, Counsel's submission was that it could be married with the arguments, in ground two, in which they had stated that the lower Court erred, when it held that the diagram that was produced was not intended to mislead the Court. Counsel reiterated the arguments in relation to those grounds adding that the case of ***Minister of Home Affairs and Attorney General v Lee Habasonda and others*** ⁽¹²⁾ gave strong principles on Judgment writing, especially that findings of the Court must be based on the evidence on record.
- 7.9 It was also Counsel's submission, that coming to the finding by the trial Magistrate that the document was not fraudulently produced, the arguments in the heads of argument were repeated that the Court used the words 'it is possible'. 'I do not think' and 'if'. The words of *Lord Barrows* were reiterated, that they inferred the personal opinion of the Court on the matter, as the Court did not refer to the evidence that was on the record to support its' findings.
- 7.10 Counsel's view was that the Court expressed its' opinion or speculated, which fell short of the standards of Judgment writing. It was therefore Counsel's prayer in the premises, that grounds 3 and 5 of the appeal should succeed as they had merit.

RESPONSE BY COUNSEL FOR RICHARD DAKA AND QUELANI PHIRI

- 7.11 Counsel in response, stated that they relied on the documents that were filed in opposition to the appeal. She augmented ground one, submitting that although they were alive to the

provisions of **Order 14A of the Rules of the Supreme Court of England, 1965 (1999 Edition)**, which allows a party to raise a point of law at any stage, the point of law in ground one, was raised in the Court below, and it was dealt with. It was stated that the Anglican Diocese of Lusaka did not appeal that decision.

7.12 Therefore, they could not raise it now, in supporting the appeal of 30th September, 2021, to circumvent an issue that should have been appealed Fourteen (14) days after the ruling. It was also Counsel's submission that it had been stated that under the **Land (Perpetual Succession) Act**, the trustees were entitled to sue. However, their understanding was that a society on being registered, becomes a body corporate, and it could authorise anybody to represent it.

7.13 The prayer on that premise, was that the grounds of appeal should fail, and it be dismissed with costs.

REPLY BY COUNSEL FOR THE ANGLICAN DIOCESE OF LUSAKA

7.14 In reply, Counsel for the Anglican Diocese of Lusaka, Mr Zimba, stated that an argument had been forward that a body corporate could authorise someone to represent it. His submission was that assuming that was correct, an appeal is a hearing on the record, and authorisation of a party was never a secret. Thus, a careful consideration of the record showed that there was no authorisation that was produced in this matter. He stated that it was one of the speculations in the Court below, that there may have been such authorisation.

- 7.15 He referred to the case of ***Edington v Fitzmaurice*** ⁽¹⁾, stating that ‘the state of a man’s mind is as much a fact a state of his digestion.’ It was submitted that there was no actual representation of the state of a body corporate on record, but there was speculation, as to what it would have been, which the Court is proscribed from swimming in.
- 7.16 Counsel reiterated that there is no estoppel at law with regard to raising a point of law. By way of concluding the reply, Counsel submitted that an appeal being a hearing on record, the Court is not precluded from considering that question.

8. DECISION OF THIS COURT

- 8.1 I have considered the appeal.

GROUND ONE

- 8.2 The first ground of appeal alleges that the Court below erred in law and fact, when it entertained the action that was brought by the Richard Daka and Quelani Phiri, who had and have no capacity to bring the said action. In so contending, the Anglican Diocese of Lusaka has argued that the Reformed Church of Zambia is registered, not only under the ***Societies Act Chapter 119 of the Laws of Zambia***, but also under the ***Land (Perpetual Succession) Act, Chapter 186 of the Laws of Zambia***
- 8.3 That this entails that it is a corporate body, and as such, it has the capacity to sue and can be sued by its’ trustees. The case of ***Secretary General of the United National Independence Party v Elias Marko Chisha Chipimo*** ⁽⁶⁾ has been relied, with the argument being, that there is no evidence on record to show

that Richard Daka and Quelani Phiri were the Trustees of the Reformed Church in Zambia, and thus had the requisite capacity to commence the proceedings on behalf of the said church.

8.4 In response, Richard Daka and Quelani Phiri have stated that the Court below ruled on the issue of locus standi, in its' Ruling of 30th July, 2021, and the Anglican Diocese of Lusaka, did not appeal the Ruling. Therefore, it should not be allowed to use the Judgment of 30th September, 2021, to grumble about the said Ruling.

8.5 It is trite that an entity that is registered under the **Societies Act, Chapter 119 of the Laws of Zambia**, is an unincorporated body. Consequently, it does not have the capacity to sue or be sued in its' own name. This was elucidated in the case of **Harry Mwanga Nkumbula and Simon Mwansa Kapwepwe v United National Independence Party** ⁽⁴⁾ where it was held that:

“An unincorporated body is not a legal entity and is therefore not capable of suing or being sued in its name. It could only sue and be sued in a representative capacity. Hence UNIP can only be sued in a representative capacity.”

8.6 However, as rightly stated by the Anglican Diocese of Lusaka, the Reformed Church in Zambia, is also registered under the **Land (Perpetual Succession) Act**. This can be seen from exhibit 'JZ1' to the affidavit that was filed in support of Notice of Motion to raise preliminary issue on a point of law by

Matthews Sakala and James Mwale, who were sued as Secretaries for the Reformed Church in Zambia in the Court below.

- 8.7 That exhibit is a certificate of incorporation under the ***Land (Perpetual Succession) Act*** for the Church. ***The Land (Perpetual Succession) Act*** in **Section 2** provides for the effect of a grant of a certificate of incorporation under that Act. It is as follows in provision:

“Trustees or a trustee may be appointed by any community of persons bound together by custom, religion, kinship or nationality or by anybody or association of persons established for any religious, educational, literary, scientific, social or charitable purpose, or for any purpose which, in the opinion of the Minister, is for the benefit or welfare of the inhabitants of Zambia or any part thereof, and such trustees or trustee may apply in manner hereinafter mentioned, to the Minister for a certificate of registration of the trustees or trustee of such community, body or association of persons as a corporate body; and if the Minister, having regard to the extent, nature and objects and other circumstances of such community, body or association of persons, shall consider such incorporation expedient, he may grant such certificate accordingly, subject to such conditions or directions generally as he shall think fit to insert in

such certificate, and particularly relating to the qualifications and number of the trustees, their tenure and avoidance of office, the mode of appointing new trustees, the custody and use of the common seal, the amount of land which such trustees may hold, and the purposes for which such land may be held and used; and the trustees or trustee shall thereupon become a body corporate by the name described in the certificate, and shall have perpetual succession and a common seal, and power to sue and be sued in such corporate name, and, subject to the conditions and directions contained in the said certificate, to hold and acquire, and by instruments under such common seal to convey, assign and demise, any land or any interest therein now or hereafter belonging to, or held for the benefit of, such community, body or association of persons, in such and the like manner, and subject to such restrictions and provisions as such trustees or trustee might, without such incorporation, hold or acquire, convey or assign, or demise the same for the purposes of such community, body or association of persons.”

- 8.8 A perusal of the record, at pages 84 and 85, shows that the Court below rendered a Ruling on the issue of locus standi on 30th July, 2021. It referred to a letter of 29th April, 2021 which it states granted Richard Daka and Quelani Phiri, authority to

act on behalf of the Reformed Church in Zambia. The Court below ruled that the letter satisfied **Order 20 of the Subordinate Court Act Chapter 28 of the Laws of Zambia** which grants discretion to the Court to allow a party to appear by proxy.

- 8.9 Richard Daka and Quelani Phiri have also argued that the Anglican Diocese of Lusaka did not appeal the Ruling of 30th July, 2021. A scrutiny of the record, does indeed reveal that there was no appeal that was launched by the Anglican Diocese of Lusaka following the Ruling on locus standi. The Anglican Diocese of Lusaka, therefore did not exercise its' right of appeal, and trial proceeded with Richard Daka and Quelani Phiri representing the Reformed Church in Zambia.
- 8.10 The Anglican Diocese of Lusaka also did not produce a list of the trustees for the Reformed Church in Zambia or any evidence to show that Richard Daka and Quelani Phiri did not have authority to act on behalf of the Reformed Church in Zambia. In its Ruling, however, the Court below referred to a letter that was authored by the Reformed Church in Zambia Trustees, that gave Richard Daka and Quelani Phiri authority to act on behalf of the Reformed Church in Zambia.
- 8.11 **Section 2 of the Land (Perpetual Succession) Act** is very clear on who has capacity to represent an entity that is registered as a body corporate under the Act. It is the trustees, and there is no provision in the Act for the delegation of such capacity. As such, the Trustees could not delegate such a

power, but they could sue in that capacity and engage Counsel to represent them.

- 8.12 The Court below referred to **Order 20 Rule 1 of the Subordinate Court Act** that allows a party to appear by proxy. That Section states as follows:

“1. In every cause or matter pending before the court, in case it shall appear to the satisfaction of the court that any plaintiff or defendant who may not be represented by barrister or solicitor is prevented by some good or sufficient cause from attending the court in person, the court may, in its discretion, permit any other person who shall satisfy the court that he has authority in that behalf to appear for such plaintiff or defendant.”

- 8.13 A careful reading of the above provision, shows that a proxy is authorised to appear on behalf of a plaintiff or a defendant, where the Court is satisfied that such plaintiff or defendant who is not represented by Counsel, is prevented by some good or sufficient cause to appear. It does not mean that the proxy assumes the locus standi of the party to sue or be sued. The proxy only represents appears in Court on behalf of a party that has capacity to sue or be sued.

- 8.14 **Black’s Law Dictionary by Bryan A. Garner, 9th Edition, Thomas Reuters 2009 at page 1346** defines a *proxy* as:

“One who is authorised to act as a substitute for another, esp in corporate law, a person authorised to vote another’s stock shares.2. The grant of authority

by which a person is so authorised.3. The document granting authority.”

8.15 In this matter, Richard Daka and Quelani Phiri took out the Writ of Summons before the Court below in their capacities as representatives or church elders of the Reformed Church in Zambia, and not as Trustees. On that premise, it was irregular for Richard Daka and Quelani Phiri to be clothed with authority to represent the Trustees of the Reformed Church in Zambia in the action as church elders or representatives, as they lacked legal capacity to do so. Ground One of the appeal succeeds.

GROUND TWO

8.16 The second ground of appeal is that the Court below erred in law and fact, by holding that the site plan that was produced by Richard Daka and Quelani Phiri was not fraudulently produced, but that it was merely produced to guide on the extent of the Reformed Church in Zambia’s land. Relying on the cases of ***Ministry of Home Affairs and Attorney General v Lee Habasonda and others*** ⁽¹²⁾ and ***Rosemary Chibwe v Austin Chibwe*** ⁽⁹⁾, the Anglican Diocese of Lusaka has argued that the Court findings must be based on the evidence that is on record.

8.17 It has been stated that in this matter, the Court below was speculative in its’ Judgment, and this can be seen by the use of words such as “it is possible”, “I do not think” and “if”. Further reliance has been placed on the case of ***Wesley Mulungushi v Catherine Bwale Mizi Chomba*** ⁽¹⁰⁾, the argument being that the facts of that case are similar to this

case. Also relied on, is the case of ***R v Governor of Brixton, Ex parte Osman*** (7).

- 8.18 Richard Daka and Quelani Phiri agree with the Court's finding on this issue, contending that the plot in issue, for the Reformed Church in Zambia, is yet to be created and numbered. Therefore, there was no need for evidence to be adduced, and the site plan was just a guide on the extent of land in question.
- 8.19 In reply, the Anglican Diocese of Lusaka states that Richard Daka and Quelani Phiri in the Court below, admitted to having tempered with the site plan. Therefore, that admission should have been used to infer malicious intentions on their part.
- 8.20 A perusal of the record shows that with regard to the site plan, Quelani Phiri when cross examined, stated that he produced an unmarked site plan, which was authorized by the Luangwa Town Council. He added that he put the dimensions on the site plan, but that he did not do the adjustments. Further in his testimony, Quelani Phiri had told the Court below, that he could identify the site plan, dated 13th January, 2020, pointing out that it was the site plan where they put dimensions when producing it.
- 8.21 He however stated that they did not submit the site plan to the Luangwa Town Council because BIGOCA encroached on their land.
- 8.22 Manjimela Kundezyi, a Senior Buildings Inspector at the Luangwa Town Council also gave testimony regarding the alterations to the site plan, stating that such alterations are not

made using a pen, but by a table of coordinates. He also testified that the scale gives the exact distances which is done by a computer, and not by hand. This witness told the Court below that any writings on a site plan would be misleading.

8.23 The Court below in relation to the issue of the site plan at page 151 of the record of appeal, decided as follows:

“Since the plaintiffs disputed the site plan, it is possible that they were merely trying to show what the extent and boundaries of their land was. I do not think they intentionally and fraudulently tampered with it in an effort to mislead anyone. Thus, I cannot impute fraud on this document if they were just guiding on how their extent of their land was supposed to be, as it was not yet created and numbered. For this reason, I find that this argument also lacks merit and I dismiss it.”

8.24 It is worth noting that Richard Daka and Quelani did not deny having tampered with the site plan that was produced. However, in its’ decision, the Court below stated that they were merely trying to show the extent of the land that was supposed to be for the Reformed Church in Zambia, and that the land as indicated on the site plan as done, had been rejected by the Reformed Church in Zambia.

8.25 It is on record that the Reformed Church in Zambia disputed the said site plan, but Quelani Phiri admitted having produced the site plan. ***Black’s Laws Dictionary, 9th Edition, by Bryan***

A. Garner, *Thomas Reuters 2009* at page 731 defines *fraud* as:

“FRAUD

Fraud .1. A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment. 2.A misrepresentation made recklessly without the belief in its’ truth to induce another person to act.3. A tort arising from a known misrepresentation, concealment of material fact or reckless misrepresentation made to induce another to act to his detriment.4. Unconscionable dealing esp in contract law, the unfair use of power arising out of the parties’ relative positions and resulting in unconscionable bargain.”

8.26 It is a well settled principle of law, that allegations of fraud must not only be distinctly alleged and particularised in the pleadings, but also at trial, evidence must also be led to clearly and distinctly prove the fraud as alleged. In the case of *Sablehand Zambia Limited v Zambia Revenue Authority* ⁽¹¹⁾, the Supreme Court held that:

“On the authorities cited to us (i.e. Associated Leisure Limited v Associated Newspaper Limited (2) and Wilde and Another v Gibson (3), we entirely agree with the appellant’s Counsel that were fraud is to be a ground in the proceedings, then a defendant or respondent wishing to rely on it must ensure that it is clearly and distinctly alleged. Further, at the trial

of the cause, the party alleging fraud must equally lead evidence so that the allegation is clearly and distinctly proved. The clear message from the two cited cases is that allegations of fraud must, once pleaded, be proved on a higher standard of proof than on a mere balance of probabilities because they are criminal in nature. In Halsbury's Laws of England, 3rd Edition, Vol 30, at paragraph 51, our reasoning is justified. The learned authors state that a defendant should raise issues of fraud, status of limitation, etc as special pleas, so as to show that the action is not maintainable or that the transaction upon which the plaintiff relies is either void or voidable in point of law because if these are not raised, then they are likely to take the plaintiff by surprise. We have looked at the affidavit in opposition sworn by the respondent and nowhere does it allege fraud. We have also examined the evidence in detail and nowhere is the issue of fraud advanced and proved. Since the issue of fraud was not pleaded and no evidence led to prove it, it was erroneous for the learned trial Judge to make a finding in the manner she did."

8.27 A perusal of the record of appeal, reveals that in its' Notice of Intention to defend and Counter Claim, appearing at page 15 of the record of appeal, the Luangwa Town Council did clearly and distinctly alleged fraud on the part of the Reformed Church in

Zambia. It will also be noted that Quelani Phiri was cross examined at trial in an attempt to show that the Reformed Church in Zambia tampered with the site plan that was produced.

- 8.28 As already pointed out, it is on record that the Reformed Church in Zambia, had issue with the said site plan, and Quelani Phiri admitted that the dimensions that the said Reformed Church in Zambia thought comprised their land, were placed on the site plan.
- 8.29 In the Judgment, the Court below held that it could not impute fraud on the document, if Richard Daka and Quelani Phiri were just trying to show the extent of the land for the Reformed Church in Zambia.
- 8.30 The evidence on record shows that Richard Daka and Quelani Phiri had an opportunity to move the Court below to the site, to appreciate the case for the Reformed Church in Zambia. Thus, through Quelani Phiri, the Court was shown the alleged extent of the land that was offered to the Reformed Church in Zambia by the Luangwa Town Council.
- 8.31 In its' argument, the Anglican Diocese of Lusaka has relied on the case of ***Wesley Mulungushi v Catherine Bwale Mizi Chomba*** ⁽¹⁰⁾, where the Supreme Court questioned the evidence that the trial judge considered, stating that it had not come across such evidence from the Respondent. The definition of *fraud* as given by ***Black's Law Dictionary*** states that it occurs where there is a concealment of a material fact or a knowing

misrepresentation of the facts in Order to induce another to act on such.

- 8.32 The evidence on record reveals that Quelani Phiri admitted that the dimensions were put on the site plan by them, and Manjimela Kundezyi testified that alterations to a site plan cannot be made using a pen, and that only the author of such a site plan can alter its' contents. Further, Richard Daka and Quelani Phiri testified that they had issues with the site plan in question. Therefore, it cannot be concluded that the site plan was produced to conceal a material fact or to make a knowing misrepresentation so that another person could act on the same.
- 8.33 It is trite that any findings made by the Court must be supported by the evidence that is on record. The parties have ably cited the cases of *Rosemary Chibwe v Austin Chibwe* ⁽⁹⁾ and *Minister of Home Affairs and Attorney General v Lee Habasonda and others* ⁽¹²⁾ as being among a plethora of authorities that stressed that position. The Court below in arriving at its' finding that the site plan that was produced by Richard Daka and Quelani Phiri was not fraudulent, based its' decision on the fact that they possibly wanted to show the extent of land that the Reformed Church in Zambia claimed.
- 8.34 While it is true that the evidence on record shows that the Reformed Church in Zambia disputed the site plan that was authored and presented to Luangwa Town Council, Quelani Phiri in cross examination admitted that they had altered the

said site plan. He advanced the reason for the said alteration as being to show the beacons that were tampered with.

8.35 Therefore, the Court below could not be faulted for finding that there was no fraud in tampering with the site plan, but rather, the alterations on the said site plan were made to show the extent of land that the Reformed Church in Zambia claimed. It can consequently be said that the lower Court's decision on the matter was part of an analysis of the evidence on record, and was not based on consideration of evidence that was not adduced at trial.

8.36 Ground Two of the appeal therefore fails and it is dismissed.

GROUND THREE

8.37 Ground three is that the learned trial Magistrate misdirected himself in law and fact, when he held that the Richard Daka and Quelani Phiri had proved their case on a balance of probabilities, when there was no evidence to clearly establish their case.

8.38 In arguing ground three, the Anglican Diocese of Lusaka has called to aid the cases of *Miller v Minister of Pensions* ⁽²⁾, *Zambia Railways Limited v Pauline S. Mundia, Brian Sialumba* ⁽¹⁵⁾, *BJ Poultry Farms Limited v Nutri Feeds Zambia Limited* ⁽¹⁷⁾ and *Jimmy Kalunga & another v Stanbic Bank Zambia Limited* ⁽¹⁸⁾. Those cases pointed out that the standard of proof in civil matters, is on a balance of probabilities.

8.39 The Anglican Diocese of Lusaka has also argued that Richard Daka and Quelani Phiri claimed that the extent of the land for

the Reformed Church in Zambia, is 90 x 80.5 meters. However, they did not bring any documentary evidence from the Luangwa Town Council to show the extent of their land. Thus, the submission is that it is more probable than not, that the Reformed Church in Zambia could have been given lesser land than that which was being claimed.

- 8.40 It has further been submitted that Alex Nyondo did not confirm the allegations that were made by Richard Daka and Quelani Phiri regarding the extent of the land, that the Luangwa Town Council gave the Reformed Church in Zambia. It has been stated that Alex Nyondo also testified that the Reformed Church in Zambia had not yet formally processed its' land.
- 8.41 In response, Richard Daka and Quelani Phiri have stated that the Court below had the benefit of both the oral and documentary evidence when crafting its' Judgment. Thus, in coming up with the Judgment complained of, the Court below properly identified the issues for determination, and thereafter embarked on an analysis of the evidence.
- 8.42 In reply, the Anglican Diocese of Lusaka maintains that the Court below had overwhelming evidence that contradicted the evidence that was given by Richard Daka and Quelani Phiri on the extent of the land for the Reformed Church in Zambia, such as the evidence contained on the survey diagrams.
- 8.43 As rightly stated by the Anglican Diocese of Lusaka, the standard of proof in civil matters is on a balance of probabilities. It is also a trite principle of law, that 'he who alleges must prove', entailing that a party that alleges, bears

the evidential burden of proving their allegations. This principle applies even where a defendant has not succeeded in their defence, as was stated in the case of ***Khalid Mohammed v The Attorney General*** ⁽⁵⁾ where the Supreme Court stated that:

“A plaintiff must prove his case and if he fails to do so the mere failure of the opponent's defence does not entitle him to judgment.”

- 8.44 The evidence on record shows that it is not in dispute that the Reformed Church in Zambia, was the first to apply for the land from Luangwa Town Council in 2004. They were offered the land in 2005 by the Luangwa Town Council, through an offer letter, which was referred to as ‘RD2’ in the witness testimonies and the Judgment by the Court below. The Court below, found that the Reformed Church in Zambia fulfilled the condition for allocation of the plot through payment of the fees.
- 8.45 A perusal of the evidence that was led in the Court below, reveals that Quelani Phiri showed the Court the extent of the land that was given to the Reformed Church in Zambia by pointing out the beacons, and the measurements of the distances between them. In cross examination, however, Quelani Phiri, admitted that there was no documentary evidence to show the extent of the land.
- 8.46 It is also worth noting that in his demonstration of the extent of the land, Quelani Phiri pointed to a number of areas on the land, where he stated that the beacons had been removed. It will further be noted that the letter of offer that was given to the Reformed Church in Zambia by the Luangwa Town Council was

in evidence in the Court below. In the Judgment of the Court below, the Court enumerated the conditions of the offer that were given to the Reformed Church in Zambia.

- 8.47 Richard Daka and Quelani Phiri admitted that the Reformed Church in Zambia, did not fully comply with the conditions of offer. It is also noteworthy that apart from Quelani Phiri's evidence, there is no other supporting evidence as regards the extent of the Reformed Church in Zambia's land.
- 8.48 On the part of the Anglican Diocese of Lusaka and the other defendants, in the Court below, documents were produced such as offer letters and receipts for land from the Luangwa Town Council, in an attempt to prove ownership and the extent of their land. Therefore, it cannot be said that Richard Daka and Quelani Phiri proved their case on a balance of probabilities merely because they moved the Court to site.
- 8.49 There is a general area map of Luangwa that was produced, which is at page 64 of record of appeal, which reflects the land in dispute as an unplanned area. The Anglican Diocese of Lusaka in the Notice to produce which is at pages 50-71 of the said record of appeal produced documents that show that it was interviewed after it applied for the plot, the offer for the plot dated 1st September, 2008, and the receipts for payment.
- 8.50 There is also a letter of complaint dated 28th August, 2012 wherein the Anglican Diocese of Lusaka complained to the Luangwa Town Council that the cadastral survey had reduced their land to 40 x 70 meters from the 50 x 75 metres to allow for construction of a road. At page 56, the Luangwa Town

Council responded stating that the area was an open space that had to re-planned for purposes of numbering and surveying.

8.51 Consequently, on the backdrop of this evidence, which was even confirmed by Reverend Zacchaeus Zulu, who testified that the Ministry of Lands went to survey and put beacons for the road and not the land, it cannot be said that Richard Daka and Quelani Phiri had proved the case on a balance of probabilities. Ground Three of appeal succeeds.

GROUND FOUR

8.52 This ground of appeal contends that the Court below erred in law when it held that hearsay evidence is admissible in civil matters. Authorities have been cited to support that position among them, *Mutambo and Five other v The People* ⁽³⁾ and the definition of hearsay as given by *Black's Law Dictionary*.

8.53 The Anglican Diocese of Lusaka has contended that the rule against hearsay evidence applies to both civil and criminal practice. Its' view is that the evidence that was received in the Court below, was evidence that was meant to establish the truthfulness of the statements, and that in itself made it inadmissible, as it was hearsay.

8.54 In response, Richard Daka and Quelani Phiri have argued that the Anglican Diocese of Lusaka has alleged an error in law, which they state is harmless. Their contention is that a resolution of this ground in favour of the Anglican Diocese of Lusaka, will not affect the outcome of the appeal, as it merely raises an issue of academic interest, which this Court should frown upon.

- 8.55 In support of the argument, Richard Daka and Quelani Phiri have cited the cases of ***Zambia Democratic Congress v The Attorney General*** ⁽⁸⁾ and ***Attorney General v The Law Association of Zambia*** ⁽¹⁴⁾. Richard Daka and Quelani Phiri's position, is that the Anglican Diocese of Lusaka ought to have pointed out the offending evidence, that they claim was hearsay, and made such the subject of the appeal.
- 8.56 They have also argued that the Anglican Diocese of Lusaka should further have pointed out which evidence, it alleges was hearsay, and that the Court must generally not act on speculation.
- 8.57 The reply by the Anglican Diocese of Lusaka is that, in its' submissions, it stated that the evidence of the Anglican Diocese of Lusaka and BIGOCA was hearsay evidence, which was the basis upon which the Court addressed the issue of hearsay evidence. The contention is further that the Court's admission of the hearsay evidence, was a grave error, as it meant that it considered this evidence in making its' determination.
- 8.58 In line with the definition of hearsay evidence as quoted from ***Black's Law Dictionary***, by the Anglican Diocese of Lusaka, an analysis of the evidence that was given by the witnesses for Richard Daka and Quelani Phiri, shows that the said evidence was given by William Chola, Getrude Zulu and Quelani Phiri. William Chola testified that the elders of the Reformed Church in Zambia applied for a piece of land at the Luangwa Town Council, and the congregants were told that the Luangwa Town Council had allocated them a piece of land.

- 8.59 This witness also stated that later, the Church elders informed them that the beacons had been tempered with. In cross examination, William Chola testified that it was the elders that had informed them about the encroachment. Gertrude Zulu on the other hand admitted that she was not part of those that applied for the land. In the case of *Mutambo and 5 Others v The People* ⁽³⁾ hearsay evidence, was stated to be evidence of a statement made to a witness by a person who is not himself called as a witness, whose object is to establish the truth of what is contained in the statement.
- 8.60 In this matter, it will be noted that William Chola testified that the information regarding the plot was given to them by the Church elders. Quelani Phiri who is the 2nd Respondent, was the first witness in the Court below. He is a Church elder at the Reformed Church. This witness at the commencement of his testimony, told the Court below that he relied on the contents of the affidavit deposed to in support of the application for an Order of interim injunction.
- 8.61 He thereafter proceeded to lead the Court to the site where he showed the Court below the alleged encroachment on the land. The affidavit in support of the application for the Order of injunction, was deposed to by Richard Daka and Quelani Phiri. In that affidavit, they gave a background as to how the Reformed Church in Zambia applied for the land in 2004, and they were thereafter allocated the land by the letter produced as 'RD2'.

- 8.62 The affidavit gave the extent of land that was given to the Reformed Church in Zambia as 90 x 80.5 metres, and allegations were made on the encroachment. In cross examination, Quelani Phiri agreed that there were no documents to prove the extent of the land. However, he testified that the presence of the beacons confirmed the extent. Later on, in cross examination, by Counsel for Luangwa Town Council, Quelani Phiri admitted that the Reformed Church in Zambia put the dimensions on the site plan which marked the boundaries.
- 8.63 In line with what amounts to hearsay, therefore, William Chola's evidence was generally inadmissible, as it was hearsay, as it was meant to prove the truthfulness of what the church elders had told the congregants. Further, it was not established that Quelani Phiri was one of the Church elders that actually applied for the land, although he showed the Court below the boundaries of the land that the Reformed Church in Zambia claimed.
- 8.64 It therefore cannot be said that the consideration of this evidence by the Court below was a grave error, as the Court took it into account in determining the matter, what the witness that perceived the events told the Court. Quelani Phiri's testimony not having been established to have been hearsay, was therefore properly considered by the Court.
- 8.65 It is also worth mentioning, that the issue in this appeal, is the extent of the land that was given to the Reformed Church in Zambia by the Luangwa Town Council. A perusal of the

evidence that was given by William Chola reveals that he was not shown the extent of the land, and that it was the elders of the church, that told them about the encroachment on the land. Therefore, his evidence does not have a bearing on the issues in this matter.

8.66 When it comes to exceptions against hearsay evidence, these include dying declarations, declarations against interest, declarations as to pedigree, declarations by testators as to their will, and declarations in the course of duty, as stated by the learned authors of the book ***The Law of Evidence in Zambia, Cases and Materials*** by ***John Hatchard and Muna Ndulo, Multimedia publications Lusaka and John Currey London, 1991.***

8.67 While the Court below erred in finding that the rule against hearsay does not apply to civil matters, this was not fatal as Quelani Phiri's evidence was not found to be hearsay. Ground Four of the appeal fails.

GROUND FIVE

8.68 This ground attacks the Judgment of the lower Court for not containing legal authorities or analytical reasoning. Thus, the contention is that it does not meet the standards of a Judgment. In supporting this ground, the Anglican Diocese of Lusaka has relied on the case of ***Minister of Home Affairs and Attorney General v Lee Habasonda and others*** ⁽¹²⁾, stating that a Judgment should contain the facts in issue, the law, the evidence and the findings of the Court premised on the evidence before it.

- 8.69 It has been argued that a perusal of the Judgment of the Court below, reveals that the Court did not base its' findings on the evidence before it. The contention is that, additionally, the Court did not cite any precedents, books, or other authorities to support its' findings and decision.
- 8.70 Richard Daka and Quelani Phiri in response, state that the Learned Magistrate in the Judgment complained about gave summaries of the testimonies of witnesses, interspaced with facts in issue, the law and that the findings of the Court were premised on the evidence before him. Further, that the resolution of the dispute before the Court below was highly dependent on determination of facts. As such, it was not absolutely necessary for the Court to cite legal authorities to justify the facts that it so found.
- 8.71 In reply, the Anglican Diocese of Lusaka has argued that the Judgment of the Court below, failed to take into consideration and analyse the evidence on record, to make certain findings. It has further been argued that had the Court considered all this evidence on record, it would have established that indeed the Anglican Diocese of Lusaka and the Reformed Church of Zambia, share boundaries on the piece of land on the site. Thus, the simple question for determination, was the dimensions of each property.
- 8.72 At the hearing of the appeal, Counsel for the Anglican Diocese of Lusaka, referred to the writings of *Lord Barrows* of the UK Supreme Court, in his speech of 21st May, 2021, titled

- Judgment Writings, a Personal Perspective*. He opined therein, that a Judge must write the law and not his opinion.
- 8.73 As rightly stated in the case of ***Minister of Home Affairs and Attorney General v Lee Habasonda and others*** ⁽¹²⁾, a Judgment must review the evidence, give a summary of the arguments and contain findings of fact, an application of the law to the facts, and the decision of the Court. A perusal of the Judgment of the Court below shows that, the main issue in the matter was identified, and the evidence on record was reviewed and considered in coming to a decision.
- 8.74 Further, the Court below referred to legal authorities in coming to some of its conclusions, such as the use of the ***Urban and Regional Planning Act No. 3 of 2015***. Therefore, on the whole, the Judgment of the Court below met the minimum requirements for a Judgment. That ground of appeal fails.

GROUND SIX

- 8.75 On this final ground of appeal, the Anglican Diocese of Lusaka argues that the Court below erred in law and in fact when it held that the Anglican Diocese of Lusaka and BIGOCA did not move it to the site. Thus, it was unable to establish if they owned land there. In support of this argument, reliance is placed on the case of ***Rosemary Chibwe v Austin Chibwe*** ⁽⁹⁾. The contention is that various pieces of evidence, such as the offer letters and receipts, that the Anglican Diocese of Lusaka produced in the Court below, could have determined the extent of its' land.

- 8.76 Further reliance is placed on **Order III Rule 2 of the Subordinate Court Act**, stating that pursuant to that provision, the Court below, was clothed with power to move to the site, if it saw it proper to do so.
- 8.77 In response, Richard Daka and Quelani Phiri have argued that the Court's findings show that there was no evidence on record that could lead to the conclusion that the Anglican Diocese of Lusaka had land at the alleged site. It has further been stated that the Anglican Diocese of Lusaka's argument does not change the finding of the Court below that failure to move to the site was fatal.
- 8.78 Richard Daka and Quelani Phiri contend that reference to **Order III Rule 2 of the Subordinate Court Rules**, was irrelevant, as the argument is not about the discretion of the Court below to move to the site.
- 8.79 The record of appeal shows that the parties have exhibited documents that speak to the land that was offered to them by the Luangwa Town Council. In the Judgment of the Court below, it will be seen that reference has been made to a document marked 'RD2' being the offer letter that was given to the Reformed Church in Zambia for land in Indeco Compound.
- 8.80 At pages 53 and 67 of the record of appeal, are letters of offer letters for the Anglican Diocese of Lusaka and BIGOCA for land from the Luangwa Town Council. The offer letters however do not disclose the extent of the land that was given to each party. I have already noted that the Anglican Diocese of Lusaka had written a letter to the Luangwa Town Council which appears at

page 55 of the record of appeal, that the land of its' land size had been reduced by the Ministry of Land surveyors, stating that there was a road that passed through the land.

- 8.81 The Luangwa Town Council replied informing them that the plot was an open space, and would need re-planning for it to be recommended for numbering and surveying, and that it had been recommended for the said exercise. It is further noteworthy that when the land dispute arose, the Luangwa Town Council had also advised the parties to do a regularization of the plots, and provide site plans.
- 8.82 The evidence on record therefore shows that the parties were similarly circumstanced with regard to their plots. The Court below, however, pointed out that the Reformed Church in Zambia had moved it to the site, to show it the extent of its' land, whereas the other parties did not do so. Thus, it was unable to determine if they had land at the alleged site. The documents on record however, establish that the Anglican Diocese of Lusaka and BIGOCA had land at the site.
- 8.83 This is evident from the offer letters, receipts and other documents on record that passed between them and the Luangwa Town Council. This is distinguishable from the 3rd Defendant in the court below, Andrey Nyirenda who did not produce any documents to show his interest in the said land. The issue nevertheless, was the extent of the land, that each party held at the site, as rightly framed by the Court below.
- 8.84 The evidence on record shows that the land was not surveyed and some beacons which were allegedly claimed by the

Reformed Church in Zambia, as missing from the land. Richard Daka and Quelani Phiri did not establish how those beacons were placed on the land. None of the parties proved the extent of their land.

8.85 The Luangwa Town Council by virtue of the ***Urban and Regional Planning Act No 3 of 2015*** has the mandate to plan land, and submit the plans for land to the Ministry of Lands for numbering. Prior to that Act coming into force, the ***Town and Country Planning Act Chapter 283 of the Laws of Zambia*** placed the planning mandate of areas on Local Authorities. At page 64 of the record of appeal, is the site plan for Luangwa which encompasses the land in issue.

8.86 It would therefore have been prudent for the Luangwa Town Council to plan for the land in issue, by way of creating the plots and submit them to the Ministry of Lands for numbering before offering them to the public, as appears to have been done in this case, and then work backwards to have site plans drawn up for numbering at the Ministry of Lands. In doing so consideration, should have been had to the buildings that are already on the land. This is what the Luangwa Town Council stated was regularization of the properties.

8.87 There is no rule of law that a Court must move to the site of any place that is in contention. ***Order III Rule 2 of the Subordinate Court Rules***, states that:

“2. Subject to any particular rules, the court may, in all causes and matters, make any interlocutory order which it considers necessary for doing justice,

whether such order has been expressly asked by the person entitled to the benefit of the order or not.”

- 8.88 This Rule reposes discretion in the Subordinate Court to make any interlocutory Orders that it deems necessary for doing justice. Therefore, pursuant to that Order, the Court below could have initiated a site visit. However, the record shows that when Quelani Phiri testified, he applied to move the Court below to the site, which was granted.
- 8.89 There, the Court had a view of the land that the Reformed Church in Zambia was claiming. Page 86 of the record of appeal shows that Quelani Phiri testified that the Anglican Diocese of Lusaka had constructed a gate where the Reformed Church in Zambia had put a second beacon. He also told the Court below that BIGOCA had also constructed within the land for the Reformed Church in Zambia.
- 8.90 He also went on to give the distance between the properties that showed the encroachment, and the house that was constructed by Andrey Nyirenda at the back left corner of the Reformed Church in Zambia’s property.
- 8.91 Therefore, there was no need for the Court below to move itself back to the site, when Quelani Phiri had at the site given evidence of the alleged encroachment, that established that the Anglican Diocese of Lusaka and BIGOCA, as well as Andrea Nyirenda were in occupation of land that the Reformed Church in Zambia claimed belonged to it.
- 8.92 The Luangwa Town Council has a statutory mandate to plan for land use. Just because the Reformed Church in Zambia had

failed to abide by the conditions set out in the offer letter which was exhibited as 'RD2', did not entail that it could start allocating plots to other entities, without planning for the land. That was a recipe for anarchy, and it resulted in the Reformed Church in Zambia complaining.

- 8.93 As the land was not planned and numbered before it was offered to the parties, none of the parties acquired a legal interest in the land. They only had equitable interests. It is trite that in terms of equity, the first in time prevails.
- 8.94 The evidence shows that the Anglican Diocese of Lusaka on being given the offer had site plans made, and they were approved. However, no approved number was given for the Anglican Diocese of Lusaka's land.
- 8.95 There being no rule of law that the Court below had to be moved to the site in order to establish that the Anglican Diocese of Lusaka had land at the site, when it had already been there, and there was other evidence on record to support that contention, Ground Six of the Appeal succeeds.

9. CONCLUSION

- 9.1 The fact that Richard Daka and Quelani Phiri had no legal capacity to represent the Reformed Church of Zambia as Trustees, but as proxies, entails that the suit by them fails.
- 9.2 Before I leave the matter, I also wish to point out although this was not raised in the appeal, the dispute in this matter involved land. **Section 23 of the Subordinate Court Act, Chapter 28 of the Laws of Zambia** provides as follows:

“23. If, in any civil cause or matter before a Subordinate Court, the title to any land is disputed, or the question of the ownership thereto arises, the court may adjudicate thereon, if all parties interested consent; but, if they do not all consent, the presiding magistrate shall apply to the High Court to transfer such cause or matter to itself.”

- 9.3 Going by the above position, the Court below was mandated by that provision, to ask the parties whether they all consented to it determining the matter. If not, the Court below was obliged to apply to the High Court to transfer the matter to itself.
- 9.4 In the case of **Crossland Mutinta and another v Donovan Chipanda** ⁽¹⁹⁾ the Supreme Court stated as follows:

“We must state from the outset that we agree with the position that a matter that has not been raised in the court below cannot be the subject of appeal. We note in the present case, however, that the issue that was being raised on appeal in the court below relates to the jurisdiction of the Subordinate Court to adjudicate on a land dispute. In the case of *Aristogerasimos Vangelatos and Another v Metro Investments Limited and 3 Others*, we held as follows with regard to jurisdictional questions being raised on appeal which had not been raised in the lower court:

“However, although it is a general rule that an issue that has not been raised in the court below

cannot be raised on appeal, the question of jurisdiction can be raised on appeal notwithstanding the fact that it was not raised in the court below.

In arriving at this decision, we are guided by the learned authors of Halsbury's Laws of England, 4th edition, volume 10, at paragraph who states as follows:

"It is the duty of an appellate court to entertain a plea as to jurisdiction at any stage, even if the point was not raised in the court below."

- 9.5 The Supreme Court went on to note that the said **Halsbury's Laws** at **paragraph 715** states that;

"where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."

- 9.6 In terms of the provisions of **Section 23 of the Subordinate Court Act**, the Supreme Court had this to say:

"We have had the opportunity of examining the provisions of that section and agree with the interpretation given to it by the learned trial judge. Indeed, a Subordinate Court may only adjudicate on matters where title to land is disputed or where an ownership question arises if the parties to the action consent....."

The import of section 23 is that all interested parties to the matter must consent to the Subordinate Court adjudicating on the matter. A perusal of the record in this case reveals that no such consent was obtained from the other appellant before the trial magistrate proceeded to hear the matter. The absence of this consent, in our view, effectively means that the trial magistrate did not possess the requisite jurisdiction to determine the matter.”

- 9.7 The record at page 75 of the Record of Appeal shows that, when the matter came up for hearing, and all the parties were present, that the Court below only addressed the preliminary issue that was raised in relation to the capacities of Richard Daka and Quelani Phiri to sue, but it did ask the parties whether they all consented to the matter being heard by that Court as it involved land.
- 9.8 At page 123 of the record of appeal, which is the second page of the Judgment, the Court below noted that the land in issue did not have a certificate of title. Therefore, he had jurisdiction to determine the said matter.
- 9.9 While it is true that the Subordinate Court has got no jurisdiction to determine any dispute involving land that is held on a certificate of title, by virtue of **Section 23 of the Subordinate Court Act**, it can only determine disputes involving land where all the parties' consent. There being no such consent on record, the Court below had no jurisdiction to determine the matter.

9.10 Therefore, all in all the proceedings before the Court below were a nullity, and the Judgment of the Court below is accordingly set aside with no Order as to costs. Leave to appeal is granted.

DATED AT LUSAKA THE 25th DAY OF SPETEMBER, 2023

S. Kaunda
**S. KAUNDA NEWA
HIGH COURT JUDGE**

