

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
AT LUSAKA
(CIVIL JURISDICTION)**

2009/HP/0247

BETWEEN:

VICTORIA FINDLAY HUWILER PLAINTIFF

AND

**ISLAND RESORTS LIMITED
KAFUE DISTRICT COUNCIL
ATTORNEY GENERAL**

**1ST DEFENDANT
2ND DEFENDANT
3RD DEFENDANT**



**BEFORE HON. MRS JUSTICE M.S. MULENGA ON THE 19TH DAY OF
DECEMBER, 2017**

FOR THE PLAINTIFF : MR. L. MWANABO OF L. M. CHAMBERS
AND MR. M. CHITAMBALA OF LUKONA
CHAMBERS

FOR THE 1ST DEFENDANT : MRS. D. RANCHOLD AND MRS. O. ZYAMBO-
CHIRWA OF RANCHOLD CHUNGU

FOR THE 2ND DEFENDANT : MR. C. NHARI OF NHARI ADVOCATES

FOR THE 3RD DEFENDANT : MRS. K. N. MUNDIA – ASSISTANT SENIOR
STATE ADVOCATE, ATTORNEY GENERAL'S
CHAMBERS

J U D G M E N T

Cases referred to:

- 1. Mopani Copper Mines Plc v Kitwe Tabernacle End Time Message Ministries 2010/HK/330**
- 2. Chimambo and Others v Commissioner of Lands (2008) 1 ZR 1**
- 3. Anti Corruption Commission vBarnet Development Corporation Limited (2002) 1 ZR 69**

4. **Augustine Kapembwa v Danny Maimbolwa and Attorney General (1981) ZR 127 (SC)**
5. **Halpern v Halpern (No. 2) (2007) EWCA GV 291, (2008) QB 195**
6. **James Chungu v Nyokasi Chitaya, Chibombo District Council and The Attorney General Appeal No. 14/2017 (CA)**

Legislation referred to:

1. **The Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia**
2. **The Land Survey Act, Chapter 188 of the Laws of Zambia**

By way of an amended Writ of Summons dated 30th March, 2010 the

Plaintiff seeks the following reliefs:

1. *A declaration that as beneficial owner of farm no. 10127 Kafue described by the approved diagram No. 5114 of 2002 attached to Certificate of Title No. 43842, she is entitled to quiet enjoyment of the full extent of the said property.*
2. *An Order that the diagram describing the property, purportedly known as farm No.10145, Kafue is wrongful and therefore null and void for overlapping into the extent of farm No. 10127, Kafue.*
3. *An Order for cancellation and or rectification of the diagram describing farm No. 10145, Kafue for encroachment into the extent of farm No. 10127, Kafue.*
4. *An Order of interim injunction restraining the 1st Defendant its agents or servants or by itself from in any way interfering with the land described on diagram No.5114 of 2002 attached to Certificate of Title No. 43842 until after the determination of this matter or until after further order of this Court.*
5. *An Order for damages for trespass to land against the 1st, 2nd and 3rd Defendants.*
6. *An Order for restitution of all land encroached upon by the 1st Defendant to the Plaintiff*
7. *Any other relief the Court may deem fit.*
8. *Interest*
9. *Costs.*

In the accompanying amended statement of claim, the Plaintiff averred that she was the beneficial owner of farm No. 10127 which was assigned to her by Prestorius Haloba (PW2) who had been granted a 99 years lease in respect of the property. The property is described on the diagram No. 5114/2002 attached to the certificate of title No. 43842.

It was further averred that the 1st Defendant's farm No. 10145 encroaches on the Plaintiff's land in that the diagram relating to the 1st Defendant's allotment overlaps onto the extent of the diagram relating to the Plaintiff's land. That despite several reminders, the 1st Defendant continues to encroach on the Plaintiff's land by erecting buildings and permanent structures. It was added that the 2nd and 3rd Defendants had, despite numerous reminders by the Plaintiff's advocates, failed, neglected or refused to remedy the erroneous encroachment. That as a consequence of the actions of the 1st, 2nd and 3rd Defendants, the Plaintiff continues to suffer loss of use of the land she beneficially owns, hence her claim.

The 1st Defendant in its amended defence dated 18th June, 2013 denied the Plaintiff's claim and averred that its occupation and developments on farm No. 10145 were restricted to the boundaries of its lot. That instead it was the Plaintiff's farm No. 10127 which encroaches on its land and other farms, namely, farm No. 10146 and farm No. 10144 as well as a Police Camp.

It was further averred that the Plaintiff had to date not made any developments on Farm No. 10127 whereas the Defendant had extensively developed farm 10145. That the Plaintiff was not entitled to the reliefs sought as there was no actual or threatened trespass or encroachment by the 1st Defendant who has cleared the area, built a three bedroomed house, two bedroomed houses, water towers, water purification tanks, boat house, garage, two roomed concrete structures for generators, piping for water and extensive cabling for power supply. It was added that the Plaintiff had not given particulars of her claims.

- The 2nd Defendant in its defence dated 4th November, 2013 equally denied the Plaintiff's allegations and stated that the 2nd Defendant has no powers or authority to correct the alleged erroneous encroachment as the land did not belong to it. That it was the Commissioner of Lands and the Surveyor General who had the requisite powers. The 2nd Defendant further pleaded the defence of time bar alleging that the action was commenced and amended outside the limitation period.

The 3rd Defendant filed its amended defence on 17th July, 2013. The 3rd Defendant denied the Plaintiff's allegations and averred that farm 10127 was erroneously surveyed by a private surveyor, Fred Mubano, who did not follow the approved site plan for Kafue District Council and as such caused encroachments on farms 10144, 10145 and 10146. The surveyor was advised by the Ministry of Lands to cancel and re-survey the property in order for it to be in conformity with the Kafue District Site Plan but this was not done and the survey was thus approved in error.

The trial only commenced on 26th January, 2015 with the Plaintiff testifying that in 2002 she was on a search for land with a river frontage and she came upon two pieces of land owned by Mr Haloba, one on the north bank and the other on the south bank. Upon satisfying herself of Mr Haloba's title and the land being unencumbered, she purchased both pieces of land. She then spent a year developing the land on the south bank so as to gain water access to the north bank. When she sought to fence the land on the north bank, she discovered a foundation on the land which had been built by the Ranchod family. Efforts to engage Mrs Ranchod proved futile; hence the Plaintiff commenced this action.

The Plaintiff further testified that farm 10127 was 250 hectares in extent and she had title to it before the 1st Defendant started developing the land. The Plaintiff made reference to the exhibited certificate of title No. 43847 in respect of farm 10127 being a lease of 99 years, correspondence from ZESCO as farm 10127 was near ZESCO land, Council Minutes and the Council approval. She added that the 1st Defendant's 14 year lease was dated 13th October, 2003 while the Plaintiff's title is dated 1st August, 2002.

Upon being referred to various correspondences from the Surveyor General's Office, the Plaintiff stated that she had received the memorandum purporting to have proposed the cancellation of her title but that the said memorandum was a forgery. That no further surveys were done on her property and the correspondence from the Surveyor General's Office did not indicate the size of her property nor the coordinates in respect of the land. And that while the Plaintiff's title had an approved diagram, the 1st Defendant's title had none. The 1st Defendant also had no minutes showing the approval of the land allocation by the Council.

Under cross examination, the Plaintiff stated that she purchased the property from a Mr. Haloba for 60,000 United States Dollars (USD). She paid a deposit of USD 40,000 in 2003 and settled the USD 20,000 later and that the final contract of sale was dated 2005.

It was her further testimony that the north bank land, farm 10127, and the south bank land were separated by the river. She discovered the concrete foundation on farm 10127 between 2003 and 2005 and sought to settle the matter amicably by investigating who the shareholders were in the 1st Defendant Company but was

unsuccessful. She also stated that Mr. Haloba placed a caveat on the properties in 2007 because he wanted to retain ownership of two identified and agreed portions of land after he had sold the property in issue to the Plaintiff.

Under further cross examination, the Plaintiff acknowledged that she had not developed farm 10127 but had all the materials for fencing as well as the concept. That Mr. Haloba had not informed her on whether a social survey had been done seeing that there were villages around her plot as well as a police camp. The Plaintiff added that she had examined the beacons around farm 10127 which showed that point E to point D was a rocky Road Reserve and there were no buildings after beacon A. She admitted that the photographs of structures on pages 41 to 64 of the Plaintiff's bundle of documents did not relate to farm 10127.

The Plaintiff testified that according to the letter on page 40 of the Plaintiff's bundle of documents, farm 10127 had not been cancelled and that she had no idea who had forged the letter purporting to have cancelled farm 10127. That the letter from the Surveyor General's Office at page 1 of the 3rd Defendant's bundle of documents stated that the increase of farm 10127 caused encroachment on other plots and recommended that the plot be re-surveyed. It was the Plaintiff's testimony that the initial survey of farm 10127 was done by the private surveyor. The Plaintiff stated that PW2 did not give her the site plans referred to in the Council letter of April, 2002. She conducted the due diligence search in 2001/2002 and found the property unencumbered. She later became aware of the Ministry of Lands issuing plots in 2008/2009. She later took a private surveyor, Mr. Kantumoya, when she became aware of the Ministry's objections

in 2008 or 2009. Mr. Kantumoya was the one who produced the diagram at page 17 of the Plaintiff's bundle of documents showing some overlap between farms 10127 and 10145. She commenced these proceedings because the other farms encroached on her land.

In re-examination, the Plaintiff stated that in 2002 she bought the piece of land on the south bank and from around 2002 to 2005, she started negotiations to buy the land in the north bank being farm 10127. It was bare land and had a few villagers living on it whom she planned to employ. There was no concrete structure at the time and she only became aware of the 1st Defendant's concrete foundation in 2008 when she was about to fence the land. She added that there was no road access to the north bank and thus she decided to develop the south bank first and later secured a boat to be transporting materials from the south bank to the north bank.

PW2 was Prestorius Cosmas Haloba who testified that the Plaintiff had expressed interest in his land on the north bank of the Kafue Gorge, otherwise known as farm 10127. The transaction went on well but took long because the Plaintiff lived in Lusaka while he lived in the Copperbelt.

PW2 narrated that he acquired farm 10127 in 1994 following his application for 697 hectares of land located on the northern bank of Kafue Dam. That he was advised to seek permission from ZESCO because the land was on the side of a power substation and ZESCO gave a letter of clearance which he presented to the Council. He successfully went through interviews for the piece of land and paid K6, 000.00. When the recommendation went to the Ministry of Lands, PW2 learnt that he could only be granted 250 hectares of the

land and his title was processed with respect to that extent. The land allotted to him maintained the river frontage length of about 1.8km but was reduced width wise. He then obtained a certificate of title in respect of the land in 2002 which indicated the size of the land as 249 hectares.

PW2 stated that there were no developments on the land and that he was the first person to hold title to that particular piece of land. He disputed the alleged encroachment and maintained that both the Council and ZESCO had their input on his application which followed all the relevant procedures as was evident from the fact that the Ministry of Lands found no error when it was processing the certificate of title. He added that when he acquired title in 2002, there were three different people that expressed interest in his property. Further, that both farms 10145 and 10146 fall within the land he had applied for but was rendered restricted by ZESCO. PW2 also stated that he had the original site plan for the property but the same was not before court.

Under cross examination, PW2 stated that the Plaintiff approached him to purchase his land in 2002 and at that time he also owned land on the south bank of the Kafue River to the extent of 386 hectares where he was doing cattle ranching. That with respect to farm 10127, he applied for the land as director of Tassel Farms, a registered Company, but the clearance from ZESCO was addressed to him personally. When he received the letter of offer in relation to farm 10127, he was advised to have the land surveyed.

In re-examination, PW2 testified that the transaction with the Plaintiff took long to be concluded because the Plaintiff used to travel a lot.

This marked the close of the Plaintiff's case.

Due to the 1st Defendant's absence from Court, the 3rd Defendant was first to open its case by calling Favoured Kabelenga, DW1, the Chief Survey Examiner from Ministry of Lands, Survey Department. He testified that he joined the Survey Department in 2011 and his duties involved carrying out field survey works, examination of the records from government and private surveyors and drafting survey documents lodged under the Office of the Surveyor General. He also supervises private and government surveyors as they conduct their field work. His duties extend to supervising the numbering of properties in the country and attending to legal proceedings relating to boundary disputes and surveys.

DW1 testified that he had studied the issue concerning farm 10127 and that it came to the attention of the Ministry in 2008 when the owner of farm 10127 through her advocates, Lukona Chambers, wrote to the Commissioner of Lands requesting for the ascertaining of properties namely farms 10127 and 10145. The memorandum produced at page 20 of the 1st Defendant's bundle of documents was generated in response and it confirmed an encroachment between the two farms. According to the memorandum, farm 10127 was wrongly surveyed and did not follow the site plan in that the shape of the diagram differed with one that was in the site plan. He stated that the manner in which the survey was carried out did not observe the accepted practice in survey drawing of starting from national

control points which then make it easy to locate and verify the beacons if need be.

The verification exercise confirmed that farms 10127 and 10145 were wrongly surveyed. With respect to farm 10145, he stated that the surveyor followed a local or provisional system which entailed the use of two beacons in determining where the other beacons were placed. Farm 10127 on the other hand was stretched on Kafue River resulting in it encroaching on farm 10145. That the surveys on both pieces of land were not started or commenced from national control points and in the absence of the surveyor, who actually carried them out, it was difficult to locate the position of the beacons. Following this discovery, recommendations were made that the two properties be re-planned.

Under cross examination, DW1 stated that when one wishes to convert customary land into state land, a site plan is needed. Boundaries are then plotted on the sketch map and attached to the application which is forwarded to the Provincial Planning Department. If the Provincial Planning Department accepts the application, they write to the Commissioner of Lands for approval. Upon approval, the Surveyor General is requested to check the availability of the land and when the sketch plan or map is given a number, it becomes a site plan. The site plan is the basis for a survey diagram and is more accurate than a sketch plan as it shows the surroundings including surrounding properties.

DW1 stated that boundary disputes could arise even where the survey was started from national control points but that starting from national control points makes it easier for beacons to be

located. DW1 testified that the Surveyor General's Office had the map of the entire country showing international boundaries, provincial boundaries, district boundaries and property boundaries based on topography. Hence, the Survey Department is able to pick encumbrances on pieces of land. The numbering of properties is equally systematic and done in sequence so that each allotment has a distinct number. That this however did not mean that the properties in the same line should follow the same numbering sequence as per page 22 of the 1st Defendant bundles but that numbers were given according to availability.

DW1 also testified that most pieces of land under government institutions were not on title. That while he could not ascertain exactly when the Police Camp near farm 10127 was established, he knew that it was in existence before farm 10127 was created. He explained that smallholdings are pieces of land within a township used for farming purposes and there was no specific hectarage for them, save for the fact that they are smaller than farms. Farms on the other hand are big in hectarage and usually surrounded by other farms and customary land.

DW1 explained that when a property is re-planned, the shape and the number is changed. The re-planning is conducted at Provincial level while the Ministry Headquarters only assists in the survey at times. The Provincial Planning Office and the Commissioner of Lands do the approvals of survey diagrams and not the District Councils or local authorities. When re-planning, none of the parties would be given priority but the focus would be on correcting the errors, so that the diagrams are in line with the site plan.

Under continued cross examination, DW1 stated that the site plans for farm 10145 did not have Council approvals while the survey diagram for farm 10127 was approved by the Surveyor General and there was nothing wrong with the approval. When the Surveyor General approves the diagram, it means that he is satisfied with the information given. In relation to farm 10127, the size of the land on the site plan was bigger than the land approved on the diagram. That the approvals for land beyond 250 hectares was not within the purview of the Commissioner of Lands but required Ministerial approval.

It was DW1's further testimony that the national control points or national grid were everywhere and in this case, they were about 12 kilometres from farm 10127. They are used for survey purposes so that one can easily locate beacons. In the case at hand, the beacons could not be located when the verification of boundaries was undertaken. DW1 added that reverting to the original positions could not help as farm 10127 would still encroach on farm 10145 to a larger extent than at present. DW1 stated that following the order of creation of the two farms, it could be said that farm 10127 has been encroached upon by farm 10145 because it was created before farm 10145 and was the first to be surveyed.

Under re- examination, DW1 stated that two verification exercises had been conducted in respect of farms 10127 and 10145.

This was the close of the 3rd Defendant's case.

With the leave of Court, the 1st Defendant opened its defence on 6th June, 2017 by calling DW2, Kelvin Ngosa Bwembya, from Ministry of

- Lands. He testified that he was assigned by the Surveyor General to carry out verifications of farms 10127 and 10145 following the Court order. He gathered information from the diagrams attached to the certificates of title and further investigations revealed that the survey of the two lots had no connection to the national grid. Such cases demanded reliance on the beacons on the ground to verify the position of the boundaries of the properties. However, there were no such beacons on the ground and hence it became impossible to link the survey of the two properties.

DW2 testified that he compiled a report advising the Surveyor General of his findings to the effect that the survey of farm 10127 was at variance with the site plan in that the property was increased during the survey markings resulting in it encroaching on about four farms. He thus recommended for the re-planning of the affected properties.

In cross examination, DW2 stated that the District Councils and local authorities were the planning agents of the Ministry of Lands and their task included approving site plans before they are forwarded to the Ministry of Lands for numbering and survey. In this respect, the Kafue District Council submits the site plans to Lusaka Town and Country Planning for approval. DW2 testified that farms 10127 and 10145 were both on title with survey diagrams approved by the Surveyor General and thus the Kafue District Council had no authority to resolve the boundary dispute in issue.

Under continued cross examination, DW2 averred that he got written instructions from the Surveyor General to verify beacons and give a report concerning farms 10127 and 10145. He accordingly made

recommendations in his report as per accepted practice. This was after he had conducted one verification exercise in 2014 by going to the site where he found some people who showed him the boundaries of the properties.

DW2 stated that prior to conducting the verification, he did not have sight of a memorandum written by one Mr. Nyirenda, with respect to the two properties, which mirrored his findings. His testimony was that he only learnt of the memorandum after the fact. That his findings revealed that farm 10127 had encroached on farm 10145 despite farm 10127 having been created earlier. DW2 testified that the numbering of the survey records showed that farm 10127 was surveyed after farm 10145 based on the fact that Diagram D555/2003 relating to farm 10145 appeared to have been done earlier than Diagram D713/2003 relating to farm 10127. However, upon perusal of the 1st Defendant's bundle of documents, DW2 acknowledged that farm 10145 did not have an approved diagram but only a sketch plan and that farm 10127 had an approved survey diagram dated August 2002.

DW2 stated that the survey diagram for farm 10127 was approved in error by the Surveyor General because it was at variance with the site plan for farm 10127. Further, that his investigations were based on the survey diagrams and normally, in instances of boundary disputes, the priority was given to the survey diagram approved first by the Surveyor General.

Under further cross examination, DW2 stated that when he conducted the verification of boundaries of the two farms in issue, he could not locate the beacons on the ground for both farms. He added

that it was possible for a property created earlier to encroach on a property created later and that his findings during the verification were based on the site plans and not when they were surveyed.

In re-examination, DW2 stated that he could only state the extent of encroachment if he superimposed the diagram on the site plan to see how it was sitting in relation to other properties. He maintained that an earlier property could encroach on one created later if the survey was done contrary to the site plan. Further, that while farm 10127 was well planned, it was increased when it was surveyed.

This was the close of the 1st Defendant's case.

The 2nd Defendant called DW3, Kabungo Matashi, the District Planning Officer, who testified that his duties included overseeing land administration issues, that is, land allocations, land disputes, land Planning, development control and preparation of reports to the Council. He stated that once title deeds had been issued with respect to the properties, it was not the obligation of the Council to resolve disputes but the Commissioner of Lands through the Surveyor General's Office.

Under cross examination, DW3 stated that Mr Haloba's application for a small holding was considered by the Council on 11th April, 2001. That a small holding included land exceeding 2.5 hectares to about 697 hectares. DW3 stated that if the situation demanded, the Council carried out social surveys in order to identify the people and activities that are conducted on a particular piece of land. The duration of the social survey depended on the extent of land, number of people and the activities undertaken on the land.

In continued cross examination, DW3 stated that a 14 year lease is issued in respect of property that had not yet been surveyed by the Surveyor General and has thus a sketch plan attached. He added that while he had come across the application in reference to farm 10127, he had not come across one in respect of farm 10145.

This marked the close of the 2nd Defendant's case and the close of the trial. Parties were given opportunity to file submissions but only the Plaintiff and the 1st and 3rd Defendants did so.

The Plaintiff's counsel in the submissions filed on 30th June, 2017, reiterated that farm 10127 was created earlier than farm 10145 and was on a 99 years lease with a final certificate of title whilst farm 10145 was on a 14 years lease with a provisional certificate of title. Relying on sections 32 and 33 of the Lands and Deeds Registry Act, the Plaintiff submitted that the diagram for farm 10127 forms an integral part of the certificate of title and hence cannot be challenged by a later title. Based on the case of **Mopani Copper Mines Plc v Kitwe Tabernacle End Time Message Ministries**¹, it was argued that farm 10145 could only have been issued in error, if not obtained fraudulently. Counsel further relied on section 12 of the Lands and Deeds Registry Act and section 25 of the Land Survey Act in arguing that a beacon duly established is unimpeachable.

Counsel also submitted that the Court has powers to cancel or amend the provisional certificate of title at the suit of any person who claims to have a better title. That in this case, the facts were clear that farm 10127 was created earlier and its boundaries and beacons were established and therefore could not be disturbed by

subsequent creation of pieces of land within its boundaries as there was no prior registered interests. It was added that the Commissioner of Lands had authority to create farm 10127 in the form it was as there were no registered interest at the time of its creation. Citing the case of **Chimambo and Others v Commissioner of Lands**², the Plaintiff's counsel urged this Court to uphold the Plaintiff's claims.

The 1st Defendant in its submissions dated 21st July 2017 recounted the evidence that it proffered at trial and on its strength submitted that the Plaintiff was not entitled to the reliefs sought. In respect of quiet enjoyment, it was advanced that the Plaintiff was not entitled to quiet enjoyment of the full extent of farm 10127 because from the evidence, farm 10127 has encroached on the 1st Defendant's farm 10145, farm 10144, farm 10146 and Sondela Police Camp. That this encroachment was caused by the fact that farm 10127 was erroneously stretched contrary to the site plans.

That there was no evidence indicating that the diagram describing farm 10145 is wrongful and that farm 10145 overlaps into farm 10127. Citing **Anti-Corruption Commission v Barnett Development Corporation Limited**³, it was added that the Plaintiff did not produce any evidence showing that the 1st Defendant obtained its certificate of title through any fraudulent acts or by way of impropriety so as to invoke the provisions of section 34 of the Lands and Deeds Registry Act. It was posited that the remedy for encroachment, if at all it existed, would in any event be the re-survey of the land in line with section 19 of the Land Survey Act.

Further, that the Plaintiff failed to prove that the 1st Defendant has entered upon her property for her to justify the claim for damages for trespass. On the strength of **Augustine Kapembwa v Danny Maimbolwa and Attorney General**⁴ it was submitted that it is in fact the Plaintiff who had trespassed by entering upon the 1st Defendant's land without any authorization.

The 1st Defendant also addressed the Plaintiff's claim for restitution by referring to **Halpern v Halpern**⁵. It was submitted that the basic purpose of restitution is to achieve fairness and prevent the unjust enrichment of a party. That this was not the case at hand in that the 1st Defendant has restricted all developments within the boundaries of farm 10145 and thus the Plaintiffs claim for restitution cannot succeed. The 1st Defendant thus prayed that the action be dismissed with costs.

The 3rd Defendant in its submissions dated 1st August, 2017 maintained that farm 10127 was wrong as the survey was approved in error and the farm was increased contrary to the site plan, thereby leading it to encroach on other farms. It was the 3rd Defendant's position that the farms ought to be re-planned and no title should be given priority over the other. Further, that the 3rd Defendant being the authority vested with power to alienate land in Zambia should be allowed to re-plan the farms in question in order to correct the error that was made by the wrong survey of farm 10127.

The Plaintiff replied to the 3rd Defendant's submissions and stated that the 3rd Defendant's submissions lacked legal backing. Relying

on section 7 of the Lands and Deeds Registry Act, the Plaintiff argued that since farm 10127 was created earlier than farm 10145, the erroneous survey cannot be attributed to farm 10127. Further, that farm 10145 being on a 14 year lease is not surveyed and thus cannot be encroached by farm 10127. The Plaintiff also referred to the case of **Anti Corruption Commission v Barnet Development Corporation Limited**³, and pointed out that the 3rd Defendant had not alleged any fraud or reasons of impropriety against the Plaintiff to warrant a challenge or cancellation of the certificate of title. It was added that the Defendants did not plead the issue of re-planning in their defences thus this Court is precluded from dealing with it.

I have duly considered the pleadings, the evidence as well as the submissions made by the respective parties.

The burden is on the Plaintiff, as the one alleging, to prove her allegations to the required standard as against the Defendants for the claim to succeed. The Plaintiff mainly seeks a declaration that she is the beneficial owner of farm 10127 and therefore entitled to the full extent of the said property based on the approved diagram; an order of cancellation or rectification of the diagram for farm 10145 to address its encroachment on farm 10127; damages for trespass as against the three Defendants and costs.

The main facts are not in dispute and are that both the Plaintiff and 1st Defendant are beneficial owners of farms 10127 and 10145, respectively. Both purchased their farms from third parties. The Plaintiff acquired it on 17th November, 2005 and the 1st Defendant on 30th October, 2003. The Plaintiff is a holder of the certificate of title under the 99 years lease for 249.6272 hectares while the 1st

Defendant is a holder of a provisional certificate of title under a 14 years lease for 244 hectares.

The Plaintiff's certificate of title has an approved survey diagram number D5114/2002 and was the first to be registered on 31st October, 2002. The survey diagram indicated the survey record number as D713/2002 and not D713/2003 as stated by DW2. The 1st Defendant's farm was first registered on 11th July, 2003 and the certificate of title has a sketch plan showing the properties neighbouring it as shown on pages 4-5 and 23-24 of the 1st Defendant's bundle of documents. The testimony of DW2 was that farm 10145 was surveyed on survey record number D555/2003 but which was not approved by the Surveyor General. The 1st Defendant has since developed part of the land in dispute while the Plaintiff is yet to develop her land.

The further evidence of the parties was that sometime in 2008/2009 when the Plaintiff wanted to put up a boundary fence, she discovered that the 1st Defendant had encroached on a portion of farm 10127 and built on it. The plaintiff then wrote letters of complaint to the Defendants.

On receipt of the Plaintiff's complaint letter sometime in 2008/2009, the Surveyor General's Office conducted a verification after which a recommendation was made that the properties affected should be re-surveyed. The memorandum in issue is addressed to the Surveyor General from Andrew Nyirenda as Acting Chief Survey Examiner is dated 15th October, 2008 and reads as follows:

Re: Encroachment of farm 10127 on several farms 10144, 10145 and 10146 along Kafue River Bank.

I write to inform you that the encroachment has been discovered as indicated above along the Kafue River.

Findings

- 1. Farm 10127 was surveyed by Mr. K.N. Mumbano in August 2002. The records were lodged under S.R. No. D713/2003, examined and passed for approval by Mr. G. Simutami on 23 September 2002. The survey is not conforming to the site plan. The consistency in the calculation book and the data on the diagrams are different. The farm was increased contrary to the site plan and it has caused the encroachment on to three farms, distance of more than 2150 metres on the side C to D of the Diagram No. 5114/2002.*
- 2. Farm 10145 was surveyed by Mr. K.N. Mumbano in August 2003 and the survey records were lodged under S.R. D555/2003, examined and passed by Mr. Jones S. Siang'andu on 29th September 2003. The photocopy of survey diagram is conforming to the approved sketch plans. The examiner's report, calculations, survey report and working plans are not in the jacket.*

Conclusion and recommendation

It is difficult to ascertain the position of the two surveyed properties since the source of original survey coordinates is not known in both surveys. Farm 10127 is completely wrong, the survey was approved in error: its survey diagrams need to be cancelled. A re-survey to be done by the Private Surveyor so that the correct diagrams should be approved to replace the wrong diagrams the same surveyor should link the survey to the other approved survey of Farm 10145 and relate to other surveys which are not yet surveyed as well to avoid further encroachment.

A second verification was conducted by DW2 in 2014 following an order of this Court. DW2 recommended that the farms should be re-planned and his memorandum of 27th May, 2014 to the Surveyor General reads as follows:

Ref: Approved Survey Records No. D713/2003 and D555/2003 for Farms 10127 and 10145 respectively.

I write to inform you sir that field verification on farms 10127 and 10145 has been done as requested by the office of Attorney General.

Findings

- *SR No. D713/2003 for farm 10127 was approved in error. The site plan was not followed during survey; the farm was increased contrary to the site plan. This caused farm 10145 approved under SR No. D555/2003 to encroach on farm 10127 by 54.1311 hectares. Both farms were surveyed by Mr. K.N. Mubano (late) in UTM provision. However, the two surveys were not connected.*
- *The Office of Surveyor General wrote to Commissioner of Lands recommending for cancellation of farms created around the Kafue Gorge. Commissioner of Lands advised that the farms on title in this area be re-planned.*

Conclusion

The increase of farm 10127 has caused farms 10144, 10145, 10146 and Sondela Police camp to encroach.

Recommendations

Re-plan the farms on title in this area after consulting Zambia Electricity Company to guide on what distance from the gorge should be the buffer with farms.

It is thus not in dispute that there exists an encroachment involving farms 10127 and 10145. The main issue for determination is whether farm 10127 which was created and surveyed earlier could encroach on farm 10145 which was created later and was yet to be surveyed.

DW1 and DW2, officials from the Surveyor General's Office, testified that farm 10127 encroaches on farm 10145 because it was surveyed wrongly and its shape was at variance with the shape on the site plan for the area. That this has also resulted in farm 10127 encroaching on other properties which were subsequently created

based on the site plan. It was their further evidence that the Surveyor General's Office erroneously approved the survey diagram number 5114/2002 for farm 10127 and there was thus a need to re-plan farms 10127 and 10145 as well as the other pieces of land that are the subject of the encroachment. Both DW1 and DW2 admitted in cross examination that since farm 10127 had been created and surveyed first the general principle was that its extent of the land ought to be upheld as against that of farm 10145 but that this could not apply in this case because farm 10127 was surveyed contrary to the site plan of the plots in the area.

The above facts are clear that at the time when farm 10145 was created on a portion of farm 10127, the general principle entailed that the particular portion of land was already subject of a certificate of title and free of any encumbrance or adverse interest save for the exceptions stated under Section 33 of the Lands and Deeds Registry Act. This section 33 stipulates the effect of a certificate of title as follows:

"A Certificate of Title shall be conclusive as from the date of its issue and upon and after the issue thereof, notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the President or otherwise, which but for Parts III to VII might be held to be paramount or to have priority; the Registered Proprietor of the land comprised in such Certificate shall, except in case of fraud, hold the same subject only to such encumbrances, liens, estates or interests as may be shown by such Certificate of Title and any encumbrances, liens, estates or interests created after the issue of such Certificate as may be notified on the folium of the Register relating to such land but absolutely free from all other encumbrances, liens, estates or interests whatsoever:

- (a) Except the estate or interest of a proprietor claiming the same land under a current prior Certificate of Title issued under the provisions of Parts III to VII; and**
- (b) Except so far as regards the omission or misdescription of any right of way or other easement created in or existing upon any land; and**
- (c) Except so far as regards any portion of land that may be erroneously included in the Certificate of Title, evidencing the title of such Registered Proprietor by wrong description of parcels or of boundaries." (emphasis mine)**

The tenor of this provision is to safeguard the titles of registered proprietors subject to the few exceptions provided. In this case, no one is challenging the certificates of title of either the Plaintiff or the 1st Defendant as being fraudulent. Therefore, their respective titles are entirely valid. What is in contention is the alleged encroachment or the physical extent of the two properties on the ground and with respect to the survey diagram for farm 10127 as well as the sketch plan for farm 10145.

Further, in terms of the Lands and Deeds Registry Act on the aspect of priority of titles, it can be said that farm 10145 is generally subservient to farm 10127 in every respect including delineation of boundaries. However, an examination of the evidence from DW1 and DW2 shows that farm 10127 was not surveyed in line with the site plan. This was not disputed by the Plaintiff. PW2, the first title holder who obtained it through the Council and later sold it to the Plaintiff, acknowledged that he was given site plans by the Council but the same were not before Court. Thus, even though DW1 and DW2 did not produce the site plan for the area, this does not negate the contention that farm 10127 was not surveyed in line with the site plan. This shows that the Plaintiff has not discharged the burden of proof on this aspect. PW2's explanation was that through his company, Tassel Farms, he had applied for a larger portion of land in 1994 than was granted to him. Certain adjustments were effected to the initial site plan to address concerns by ZESCO and the farm was reduced further to fit within the 250 hectares approval limit for the Commissioner of Lands. The Council recommendation letter at page 4 of the Plaintiff's bundle of documents does not

indicate the hectarage PW2 was granted. There was further evidence from DW1 and DW2 indicating that the beacons for both farms 10127 and 10145 could not be located during the two verification exercises conducted on the land.

This shows that the boundaries to the two farms are uncertain. This is compounded by the fact that beacons for both farm 10127 and 10145 could not be located by DW2 who carried out the verification following the Court order. The failure to locate the beacons was also attributed to the fact that the surveys for both were done by the private surveyor Mubano, who is said to be deceased, and who did not conduct the surveys from the national control points or grid as required. Due to the inability to locate the beacons, the exact extent of encroachment is not known. However, both the Plaintiff and the 1st Defendant have produced drawings at pages 17 and 25 of the Plaintiff's and 1st Defendant's bundles of documents, respectively. The drawings indicate significant encroachment along the river bank extending to two other lots namely farms 10144, 10146 and the police camp, apart from the two farms in issue. Hence, there is need to determine the right boundaries of the lots by re-surveying both farm 10127 and farm 10145.

In terms of the reliefs sought, under the first relief, the Plaintiff seeks a declaration that as beneficial owner of farm 10127 described by the approved diagram attached to the certificate of title, she is entitled to quiet enjoyment of the full extent of the said property. Based on the findings above, it is apparent that the Plaintiff has not discharged the burden of proof in light of the testimony of DW1 and DW2 that the survey of farm 10127 did not follow the site plan and the

beacons could not be located as the private surveyor had not carried out the survey from the national control points. I thus cannot to grant the declaration sought.

The second and third reliefs seek an order for cancellation or rectification of the diagram describing farm 10145 for encroaching or overlapping on the Plaintiff's farm 10127. The evidence on record is that farm 10145 is still on a provisional certificate of title and therefore has a sketch map attached. There is no approved survey diagram. The testimony of DW2 was that there is a survey diagram under survey record number D555/2003 carried out by private surveyor Mubano but which is not approved. This shows that there is no valid survey diagram but a sketch map. I have considered the evidence of DW1 and DW2 and that the alleged beacons for farm 10145 could not be located on the ground. In these circumstances, I cannot order the cancellation of the diagram or sketch plan for farm 10145 but instead order that farm 10145 be re-surveyed in accordance with the site plan for the area which also covers farm 10127. Subject to this order, the second and third reliefs fail. It follows that the sixth relief for an order of restitution of land encroached upon by the 1st Defendant cannot succeed.

The fourth relief was for an order of interim injunction which has since been overtaken by events.

The fifth relief is for an order for damages for trespass to land as against the 1st, 2nd and 3rd Defendants. This claim for trespass has not been proved to the required standard against the Defendants in view of the finding that the survey for farm 10127 was not done according to the site plan. The fact that the diagram for farm 10127

was approved by the Surveyor General did not mean that it could not have been done in error and any such error can be corrected as stated in section 10(3) of the Land Survey Act. This relief fails.

Consequently, the eighth relief for interest fails as there is no monetary award or damages ordered upon which it can be based.

The seventh relief is for any relief that the Court may deem fit. I have considered section 5 of the Land Survey Act which empowers the office of the Surveyor General to correct and amend diagrams and plans relating to allotments. It provides in part that:

“5. Any Government surveyor may-

(d) cancel or appropriately amend any general plan or diagram found to be incorrect;

(f) endorse, amend and, if necessary, correct any registered diagram or plan, and sign such endorsement, amendment or correction.”

Section 18 of the Land Survey Act also empowers the Surveyor General to rectify errors as regards boundaries and beacons and provides for the replacement of the incorrect diagram after a re-survey is conducted. Section 19 further provides for re-survey of blocks of land.

I am further guided by the recent decision of the Court of Appeal in the case of **James Chungu v Nyokasi Chitaya, Chibombo District Council and The Attorney General**⁶ where an order of re-survey a farm was upheld where it was found that the private surveyor had not conducted the initial survey in accordance with the approved site plan.

I thus order that pursuant to sections 18 and 19 of the Land Survey Act, farms 10127 and 10145 be re-surveyed according to the site plan so as to determine their definite boundaries.

On the issue of costs, having found that the Plaintiff had not proved her claim against the 2nd Defendant, I award costs to the 2nd Defendant as against the Plaintiff to be taxed in default of agreement. On the particular facts of this case, I order the rest of the parties to each bear their own costs of this action.

Leave to appeal is granted.

Dated this 19th day of December, 2017



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M. S. MULENGA
JUDGE