

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

**2014/HP/1760  
2014/HP/1761**

**B E T W E E N :**

JOHN MUMBA & 16 OTHERS

**PLAINTIFFS**

**AND**

HOWARD COOKE  
ELIZABETH CATHERINE COOKE  
THE ATTORNEY GENERAL

**1<sup>ST</sup> DEFENDANT  
2<sup>ND</sup> DEFENDANT  
3<sup>RD</sup> DEFENDANT**

**AND**

PIDON KASIKETI & 5 OTHERS

**PLAINTIFFS**

**AND**

HOWARD COOKE  
ELIZABETH CATHERINE COOKE  
THE ATTORNEY GENERAL

**1<sup>ST</sup> DEFENDANT  
2<sup>ND</sup> DEFENDANT  
3<sup>RD</sup> DEFENDANT**



**Before Honorable Mrs. Justice M. Mapani-Kawimbe on the 25<sup>th</sup> day of  
January, 2018**

*For the Plaintiffs* : *Mr. P. Mulenga and Mr. W. Chitungu,  
Messrs Mulenga & Wallace Advocates*  
*For the 1<sup>st</sup> & 2<sup>nd</sup> Defendants* : *Mr. R. Malipenga & Mr. B. Mukatuka,  
Messrs Robson Malipenga & Company*  
*For the 3<sup>rd</sup> Defendant* : *Mr. D. Katufwa, & Mr. P. Kachimba,  
Assistant State Advocates*

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**J U D G M E N T**

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**Cases Referred To:**

1. *Patrick Siakulipa v Attorney General* 2004/HP/03
2. *Claude Samuel Gaynor v Cyril Robert Cowley* (1971) ZR 50 (H.C)
3. *Mubita Mbanga v The Attorney General* 1979 ZR 234
4. *Hermiman v Smith* (1938) 1 All ER
5. *Anti-Corruption Commission v Barnnet Development Corporation Limited* (2008) Z.R 69 Volume 1 (S.C)
6. *Construction and Investment Holdings Limited v William Jacks and Company Zambia Limited* (1972) ZR 66
7. *Sam Amos Mumba v The Attorney General* (1984) ZR 14
8. *Richman Chulu v Monarch (Z) Limited* 1983 Z.R 33 (H.C)
9. *Fredrick Kunongona Mwanza v Zambia Publishing Company Limited* (1981) Z.R 234 (H.C)
10. *Rodger Chitengi Sakuhuka v Sassali Lungu & Others* (2005) Z.R 48
11. *John Namashoba Muchabi v Aggrey Mwanamufwenga* (1987) Z.R 110

**Legislation Referred To:**

1. *Lands and Deeds Registry Act, Chapter 185*

**Other Works Referred To:**

1. *Clerk & Lindsell on Torts Sweet & Maxwell London, 1965*
2. *Winfield & Jolowicz, Tort, 19<sup>th</sup> Edition by W.E Peel & J, Goudkamp, Sweet & Maxwell, London 2014*

By Writ of Summons and Statement of Claim, the Plaintiffs seek the following reliefs:

- (i) *Substantial compensatory damages to be assessed by the Court for false imprisonment, wrongful detention, malicious prosecution and defamation of character of the Plaintiffs suffered by the Plaintiffs at the instance and instigation of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.*
- (ii) *Substantial compensatory damages to be assessed by the Court for indignity, embarrassment, disgrace, humiliation and mental anguish, etc. suffered by the Plaintiffs as a result of the Defendants' wrongful and torturous acts complained of by the Plaintiffs herein.*

- (iii) Aggravated and exemplary damages for the malicious and concocted falsehoods made by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants on account of which the Plaintiffs were falsely imprisoned, wrongfully detained and maliciously prosecuted by the 3<sup>rd</sup> Defendant.*
- (iv) Aggravated and exemplary damages for aggravated conduct on the part of the Defendants and complained of by the Plaintiffs.*
- (v) Legal costs incurred by the Plaintiffs in the defence of the criminal proceedings instituted by the 3<sup>rd</sup> Defendant at the instance and instigation of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.*
- (vi) Interest on all sums found due and payable by the Defendants to the Plaintiffs.*
- (vii) Costs of the action herein, and*
- (viii) Any other relief that the Court may deem fit in the present circumstances.*

The Statement of Claim in Cause No. 2014/HP/1760, discloses that on 14<sup>th</sup> December, 2011, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants without reasonable and probable cause made false, malicious, vexatious and concocted allegations that the Plaintiffs unlawfully entered upon the premises of Elizabeth Catherine Cooke, Farm No. 394a/A, Lusaka West, Lusaka with intent to annoy when in fact not or at all.

By reason of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' false, malicious, vexatious and concocted allegations, the Plaintiffs were unlawfully arrested by officers of the Zambia Police Service stationed at

Westwood Police Post, agents and servants of the 3<sup>rd</sup> Defendant and charged with the alleged offence of Criminal Trespass contrary to section 306 (a) of the Penal Code Chapter 87 and subsequently unlawfully detained in custody for four (4) days at Westwood Police Post. They were released on police bond pending trial before the Subordinate Court, Lusaka.

The Petitioners aver that the false, malicious and vexatious proceedings instituted by the 3<sup>rd</sup> Defendant against the Plaintiffs at the instance and instigation of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants terminated in the favour of the Plaintiffs and they were acquitted by Honourable Mr. L. Mwale on the 11<sup>th</sup> January, 2013. Notices of Acquittal were subsequently issued on the 6<sup>th</sup> February, 2013. The Plaintiffs will rely on the said Notices of Acquittal at the trial of this action.

The Plaintiffs aver that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had no reasonable or probable cause for the false, malicious, vexatious and concocted allegations made against them and the consequent malicious prosecution by the 3<sup>rd</sup> Defendant. The actions of the 1<sup>st</sup>

and 2<sup>nd</sup> Defendants were punctuated by malice, spite and improper motives.

The Statement of Claim in Cause No. 2014/HP/1761, discloses that on 27<sup>th</sup> April, 2012, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants without reasonable and probable cause made false, malicious, vexatious and concocted allegations that the Plaintiffs unlawfully entered upon the premises of Ryan Cooke, namely, Farm No. subdivision A of Farm No. 394a with intent to annoy when in fact not or at all.

By reason of the 1<sup>st</sup> and 2<sup>nd</sup> Defendant's' false, malicious, vexatious and concocted allegations the Plaintiffs, were unlawfully arrested by police officers from Westwood Police Post, agents of the 3<sup>rd</sup> Defendant and charged with the alleged offence of criminal trespass contrary to section 306(a) of the Penal Code Chapter 87. They were subsequently detained for four (4) days at Westwood Police Post and later released on police bond pending trial before the Subordinate Court. Criminal proceedings were conducted by

the 3<sup>rd</sup> Defendant for the alleged offence at the instance of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

The Plaintiffs state that they were not found guilty and later acquitted on 26<sup>th</sup> February, 2013. They contend that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had no reasonable or probable cause for the false, malicious, vexatious and concocted allegations made against the Plaintiffs.

The particulars of prosecution given in both causes are that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants proffered false, malicious and concocted information to the Zambia Police officers and as a result the Plaintiffs were maliciously prosecuted for criminal trespass by the 3<sup>rd</sup> Defendant.

The 1<sup>st</sup> and 2<sup>nd</sup> Defendants concocted and fabricated false information that the Plaintiffs had unlawfully entered upon the premises of Ryan Cook, namely Farm No. Subdivision A of Farm No. 394a, Lusaka with intent to annoy without any reasonable or probable cause.

The concocted and fabricated false information was given by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to the 3<sup>rd</sup> Defendant or its servants or agents with the full knowledge that the Plaintiffs would be prosecuted for the offence of criminal trespass. By reason of their false imprisonment, wrongful detention, defamation of character and malicious prosecution, the Plaintiffs suffered injury, damage and loss.

The particulars of injury, damage and loss are that the Plaintiffs were deprived of their liberty for four (4) days as a result of the false imprisonment and unlawful detention by the Zambia Police officers at Westwood Police Post.

The Plaintiffs and their families suffered defamation of character, humiliation, indignity, disgrace, embarrassment, mental torture and anguish occasioned as a result of the arrest, false imprisonment, wrongful detention and malicious prosecution. The Plaintiffs faced fear and anxiety of the groundless, baseless, vexatious and malicious prosecution against them at the instance and instigation of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. They suffered

inconvenience as a result of their need to attend Court hearings on numerous occasions.

In their defence the 1<sup>st</sup> and 2<sup>nd</sup> Defendants aver that they never made false, malicious, vexatious and concocted allegations against the Plaintiffs for unlawfully entering Farm No. subdivision A of Farm No. 394a. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants only made a report of trespassers who were charcoal burners and were arrested by the Police on their farm.

The 1<sup>st</sup> and 2<sup>nd</sup> Defendants further aver that the proceedings and prosecutions were not malicious and the acquittal of the Plaintiffs does not mean that they never trespassed on the 1<sup>st</sup> and 2<sup>nd</sup> Defendant's farm. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants contend that they had reasonable or probable cause to report the trespass of the Plaintiffs who were arrested because they had no permission from them to enter their farm, cut down trees and burn them for charcoal.



That the 1<sup>st</sup> and 2<sup>nd</sup> Defendants state that they were lawfully entitled to report any illegal activities by the Plaintiffs on their farm. They also state that the Plaintiffs are not entitled to the reliefs sought and pray that they be dismissed with costs.

At trial, **Pidon Kasiketi** testified as **PW1**. He stated that on 27<sup>th</sup> April, 2012, he was at his Farm No. 7/38/subdivision 60, Lusaka West in the company of his friends when police officers suddenly appeared and apprehended them. They were taken to Westwood Police Station, Lusaka West and were not informed of the reasons of their arrest. PW1 stated that he and the others spent four days in police custody and their families were not allowed to visit or give them food. A few days after his release from detention, he was served with summons to appear in the Subordinate Court for an offence he was alleged to have committed. He was not aware of the trial date and a bench warrant was issued against him. According to PW1, he was charged with the offence of criminal trespass on Ray Cooke's Farm No. 394a, which he stated was further from his property. PW1 stated that he was acquitted of the criminal offence as per Notice of Acquittal at page 1 of his Bundle.

PW1 testified that he suffered at the hands of the police for an offence that he did not commit. His family was ridiculed in his community, and was viewed as a thief. Further, he fell sick whilst in police custody due to the poor sanitary conditions. He prayed to the Court to order the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to compensate him for defamation of character and the suffering he experienced whilst in police cells. He also prayed for damages.

In **cross-examination by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants**, PW1 testified that he owned Farm No. 7/38/subdivision 60, Lusaka West, which he acquired in 2006. He did not have an offer letter or title deed from the Ministry of Lands. He stated that the Kafue District Council allocated him the farm and he was given an offer letter through his community representative, Mr. Osick Holiday Chitembo at page 8 of his Supplementary Bundle.

PW1 testified that Elizabeth Catherine Cooke owned Farms Nos. 738/44(2) and 394a/a/31 in reference to the Defendants' Bundle. He built a house on his farm and cultivated on it. PW1 denied that his farm belonged to Elizabeth Catherine Cooke.

However, in reference to a letter at page 9 of his Supplementary Bundle, PW1 stated that Elizabeth Catherine Cooke was mentioned as the title holder.

In further reference to a letter dated 30<sup>th</sup> September, 2009, at page 11 of his Supplementary Bundle, PW1 testified that the Council never allocated Farms Nos. 394a and 738 Nyemba Ward to Elizabeth Catherine Cooke. The certificate of title dated 1<sup>st</sup> July, 1975, in the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' Bundle was issued by the Ministry of Lands to Progress Poultry Limited. PW1 testified that Elizabeth Catherine Cooke had taken out an action against him in another cause on the disputed property and he did not know whether the Court granted her an injunction.

In continued **cross-examination**, PW1 stated that there was a Court Order dated 21<sup>st</sup> July, 2014 striking out Elizabeth Cooke's matter in Cause No. 2009/HP/445. PW1 stated that he was apprehended on 27<sup>th</sup> April, 2012, and he did not know if the injunction order was still in force. He added that the striking out order was not in existence at the time of his arrest.

In **cross-examination by the 3<sup>rd</sup> Defendant** PW1 stated that he owns the property where he resides, which is under statutory law. He acquired the property from Kafue District Council. PW1 stated that at the time of his arrest he showed the police officers his property documents from the Ministry of Lands and Kafue District Council. He did not have an offer letter or title at the time of his arrest. PW1 disputed the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' title deeds insisting that they not genuine. He added that the police unreasonably arrested him on false information given by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants that he was found on their property. He knew the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' property boundaries even if he had not seen their certificates of title. PW1 testified that the police officers did not properly investigate the case.

In **re-examination**, PW1 stated that he was not charged with any offence nor shown the Defendants' certificates of title at the police station. He challenged the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' certificates of title because they were not allocated land by Kafue District Council. It was his evidence that the status quo remained vis the

Ruling dated 15<sup>th</sup> September, 2009 and the Court did not determine the issue of property ownership.

**PW2** was **Victor Hamoonga** who testified that while at PW1's house on 27<sup>th</sup> April, 2012, with other friends, they were apprehended by police officers who took them to Westwood Police Post. They were detained for four days and were not allowed visitors or food. At the time they were released, they were not charged with any offence.

PW2 stated that about a month afterwards, one of the police officers told him the Subordinate Court issued a bench warrant against them. PW2 claimed that he only learnt of the offence he was alleged to have committed in Court. He could not recall when the case concluded but he was acquitted of criminal trespass according to the notice at page 5 of the Plaintiffs' Bundle. He prayed for compensation from the 1<sup>st</sup> and 2<sup>nd</sup> Defendants for his wrongful detention and defamation of character. He also prayed for costs.

In **cross-examination by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants**, PW2 stated that he was at PW1's farm shelling groundnuts when they were arrested. He acquired his farm in 2009 verbally from the Chairman of Westwood Farming Community Committee, Mr. Osick Chilembo. He was not given an offer letter but paid ZMW5,000,000 for twenty acres of virgin land, which he cleared. The money was receipted by the Treasurer. He added that his land was surveyed but he did not know if he fulfilled all the statutory requirements in acquiring it.

PW2 testified that he was not aware if the Ministry of Lands issued the Community Committee title deeds. He never verified the status. He was not aware that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had title deeds for the property. He insisted that he and his friends were wrongfully arrested because they did not trespass on the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' property. He did not know if PW1 had title for his property and did not make any inquiries at the Ministry of Lands.

The witness was not **cross-examined** by the 3<sup>rd</sup> Defendant.

In **re-examination**, PW2 stated that he was apprehended at Plot 738 subdivision 60, which belongs to PW1.

**Chris Chikonka** testified as **PW3**. He stated that on 27<sup>th</sup> April, 2012, he was at PW1's farm shelling groundnuts with other friends, when they were apprehended by police officers, who were accompanied by Mr. Howard Cooke's workers. They were taken to Westwood Police Post where they were detained for four days. They were not given food or allowed family visits during their incarceration.

They were eventually released but not charged with any offence. He repeated the earlier evidence on record regarding the Court appearances and how they were charged after their release from police cells, their prosecution and acquittal. PW3 testified that the land claimed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants belonged to the Government and there was a caveat on it.

PW3 stated that after his arrest, the members of his community negatively viewed him as a criminal. He prayed for compensation from the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

In **cross-examination, by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants**, PW3 stated that he was arrested on PW1's property. He did not go back to police station after his release because he thought that the case had concluded. He had no proof that the property belonged to the Government. He went to help PW1 at his farm because they were friends and congregated at the same church. PW3 testified that PW1 lived on his property for over three years and did not know when he acquired it PW2 had a house in the same area. He never gave a statement at the police station and did not know the reasons for his arrest.

PW3 did not know if the 1<sup>st</sup> and 2<sup>nd</sup> Defendants owned the land on which PW1 settled. He denied that he was a charcoal dealer and arrested for cutting down trees. PW3 stated that Mr. Howard Cooke was entitled to report any trespassers on his farm and had power to remove anyone who illegally settled on it.



PW3 was not **cross-examined** by the 3<sup>rd</sup> Defendant.

**PW4** was **Derrick Chisi** who testified that on 14<sup>th</sup> December, 2012, whilst cultivating at Mr. Frackson Zulu's field with others, they were apprehended by four police officers who took them to Westwood Police Station. They were detained for four days and released after Mr. Zulu's nephew signed police bond on 17<sup>th</sup> December, 2011.

PW4 testified that they were charged with criminal trespass and on 19<sup>th</sup> December, 2011, appeared in the Subordinate Court. They were accused of trespassing on Elizabeth Catherine and Howard Cooke's farm. They were subsequently acquitted of the offence as shown in the Notice of Acquittal at page 2 of the Plaintiffs' Bundle in Cause No. 2014/HP/1761. He prayed to the Court to order the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to compensate him for the injury suffered.

In **cross-examination by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants**, PW4 stated that he knew Mr. Zulu on the date that he engaged him as a

piece worker. Mr. Zulu's nephew told him that he owned the farm and did not know that Elizabeth Catherine Cooke owned the farm.

In **cross-examination by the 3<sup>rd</sup> Defendant**, PW4 repeated that he was arrested on 14<sup>th</sup> December, and released on 17<sup>th</sup> December, 2011.

PW4 was not **re-examined**.

**PW5** was **John Mumba** who testified that on 14<sup>th</sup> December, 2011, whilst working on Mr. Frackson Zulu's farm with others, they were apprehended by police officers who took them to Westwood Police Station. They were detained for four days and released. They appeared in Court the next day and were consequently prosecuted and found with no case to answer.

In **cross-examination by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants**, PW5 stated that Mr. Zulu hired him as a piece worker to weed his field and was paid for the work. He never asked Mr. Zulu if he owned

his farm. He did not know Elizabeth Catherine Cooke and was not aware that she owned the property.

The witness was not **cross-examined** by the 3<sup>rd</sup> Defendant.

PW5 was not **re-examined**.

**George Banda** testified as **PW6**. His testimony was that he and others were apprehended by police officers on 14<sup>th</sup> December, 2011, at Mr. Frackson Zulu's farm. They were taken to Westwood Police Station and detained without charge for four days. They were eventually released on police bond and appeared in the Subordinate Court the following day. PW6 prayed for compensation from the 1<sup>st</sup> and 2<sup>nd</sup> Defendants for the suffering he experienced in police cells.

In **cross-examination by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants**, PW5 stated that he lived in a different area from Mr. Zulu and never went back after his release. He did not know that Mr. Zulu was not the owner of his farm nor that it belonged to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

The witness was not **cross-examined** by the 3<sup>rd</sup> Defendant.

PW6 was not **re-examined**.

**Howard Cooke** testified as **DW1**. He stated that sometime in December, 2011, his workers told him that some trespassers invaded his farm and were cutting down trees. They were clearing the bush and demarcating plots. He reported the matter to Westwood Police Station and produced his property documents from the Ministry of Lands.

DW1 stated that after his report, the police apprehended the trespassers and detained them at Westwood Police Station. He was later summoned to the Subordinate Court where he testified that he was the owner of the land that had been encroached. He was later surprised to learn that he was sued for malicious prosecution.

In **cross-examination by the Plaintiffs**, DW1 stated that his property was registered in his wife's name. Progress Poultry Limited at page 17 of the Plaintiffs' Bundle was next to his farm. He

was aware that the Plaintiffs were acquitted but it did not imply that that they were not guilty. He did not appeal the Subordinate Court's decision. DW1 stated that his wife took out an action against the Plaintiffs in the cause shown at pages 3 and 4 of the Plaintiff's Supplementary Bundles.

DW1 stated that the Ruling at page 5 of the Plaintiffs' Further Bundle relates to a different property. At page 12 of the Plaintiffs' Further Bundle, DW1 testified that the Court ordered a stay of proceedings to maintain the status quo of the property, which is the subject of dispute between the parties.

DW1 was not **cross-examined** by the 3<sup>rd</sup> Defendant.

In **re-examination**, DW1 stated that the Plaintiffs were arrested on his farm.

**Musamvhu Wanki** testified as **DW2**. His evidence was that, Farm 394 subdivision A was registered in Mr. Swantes name and is about 219 hectares in size. He stated that the land is situated in

Lusaka West and Mr. Swantes was offered the property in 1957. DW2 testified that according to the Lands Register, Farm 394a/A was offered to Swantes Limited in 1988 and the current title holder is Elizabeth Catherine Cooke who appears on entry No. 32 of the Land Register at page 14 of the Defendants' Bundle. The size of the farm is approximately 219.2372 hectares. DW1 went on to state that Elizabeth Catherine Cooke obtained title on 25<sup>th</sup> April, 2007. He never visited the property and could not tell whether it was developed or not. DW1 added that the property has never repossessed by the Commissioner of Lands, neither was it issued to another person.

In **cross-examination**, DW2 stated that he was not aware that there are other cases in Court concerning the property.

DW2 was not **cross-examined** by the 1<sup>st</sup> Defendant neither was he **re-examined**.

Detective Chief Inspector, No. 6637 **Phanuel Chipepo** testified as **DW3**. His testimony was that in 2010 he was transferred from

Lusaka Division to Westwood Police Station as Criminal Investigations officer, and was in charge of crime. He testified that DW1 and his son Leone reported that trespassers had invaded their Farm No. 394. Before taking action, he asked DW1 to provide proof of ownership and he eventually produced a title deed, which he verified at the Ministry of Lands.

DW3 stated that he handled a number of cases regarding DW1's property. In some cases, the persons were convicted while others were acquitted. DW3 testified that Mr. Chilembo and his co-accused were acquitted. He added that the Plaintiffs were charged with criminal trespass because they allegedly cut down trees, demarcated plots and built houses on DW1's farm without his permission.

In **cross-examination by the Plaintiffs**, DW3 stated that he attended the Court proceedings against the Plaintiffs. He could not recall when their cases were taken to Court and when they were acquitted. He did not know if the State appealed against the Plaintiffs' acquittals.

The witness was not **re-examined**.

Learned Counsels for the parties filed written submissions for which I am indebted. Learned Counsel for the Plaintiffs submitted that the police officers from Westwood Police Station did not conduct proper investigations against the Plaintiffs. He cited the case of **Patrick Siakulipa v Attorney General**<sup>1</sup>, where the Court stated that:

**“It is the duty of the Police to investigate all suspected crimes, to temporarily restrain a person provided there are reasonable grounds that a crime has been committed.”**

He called in aid the Learned authors on Clerk & Lindsell on Torts who state at paragraph 12-50 that:

**“Police officers have discretion as to whether or not to exercise a power to detain or arrest which discretion must be exercised in good faith and can only be challenged as unlawful if it can be shown to have been exercised ‘unreasonably’ under the principles laid down by Lord Greene M.R in Associated Picture House Limited v Wednesday (1948) L.K.B. 223.”**

Counsel contended that based on the subjective information availed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to the police officers, there were no reasonable grounds to suspect and arrest the Plaintiffs for criminal trespass. It was his submission that if the police officers



had carried out proper and competent investigations or enquiries, they would not have arrested and detained the Plaintiffs who were not trespassers. Counsel submitted that some of the Plaintiffs were legitimate occupants who have rights to remain on the land until the determination of their case in Cause No. 2009/HP/445.

Counsel went on to submit that the ingredients of malicious prosecution had been met. The Plaintiffs incarceration was expressly admitted by the Defendants and the prosecution terminated in the Plaintiffs' favour. Counsel asserted that the Plaintiffs' prosecution lacked reasonable or probable cause for the following reasons:

- (a) *DW1 did not have proof that the Plaintiffs were trespassing on his property but lodged a complaint on hearsay from his workers.*
- (b) *DW3 and the other police officers failed to recognise that there was a caveat placed on Farm No. 394a/A on 10<sup>th</sup> August, 2010 warning everyone that the property was subject to Court proceedings in the High Court on the question of ownership.*
- (c) *The 1<sup>st</sup> and 2<sup>nd</sup> Defendants were aware of the Supreme Court Ruling at pages 5-12 of the Plaintiffs' Further, Supplementary Bundle as well as the proceedings in Cause Nos. 2007/HP/0065 and 2008/HP/0529 on Farm No. 394a/A.*
- (d) *The police officers did not act with reasonable competence, diligence, and necessary caution before prosecuting the*

*Plaintiffs, because they failed to acknowledge that Farm 394a/A is subject to judicial proceedings. Neither the Plaintiffs nor the 1<sup>st</sup> and 2<sup>nd</sup> Defendants could bring and maintain criminal proceedings against each other in the intervening period.*

- (e) *The 1<sup>st</sup> and 2<sup>nd</sup> Defendants' certificate of title was not clean and is encumbered by a caveat, which precludes the 1<sup>st</sup> and 2<sup>nd</sup> Defendants from holding themselves as absolute owners of the property.*

Counsel contended that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants falsely accused the Plaintiffs and placed reliance on the case of **Claude Samuel Gaynor v Cyril Robert Cowley**<sup>2</sup>. Counsel further submitted that the Plaintiffs were defamed and suffered humiliation, indignity, disgrace, embarrassment as a result of their arrest, four days detention and subsequent prosecution.

Counsel added that the Plaintiffs testified on how appalling the conditions in detention were with no toilet facilities and how they were made to sleep on the floor in overcrowded cells with insane persons. The Plaintiffs' families were denied visitation and all this caused the Plaintiffs to suffer mental torture, anxiety and anguish. He prayed to the Court to award the Plaintiffs substantial compensatory damages and substantial aggravated and exemplary

damages from the 1<sup>st</sup> and 2<sup>nd</sup> Defendants for abusing the legal process.

In response, Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants submitted that the Plaintiffs proved that they were prosecuted and the prosecution ended in their favour after their acquittal. Counsel argued that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants instituted the Plaintiffs' prosecution with reasonable and probable cause because in their testimony, the Plaintiffs testified that they did not own the property they were found on. As a result, they had no legal right to be found on the property.

Counsel submitted that DW1 testified that the Plaintiffs illegally cut trees and demarcated plots on his property. Thus, DW1 had the right to report the illegal squatters who encroached his farm to the police so as to safe guard it. Counsel submitted that any reasonable and prudent man if placed in the position of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants could have come to the conclusion that the Plaintiffs were probably guilty of criminal trespass.

Counsel went on to submit that the Plaintiffs failed to prove that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had a motive other than that of securing the ends of justice.

Counsel contended that the Plaintiffs were not entitled to any of the reliefs sought as the Plaintiffs were prosecuted in accordance with the law. The fact that they were acquitted did not entitle them to a claim of malicious prosecution.

Counsel for the 3<sup>rd</sup> Defendant did not file submissions and belatedly sought leave to enlarge time for filing submissions on 22<sup>nd</sup> January, 2018, when the judgment had been substantially written. I declined to entertain the application as Counsel should have filed submissions by 14<sup>th</sup> January, 2018, or informed the Court much earlier of his hardships, rather than leaving it too late.

It is common ground that the Plaintiffs in Cause No. 2014/HP/1760 were all arrested on 14<sup>th</sup> December, 2011 after DW1 lodged a complaint at Westwood Police Station. The Plaintiffs were all charged with criminal trespass. The Plaintiffs in Cause No.

2014/HP/1761 were arrested on 27<sup>th</sup> April, 2012 and equally charged with criminal trespass of DW1's property. In both cases, the Plaintiffs spent four days in police cells. They appeared in the Subordinate Court and subsequently prosecuted. They were eventually acquitted of criminal trespass and commenced this action with a claim for malicious prosecution. The Plaintiffs all testified that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants lacked reasonable and probable cause when they reported them to Westwood Police Post because Farm 394a/A, which is the source of their grievance is subject to Court proceedings in Cause Nos. 2007/HP/0065, 2008/HP/0529 and 2009/HP/0445.

The Plaintiffs all testified that they were denied food and family visits during their detention. PW1, PW2, and PW3 testified that they suffered prejudice in their community after release and were negatively viewed as criminals. The Defendants denied the Plaintiffs' claims and asserted that they had reasonable and probable cause to institute their prosecution.

In my considered view, the issue that falls for determination is whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants maliciously caused the prosecution of the Plaintiffs?

According to the Learned Authors of Winfield & Jolowicz, Tort, 19<sup>th</sup> Edition at paragraph 20-001, the majority of actions for malicious prosecution lie against the police but a private person who sets the law in motion can incur liability.

At paragraph 20-002, the Learned Authors state that:

**“The burden which has to be undertaken by the claimant in a case of malicious prosecution is a heavy one, so heavy that no honest prosecutor is likely to be deterred from doing his duty.”** (Underlining mu own)

In the case of **Mubita Mbanga v The Attorney General**<sup>3</sup>, Muwo J as he then was, elucidated the elements of malicious prosecution as follows:

**“The Plaintiff has to prove on a preponderance of evidence that he was prosecuted which is the first essential of the case and secondly that the prosecution was malicious, he has to do the same in respect of the second part of his claim in the writ.**

**The essential of malicious prosecution are four. They are:**

- (1) Prosecution**
- (2) Favourable termination of the prosecution**
- (3) Lack of reasonable and probable cause, and**
- (4) Malice**

**In simple language this means that the Plaintiff must prove that he was prosecuted and that the prosecution terminated in his favour and the accuser acted without reasonable and probable cause and did so with malice. (See Winfield and Jolowicz on Tort, 10<sup>th</sup> Edition at pp. 478 to 484). Although in a number of cases judicial attempts to define the word 'malicious' have not been completely successful a consensus of opinion among judges has been that there must be some other motive on the part of the accuser than a desire to bring to justice the person whom he honestly believes to be guilty."**

Counsel for the Plaintiffs submitted that the dispute on property ownership was a high factor. He indulged me to take strong notice of it. As much as it is a strong factor, I am constrained to consider the dispute because the Plaintiffs' claim is strictly for malicious prosecution. I shall therefore restrict myself to an evaluation of the Plaintiffs' claims as endorsed on the Writ of Summons.

As regards the first two elements in proving malicious prosecution, I find as a fact that the Plaintiffs were incarcerated for four days and charged with criminal trespass. They were prosecuted and subsequently acquitted of malicious prosecution as shown in their Notices of Acquittal.

The question that lingers though, is whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had reasonable and probable cause to institute the Plaintiffs' prosecution or merely acted on malice. The Plaintiffs' evidence was that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants lacked reasonable and probable cause when they instituted their arrest, because there is a caveat on the disputed property coupled with proceedings in the Court where the Plaintiffs are challenging the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' title. The Plaintiffs also relied on the Ruling of the Supreme Court which ordered the parties to maintain the status quo of the property until the final determination of the dispute. In addition, the Plaintiffs claimed that they are legitimate occupants of the property because the Defendants have unclean title, which precludes them from holding themselves out as absolute owners.

The 1<sup>st</sup> and 2<sup>nd</sup> Defendants argued that they are the legitimate owners of the disputed property and have a right to secure it from illegal squatters. Further, they only reported the Plaintiffs who happened to be the illegal squatters on their property. Hence, their arrest and prosecution was justified.



In the case of **Hermiman v Smith**<sup>4</sup>, the Court adopted the definition of reasonable and probable cause cited in the case of *Hicks v Faulkner (1878) Q.B.D 161* as follows:

**“Reasonable or probable cause is an honest belief in the guilt of the accused based upon full conviction founded upon reasonable grounds of the existence of a state of circumstances which assuming them to be true would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed.”**

DW1 testified that the Plaintiffs unlawfully entered his property, cut down trees, cleared bushes, started demarcating plots and built houses without his consent. According to DW1, the persons he reported and were subsequently arrested happened to be the trespassers that were found on the Defendants’ farm.

DW3 testified that he received a report from DW1 and his son alleging that trespassers had illegally encroached their property. DW1 produced property documents, which DW3 verified at the Ministry of Lands. According to DW3, the persons who were arrested were the trespassers that were found on DW1’s farm. He

opened dockets against them and these were sent to the Public Prosecutor in readiness for prosecution.

It is worth stating that the authorities I have cited, articulate that reasonable and probable cause can only be established where there is sufficient ground to suspect that a person has committed an offence for which he/she is probably guilty of. A prosecutor does not have to believe in the probability of the conviction and by implication does not have to test the strength of the defence. A prosecutor must only be concerned with the question whether there is a case fit to be tried.

On the pleadings and evidence adduced, my view is that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had reasonable and probable cause to believe that trespassers had invaded their farm. Even if they were informed of the trespass by their workers, the fact remained that some persons had entered their farm and were found on it by police officers who went to investigate the report lodged by DW1. The source of DW1's information mattered less as there was an investigation to be conducted following a complaint that was lodged.

In his submissions, Counsel assailed the integrity of the police's investigation asserting that DW1's report was subjective. Further, that the caveat lodged on the farm subject to Court proceedings, precluded the Defendants from claiming absolute ownership.

It is apparent that there is a dispute on the ownership of the farm, however the title deed on record, which has not been cancelled shows that the farm belongs to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

Section 33 of the Lands and Deeds Registry Act provides:

**"33. 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, estate 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."**

Section 34 of the Lands and Deeds Registry Act, reads:

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

**Restriction on ejection after issue of Certificate of Title**

- (a) the case of a mortgage as against a mortgagor in default;**
- (b) the case of the President as against the holder of a State Lease in default;**
- (c) the case of a person deprived of any land by fraud as against the person registered as proprietor of such land through fraud, or against a person deriving otherwise than as a transferee bona fide for value from or through a person so registered through fraud....”**

In **Anti-Corruption Commission v Barnnet Development Corporation Limited<sup>5</sup>**, the Supreme Court stated thus with regard to sections 33 and 34 of the Act:-

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

The claims in this case do not raise the issue of fraud or impropriety regarding the certificate of title, which in any event, I have not been invited to cancel. Thus, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' certificate of title remains good in these proceedings.

Let me add that section 34 of the Lands and Deeds Registry Act does not list a caveat as one of the grounds upon which a certificate of title can be impeached. I am fortified by the case of **Construction and Investment Holdings Limited v William Jacks and Company Zambia Limited**<sup>6</sup>, where Scot J observed that:

**“The effect of a caveat is that the Registrar of Lands and Deeds is forbidden to make any entry on the register having the effect of changing or transferring or otherwise effecting the estate or interest protected by the caveat. The registered proprietor is therefore prevented from showing a clear title.”** (emphasis my own)

From that authority, a caveat affects the power of the Registrar of Lands and Deeds to alter the Lands Register. It does not affect a subsisting interest in the land but rather maintains the status quo on the Lands Register. Furthermore, a caveat restricts a title holder from carrying out transactions on the property, which is quite remote from protecting it.

I take judicial notice that the 2<sup>nd</sup> Defendant is the current registered owner of the property and according to DW2, her certificate of title has not been cancelled. Thus, the status quo, which is protected by the Supreme Court ruling holds the Defendants as the property owners. As such, they have a right to

protect their property from trespassers. They reported the illegal squatters who happened to be the Plaintiffs to the police and set their prosecution in motion. Any reasonable person or property owner would have taken steps to protect their land as the 1<sup>st</sup> and 2<sup>nd</sup> Defendants did.

In his submissions, Counsel attacked the integrity of the police's investigations. On the other hand, DW3 argued that he carried out credible investigations. The record shows that DW1 lodged a complaint with the police, which was investigated after he produced his title deed. DW3 verified the title at the Ministry of Lands and thereafter arrested the trespassers who were found on the Defendant's farm. DW2 confirmed that DW1's wife is the registered owner of the property and title was issued on 25<sup>th</sup> April, 2007. According to DW3, the trespassers were arrested on the Defendants' farm and taken to Westwood Police Station. They were charged with trespass and were later prosecuted in Court. I find that the investigation was logically and purposefully conducted.

A complaint was laid, investigated and suspects apprehended. They were charged and later prosecuted. The fact that the Plaintiffs were acquitted does not necessarily invite a conclusion that the police investigations were flawed.

In the **Mubita Mbangwa case**<sup>3</sup>, Muwo J as he then was, stated of malice that:

**“A consensus of opinion among judges has been that there must be some other motive on the part of the accuser than a desire to bring to justice the person whom he honestly believes to be guilty.”**

After analyzing the evidence on record, I am not satisfied that DW1 harboured other malicious motive against the Plaintiffs than his desire to bring to justice the persons whom he honestly believed to be guilty of criminal trespass. Even though the parties have sued each other in other causes, I am not convinced that malice can be imputed on the part of the Defendants. I observed during trial that the parties had never seen each other and probably met in Court for the first time.

In the case of **Claude Samuel Gaynor v Cyril Robert Cowley**<sup>2</sup>, Baron J held that:

- “(i) In an action for malicious prosecution the onus is on the Plaintiff to prove his cause of action.**
- (ii) To found an action for malicious prosecution the test is not whether the criminal proceedings have reached a stage at which they could be correctly described as a prosecution, but whether they have reached a stage at which damage to the Plaintiff results, whether the complaint has been made to a Magistrate or to the Police.”**

While the Plaintiffs proved that they were arrested and prosecuted, I find that they failed to prove that the Defendants lacked reasonable and probable cause to set their prosecution in motion. Generally, conditions in police cells or detention centres fall far short of the expected standards of human dignity. This is very unfortunate and the need to rehabilitate these facilities is urgent. I cannot however, award damages to the Plaintiffs for the deplorable conditions in detention cells. Rather, I would take this opportunity to recommend to the Government to improve the conditions in these detention centres.

The Plaintiffs in Cause No. 2014/HP/1761 claim that they were falsely imprisoned in that they were kept in police cells at Westwood Police Station for four days without being charged. However, in Cause No. 2014/HP/1760, the witnesses testified that



they were detained, charged and appeared in Court a day after they were placed on bond.

In the case of **Sam Amos Mumba v The Attorney General**<sup>7</sup>, the Supreme Court held that:

- “(i) Where a Police Officer makes an arrest without warrant, it is incumbent upon him to inform the person so arrested of the grounds for his arrest unless he himself produces a situation which makes it practically impossible to inform him.**
- (ii) Failure to inform the arrested person as soon as is reasonably practicable to do so of the true reason of his arrest will, in a proper case, constitute false imprisonment.**
- (iii) It is not enough where a Police officer makes an arrest without warrant, that a Police officer has reasons for effecting an arrest without a warrant if such reasons are kept to himself, or if the reasons given are not true. In either situation, such a Police officer may be liable for false imprisonment,”**

In **Richman Chulu v Monarch (Z) Limited**<sup>8</sup>, the Court held that:

- “(i) False imprisonment only arises where there is evidence that the arrest which led to the detention was unlawful, since there was no reasonable and probable cause.”**

I have taken the view that the Plaintiffs' arrest was based on reasonable and probable cause. DW3 testified that the trespassers who happen to be the Plaintiffs were arrested on DW1's property. Dockets were opened and sent to the Public Prosecutor's office. A

bench warrant was issued against the Plaintiffs in Cause No. 2014/HP/1761 for not responding to the summons.

It is remarkable that the Plaintiffs in Cause No. 2014/HP/1761 claim that they were not charged at the police station. If that were the case, how then was a bench warrant issued without information? The Plaintiffs did not produce the proceedings of the lower Court even after they were ordered to do so. This would have assisted them in proving their assertions. As a result, I find that they failed to prove their claim and it accordingly fails.

PW1, PW2 and PW3 testified that they were defamed as a result of their arrest and prosecution. Their evidence in Court was rather patchy and unpersuasive. According to the Learned Authors of Halsbury's Laws of England, 4<sup>th</sup> Edition, paragraph 10, a defamatory statement is one

**“which tends to lower a person in the estimation of right thinking members of society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt, ridicule, or to convey an imputation on him disparaging or injurious to him in his office, profession, calling or trade or business.”**

In the case of **Frederick Kunongona Mwanza v Zambia Publishing Company Limited**<sup>9</sup>, Cullinan J. quoted the following extract at paragraph 57, 7<sup>th</sup> Edition Gatley on Libel and Slander as follows:

**"Any imputation which may tend to injure a man's reputation in a business, employment, trade, profession, calling or office carried on or held by him is defamatory. To be actionable, words must impute to the plaintiff some quality which would be detrimental, or the absence of some quality which is essential, to the successful carrying on of his office, profession or trade."**

In the case of **Rodger Chitengi Sakuhuka v Sassassali Lungu, The Attorney General, Times of Zambia, Times Printpak Zambia Limited; and Newspaper Distributors Limited**<sup>10</sup>, the Supreme Court stated that:

**"any imputation which may tend to injure a man's reputation in business, in employment, calling or office carried on or held by him is defamatory."**

Further, in the case of **John Namashoba Muchabi v Aggrey Mwanamufwenga**<sup>11</sup>, the Supreme Court stated that:

**"In slander actions it is no longer necessary for the plaintiff to prove that the precise words were uttered. It is sufficient if he proves a material and defamatory part of them or words which are substantially to the same effect."**

I expected the Plaintiffs to show that slanderous words were uttered against them and were communicated to the members of their community. They did not call any independent evidence to aid their case and this reacted against them. Accordingly, this claim fails together with the others for compensatory damages for indignity, embarrassment, disgrace, humiliation and mental anguish.

In the net, I dismiss the Plaintiffs' case and award costs to the Defendants to be taxed in default of agreement.

Leave to appeal is granted.

Dated this 25<sup>th</sup> day of January, 2018

  
M. Mapani-Kawimbe  
**HIGH COURT JUDGE**