

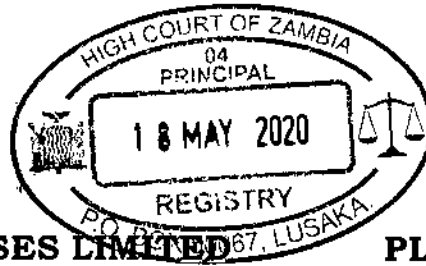
**IN THE HIGH COURT FOR ZAMBIA**

**2017/HP/0759**

**AT THE PRINCIPAL REGISTRY**

**HOLDEN AT LUSAKA**

*(Civil Jurisdiction)*



**BETWEEN:**

<b>SAFAL ENTERPRISES LIMITED</b>	<b>PLAINTIFF</b>
<b>AND</b>	
<b>UMU KANYANTA</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>DICKO KANYANTA</b>	<b>2<sup>ND</sup> DEFENDANT</b>
<b>KALINDU KANYANTA</b>	<b>3<sup>RD</sup> DEFENDANT</b>
<b>BAJORO KANYANTA</b>	<b>4<sup>TH</sup> DEFENDANT</b>

**BEFORE THE HONOURABLE LADY JUSTICE P. K. YANGAILO,  
IN OPEN COURT, ON 18<sup>TH</sup> MAY, 2020.**

*For the Plaintiff: Mr. R. Ngulube - Messrs. Tembo Ngulube  
and Associates*

*For the Defendants: Dr. O. M. M. Banda – OMM Banda and  
Company*

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## **JUDGMENT**

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**CASES REFERRED TO:**

1. *Zambia Consolidated Copper Mines limited vs. Eddie Katayi and Max Chilango - SCZ No. 2 of 2001;*
2. *Anti-Corruption Commission vs. Barnet Development Corporation Limited (10/2006)(2008) ZMC 5 (29<sup>th</sup> January, 2008);*
3. *Joyce Ndauvuka Gondwe vs. Christine Ziwolile Ngwira - Appeal No. 36 of 2015;*
4. *Societe Nationale Des Chemis De Pur Du Congo (SNNC) vs. Joseph Nonde Kakonde - SCZ Judgment No. 19 of 2013;*
5. *B.P. Zambia vs. Interland Motors Limited (2001) Z.R. 37;*

6. *Development Bank of Zambia and KPMG Peat Marwick vs. Sunvst Limited and Sun Pharmaceuticals Limited* (1997) S.J. 10 (S.J.);
7. *Beatrice Muimui vs. Sylvia Chunda* - SCZ Appeal No. 50/2000;
8. *Edith Nawakwi vs. Lusaka City Council and Sikanyika Nkaka Bernadette* - Appeal No. 26/2001;
9. *Rajan Patel vs. Attorney General* - SCZ Judgment No. 14 of 2002; (2002) Z.R. 59;
10. *Bank of Zambia vs. Jonas Tembo and Others* (2002) Z.R. 103;
11. *ANZ Grindlays Bank (Z) vs. Kaoma* - SCZ Judgment No. 12 of 1995;
12. *Musakanya Valentine Shula and Edward Jack Shamwana vs. Attorney General* (1981) Z.R. 221;
13. *Fidelis Shipping vs. V/O Exportchles* (1955) 2 ALL ER 4,8;
14. *Kajimanga vs. Chilemya* - Appeal No. 50/2014 (2016) ZMSC 189 (2 August, 2016);
15. *Benson Munganama vs. Fridah Ngoma and the Attorney* - Appeal No. 186/2015; (2018) ZMSC 339 (31<sup>st</sup> July, 2018);
16. *Davy vs. Garret* (1878) 7 CH 473;
17. *Intermarket Banking Corp. Zambia Limited vs. Priscilla Kasonde* - SCZ Judgment No. 44 of 2014;
18. *Sablehand Zambia Limited vs. Zambia Revenue Authority* - SCZ Judgment No. 20 of 2005;
19. *Sithole vs. The State Lotteries Board* (1975) Z.R. 106;
20. *Attorney General vs. Kakoma* (1975) Z.R. 212 (S.C); and
21. *Attorney General vs. Mpundu* (1984) Z.R. 6.

**LEGISLATION AND OTHER WORKS REFERRED TO:**

1. *Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia;*
2. *Black's Law Dictionary, Eighth Edition, 2004, page 1541;*
3. *Halsbury's Laws of England, Volume 16, 4th edition;*
4. *The Rules of the Supreme Court, 1999 Edition, London Sweet & Maxwell; and*
5. *Wirfield and Jolowicz on Tort by W.E. Peel and J Goudkamp, 19<sup>th</sup> Edition, page 427, paragraph 14-001.*

**1 BACKGROUND**

1.1 By a Writ of Summons, dated the 11<sup>th</sup> of May, 2017, the Plaintiff commenced this action against the Defendants claiming the following reliefs: -

- i) A declaration that the Plaintiff is a legal and beneficial owner of the property known as Subdivision N of Subdivision No. 151 of Farm No. 737, Lusaka;*
- ii) An Order of prohibitory injunction restraining the Defendants whether by themselves, their agents, servants or whosoever is connected to them from trespassing on and/or interfering with the Plaintiff's quiet enjoyment of its property through acts of intimidation, unsolicited visitation, vandalism and in any manner whatsoever;*
- iii) Damages for trespass to the Plaintiff's property to be assessed by the Deputy Registrar;*
- iv) Special Damages to be assessed by the Deputy Registrar; and*
- v) Costs and any other relief that the Court may deem just in the circumstances.*

## **2 PLEADINGS**

2.1 According to the Statement of Claim, the Plaintiff avers that it is the legal and beneficial owner of the property known as Subdivision 'N' of Subdivision No. 151 of Farm No. 737, Lusaka ("Subject Property"). It further avers that the said Subject Property was initially acquired by a Mr. Solomon Kapona by way of direct lease to him from the President of the Republic of Zambia in 2011. The Plaintiff further avers that in the same year, Mr. Solomon Kapona sold the said Subject Property to Mr. Badat Yousuf at a consideration of K110,000,000.00 (unrebased) and subsequently in the year 2014, Mr. Badat Yousuf then sold the Subject Property to the Plaintiff at a consideration of ZMW 268,000.00. That after acquiring the Subject Property,

the Plaintiff proceeded to construct a boundary wall around the property. Furthermore, the Plaintiff avers that to its shock, in the year 2016, the Defendants through their Advocates, Messrs. OMM Banda and Company wrote to the Plaintiff demanding that the Plaintiff must vacate the Subject Property stating that the Subject Property belonged to the Defendants.

2.2 The Plaintiff also avers that the gist of the Defendants' claim is that by a purported Judgment in Default of Appearance and Defence against Charity Kapona, Solomon Kapona and New Hope Ministries by this Honourable Court under Cause No 2009/HP/1311, the Defendants are the legal and beneficial owners of a property known as Subdivision 'R' of Subdivision No. 151 of Farm No. 737 from which said piece of land, the Subject Property was created and subsequently acquired by Mr. Solomon Kapona after the said Default Judgment was entered.

2.3 The Plaintiff avers that contrary to the Defendants' assertions, the land record at Lands and Deeds Registry shows that Mr. Solomon Kapona acquired the said Subject Property by way of direct lease between the President of the Republic of Zambia and himself. That despite advising the Defendants as aforesaid, the Defendants have chosen to ignore, neglect and disregard the said advice and have since proceeded to trespass on and interfere with the Plaintiff's quiet enjoyment of its property through intimidation and

unsolicited visitations with the view of illegally taking over possession of the Plaintiff's property. It is also averred that the Defendants have vandalised the Plaintiff's property, particularly the main gate, its locks and boundary wall, which resulted in the Plaintiff incurring expense/costs in the sum of ZMW 20,000.00, in fixing the main gate and ZMW 1,000.00 in replacing the locks to the main gate.

- 2.4 In their Defence and Counter-Claim, filed on the 22<sup>nd</sup> of September, 2017, the Defendants aver that the Subject Property was fraudulently and illegally subdivided without consent to assign title from the beneficial owners of Subdivision 'M' of Subdivision No. 151 of Farm No. 737 and that they have always been the beneficial owners. They further aver that they have documentary evidence that can prove that the Subject Property does not exist and that this had already been determined in the case between Solomon Kapona and Others vs. Umu Kanyanta and 3 Others, Cause No. 2013/HP/1311. Furthermore, the Defendants aver that they have documentary evidence to prove that the said Yousuf Badat had no clear title to the Subject Property to pass to the Plaintiff. That the Plaintiff herein had a duty to investigate the title before purchasing the said property as the said property had been a subject of litigation in the High Court civil case and also the criminal case Cause No. 2PB/045/2013 between Baid Kanyanta and Yousuf

Badat. The Defendant also avers that the Default Judgment of the High Court in favour of the Defendants as against Charity Kapona, Solomon Kapona and New Hope Ministries wherein the Court held that the Defendants are the legal and beneficial owners of Subdivision 'R' of Subdivision No. 151 of Farm No. 737 still stands and that the Plaintiff was in contempt when it purchased the Subject Property.

2.5 The Defendants avers that the criminal case under Cause No. 2PB/045/2013, referred to above, directed that Yousuf Badat yield vacant possession, but instead he sold the property to the Plaintiff and that therefore, the Plaintiff is not entitled to any of the reliefs they are seeking.

2.6 In their Counter-claim, the Defendants aver that despite being aware of the case under Cause No. 2PB/045/2013 and the case of Solomon Kapona and others vs. Umu Kanyanta and 3 others under Cause No. 2009/HP/1311, the Plaintiff went ahead and bought the Subject Property in contention. They therefore claim the following: -

*(a) A declaration that Subdivision 'M' of Subdivision No. 151 of Farm No. 737 belongs to the Defendants as beneficial owners;*

*(b) A declaration that Subdivision 'R' Subdivision No. 151 Farm No. 737 fraudulently became Subdivision 'N' of Subdivision No. 151 of Farm No. 737 and it's the same property on Subdivision 'M' of Subdivision No. 151 of Farm No. 737 belongs to Defendants as beneficial owners;*

*(c) Mesne Profits from 2010 to date in default of agreement to be assessed by the Deputy Registrar of the High Court for Zambia;*

*(d) Compensation for special damages;*

*(e) Compensation for damages caused by the Plaintiff breaking various structures including a Guard Room, Toilet and Gate; and*

*(f) Interests, Costs and any relief the Court may deem fit.*

2.7 In its Reply and Defence to the Counter-Claim, filed on the 3<sup>rd</sup> of October, 2017, the Plaintiff herein avers that it is not bound by the cases under cause numbers 2PB/045/2013 and 2009/HP/1311. It further avers that it was not aware nor was it a party to the aforesaid proceedings and further averred that the Defendants are not entitled to any of the reliefs.

### **3 EVIDENCE AT TRIAL**

3.1 PW1 was Asif Mohammed Bajiwalla, a Director of the Plaintiff Company. He testified that in 2014 the Plaintiff bought land along Lumumba Road near Mandevu junction known as 737/151/N from Yousuf Badat at the price of K267,000.00. He further testified that upon viewing the property, he went to Yousuf Badat's office to look at the Title Deeds and that the said Title Deeds were in Yousuf Badat's name. He referred the Court to Pages 11-16 of the Plaintiff's Bundle of Documents containing the said Title Deed and read the full description of the property. PW1 further testified that he was given copies of the title for verification and that he gave the said copies to the

Lawyers for verification at the Lands Registry and everywhere. Furthermore, PW1 testified that when the Lawyers had verified the title, they told him that he could proceed with the transaction as the Land was free of encumbrances.

- 3.2 PW1 testified that according to what he was shown, the first owner of the land in question was the State and that the second owner was Solomon Kapona and the third owner was Yousuf Badat. PW1 further testified that he had not come across any entry that suggested that any third parties were owners of the Subject Property. He referred the Court to a copy of the Lands Register.
- 3.3 Furthermore, PW1 testified that after he made payment for the Subject Property, he applied to the Ministry of Lands for change of title and it was changed. He referred the Court to page 1-2 of the Plaintiff's Bundle of Documents and particularly to entry number 6 which shows that the Certificate of Title was issued on the 12<sup>th</sup> of September, 2014.
- 3.4 PW1 also testified that after he had obtained the Certificate of Title, he put up a wall fence around the property and constructed a guard room. He further stated that for three years nothing happened but one day his guard informed him that a man had come to the premises saying that the property on which he had constructed the wall fence was his and gave him the man's phone number. That when he called the



number that was given to him, a gentleman who answered the phone call told him that he was the owner of the property and that he should stay away from the property. Following that call, PW1 received a call from Matero Police which informed him that there was a complaint from a Mr. Kanyanta concerning the land and requested PW1 to go to the Police station. PW1 went to the Police Station carrying the Certificate of Title and all the documents relating to the Subject Property. The police checked the documents and said that they would call him later, but never did.

3.5 PW1's further testimony was that he later received a call from some car washers who informed him that there were people breaking the Plaintiff's gate and walls. He went to the Subject Property where he found four people who broke the gate and cut it in the middle to make it small and built a wall on the other side. He found building sand and blocks on the Subject Property belonging to a Mr. Kanyanta. PW1 referred the Court to Pages 31-33 of the Plaintiff's Bundle of Documents and testified that the pictures contained therein were of the place where they had removed the gate, the bricks and the reduced gate.

3.6 PW1 testified that following this incident, he went to see Mr. Yousuf Badat and explained what was going on. Mr. Yousuf Badat advised him to come to Court and claim the land as the Plaintiff Company had all the legal documents. PW1 further stated that he had

not enjoyed the benefit of the property due to the injunctions and legal procedures. PW1 testified that the Plaintiff's property was Subdivision N and that he had no interest in Subdivision M. He also testified that there was no document that suggests that the Subject Property came from Subdivision R and requested the Court to grant him the reliefs as set out in the Statement of Claim.

- 3.7 Under Cross-Examination, PW1 testified that it took about a month and a half to 2 months for him to obtain the Certificate of Title from the Ministry of Lands and that he signed the Contract of Sale relating to the Subject Property sometime in July and another document at the Lawyers' office which was processed according to the law. PW1 further testified that the copies of the said documents were with the Lawyers and that the only documents before the Court is the Certificate of Title. PW1 testified that Mr. Badat had told him that he had had problems in relation to the other properties and that he had a Judgment but not with regards to the Subject Property. Furthermore, PW1 stated that he was not aware that there are other cases relating to the Subject Property. He also stated that he had not seen a map for F373 nor had he found out how the Subject Property became a Subdivision but that he relied on the Certificate of Title given to him by Mr. Badat for Subject Property. When referred to the Defendants' Defence and Counter-claim shown

at page 6 of the Plaintiff's Bundle of Pleadings, PW1 testified that he did not investigate paragraph 6 of the Counter-claim and he did not know Mr. Kapona and Mr. Kanyanta.

3.8 In Re-Examination, PW1 testified that before he transacted, Mr. Badat had informed him of the case he had with Mr. Kanyanta and produced all the documents and Title Deeds. That he had been assured that there were no encumbrances on the Subject Property.

3.9 Dicko Kanyanta, the 2<sup>nd</sup> Defendant herein testified as DW1. In Examination-in-Chief, DW1 testified that the Subject Property belonged to his late mother who acquired it in 2000 and that when she passed away, the family decided that the Subject Property be put in the names of the Defendants. He further stated that after the property was put in their names, Solomon Kapona and Charity Kapona subdivided 75% of the Subject Property, without the consent of Lusaka City Council.

3.10 DW1 testified that when the offer letter was issued to the Defendants it was for the whole Subject Property but when they collected the Certificate of Title, they discovered that they were only given 25% of the Subject Property. He further testified that the whole piece of land for the Subject Property was known as F/737/151/N and that 75% of the Subject Property was lost to Solomon Kapona and Charity Kapona, who

started subdividing it without the consent of Lusaka City Council.

3.11 DW1's further testimony is that his father started to follow up the matter and it was taken to Court where a ruling was passed which stated that the Subject Property was theirs. That it was at this point that Solomon Kapona sold the piece of land to Yousuf Badat who subsequently sold it to the Plaintiff. He testified that the Plaintiff's title relates to F/737/151/N and that the Defendants and the Plaintiffs have been having disputes over the said Subject Property because the Defendants are of the view that the Plaintiff acquired it illegally.

3.12 DW1 stated that he had the title, offer letter from Lusaka City Council and receipts of payments for the Subject Property. He further stated that there was a Judgment in Default entered concerning the matter before this Court. DW1 referred the Court to Pages 1-4 of the Defendants' Bundle of Documents which contains Planning Permission in relation to Plot No. M/151/737, A letter of Sale between Charity Kapona, Solomon Kapona and Mrs. Hai Zhen Guo, relating to Sub R of Sub 151 of Farm 737 and Sub N of Sub 151 of Farm 737 and an unsealed Judgment in Default endorsed by Judge C. B. Phiri wherein the Court Ordered *inter alia* that the purported property number F/737/151/R is an illegal stand and therefore does not exist.

3.13 In Cross-examination, DW1 testified that he had an offer letter that showed that his mother owned the Subject Property. DW1 referred the Court to page 1 of the Defendants' Bundle of Documents, which contains a letter from the office of the Director City Planning, Lusaka City Council granting the 2<sup>nd</sup> and 4<sup>th</sup> Defendants Planning Permission to commence construction works on Plot M/151/737, Emmasdale. DW1 testified that the said letter was in relation the Subject Property, which was part of the whole property belonging to his late mother. He conceded that it is not indicated on the said letter that the Subject Property is part of their property but insisted that the Subject Property came from Subdivision M of Subdivision 151 of Farm 737, which is theirs.

3.14 DW1 further stated that he did not have a survey diagram to show that Subject Property came from Subdivision M of Subdivision 151 of Farm 737. DW1 testified that it was his mother who was issued with the original Title Deeds and that it was not before the Court. He further stated that there was a Ruling of the High Court which directed that the Subject Property belonged to the Defendants. DW1 further conceded that the said Judgment that he referred to was not before the Court. DW1 referred the Court to page 4 of the Defendants' Bundle of Documents, which contained a Judgment in Default of Appearance and Defence wherein the Defendants herein were the

Plaintiffs and Charity Kapona, Solomon Kapona and New Hope Ministries were the Defendants. In the said Judgment, it was held that the land on which Property No. F/737/151/R is located belongs to the Plaintiffs. DW1 conceded that the said Judgment did not make reference to Subject Property but reiterated his earlier testimony that Subdivision R and the Subject Property came from Subdivision M which was subdivided after it was acquired by Charity and Solomon Kapona. He further stated that he had no proof in terms of Survey Diagrams to show that Subdivision N came from Subdivision M.

3.15 DW1 testified that his father Baid Kanyanta was arrested and charged with criminal trespass on the Subject Property but that he was acquitted by the Subordinate Court because there was no evidence that he had trespassed on the said piece of land. DW1 further stated that the complainant in that case was Mr. Yousuf Badat and that he was not aware that his father confirmed that the Subject Property belonged to Mr. Yousuf Badat. DW1 was referred to the last 4 lines on Page 14 of the Defendants' Bundle of Documents which contained the Judgment in the criminal case under Cause No. 2PB/045/20B against Baid Kanyanta, in the Subordinate Court. The last four lines read as follows: -

***"Accused told the Court that Property N is for PW1 (Yusuf Badat) and that he never sent anyone to work on the land and put anything on that land and that***

***the case is still in the High Court. Accused told the Court that he has no actual possession of the property."***

3.16 DW1 conceded that his father had told the Subordinate Court that the Subject Property belonged to Yousuf Badat according to the Judgment. DW1 further testified that he had read through the computer printout relating to the Subject Property from Ministry of Lands shown at pages 1-2 of the Plaintiff's Bundle of Documents. DW1 stated that according to the said Computer Print-out, the first owner of the Subject Property was Solomon Kapona, who acquired it on the 13<sup>th</sup> of September, 2011 and it was sold to Yousuf Badat on the 6<sup>th</sup> of October, 2011, who then sold the property to the Plaintiff herein on the 12<sup>th</sup> of October, 2014.

3.17 DW1 further testified that the three titles deeds relating to Subject Property were issued on different dates according to the computer print-out, but insisted that the three titles were actually issued on the same date, although he had no proof to that effect. He also testified that on the said Land Register, his mother's name was not indicated.

3.18 During Re-Examination, DW1 re-emphasised that after Subdivision M, four other Subdivisions were created by Solomon Kapona being, F/737/151/R, F/737/151/N, F/737/151/L and F/737/151/M.

3.19 Baid Kanyanta testified as DW2. His testimony was that Subdivision M of Subdivision 151 of Farm 737

was given to his wife by the Ministry of Lands who issued her an offer letter in September, 2001 and they started developing the land, until his wife fell sick in 2002. That they stopped developing the property as he travelled with his sick wife to and from South Africa for medical attention, until she passed away in 2009. He testified that when the said property was offered to his wife, they were advised to pay arrears in relation to property No. 737/151/M by Lusaka City Council, which they paid.

3.20 DW2 further testified that upon his wife's passing, the family sat and decided that the land that she had purchased would be put in their children's names, who are the Defendants herein. That when he went to Ministry of Lands to inquire on the title deed to the said property, he discovered that 75% of the said land had been assigned to someone else and the officials at Ministry of Lands told him to get whatever was left of the land so that the title deed could be processed. The title deed was then issued in the names of the Defendants.

3.21 DW2 stated that barely two weeks after being issued with the title deed, he learnt that Subdivision R was issued in Charity Kapona's name and Subdivision N, which is the Subject Property was issued in Solomon Kapona's name. DW2 testified that he reported this development to his lawyers who sent letters to City Planning at Lusaka City Council and the Surveyor



General at Ministry of Lands. Lusaka City Council responded by stating that Subdivision N and R do not exist in their books and that if the Kaponas have it, they should show him where Lusaka City Council agreed to subdivide the land. DW2 also testified that the Kaponas failed to produce the documents when requested to do so.

3.22 DW2 further stated that around September, 2010, he obtained the Default Judgment under Cause Number 2019/HP/1311 and quickly placed 3,000 blocks on the site and 30 tonnes of building sand whilst the Kaponas challenged the Default Judgment but have never been to Court to follow it up and therefore, the Default Judgment still stands.

3.23 Furthermore, DW2 testified that in 2013 he was arrested by the police at the instigation of Yousuf Badat and was charged with Trespass on the Subject Property. He stated that he was acquitted of the charges based on the Default Judgment that stated that Subdivision R and N do not exist. He also stated that the Subject Property does not exist and the title deed in respect of the Subject Property was fraudulently obtained.

3.24 During Cross-examination, DW2 testified that the land that his wife acquired from the Ministry of Lands was Subdivision M and that 75% of this land is what comprises the Subject Property. He further stated that the Survey Diagram that was given to his wife was not

before the Court and insisted that the Subject Property does not exist as was confirmed to him by the Surveyor General and as contained in the Default Judgment. DW2 conceded that he did not have any document from the Ministry of Lands or Lusaka City Council that suggest that the Subject Property does not exist. He further conceded that the said Default Judgment that he referred to does not state that the Subject Property does not exist.

3.25 When referred to Page 3 of the Plaintiff's Bundle of Documents, which is the Title Deed to the Subject Property, DW2 testified that the said title deed as well as that in Mr. Solomon Kapona's name, Yousuf Badat's Name and in the Plaintiff's name referring to the Subject Property were fake as they were issued on the same day, although he conceded that he had no document to prove his assertion. He further testified that entries 1 to 6 of Lands Register shown at page 1 to 2 of the Plaintiff's Bundle of Documents are fake. However, he conceded that in the criminal trial, the Court found that the Subject Property belonged to Yousuf Badat.

3.26 When referred to the last paragraph on page 11 of the Defendants Bundle of Documents, which contains part of the Judgment in the Criminal trial hereinbefore referred to, DW2 conceded that the Director Legal at Lusaka City Council had informed the Court that she

had worked on the Subject Property which exists, but stated that he did not agree with the said testimony.

3.27 DW2 further testified that he had not been going to the Subject Property to vandalise it and did not know the people who have been vandalising it. He also testified that his children have never been to the Subject Property after the injunction was granted.

#### **4 SUBMISSIONS**

4.1 In its submissions filed herein on 24<sup>th</sup> January, 2020, Counsel for the Plaintiff submitted *inter alia* that based on the uncontroverted evidence adduced before this Court, it was abundantly clear that the Plaintiff was a *Bona fide* purchaser for value without notice of the purported and unsubstantiated interest of the Defendants. That therefore, the Plaintiff's circumstance fell within the ambit of the case of ***Zambia Consolidated Copper Mines Limited vs. Eddie Katayi and Max Chilango***<sup>1</sup>, in which it was stated as follows: -

***"it was not possible without basis to ignore the rights of an innocent purchaser for value and who had no reason to suspect there was to be an adverse claim... there would be no justification to inflict injustice on the third party in the name of justice."***

4.2 Based on the foregoing, Counsel submitted that the Plaintiff's Certificate of Title is valid and conclusive evidence of legal ownership of the Subject Property, as

the title holder qualifies in law as an innocent purchaser for value without notice.

- 4.3 Counsel further submitted that the law was clear regarding the circumstance under which the Certificate of Title can be vitiated or cancelled and cited **Section 34 of The Lands and Deeds Registry Act<sup>1</sup>**, which stipulates that a Certificate of Title can be cancelled on account of fraud or for reasons of impropriety in its acquisition. In fortifying his contention, Counsel cited the case of **Anti-Corruption Commission vs. Barnet Development Corporation Limited<sup>2</sup>**, where it was held as follows: -

*"Under Section 33 of the Lands and Deeds Registry Act, a Certificate of Title is conclusive evidence of ownership of land by a holder of a Certificate of Title. However, under Section 34 of the same Act, a Certificate can be challenged and cancelled for impropriety in its acquisition."*

- 4.4 Counsel contends that the Defendants failed to adduce any credible and cogent evidence to prove the allegations of fraud and impropriety on the part of the Plaintiff nor the previous owners. He argued that litigants who plead fraud in any form of transaction are required to prove their case on a higher standard of proof and cited the Supreme Court case of **Joyce Ndavuka Gondwe vs. Christine Ziwolile Ngwira<sup>3</sup>**, where it was held as follows: -

***"Instead we agree with the Respondent's submission that in Civil cases fraud must be proved to a higher degree than a mere balance of probabilities."***

- 4.5 Counsel submitted that the evidence adduced by the Defence Witnesses fell short of the standard required to prove fraud, which is supposed to be on a higher probability scale. He further submitted that the defence of *res judicata* cannot be applied to the facts of this case as the Default Judgment obtained by the Defendants against Charity Kapona, Solomon Kapona and New Hope Ministries, under Cause Number 2009/HP/1311 made no reference to the Subject Property. Counsel submitted that similarly, the Defendant's defence that the Criminal Judgment under Cause Number 2PB/045/2013 directed Yousuf Badat to yield possession of the property to the Defendants is not true as nowhere in the said judgment did the trial magistrate make the aforementioned direction.
- 4.6 Counsel for the Plaintiff contends that the Plaintiff has proved its case on a balance of probability and is entitled to the reliefs sought as it has placed before this Court uncontroverted evidence that an act of trespass was committed on the Subject Property, where the boundary wall and gate were damaged by the Defendants and their agents, which acts prompted the Plaintiff to lodge a complaint with the Police who arrested and charged DW2 with trespass. Counsel contends that although DW2 did attempt to deny the Plaintiff's assertion of trespass, this cannot be doubted

due to the manner in which DW2 evaded questions at trial and therefore he was not a credible witness. Based on the foregoing, counsel submitted that the Defendant's actions of intruding on the Plaintiff's property constituted trespass as to entitle the Plaintiff to damages. In fortifying his contentions, Counsel cited the definition of the tort of trespass at **page 1541** of **Black's Law Dictionary**<sup>2</sup> as follows: -

***"An unlawful act committed against the person or property of another especially, wrongful entry on another's real property."***

4.7 Counsel submitted that the Defendants and their agents did unlawfully enter the Plaintiff's Subject Property and cause damage which the Plaintiff is entitled to recompense through assessment by the Deputy Registrar. In conclusion, Counsel submitted that the Defendants were never legal and beneficial owners of the Plaintiff's Subject Property and that the Defendants counter-claim should be dismissed accordingly with Costs to the Plaintiff.

4.8 In the Defendants' submissions filed on 6<sup>th</sup> January, 2020, Counsel for the Defendants submitted *inter alia* that after the Default Judgment of 2010 under Cause Number 2009/HP/1311 which settled all issues in dispute relating to what should have been a parent title for F/737/151/M, the Land Register shows that Yousuf Badat registered an Assignment on the 6<sup>th</sup> of October, 2011 and that on the same date, he obtained a Certificate of Title. Further, he submitted that on

the 12<sup>th</sup> of September, 2014, the Plaintiff registered an Assignment and that on the same date he managed to secure a Certificate of Title to the Subject Property, which according to Counsel suggest that there is an element of fraud.

4.9 Counsel submitted that the dispute in this case was settled under Cause Number 2009/HP/1311, where the Subject Property F/737/151/N was shown to have been fraudulently subdivided from the parent property which ought to have been known as F/737/151/M and that a Default Judgment of 2010 and Judgment of the Subordinate Court under Criminal Case No. 2PB/045/2013 settled all the issues in this dispute relating to the fraud and forgery alleged by the Defendants.

4.10 Counsel further submitted that the property in this dispute is before this Court and before Judge M.D. Bowa under cause number 2018/HP/0083 and therefore, Mr. Solomon Kapona is now deploying his grievance in piecemeal and scattered litigation. To support this submission, Counsel cited the case of ***Societe Nationale Des Chemis De Pur Du Congo (SNNC) vs. Joseph Nonde Kakonde<sup>4</sup>*** which made reference to ***B.P. Zambia vs. Interland Motors Limited<sup>5</sup>*** where it was held that: -

***"A party in dispute with another over particular subject should not be allowed to deploy his grievance piecemeal in scattered litigation and keep hauling***

*the same opponent over the same matter before the Courts...*

*The administration of justice would be brought into disrepute if a party managed to get conflicting decisions which undermined each other from two or more different Judges, over the same object matter."*

4.11 Counsel also cited various cases, amongst them being the cases of **Development Bank of Zambia and KPMG Peat Marwick vs. Sunvst Limited and Sun Pharmaceuticals Limited**<sup>6</sup> and **Beatrice Muimui vs. Sylvia Chunda**<sup>7</sup> to support this contention that the Subject Property is subject matter of litigation before various Courts.

4.12 Counsel for the Defendants' argued that all transactions relating to the property in issue were done after the Defendants' had already obtained the Default Judgment and that Yousuf Badat obtained Title to the Subject Property to avoid the contents of the Default Judgment. He further submitted that the said Default Judgment under Cause No. 2009/HP/1311 did not only relate to Subdivision R but to any other properties connected to Subdivision M as it was proved that Subdivision R was sitting where Subdivision M should have been as per offer letter on record.

4.13 Counsel further submitted that the Plaintiff should have sued Mr. Yousuf Badat for a refund as he had no good title to pass to him and he in turn should have sued Mr. Solomon Kapona. To support his



submissions, Counsel cited the cases of ***Edith Nawakwi vs. Lusaka City Council and Sikanyika Nkaka Bernadette***<sup>8</sup> and ***Rajan Patel vs. Attorney General***<sup>9</sup>.

4.15 Finally, Counsel for the Defendants submitted that the Court should grant the Defendants the reliefs sought in the Counter-claim. He cited the case of ***Anti-Corruption Commission vs. Barnnet Development Corporation Limited***<sup>2</sup> and requested this Court to refer to **Sections 33 and 34 of *The Lands and Deeds Registry Act***<sup>1</sup>, which allows for cancellation of title owing to the fact that the Defendants have shown their interest and proved encumbrances arising on the said Title Deeds on the strength of the offer letter exhibited by the Defendants and explanation of the circumstances which led to the dispute herein. Counsel further submitted that the ownership of Subject Property was wrongly passed from Mr. Solomon Kapona to Yousuf Badat in 2011, who in turn sold the same property to the Plaintiff herein.

## **5 THE LAW**

5.1 I have considered the Pleadings and evidence adduced herein. I have also considered the submissions and authorities cited by Counsel, which have made my task considerably easy.

5.2 From the facts and evidence adduced herein, the Plaintiff claims that it is legal and beneficial owner of the Subject Property. On the other hand the

Defendants contend that the Subject Property was acquired by the Plaintiff through the fraudulent and illegal subdivision of a property known as Subdivision M of Subdivision No. 151 of Farm No. 737, Lusaka. The Defendants further contend that the Subject Property was a subject of a case under Cause Number 2007/HP/1311 which involved the Defendants herein on the one hand and Solomon Kapona and Others on the other hand. The Defendants also contend that the Judgment of the Subordinate Court in a criminal matter under Cause Number 2PB/045/2013, directed the Plaintiff's predecessor in title, Mr. Yousuf Badat, to yield vacant possession of the Subject Property to the Defendants.

- 5.3 **Sections 33, 34 (1) and 35 of *The Lands and Deeds Registry Act*<sup>1</sup>** are instructive on the fact that any title holder is regarded as the conclusive owner to a parcel of land. This is the case unless evidence is led that suggests that the title was acquired fraudulently.
- 5.4 The provision of the law that is relevant to this matter under **Section 33 of *The Lands and Deeds Registry Act*<sup>1</sup>** provides 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..."*

5.5 The part relevant to this action under **Section 34 (1)** and **(2)** of **The Lands and Deeds Registry Act**<sup>1</sup> reads as follows: -

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

*(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;*

*(2) In any case other than as aforesaid, the production of the Register or of a copy of an extract therefrom, certified under the hand and seal of the Registrar, shall be held in every court of law or equity to be an absolute bar and estoppel to any such action against the Registered Proprietor of land the subject of*

*such action, and in respect of which a Certificate of Title has been issued, any rule of law or equity to the contrary notwithstanding."*

*(Court's emphasis)*

5.6 **Section 35 of The Lands and Deeds Registry Act<sup>1</sup>** provides as follows: -

*"After land has become the subject of a Certificate of Title, no title thereto, or to any right, privilege, or easement in, upon or over the same, shall be acquired by possession or user adversely to or in derogation of the title of the Registered Proprietor."*

## **6 ANALYSIS AND FINDINGS**

6.1 Having considered the evidence adduced before this Court, the following are the legal issues for determination: -

1. Whether the Subject Property is the same property referred to in the Default Judgment under cause number 2009/HP/1311;
2. Whether the Plaintiff is the legal and beneficial owner of the property known as Subdivision N of Subdivision No. 151 of Farm 737, Lusaka and whether the Defendants have proved their allegation of fraud; and
3. Whether the Defendants committed a Trespass on Subdivision N of Subdivision No. 151 of Farm 737, Lusaka.

6.2 I will start by determining the first issue of whether or not the Subject Property is the same property referred to in the Default Judgment under Cause Number

2009/HP/1311, between Umu Kanyanta and 3 others vs. Solomon Kapona and 2 others. The Defendants allege that the matter before this Court is *res judicata* as the status of the Subject Property was determined in the aforementioned Default Judgment.

- 6.3 The substratum regarding the plea of *res judicata* is expressed in the legal maxim, *interest reipublicae ut sit finis litium*, meaning that it is in the interest of society as a whole that litigation must come to an end. Thus, the doctrine of *res judicata* is a fundamental doctrine of all Courts that there must be an end of litigation.
- 6.4 The learned author of ***Black's Law Dictionary***<sup>2</sup>, defined *res judicata* as follows: -

***"An issue that has been definitively settled by judicial decision. An affirmative defence barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been - but was not - raised in the first suit. The three elements are:***

- 1. An earlier decision on the issue;***
- 2. A final Judgment on the merits; and***
- 3. The involvement of the same parties or parties in privity with the original parties." (Court's emphasis)***

- 6.5 The learned authors of ***Halsbury's Law of England***<sup>3</sup>, at **paragraph 1528** state as follows: -

***"Where res judicata is pleaded by way of estoppel to an entire cause of action, it amounts to an allegation that the whole legal rights and obligations of the***

*parties are concluded by the earlier judgment, which may have involved the determination of questions of law as well as the finding of fact. To decide what questions of law and fact were determined in the earlier judgment the Court is entitled to look at the judge's reasons for his decision and is not restricted to the record but, as a general rule, the judge's reasons cannot be looked at for the purpose of excluding from the scope of his formal order any matter which, according to the issues raised on the pleadings and the terms of the order itself, is included therein..."*

6.6 It is also stated at **paragraph 1529** of **Halsbury's Law of England**<sup>3</sup> as follows: -

*"In all cases where the cause of action is really the same and has been determined on the merits and not on some ground...which has ceased to operate when the second action is brought, the plea of res judicata should succeed. The doctrine applies to all matters a party had an opportunity to bringing before the Court. If however, there is a matter subsequent which could not be before the Court that time, the party is not stopped from raising it."*

6.7 I am indebted to the parties, who drew my attention to a number of cases on the subject matter. In the case of **Bank of Zambia vs. Tembo and Others**<sup>10</sup>, the Supreme Court of Zambia, in the course of hearing, referred to a passage from **paragraph 1254** of **Halsbury's Laws of England**<sup>3</sup>, which highlights the essentials of *res judicata*, in the following terms: -

*"In order that a defence of res judicata may succeed it is necessary to show that not only the cause of action was the same, but also that the plaintiff has had an opportunity of recovering, and but for his own fault might have recovered in the first action that which he seeks to recover in the second. A plea of res judicata must show either an actual merger, or that the same point had been actually decided between the same parties. Where the former judgment has been for the defendant, the conditions necessary to conclude for the plaintiff are not less stringent. It is not enough that the matter alleged to be concluded might have been put in issue, or that the relief sought might have been claimed. It is necessary to show that it actually was so put in issue or claimed."*

- 6.8 In the case of ***ANZ Grindlays Bank (Z) vs. Kaoma***<sup>11</sup>, the Supreme Court of Zambia, held that in order for the defence of *res judicata* to succeed, it is necessary to show not only that the cause of action was the same, but also that the Plaintiff has had no opportunity of recovering in the first action that which he hopes to recover in the second.
- 6.9 In ***Musakanya Valentine Shula and Edward Jack Shamwana vs. Attorney General***<sup>12</sup>, Chirwa, J., as he then was, stated that the law on *Res Judicata* is very clear as stated in ***Halsbury's Laws of England***<sup>3</sup>, at **page 1027** and quoted Lord Denning, M.R., who put it as follows, in the case of ***Fidelitas Shipping vs. V/O Exportchles***<sup>13</sup>: -

*"The umpire held in his interim award (subject to the opinion of the court) that the claim was not excluded. The court took a different view and held that the claim was excluded by the cesser clause. That issue having been decided by the court can it be re-opened before the umpire? I think not. It is a case of 'issue estoppel' as distinct from 'case of action estoppel' and 'fact estoppel'a distinction which was well explained by Diplock, L.J., in Thoday v. Thoday (1964) 1 All E.R. 341. The law as I understand it, is this: if one party brings an action against another for a particular cause and judgment is given on it, there is a strict rule of law that he cannot bring another action against the same party for the same cause. Transit in ren judicatam. But within one cause of action there may be several issues raised which are necessary for the determination of the whole case, the rule then is that, once an issue has been raised and distinctly determined between the parties, then, as a general rule neither party can be allowed to fight that issue all over again. The same issue cannot be raised by either of them again in the same or subsequent proceedings except in special circumstances."*

6.10 I am well guided by the above authorities. I have carefully perused the claims herein and in Cause Number 2009/HP/1311, that the Defendants referred to and analysed the evidence adduced herein. According to the Defendants' evidence adduced at trial, DW1 conceded that the said Default Judgment obtained under Cause Number 2009/HP/1311 did not make any reference to the Subject Property. He



further stated that Subdivision R and the Subject Property came from Subdivision M which was subdivided after it was acquired by the Defendants. However, he stated that he had no proof in terms of Survey Diagrams to show that the Subject Property came from Subdivision M. On perusal of the said Default Judgment, there is indeed no single reference to the Subject Property and the lack of further evidence to substantiate the Defendants claims is an indication that the said Defence of *res judicata* has no basis as the Subject Property was not a subject of those proceedings.

6.11 As can be seen from the pleadings and evidence adduced, this action and the action under Cause Number 2009/HP/1311 that the Defendants referred to, are very distinct actions and I do not see how they can be one and the same, save for the fact that the Defendants herein were party to the action under Cause Number 2009/HP/1311 that they referred to. The Plaintiff herein did not and has never had an opportunity to raise its current claims under the actions under Cause Number 2009/HP/1311 that the Defendants referred to. Further, the current claims herein have never arisen in the action under Cause Number 2009/HP/1311. Accordingly, I find and hold that the principle of *res judicata* does not apply to this action.

6.12 The next issue for determination is whether or not the Plaintiff is the legal and beneficial owner of the Subject Property and whether or not the Defendants have proved their allegations of fraud. The statutory provisions reproduced above in paragraph 5 above have been discussed in the Supreme Court Judgment of ***Kajimanga vs. Chilemya***<sup>14</sup> where it was held as follows: -

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

2. ***An allegation of fraud must not only be clearly and distinctly alleged but it must also be clearly and distinctly proved by evidence. The standard of proving an allegation of fraud is higher than the civil law standard of proof.***"

*(Court's emphasis)*

6.13 According to the evidence adduced at trial, the PW1 testified that he had carried out due diligence before the purchase of the Subject Property as he had engaged lawyers to verify the ownership of the land and that this could be demonstrated by the Lands Register print out which contained the history of the ownership of the subject land and the Certificate of Title that was issued in the Plaintiff's name. It should be noted however that a general search at lands which results in a Land Register Print out as prescribed under **Section 22 of *The Lands and Deeds Register Act***<sup>1</sup>, is not an official search. According to case of

***Benson Munganama vs. Fridah Ngoma and the Attorney***<sup>15</sup> the Supreme Court held that for a search to be valid, it needs to comply with the provisions of **Section 23** as read with **Regulation 13** of **The Lands and Deeds Registry Act**<sup>1</sup>. The Court went on to say that one important characteristic about an official search is that the Registrar of Lands issues a certificate in accordance with **Section 23**<sup>1</sup> after a requisition has been made in accordance with **Regulation 13**<sup>1</sup>.

- 6.14 Therefore, based on the foregoing, the lands print out exhibited by the Plaintiff is merely a general search and not an official search from which one can satisfactorily be said to have carried out a search of the status of a particular piece of land.
- 6.15 At trial, the Plaintiff through PW1 demonstrated that it was the holder of a Certificate of Title to the Subject Property by producing a copy of the Certificate of Title issued in its name. According to the provisions of **Section 33** of **The Lands and Deeds Registry Act**<sup>1</sup>, the Plaintiff is the registered proprietor of the subject land. However, although the Defendants acknowledge the existence of the said Certificate of Title, they allege that it was acquired fraudulently by the illegal subdivision of the Defendants' property known as Subdivision M of Subdivision No. 151 of Farm No. 737, Lusaka.

6.16 I refer to the case **Davy vs. Garret**<sup>16</sup>, cited and upheld in the case of **Intermarket Banking Corp. Zambia Limited vs. Priscilla Kasonde**<sup>17</sup>, in which the Supreme Court held as follows: -

*"Any charge of fraud or misrepresentation must be pleaded with the utmost particularity and that the fraudulent conduct must be distinctly alleged as distinctly proved, and that it is not allowable to leave fraud to be inferred from the facts."*

6.17 Further, in the case of **Sablehand Zambia Limited vs. Zambia Revenue Authority**<sup>18</sup>, the Supreme Court held as follows: -

*"Where fraud is to be a ground in the proceedings, then a Defendant or Respondent wishing to rely on it must ensure that it is clearly and distinctly alleged. Further at the trial of the cause, the party alleging fraud must equally lead evidence so that the allegation is clearly and distinctly proved."*

6.18 I also refer to the case of **Sithole vs. The State Lotteries Board**<sup>19</sup>, where Baron, DCJ., stated as follows: -

*"If a party alleges fraud the extent of the onus is greater than a simple balance of probabilities."*

6.19 I am guided by the above authorities and an analysis of the Defendants' pleadings, which lead me to the considered view that the Defendants have not clearly and distinctly stated the particulars of the alleged fraud in their Defence and Counter-Claim. Further, at trial the Defendants' witnesses did not sufficiently lead any cogent evidence or produce any documents such

as a site plan or survey diagrams to show that the Subject Property was initially offered to their mother and was illegally purchased by Solomon Kapona or any other person.

6.20 Furthermore, the Defence Witnesses did not adduce any cogent evidence to demonstrate the fraud or the illegal subdivision of their purported property known as Subdivision M of Subdivision No. 151 of Farm No. 737, Lusaka. DW1 merely testified that the Certificate of Title in Mr Solomon Kapona's name, Yousuf Badat's name and in the Plaintiff's name referring to the said Subject Property were fake as they were issued on the same day, but conceded that he had no documents to prove this allegation. He further testified that entries 1 to 6 of Lands Register contained on pages 1 to 2 of the Plaintiff's Bundle of Documents are fake but again DW1 did not lead further evidence to prove this. Needless to emphasise, a higher standard of proof is required to prove an allegation of fraud. According to ***Order 18/12/18 of The Rules of the Supreme Court<sup>4</sup>, "Fraudulent conduct must be distinctly alleged and ... distinctly proved, and it is not allowable to leave fraud to be inferred from the facts..."***

6.21 Additionally, although the Defendants claimed that they owned Subdivision M of Subdivision No. 151 of Farm No. 737, at trial, they did not exhibit the Certificate of Title to the said land. Further, DW1

conceded that in the criminal trial under Cause Number 2PB/045/2013, the Court found that the Subject Property belonged to Yousuf Badat who is the predecessor in title of the Subject Property. In my considered view, the Defendants did not discharge their burden of proof as they failed to clearly and distinctly prove the allegation of fraud. The Defendants having failed to prove their allegation of fraud, I accordingly find and hold that the Plaintiff is the legal owner of the Subject Property.

6.22 This now brings me to the final issue for determination, which is whether or not the Defendants committed a trespass on the Subject Property. According to the learned authors of ***Winfield Jolowicz on Tort***<sup>5</sup>, trespass to land has been defined as follows:-

***"Trespass to land is the name given to that form of trespass which is constituted by unjustifiable interference with the possession of land."***

6.23 In order for the tort of trespass to arise, there must be an unjustifiable interference with the possession of land. Unlike many other torts, trespass is actionable as a civil wrong without proof of actual damage and/or special intention. According to the evidence adduced at trial, PW1 stated that part of the boundary wall and the gate to the Subject Property were damaged by the Defendants and their agents. PW1 further adduced pictorial evidence and testified that it showed that there was some illegal intrusion on the Plaintiff's

property. DW2 testified that he had put 3000 blocks, 30 tons of building sand and 30 tons of river sand on the Subject Property, but stopped going there when his lawyers advised him that there was nothing he could do since there was an injunction in place. He denied having vandalised the Plaintiff's property and further testified that he had not been going to Subject Property to vandalise it and did not know the people who have been vandalising it. He further testified that the Defendants have not been to the Subject Property ever since the injunction was granted.

6.24 I refer to the case of ***Attorney General vs. Kakoma***<sup>20</sup>, where the Supreme Court stated that: -

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

6.25 Having analysed the evidence adduced at trial, it is my view that the Plaintiff has sufficiently adduced evidence that places the Defendants on the subject land, which has been confirmed by DW2. The Defendants' act of placing building materials on the Plaintiff's property amounted to unjustifiable interference. Therefore, the Plaintiff has discharged the burden of proof demonstrating that the Defendants and/or their agents committed the trespass to the Subject Property. Accordingly, I find and hold that the Plaintiff is entitled to damages for Trespass as

against the Defendants as evidence has been led, per DW2's testimony that the Defendants placed building materials on the Subject Property and only stopped going to the Subject Property when the injunction was granted.

6.26 With respect to the Plaintiff's claim for special damages, it is my considered view that the Plaintiff did not specifically plead this in its Statement of Claim nor lead evidence to prove the claim. Accordingly, this claim fails. I am fortified by the case of **Attorney General vs. Mpundu**<sup>21</sup> in which the Court stated as follows: -

*"It is thus trite law that, if a plaintiff has suffered damage of a kind which is not the necessary and immediate consequence of a wrongful act, he must warn the defendant in the pleadings that the compensation claimed would extend to this damage, thereby showing the defendant the case he has to meet and assisting him in computing a payment into court. The obligation to particularise his claim arises not so much because the nature of the loss is necessarily unusual but because a plaintiff who had the advantage of being able to base his claim upon a precise calculation must give the defendant access to the facts which make such a calculation possible. Consequently, a mere statement that the plaintiff claims 'damages' is not sufficient to let in evidence of a particular kind of loss which is not a necessary consequence of the wrongful act, and of which the defendant is entitled to a fair warning. In other words, usual, ordinary or general damages may be*



*generally pleaded; whereas, unusual or special damages may not, as these must be specifically pleaded in a statement of claim (or where necessary, in a counter-claim) and must be proved.*" (Court's emphasis)

## **7 COUNTER-CLAIM**

7.1 The Defendants counter-claimed for declarations that they are the beneficial owners of Subdivision M of Subdivision No. 151 of Farm No. 737 and that Subdivision R of Subdivision No. 151 of Farm No. 737 fraudulently became Subdivision N of Subdivision No. 151 of Farm No. 737 which is the same property on Subdivision M of Subdivision No. 151 of Farm No. 737 belonging to the Defendants as beneficial owners. The Defendants' grievance is owed to the Plaintiff acquiring a Certificate of Title to the Subject Property, which the Defendants allege was fraudulently subdivided from their alleged property without their approval. It is on this strength that they pray for the reliefs sought in their Counter-Claim.

7.2 For my part, I am constrained to appreciate how the Defendants have arrived at the conclusion that the Subject Property was fraudulently subdivided from their alleged property. No cogent evidence in terms of boundaries, areas or documents have been adduced before me demonstrating the same. Further, the Defendants did not adduce sufficient evidence nor place cogent evidence in the form of Certificates of Title

or Survey Diagrams before this Court to support their claims. The burden is on the Defendants to show that they are the beneficial owners of the alleged property claimed and that prior to issuing the Certificate of Title of the subject property to the Plaintiff, their alleged property had been fraudulently subdivided.

7.3 Unfortunately for the Defendants, the Subject Property had been offered on title, to the Plaintiff. The Defendants would have been most useful in leading and placing cogent evidence before this Court to demonstrate that the Subject Property was fraudulently subdivided from their alleged property and that they indeed owned the alleged property.

## **8 CONCLUSION**

8.1 For the reasons recorded in my Judgment above, I find and hold that the Plaintiff is the the registered proprietor of the Subject Property and therefore the legal and beneficial owner of the Subject Property.

8.2 I find and hold that the Plaintiff has sufficiently proved that the Defendants committed an act of trespass on the Subject Property. I therefore award the Plaintiff damages for trespass as against the Defendants, to be assessed by the Deputy Registrar.

8.3 The Defendants did not lead sufficient evidence to demonstrate that the Plaintiff acquired the Subject Property illegally and by fraud. Therefore, they did not discharge their burden of proof as they failed to clearly and distinctly prove the allegation of fraud.

- 8.4 The Defendants did not lead sufficient evidence nor place cogent evidence before this Court in support of their Counter-Claims. Therefore, the Defendants' Counter-Claims against the Plaintiff fail and are accordingly dismissed.
- 8.5 Costs are awarded to the Plaintiff, to be taxed in default of agreement.
- 8.6 Leave to Appeal is granted.

**Delivered at Lusaka on the 18<sup>th</sup> day of May, 2020.**

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