

IN THE HIGH COURT FOR ZAMBIA 2013/HP/1410
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

BENARD SIAKACHA AND 166 OTHERS PLAINTIFFS

AND

CHIEF SINAZONGWE 1ST DEFENDANT

AFRICAN BROTHERS CORPORATION 2ND DEFENDANT
LIMITED

THE ATTORNEY GENERAL 3RD DEFENDANT

BEFORE THE HONOURABLE LADY JUSTICE P. K. YANGAILO,
IN OPEN COURT, ON 16TH MARCH, 2020.

For the Plaintiffs: Mr. W. Simutenda & Mr. M. S. Choonga
- Messrs. GDC Chambers.

Ms. B. M. Mulenga - National Legal Aid
Clinic for Women.

For the 1st Defendant: N/A

For the 2nd Defendant: N/A

For the 3rd Defendant: Mr. C. Mulonda - State Advocate,
Attorney General's Chambers.

JUDGMENT

CASES REFERRED TO:

1. *Siwale vs. Siwale* (1999) Z.R. 84;
2. *Village Headman Mupwaya and Another vs. Mbaimbi* - SCZ Appeal No. 41 of 1999;

3. *Water Farms Limited vs. Mpongwe District Council and others - Supreme Court Appeal No. 90/2001;*
4. *May Vijaygiri Goswami vs. Dr Mohamed Anwar Essa and the Commissioner of Lands - SCZ Judgment No. 3 of 2001;*
5. *Cobbet-Tribe vs. The Zambia Publishing Company Limited (1973) Z.R. 9;*
6. *Khalid Mohamed vs. The Attorney General (1982) Z.R. (S.C);*
7. *Chikuta vs. Chipata Rural Council (1974) Z.R. 241 (S.C);*
8. *New Plast Industries vs. The Commissioner of Lands and the Attorney General (2001) Z.R. 51;*
9. *Wynter M. Kabimba vs. The Attorney General and Lusaka City Council (1996) S.J. (S.C);*
10. *Kitwe City Council vs. Nguni (2005) Z.R. 57;*
11. *Kachingwe vs. Mumba (2013) Vol. 3 Z.R. 17;*
12. *Patel vs. The Attorney General (1969) ZR 97;*
13. *Attorney General vs. Law Association of Zambia (99/2006) (2008) ZMSC 3 (15th January, 2008);*
14. *Barclays Bank (Zambia) Limited vs. Walisco and Company and Another (1980) Z.R. 7;*
15. *Sichikolo vs. Mutale and Another - 2009/HK/308 (unreported);*
16. *Supa Bakery Company vs. Philimon J Pendwe - SCZ No. 31 of 2004;*
17. *Corpus Legal Practitioners vs. Mwanandani Holdings Limited - SCZ Judgment No. 50 of 2014; and*
18. *Lt. General Peter Zuze & 11 Other Ex-Service Chiefs vs. The Attorney General - Appeal No. 108 of 2017 (2018) ZMCA 13 (16th May, 2018).*

LEGISLATION REFERRED TO:

1. *The Companies Act, Chapter 388 of the Laws of Zambia;*
2. *The State Proceedings Act, Chapter 71 of the Laws of Zambia;*
3. *The Constitution Amendment Act No. 2 of 2016;*
4. *The Lands Act, No. 29 of 1995;*
5. *The Environmental Management Act, No. 12 of 2011;*
6. *The Protection of Fundamental Rights Rules: Statutory Instrument No. 156 of 1969; and*
7. *The Rules of the Supreme Court of England (White Book), London Sweet & Maxwell.*

OTHER WORKS REFERRED TO:

1. *Winfield and Jolowicz on Tort, by W.E. Peel and J. Goudkamp, 19th Edition, at page 427, paragraph 14-001;*

2. *Patrick Matibini, Zambian Civil Procedures: Cases and Commentaries, at page 159; and*
3. *Halsbury's Laws of England, 11th Edition, Paragraph 715.*

1 BACKGROUND

1.1 This matter has been long outstanding on the active cause list having been presided over by several Courts before me, the consequence of which delivery of Judgment has unavoidably been delayed.

1.2 By a Writ of Summons dated the 13th of September, 2013, the Plaintiffs commenced this action against the Defendants claiming the following reliefs: -

- i) *A declaration that the impending forceful removal of the Plaintiffs from their ancestral lands without compensation is unconstitutional, unlawful and a breach of the fundamental rights under the Constitution;*
- ii) *An injunction restraining the Defendants from evicting the Plaintiffs from their ancestral land and from constructing an irrigation dam on their land until conclusive arrangements regarding compensation, the provision of dip tanks, grazing land, school, clinic, drinking water, access to ZESCO and others have been finalised for the Plaintiffs' settlement;*
- iii) *The provision of means to the Plaintiffs to enable them shift to the new settlement together with their livestock;*
- iv) *The Defendant to provide adequate grazing ground, dip tank and water;*
- v) *The Provision of a school and clinic as well as safe drinking water for the use of the community as they will be settled in a distant place;*

- vi) *That the Plaintiffs be settled presumably in Mumbwa or Itezhitezhi if there is no suitable land in Southern Province;*
- vii) *Any further or other relief the court may deem fit;*
- viii) *Damages for trespass;*
- ix) *Interest; and*
- x) *Costs.*

2 PLEADINGS

2.1 In the Statement of Claim, it was averred *inter alia*, that the 167 Plaintiffs whose names appeared on the appended list were at all material times small scale farmers and residents of Sinazongwe District in the Southern Province of Zambia. The Plaintiffs further averred that the 1st Defendant is a traditional leader who resides at his palace in Sinazongwe District and that the 2nd Defendant is a Company incorporated in the Republic of Zambia under ***The Companies Act***¹ and is a contractor, while the 3rd Defendant was joined to the proceedings pursuant to ***The State Proceedings Act***².

2.2 The Plaintiffs aver that in or about March, 2013, the 1st Defendant in his capacity as Chief arbitrarily and without the consultation of the Plaintiffs, initiated the construction of an irrigation dam and the 2nd Defendant started clearing the site for the construction of the said dam. The Plaintiffs further aver that the said construction of the dam in the Plaintiffs' village would force them to leave their

villages which will result in untold misery as they will be forced to abandon their farming land, grazing fields and will have no access to a school, clean water and a clinic. They further aver that they will incur economic loss as they will abandon their orchards which they planted to fertilise their farms. That the Defendants have not made arrangements for the Plaintiffs' resettlement, and that this abrupt uprooting of the families is inhumane and unconstitutional.

- 2.3 The Plaintiffs also aver that they have told the 1st Defendant of their unwillingness to leave their farms and have written to the District Commissioner for Sinazongwe District and the Permanent Secretary for Southern Province but nothing has been done. That the 1st Plaintiff has now instructed the 2nd Defendant to clear the site for building the irrigation dam.
- 2.4 In his Defence filed on the 28th of October, 2013, the 1st Defendant stated *inter alia*, that the construction of the irrigation dam is a government funded programme under the Gwembe Tonga Development Project and members of the community were through a research conducted by the Institute of Economic and Social Research (INESCOR) extensively consulted and the people of Sinazongwe expressly stated that they wanted an Irrigation Dam.
- 2.5 He further avers that the decision to construct the dam was as a result of Government's realisation that the displacement of the people of the Gwembe Valley

during the construction of Lake Kariba coupled with Gwembe Valley's poor rainfall pattern had caused extreme poverty which required various interventions, one of which was the construction of irrigation dams.

2.6 The 1st Defendant avers that no one will be displaced by the construction of the dam and that no one has been asked to leave their farms. He further avers that the Plaintiffs' claim is untrue as the essence of the project is to cushion the impact of the displacement of the people by the Kariba dam and not to cause further displacements.

2.7 The 1st Defendant also avers that he has not instructed the 2nd Defendant to do anything as he is not privy to their contract to construct the dam although he is in support of the project.

2.8 In the 2nd Defendant's Defence and Counter-claim filed on the 25th of October, 2013, the 2nd Defendant stated *inter alia*, that it had not constructed a dam in Sinazongwe. The 2nd Defendant avers that it was contracted by the 3rd Defendant through the Ministry of Agriculture to construct the Sinazongwe Irrigation Scheme (SIS) which was designed to drain water from the Kariba Dam using canals to the Sinazongwe Farming Community comprising a lot of people including some of the Plaintiffs.

2.9 It further avers that the said Irrigation Scheme does not involve displacing people from the settlements but channelling water from the Kariba Dam using canals

and pipe drains to the surrounding community occupied by the several people including the Plaintiffs to enable them carry out irrigation farming. That the said works being carried out are public works for and on behalf of the Government of the Republic of Zambia for the benefit of the Sinazongwe farming community, including some of the Plaintiffs and not for its own benefit.

2.10 In its Counter-claim, the 2nd Defendant avers that it was awarded a contract in May, 2013 to construct the Sinazongwe Irrigation Scheme (SIS) in Sinazongwe at a consideration of K9, 065, 780.20. That by that contract, it was to construct canals, roads and drain structures to channel water from the Kariba Dam to the farming community of Sinazongwe within a period of 12 months.

2.11 The 2nd Defendant further avers that on or about the 11th of March, 2013, it was taken to the site by the District Agriculture Officer, Mr. Sampa and the 2nd Defendant commenced works on that day. That between 11th June, 2013 and October, 2013, the Plaintiffs begun to chase the 2nd Defendant from the construction site and commenced an action in the High Court to obtain an injunction restraining the 2nd Defendant from occupying and continuing with its works on the grounds.

2.12 It stated that as a consequence whereof, the 2nd Defendant suffered damage, loss and unnecessary

delay in work schedule including but not limited to the damage of removing the workers from the site to their homes. The 2nd Defendant therefore claims the following reliefs: -

1. *Damages;*
2. *Interest thereon;*
3. *A permanent injunction restraining the Plaintiffs from interfering with the 2nd Defendant's work;*
4. *Any other relief the Court may deem fit; and*
5. *Costs.*

2.13 In their Reply to the 1st and 2nd Defendant's Defence and its Defence to the 2nd Defendant's Counter-claim, filed on the 25th of September, 2014, the Plaintiffs aver that the Government of the Republic of Zambia had no hand in the construction of the irrigation project as the whole project was spearheaded and is being engineered and supervised by the 1st Defendant as opposed to government officials contrary to the wishes of his subjects.

2.14 Further, the Plaintiffs aver that they were not told that the project was government funded nor were the Sinazongwe community members consulted. It is averred that there was no unanimous acceptance of the project and it was therefore rejected as it did not reflect the wishes of the people. That the few people that are purported to have accepted the project were forced and unduly influenced and have since recanted the project upon realising the nature of the project.

2.15 The Plaintiffs also aver that the project is not being done in good faith and it shall bring more pain, hardship, anguish and extreme poverty to its purported beneficiaries. That they know that they will be required to move as the said dam is in their fields and it is common knowledge that whenever a dam is constructed the area becomes inhabitable. It is averred that the dam cannot be said to be a step to cushion the impact of the displacement that occurred during the construction of the Kariba Dam in 1958 - 1959. That the said dam has already been constructed and does not serve the interests of the community but that of the 1st Defendant.

2.16 In their Defence to the 2nd Defendant's Counter-claim, the Plaintiffs question the authenticity of the contract between the Government and the Republic of Zambia and the 2nd Defendant. The Plaintiffs state that the 2nd Defendant came with Earth Moving Equipment with the intention to clear off virgin bushes in readiness to construct the dam, but to the Plaintiffs' surprise, the 2nd Defendant parked the equipment and started constructing the dam on already cleared land on the Plaintiffs' fields which resulted in the Plaintiffs commencing this legal action against the Defendants. The Plaintiffs further deny ever causing damage or loss to the 2nd Defendant as they were only protecting what is legally theirs and as such, the

Plaintiffs aver that the 2nd Defendant has no claim against them.

2.17 In its defence, filed on the 4th of June, 2015, the 3rd Defendant avers that the Plaintiffs' Statement of Claim does not reveal any cause of action as against the 3rd Defendant specifically. It further avers that following the construction of the Kariba Dam in the late 1950's, about 35,000 valley inhabitants on the Zambian side were displaced, hence there has always been a need to provide socio-economic facilities for them.

2.18 The 3rd Defendant avers that the Government embarked on Power Sector Reform Programme in 1994, which partly culminated in the launching of the Gwembe Tonga development Project (GDTP) in 1998. It further avers that the GDTP included infrastructure Development, provision of safe drinking water, Agriculture Development projects and provision of education and health services.

2.19 The 3rd Defendant states that the construction of the Dam by the 2nd Defendant is part of the GDTP, intended to mitigate the negative environmental and socio-economic impacts that resulted from the displacement of the inhabitants due to the construction of the Kariba Dam. It further states that the Plaintiffs are not entitled to any reliefs sought as the construction has been undertaken for the benefit of the communities.

3 EVIDENCE AT TRIAL

- 3.1 At trial, Evans Sianjobo, the 78th Plaintiff herein, testified as PW1. His testimony was that in the year 1958 to 1959, when the Kariba Dam was being constructed, his parents and those of the other Plaintiffs were chased from the area along the Zambezi river and were advised to look for a place up the upper valley. That is how he came to live at the place where he and the other Plaintiffs are farming as they were born there. He further stated that this is the place from which they sustain their livelihood and have educated their children.
- 3.2 PW1 testified that in 2007, he and the other Plaintiffs saw vehicles driving through their fields and requested their Headman to tell them who the people were, but that the Headman responded that he did not know them and the vehicles continued to pass through their fields. He further testified that, they eventually approached the drivers of the vehicles who informed them that they were examining soil samples as they wanted to put up irrigation. PW1 and the rest of the Plaintiffs then went to their Headman to find out why he had not informed them of the irrigation project. In response, the Headman stated that he did not know anything about the project and advised them to go and see the Chief.
- 3.3 PW1 testified that when they saw the chief, he informed them that the people on the land wanted to

determine the levels of water when the water flooded the land. PW1 further testified that it was at that point that he and the other Plaintiffs decided to write a letter to the Project Manager and DACO, Sinazongwe Irrigation Cooperative Society, in 2007 informing them that they had refused to surrender their land as they depended on it for everything and requested them to stop the project. PW1 referred the Court to pages 1 - 4 of the Plaintiffs Bundle of Documents containing the said letter and testified that after the said letter many more were written but that they had not received a response. That the Plaintiffs were finally told that no one would take their land as the people on their fields were only looking at the water levels.

3.4 It was PW1's testimony that in 2012, he and the other Plaintiffs found some pegs with some iron on them, placed in their fields. That when they approached the Headman concerning the said pegs, he denied being aware of them and that they therefore, went to inquire from the Chief who informed them that the said pegs were meant to check the water levels during the flood of the Kariba Dam.

3.5 PW1 further testified that later, he and the other Plaintiffs saw some people who were non-residents camped on their land and were being taught on how to go about with the irrigation project. That these non-residents informed the Plaintiffs that the Project

was about to take off, which prompted the Plaintiffs to write a letter to other Government Departments. The 1st Plaintiff herein, Bernard Siakacha, who is the representative of the Small Scale Farmers of Sinazongwe then wrote a letter to the Ministry of Agriculture and Lands dated the 4th of July, 2012, which is shown at page 5 of the Plaintiffs' Bundle of Documents. In the said letter, the 1st Plaintiff stated that the farmers had refused the Ministry to issue Certificates to this land and that they were stopping the Ministry from getting their land.

3.6 PW1 stated that the 1st Plaintiff wrote another letter to NGOCC and Women for Change dated the 30th of July, 2012, shown at page 14 of the Plaintiffs' Bundle of Documents, in which he requested their intervention in ensuring that their land is not taken from them. There was no response to this letter. PW1 testified that due to the non-response, he and Bernard Siakacha, wrote to the then Republican President, Mr. Michael Sata, seeking assistance as they had not received any help in response to the letters that were earlier written. The letter is shown at Pages 17 - 19 of the Plaintiffs' Bundle of Documents.

3.7 Further, PW1 testified that the Headman had also written a letter to Chief Sinazongwe, where he expressed concern that the owners of the land on which the irrigation system was put up were not

consulted but that there was no response to the said letter. PW1 referred the Court to Page 15 of the Plaintiffs' Bundle of Documents for the said letter, dated the 21st of June, 2013. That there was another letter written by Chief Sinazongwe to the District Commissioner, dated the 20th of August, 2013, informing the District Commissioner to authorise the police from Sinazongwe to apprehend him and the other Plaintiffs if they continued stopping the project. The said letter is exhibited on page 25 of the Plaintiffs' Bundle of Documents. That PW1 and the 1st Plaintiff were arrested for telling them that what they were doing was wrong.

3.8 PW1 testified that when he and the other Plaintiffs did not receive responses to the letters and following his arrest, they sought the Court's intervention. He further stated that the said project is now complete and the canals and the dams have been put up and that the only thing remaining is to start pumping the water.

3.9 PW testified that he and the other Plaintiffs were not informed of this project and how it would benefit them. He further stated that the said project had people who were paying money and had shares. That the said people were from outside the village and would be the ones who would be ploughing the Plaintiffs' fields. PW1 also stated that the said people have a list of 106 people who will receive part of the

Plaintiffs' field to start agriculture programs. That though his name and that of the 1st Plaintiff were on the list and that it indicated that PW1 was a treasurer, he was not aware who included his name on it as he was not there when the list was prepared. He testified that the said list of names also listed shares held and his purported signature was appended on it. That some names that appeared on the list were of people who were from outside his village. He referred the Court to pages 49 to 52 of the Plaintiffs' Bundle of Documents containing the said list. It was his testimony that he did not pay the money that was listed as membership fee and that he did not know when the payment was made. He further stated that once the 106 people on the list, who do not have fields, are given the land that they have paid for, the Plaintiffs will not have any land to continue with their agriculture activities as their pieces of land would be reduced and they would therefore not be able to farm adequately, which will lead to them failing to send their children to school.

3.10 According to PW1, the said fields are estimated to be about 90 hectares and that he does not know the size of the fields that the people on the list paid for and the portion of that size that would remain for the Plaintiffs. He further stated that it was the people that are putting up the project that will divide the land and that he knows that what will remain for the

Plaintiffs will not be sufficient for the Plaintiffs to carry on their usual farming activities. Finally, PW1 prayed that the court may grant him the reliefs as set out in the Statement of Claim.

3.11 During Cross-examination, PW1 testified that he wanted to find out if the Government took away the Plaintiffs' land as they were not told who was getting the land from them and how the 2nd Defendant started their project on their land. He further testified that the Plaintiffs sued the Attorney General because they wanted him to identify those that wanted to take their land away from them.

3.12 PW1 testified that he knew that the land in Zambia is vested in the President and that also the Chief has rights over land. PW1 asserted that if all the people on the list came to the land being used by the Plaintiffs, it would not be enough for all of them. PW1 further testified that the list did not state that the people on it will be allocated land but that he knows that they would be allocated land from the land in dispute. PW1 testified that he and the other Plaintiffs live in Sinazongwe village and that some were from outside the village but had acquired land in the village when they retired.

3.13 There was no re-examination conducted and that marked the close of the Plaintiffs' case.

3.14 The 1st and 2nd Defendants were not in attendance on the return date for continued trial on 3rd December,

2018 and no reasons were advanced for their absence. Following an unsuccessful application for an adjournment by the 3rd Defendant, the 3rd Defendant closed its case without calling any witnesses and requested to file written submissions.

3.15 The parties were given up to 31st January, 2019, to file their written submissions. Only the 3rd Defendant filed herein its written submissions within the specified period. The Plaintiffs filed their submissions on 31st May, 2019, without leave of the Court. Nevertheless, I have exercised my discretion and deemed them to have been filed within the specified period.

4 SUBMISSIONS

4.1 By their written submissions, dated the 31st of May, 2019, the Plaintiffs contend that customary land is protected by the law and entails that the owners of the customary land are equally protected by law and that no person should be deprived of their property. Learned Counsel for the Plaintiffs cited **Article 253 (1)** of **The Constitution**³ and **Section 7** of **The Lands Act**⁴ in support this contention.

4.2 Further, Counsel cited **Article 16 (1)** of **The Constitution**³ which provides as follows: -

"Except as provided for in this Article, no property of any description shall be compulsorily taken possession of, and the interest in or right over property of any description shall be compulsorily

acquired unless by or under the authority of an Act of Parliament which provides for payment of adequate compensation for the property or interest or right to be taken possession of or acquired."

4.3 Counsel contends that contrary to the provision cited above, the project's net effect is that it would deprive the Plaintiffs of their customary land without consultation or at all.

4.4 Counsel also cited the relevant provision of **Section 3 (4)** of **The Lands Act**⁴ as follows: -

"Notwithstanding Section (3) the President shall not alienate any land situate in a district or an area where land is held under customary tenure.

(c) Without the authority of any other person or body whose interest might be affected by the grant and,

(d) If an applicant for leasehold-title has not obtained the prior approval of the Chief and the local authority within whose area the land is situated."

4.5 In interpreting the above provisions, Counsel referred to the case of **Siwale vs. Siwale**¹, where the Supreme Court held to the effect that failure to consult persons who may be affected by the grant offered against **Section 3 (4) (c)** of **The Lands Act**⁴ is fatal.

4.6 Counsel also cited the cases of **Village Headman Mupwaya and Another vs. Mbaimbi**² and **Water Farms Limited vs. Mpongwe District Council and others**³ to fortify his contention that the Plaintiffs were not consulted by the Defendants prior to the

commencement of the irrigation project being undertaken by the Defendants on the Plaintiffs' customary land as demonstrated by the various letters on pages 1 to 4 of the Plaintiffs Bundles of Documents. It is his further contention that the 1st Defendant imposed the project on his subjects for personal gain and that this is demonstrated by the letter on page 25 of the Plaintiffs Bundle of Documents.

- 4.7 Counsel submits that the correspondence on record demonstrates that the 1st Defendant had *mala fide* intentions. He referred the Court to the letter on Pages 15 and 17 of the Plaintiffs' Bundle of Documents from the Senior Headman Sinazongwe, Nelson Siampubu, who had protested against the project and stated that the subjects had rejected the irrigation project as it did not benefit the people. The said letter further stated that the project had the effect of displacing the Plaintiffs from their ancestral land and was not done in good faith. Counsel argues that the canals dug by the 2nd Defendants entail that it will be practically impossible to conduct any farming activities or keep livestock on that land as the land will be littered with water flowing from the Zambezi river. It is submitted that the consequences of the involuntary displacement that the Plaintiffs have been subjected to are enormous as they have

destroyed the existing modes of production and way of life among other things.

4.8 It is contended that the Defendant's activities on the Plaintiffs' customary land does not comply with the law on Environmental Impact Assessments as no public hearings were held with the affected Plaintiffs or the general public as required by law. To fortify this contention, Counsel cited **Section 30** of **The Environmental Management Act**⁵ and submitted that the activities undertaken by the Defendants on the Plaintiffs' lands is contrary to **Section 29 (1)** of **The Environmental Management Act**⁵, which requires an approval or an Impact Assessment report to be made by the Agency. Counsel further submitted that the activities undertaken by the Defendants abrogate the rights of the Plaintiffs to a clean, safe and healthy environment and cited **Section 4** of **The Environmental Management Act**⁵.

4.9 Further, Counsel for the Plaintiffs submits that if the activities undertaken by the Defendants were sanctioned by the 3rd Defendant, the Plaintiffs ought to have been compensated adequately prior to commencing the irrigation project. He further submitted that the activities of the Defendants are illegal in that the law in Zambia prohibits deprivation of land without compensation as provided under **Article 16 (1)** of **The Constitution**¹. The Court was invited to the case of **May Vijaygiri Goswami vs. Dr**

Mohamed Anwar Essa and the Commissioner of Lands⁴ where the Supreme Court of Zambia put it explicitly clear as follows: -

"Our Constitution does not countenance the deprivation of property belonging to anyone without compensation."

4.10 It has been submitted that, the Plaintiffs as beneficial owners of the customary land have suffered loss and damages for the use of their property as a result of the illegal displacement by the Defendants and in this vein, the Defendants are liable to compensate the Plaintiffs for the aggravated loss and damages. Reliance was placed on the case of ***Cobbet-Tribe vs. The Zambia Publishing Company Limited***⁵.

4.11 Finally, Counsel for the Plaintiffs submitted that the Plaintiffs had proved their case on a preponderance of probability and prayed for this Court to grant the Plaintiffs the reliefs sought with costs to be taxed in default of agreement by the parties.

4.12 In its submissions filed on the 27th of December, 2018, the 3rd Defendant's Learned Counsel submitted that the following were the three legal issues for determination before the Court: -

1. Whether the Plaintiffs have commenced this action correctly;
2. Whether the claims by the Plaintiffs are tenable at law against the 3rd Defendant; and
3. Whether the Defendants are liable for trespass.

4.13 Counsel began by reiterating in summary what was adduced in evidence by the Plaintiffs. He then cited the case of ***Khalid Mohamed vs. The Attorney General***⁶ and submitted that the mere fact that the Defendants did not call witnesses to testify during the trial does not entitle the Plaintiffs to succeed. He further submitted that the Plaintiffs must prove their case on a balance of probability.

4.14 In addressing the first issue, Counsel submitted that the case before this Court is centred on the Plaintiffs' first claim and that all other claims are dependent on the first claim which appears in the Statement of Claim as follows: -

"A declaration that the impending forceful removal of the Plaintiffs from their ancestral land without compensation is unconstitutional, unlawful and a breach of their fundamental rights under the Constitution."

4.15 Counsel submitted that from the above, the Plaintiffs are seeking the enforcement of fundamentally protected Rights under the Republican Constitution. He contends that for a party to be properly before the Court on any provisions of the fundamentally protected human rights, the litigant or applicant has to launch his/her claim by way of petition pursuant to ***Statutory Instrument No. 156 of 1969***⁶. He therefore submits that in the present case, the Plaintiffs though seeking enforcement of their

fundamentally protected human rights, have commenced this action by way of Writ of Summons and Statement of Claim. In establishing the effect of wrongly commencing this action, Counsel cited the cases of ***Chikuta vs. Chipata Rural Council***⁷ and ***New Plast Industries vs. The Commissioner of Lands and the Attorney General***⁸. Based on the foregoing, Counsel submitted that this Court did not have jurisdiction to determine this matter as it was commenced wrongly.

4.16 In addressing the second issue, Counsel submitted in the alternative that the Plaintiffs' action should be dismissed and proceeded to outline the various claims against the 3rd Plaintiff, as outlined in paragraph 1.2 above. He cited **Section 16** of ***The State Proceedings Act***² to support his contention. Counsel further cited the case of ***Wynter M. Kabimba vs. The Attorney General and Lusaka City Council***⁹ in which the Supreme Court stated the following: -

"It is not properly described as an injunction, which is an order directed at a party to litigation, not to the Court or decision making body."

4.17 In applying the above authorities to the claims of the Plaintiffs against the 3rd Defendant, Counsel submitted that the reliefs sought by the Plaintiffs are injunctive in nature as they seek to compel the State to perform specific acts and therefore were

misconceived as they are not legally tenable against the 3rd Defendant.

4.18 In addressing the third issue, Counsel for the 3rd Defendant cited the learned authors of ***Winfield Jolowicz on Tort***¹, where 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..."

4.19 Counsel submitted that in order for the tort of trespass to arise, there must be an unjustifiable interference with the possession of land. Failing which, the tort will not arise. Counsel referred the Court to page 32 of the Plaintiffs' Bundle of Documents which contains a letter dated 27th September, 2013, written by the Plaintiffs which states in part as follows: -

"Twenty one (21) years down the line in 2007, this current project started, people were lured towards it scornfully by the local leadership, without our democratic rights to our property farm land..." (Counsel's emphasis)

4.20 Counsel submitted that the wording of the above stated letter implies that the irrigation project that is the subject of these proceedings was consented to by the Plaintiffs. Counsel further contends that the 3rd Defendant was on firm ground to engage the 2nd Defendant to construct the said irrigation project in

Sinazongwe District and therefore, the tort of trespass to land cannot arise as there was implied consent to enter upon the said land. Finally, Counsel prayed on behalf of the 3rd Defendant that all the claims herein by the Plaintiffs should be dismissed with costs to the 3rd Defendant.

5 ISSUES FOR DETERMINATION

- 5.1 I have considered the pleadings and evidence adduced before this Court. I am indebted to Counsel for their submissions and authorities cited, that I have keenly considered.
- 5.2 It must be noted from the outset that the 3rd Defendant, in its submissions, has raised an issue regarding the mode of commencement, which I am compelled to address before I can delve into the main issues. The question is whether or not the Plaintiffs' action was properly commenced by way of Writ of Summons and Statement of Claim as opposed to a Petition.
- 5.3 The issue raised by the 3rd Defendant is so pertinent and must be addressed from onset as it goes to the root of jurisdiction and determines whether this Court can entertain the reliefs sought by the Plaintiffs.
- 5.4 The issue raised on mode of commencement emanates from the submissions of Counsel for the 3rd Defendant. Counsel submitted that this Court has no

jurisdiction to hear and determine this matter as it has been wrongly commenced.

5.5 Before I address, this issue I want to state that submissions are largely for the convenience of the Courts, and are not appropriate for raising new issues for determination by the Court. I am fortified by the case of ***Kitwe City Council vs. Nguni***¹⁰, in which the Supreme Court held as follows: -

"What is important is for the parties to note that the trial judge was not bound to consider counsel's submissions as they were meant to assist the trial court in shaping up its judgment..."

5.6 This is an issue, which the 3rd Defendant should have raised *ab initio* instead of waiting to introduce it in its submissions after close of trial. Counsel ought to have brought the issue of mode of commencement of action to the Court's attention at inception of this matter by entering Conditional Appearance and filing the necessary application or prior to the close of the proceedings as raising it in its submissions denies the other party, in this case the Plaintiffs, an opportunity to challenge it. The appropriate manner in which the said contentions should have been raised at stage of proceedings are as set out under ***Order 14A of The Rules of the Supreme Court***⁷, which provides that: -

"The court may, upon the application of a party or of its own motion, determine any question of law or construction of any document arising in any cause

or matter at any stage of the proceedings where it appears to the court that-

- (a) Such question is suitable for determination without a full trial of the action; and*
- (b) Such determination will finally determine (subject only to any possible appeal), the entire cause or matter or any claim or issue therein."*

5.7 Further, **Order 14A, Rule 1 (2) and (3)** of **The Rules of the Supreme Court**⁷ provides that: -

- "(2) Upon such determination, the court may dismiss the cause or matter or may make such order or judgment as it thinks just.*
- (3) The Court shall not determine any question under this Order unless the parties have either had an opportunity of being heard on the question or consented to an order or judgment on such determination."*

5.8 It is undeniable that the Court has power under **Order 14A, Rule 1** of **The Rules of the Supreme Court**⁷, either upon application by a party or of its own motion, to determine any question of law or construction of a document arising in any cause or matter at any stage of the proceedings as stated in the provisions cited above. However, this power is not open ended. The editorial note at **paragraph 14A/2/7**, at **page 202** of **The Rules of the Supreme Court**⁷ is very instructive. It reads as follows: -

"The application may be made at any time after the defendant has given notice of intention to defend

and before the full trial of the action has begun."

(Court's emphasis)

5.9 Therefore, Counsel should have raised the issue of wrongful commencement of action by application before the full trial of the action had begun as opposed to raising it in its submissions, which denies the other party, in this case the Plaintiffs, an opportunity to challenge it.

5.10 The application of these provisions was demonstrated in the case ***Kachingwe vs. Mumba***¹¹, where Kabuka J., held that: -

"...Since the parties had been given ample opportunity to be heard on the preliminary issues as presented in their respective affidavits, and oral submissions, she was satisfied that the matter was properly launched under the provisions of Order 14A."

5.11 Consequently, raising of a preliminary issue by application to the Court and not merely introducing it in submissions would have been an appropriate procedure that could have been used by the 3rd Defendant to raise the issue of the Court's jurisdiction.

5.12 Having said that, since jurisdiction goes to the root of the entire action before the Court, I will proceed to determine whether the Plaintiffs have commenced this action correctly, having regard to the reliefs sought and ***The Protection of Fundamental Rights Rules, Statutory Instrument No. 156 of 1969***⁶.

5.13 The 3rd Defendant in its submissions contends that for a party to be properly before the Court on allegations of a violation of any of the provisions of the fundamentally protected human rights, the litigant or applicant has to launch his or her claim by way of Petition pursuant to ***The Protection of Fundamental Rights Rules, Statutory Instrument No. 156 of 1969***⁶. It further contends that therefore, the Court has no jurisdiction to determine this case.

5.14 The Plaintiffs' claims as they appear in the Statement of Claim are as reproduced in paragraph 1.2 above. ***Article 16 (1) of The Constitution***¹, which provides for the protection from deprivation of property, states as follows: -

"Except as provided in this Article, no property of any description shall be compulsorily taken possession of, and the interest in or right over property of any description shall be compulsorily acquired unless by or under the authority of an Act of Parliament which provides for payment of adequate compensation for the property or interest or right to be taken possession of or acquired."

5.15 From the claims and provision of ***The Constitution***¹ cited above, it is clear that the parties are seeking among other reliefs the enforcement of their fundamentally protected human rights under the Republican Constitution particularly the right not to be deprived of their property.

5.16 Regarding the enforcement of the Fundamental Rights and Freedoms under **The Constitution¹, Article 28 (1)** of **The Constitution¹** provides as follows: -

"Subject to clause (5), if any person alleges that any of the provisions of Articles 11 to 26 inclusive has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply for redress to the High Court."

5.17 Thus, **Article 28(1)** of **The Constitution¹** cited above, empowers the High Court to grant redress to any person who proves to it that any of the provisions of **Articles 11 to 26** of **The Constitution¹** inclusive, has been, is being or is likely to be contravened. It should be noted, however, that the mode of application to be employed in seeking redress from the Court has not been provided for under the Constitution. Citing the case of **Patel vs. The Attorney General¹²**, the learned author of **Zambian Civil Procedures: Cases and Commentaries²** states as follows: -

"In so far as constitutional matters are concerned, the Protection of Fundamental Rights Rules were promulgated in 1969. Rule 2 provides that an application under Article 28 of the Constitution should be made by petition." (Court's emphasis)

5.18 In the case of **Attorney General vs. Law Association of Zambia¹³**, the Supreme Court referred to its decision in the case of **Patel vs. The Attorney**

General¹² and confirmed that, by virtue of **Rule 2 of The Protection of Fundamental Rights Rules, Statutory Instrument No. 156 of 1969**⁶, an application under **Article 23 (1) of The Constitution**³ should be made by way of Petition.

5.19 Therefore, I find and hold that the correct mode of application that should be used to enforce the provisions relating to the protection of fundamental rights of the Constitution in the High Court is a Petition.

5.20 The question that I pose is that what is the fate of this action, having found that it ought to have been commenced by way of Petition? In the case of **New Plast Industries vs. Commissioner of Lands and the Attorney General**⁸, it was held as follows: -

"...the mode of commencement of any action is generally provided for by the relevant statute and where a statute provides for the procedure of commencing an action, a party has no option but to abide by that procedure."

5.21 Further, in the case of **Chikuta vs. Chipata Rural Council**⁷ it was held as follows: -

"Where any matter is brought to the High Court by means of an originating summons when it should have been commenced by writ, the court has no jurisdiction to make any declarations."

5.22 In the case of **Barclays Bank (Zambia) Limited vs. Walisco and Company and Another**¹⁴, the Court re-

stated the holding in **Chikuta vs. Chipata Rural Council**⁷ that: -

"Where an Act of Parliament has specifically laid down the method by which proceedings must begin, there is no option as to which procedure to adopt. The Plaintiff is bound to commence his action by the procedure laid down by the Act."

5.23 Further, in the case of **Sichikolo vs. Mutale and Another**¹⁵, the High Court cited the Supreme Court Judgment of **Supa Bakery Company vs. Philimon J Pendwe**¹⁶, where the Supreme Court nullified proceedings that were started using the wrong procedure and ordered the Plaintiff to go back to the High Court and commence the action using the correct procedure.

5.24 From the law cited above it clear that when a matter has been commenced wrongly, the Court has no jurisdiction to make any declarations. Be this as it may, the Supreme Court has held that an amendment to a Writ of Summons could be made to include the removal of a caveat, despite the fact that an application for the removal of a caveat is by law required to be done using an Originating Summons. This was the position in the case of **Corpus Legal Practitioners vs. Mwanandani Holdings Limited**¹⁷, where the Supreme Court stated as follows: -

"...From the above, it is clear that the correct mode of commencing proceedings, seeking an Order for the removal of a caveat, is by Originating Summons."

However, we must hasten to mention here that the relief sought by the Appellant, for the removal of a caveat is not the only claim which the respondent is seeking in the Court below. In our view, the position of the law, as stated in the Rural Development Corporation Limited case envisages a situation and is only applicable where the sole claim is an Order for the removal of a caveat.

We take the further view that, looking at the circumstances of the case, to insist that the claim for the removal of the caveat must be brought in a separate action, commenced by way of Originating Summons, would amount to asking that the different claims in this case, although involving the same parties and arising from the same set of facts, be severed and brought in separate actions. In effect this would amount to multiplicity of actions a practice which we have always frowned upon. For the reasons we have given, we find no basis to fault the decision by the Judge in the Court below to allow the amendment of these proceedings, which were commenced by way of writ of summons to include the relief for the removal of a caveat."

5.25 From the above, it would appear that if the Plaintiffs' claims included other claims which on their own could be commenced under a Writ of Summons, the claim for the enforcement of their fundamental rights could be rightfully determined by the High Court. However, in the present case, the Plaintiffs' other claims, except for the claim for damages for trespass, all emanate from their claim to enforce the alleged

breach of their fundamental rights under the Constitution. Therefore, based on the foregoing cited case, the Court cannot deem the Plaintiffs' claims to be correctly commenced as the first claim which is aimed at enforcing their fundamental rights is the main claim from which the rest of the claims emanate and therefore, this matter should have been commenced by Petition.

5.26 According to ***Halsbury's Laws of England***³, where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before Judgment is given.

5.27 Accordingly, the effect of failure to commence the action as prescribed is that the Court has no jurisdiction to grant the reliefs being sought, even if it had been so disposed. I am fortified by the recent case of ***Lt. General Peter Zuze & 11 Other Ex-Service Chiefs vs. The Attorney General***⁸.

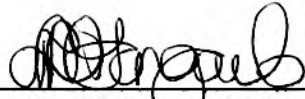
6 CONCLUSION

6.1 For the reasons recorded in my Judgment above, I find and hold that the Plaintiffs' action was not properly commenced and is therefore dismissed for lack of jurisdiction.

6.2 In the circumstances of this case, I make no order as to costs.

6.3 Leave to Appeal is granted.

Delivered at Lusaka on the 16th day of March, 2020.



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