

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

2013/HP/1615



BETWEEN:

CLAYTON MULOMBA HAMANE

PLAINTIFF

AND

KENNEDY MULOMBA

1ST DEFENDANT

JOE KAAMBWA

2ND DEFENDANT

CHIBOOLA MAAMBO

3RD DEFENDANT

ANANIA SIMIOTA

4TH DEFENDANT

WILFRED MULOMBA

5TH DEFENDANT

COLLINS MULOMBA HAMUNKOYO

6TH DEFENDANT

ROBERT MULOMBA HAMUNKOYO

7TH DEFENDANT

Before the Hon. Mr. Justice M.D. Bowa on the 4th day of February 2020.

✓ *For the Plaintiff: Miss MC Kaoma from KMG Chisanga advocates*

For the Respondent Mr. Mulongoti of Lusenga Mulongoti advocates

JUDGMENT

Cases referred to:

1. *Chilufya v Kangunda* (1999) ZR 166 (SC).
2. *Lumanyanda and Another vs. Chief Chamuka and Others* (1988/89) ZR 194 SC

3. *Sablehand Zambia Limited v. Zambia Revenue Authority (2005) ZR. 109 (SC).*

Legislation referred to

The Lands and Deeds Registry Act Cap 185 of the Laws of Zambia

The Plaintiff commenced this action by writ of summons and statement of claim dated 31st October 2013. He sued the Defendants in his capacity as administrator of estate of the late Petterson Bob Chinda Hamane claiming the following reliefs.

- i. *A declaration that the Defendants have illegally encroached on the property known as farm number 2038.*
- ii. *An order that the Defendants do allow the Government Surveyors to enter upon and re-survey and locate the beacons establishing the boundaries of the property known as farm number 2038*
- iii. *For an order that the Defendants vacate the parcel or portion of farm No. 2038 upon which they have encroached.*
- iv. *Damages for wrongfully entering the deceased's land and tiling the said land and otherwise using it for unauthorized farming purposes.*
- v. *Such further or other relief as the court may deem fit to award to the Plaintiff.*

vi. Cost of and incidental to the proceedings.

Lady Justice M Mulenga sitting as a High court Judge as she was at the time proceeded to hear the matter and found for the Plaintiffs in the absence of the Defendants who had not entered appearance or filed defence. I later by ruling dated 28th February 2017 allowed an application for joinder of the 6th and 7th Defendant and set aside the judgment earlier granted. I accordingly gave directions for the filing of a defence and bringing the matter to trial. In their defence, the Defendants denied encroaching on the Plaintiff's land. Further that they only turned away people who were trespassing on their property. They denied that the Plaintiff was entitled to any of the claims sought and put him to strict proof.

At trial the Plaintiff testified that the case before court involves property 2038 Lubombo Mazabuka. He explained that the matter dates back to the year 1956. According to the Plaintiff, the land in question was owed by a Mr. Duploy Jacob Bester. Mr. Bester had a mortgage over the land with the Land and Agricultural Bank of Zambia. He failed to settle the mortgage and the farm was repossessed. Lima Bank of Zambia then assumed ownership and

eventually sold it to his late father Mr. Patterson Bob Chinda Hamane.

He testified further that upon acquiring this farm from Lima bank, Mr. Petterson Hamane got a loan from Meridian Bank in 1989. The Bank then went into liquidation. Thereafter, the Plaintiff's father started having problems with the neighbours who owned farm 604, and were encroaching on their farm. He clarified that the owners of farm 604 were actually uncles to his father. The Plaintiff testified further that on several, occasions, his late father tried to sit down to resolve the issue of the alleged encroachment with his uncles.

In one such meeting at which the Plaintiff was present it was suggested that since the parties were failing to agree perhaps consideration could be made to engage the police to help resolve the dispute. Young as he was at the time at the tender age of 18, the Plaintiff advised that the matter be resolved within the family than going to the police. No resolution was reached. It was at this point that the late Peterson Hamane engaged the office of the surveyor general to survey the land with a view of stopping the dispute. This was in the year 1994.

A Mr. Mwanza went to the farm to survey the land. Having picked some points for the survey, he began the exercise but was interrupted midway by the occupants of farm 604 who became violent. Mr. Mwanza fearing for his life then stopped the exercise. He nonetheless was able to produce a report of his survey which was copied to the late Patterson Hamane, the Surveyor General's office and the Zambia Police.

5 months later in 1999 Mr. Hamane passed on. The Plaintiff assumed the role of administrator of the estate in December 1999. He clarified that during the 1994 survey only one family was present on farm 2038. This was the 7th Defendant Mr. Robert Mulomba Hamunkoyo's family to be precise. With the passage of time, more people started encroaching on the land. The Plaintiff decided to engage a surveyor by the name of William Nkhata in the Ministry of Agriculture to undertake a survey of the land. Mr. Nkhata started the survey but he too was interrupted by the occupants of farm 604. The 5th Defendant in particular even went as far as collecting the car keys from Mr. Nkhata in his bid to stop the surveyor from carrying out the survey. Like the previous surveyors before him, Mr. Nkhata then left without completing the survey. He

too produced a report of the work he carried out. The report was given to the Plaintiff and copied to the Ministry of Agriculture and Surveyor General's office. Things gradually got worse. The Plaintiff's family could not have access to farm 2038 due to the encroachment.

He testified further that an out grower programme was introduced by Zambia Sugar Company and the owners of farm 604 were engaged in the scheme. Having leased out their farm to Zambia Sugar, they run out of land to do their own agricultural activities resulting into their further encroachment of farm 2038 being the adjacent farm. As a way of securing their crop, Zambia Sugar fenced off the leased land thereby distinctly showing the boundary of farm 604.

The Plaintiff went ahead to request for another surveyor, this time from Mazabuka Municipal Council in September 2013. A Mr. Cosam from the Department of planning was assigned to do the survey. He plotted some of the beacons but like others before him was interrupted by the occupants of farm 604 who violently disrupted his work. He too wrote a report of the disturbance of duty

and a copy of the report was sent to the Plaintiff, the town clerk and Surveyor General's office.

Having considered the several thwarted attempts to bring in surveyors by both his late father and himself in their quest to resolve the dispute, it was felt that the matter was best brought to court. He referred me to the reports from the surveyors in the Plaintiff's bundle of documents paged 1 to 3 respectively.

In cross examination, the Plaintiff was not in a position to state why inspite being adjacent farms one was numbered 604 and the other 2038. As far as he was aware, Lima Bank took over the farm in 1975. When referred to page 3 of the Defendant's bundle of documents he acknowledged the date indicated it was actually the 3rd of April 1989.

He further acknowledged that he only attended one of the several meetings held that failed to resolve the dispute. Cross examined further, the Plaintiff testified that his action was initially against the 5 Defendants that he was aware had encroached on farm 2038. He did not consider it necessary to include the wives and children of these Defendants as well.

The witness was not re-examined.

DW2 was Bob Hamane a farmer and businessman. His evidence was that as far as he could remember his late father Mr. Petterson Bob Chinda Hamane owned a farm known as F/2038 in Lubombo Mazabuka. Sometime in 1994 he informed the family that there had been some encroachment on that piece of land and travelled to Lusaka to fetch a surveyor to ascertain the beacons. Ricky Mwanza was the name of the surveyor engaged.

The exercise was abandoned due to disturbances on the ground. PW2 then more or less repeated the evidence of PW1 of the report that was prepared by Mr. Mwanza, his father's subsequent passing, the out grower scheme for farm 604 and the resulting boundaries which distinctly set out the boundaries for the said farm. He also gave evidence about the engagement of Wisdom Nkhata and the failed survey on account of disturbances at the hands of the persons who had encroached and by the 5th Defendant in particular who grabbed Mr. Nkhata's car keys. He verified that he was actually present at the farm when the aborted survey was being done.

PW2 also gave evidence of the attempt that his family made to have the survey done using the surveyor from Mazabuka Municipal Council and the resulting disruption by the encroachers that included the Defendants. He confirmed that this surveyor also prepared a report on the attempted survey and the disturbance that he had faced.

Faced with these disruptions the family decided that rather than continue to go through the same routine, the matter was best brought to court at which an order could be sought to allow a surveyor to carry out their work undisturbed. He added that the Hamane family have been paying for ground rent for the property but cannot access their land. He testified further that his family had on several occasions reached out to the Defendants to try and resolve the matter amicably but they have insisted that farm 2038 does not exist. He explained that the Defendants are actually related to the Hamane family. They are uncles and cousins with the exception of the 3rd and 4th Defendants with whom they do not share any blood ties.

When cross examined PW2 testified that he did not know exactly when the first encroachment took place but believed it must have

been in 1994. Further that the 7th Defendant was in occupation of the land at the time. When referred to page 12 of the Defendant's bundle of documents, PW2 acknowledged that the diagram of the title of farm 604 was done before farm 2038 was bought.

He however maintained that what was appearing as farm 605 on the diagram does not exist as that was where the Hamane house is and is L27. He disputed the suggestion that the surveys were done after hours or weekends. He testified further that to the best of his knowledge, PW1 had never occupied farm 2038. The vesting assent was only done after he was formerly appointed administrator.

PW2 further testified that there was a police officer present the whole time an attempt to survey the land was done. However this was against a background of a presence of people who stopped the survey. He acknowledged that an action was commenced in Livingstone but discontinued. He added that the documents as presented on page 20 and 24 of the Defendant's bundle and discrepancies pointed out on the location of farms 2038 were not within his knowledge. He maintained that the diagram in the Plaintiffs camp indicates that the property is in Southern Province

so he was not in a position to comment on the suggestion that the title was a possible forgery.

When re-examined and referred to the title deed on pages 4-9 of the Plaintiffs bundle of documents for farm 2038, PW2 confirmed that the diagram is what is on the original title deed.

That was the case for the Plaintiff.

DW1 was Wilfred Mulomba the 5th Defendant. He testified that to the best of his knowledge, it was in the year 1968 when his parents moved from Bwengwa to Mazabuka after acquiring a farm then known as farm 604(a). This, he explained, was a property neighbouring the remaining extent of farm 604 which is in dispute. DW1 testified further that farm 604 (a) was acquired by his parents who paid for it in installments jointly with his father's brothers. He informed the court that his father was Mr. John Hamunkoyo who partnered with his two brothers Mr. Joel K Hamukoyo and Mr. Wilson Hamukoyo to acquire the property.

At the time, the Plaintiff's father Mr. Patterson Hamane was the only educated child that could be used to process the documentation and appreciate the legal implications. He clarified that Mr.

Patterson Bob Chiinda Hamane was his father's elder sister son. That made him DW1's cousin. He testified further that his parents raised money through the sale of cattle. The proceeds were given to Mr. Hamane to go pay for farm 604 (a). Unknown to his parent their nephew did not pay for the land. They were later evicted from the farm by bailiffs.

He asserted that Mr. Hamane lived freely on the farm with his wife but after the eviction deserted the farm and his uncles to live in Lusaka. The uncles thus ended up squatters in Libombo just outside farm 604 (a) from 1970/71.

In 1972, a neighbor Mr. Machila who had occupied the remaining extent of farm 604 offered his fields to DW1's parents with the intention of relocating. This was between 1972/73 planting seasons. In the process the owner Mr. Machila acquired another property in Chipangwe Kafue District and introduced his parents to the lessor whom he believed was Lima Bank. A purchase price for the farm was agreed and finally paid. This time around they did use the nephew Patterson to make the payment. Therefore by July 1975 the remaining extent of farm 604 was fully paid for by his parents. His uncle Joel also participated in the purchase of the land. DW1

testified further that his family had already occupied the whole land at the time the title was issued. He added that they are still occupying the land to present day.

DW1 testified further that the alleged encroached area was occupied by the 7th Defendant Mr. Robert Hamunkoyo, his late elder brother and Mr. Richard Hamunkoyo. They were bonafide residents of the area. The court was further informed that there was yet another family and in law to Mr. Machila's father that opted to remain on the farm. This was Mr. Chipangwe and it is his grandson and now 3rd Defendant in this case, who presently resides there.

The court further learnt that within the same area is a borehole which is used by the family. This is also the area where the fields that the family has survived on are located. He insisted that these were not newly created fields. DW1 testified further that in 1996 his father passed on. As such his uncle Joel became the sole owner of the remaining extent of farm 604. Because he was advancing in age, their uncle Joel called all his children and nephews whom he informed he could not continue owning the farm. He later changed ownership to his first son Andeson Hamunkoyo, a nephew Most

Mulomba and Collins Hamunkoyo the 6th Defendant. Title for the property thus moved to the 3 as joint tenants.

It was then that the late Patterson Hamane commenced an action against the 3 claiming ownership of the land but he lost the case. In 2004, one of the joint owners passed on. Later DW1's brother Most Mulomba also died in 2006. The 7th Defendant took over as joint owner with the blessing of their uncle Joel. DW1 came in as joint owner in place of his late brother Most.

DW1 testified further that in 1986, Mr. Patterson Hamane had stopped work. He joined his uncles in Mazabuka and his mother who was still alive at the time. He had some cattle which he kept at the farm which was also grazing on the land. Mr. Hamane later pleaded with his uncles for a piece of land to build a house. The uncles obliged and gave him some land just next to his mother's residence. He then lived peacefully with his surviving uncle Joel and mother and successfully contested and was elected area member of parliament in 1986.

Moving on to the issue of surveyors, the witness testified that he was aware of the circumstances surrounding 2 of the surveyors that

had visited the farm. He stated that he personally confronted Mr. Nkhata to find out if he had been sent by an appropriate authority to do the survey. The witness recalled that Mr. Nkhata had come to the farm on a Sunday and when confronted failed to justify that he was authorized to do a survey. DW1 thus grabbed the keys for the vehicle he was using because it was a personal and not official car.

He recalled that Mr. Nkhata pleaded that he could lose his job as what he was doing was private and that he had been paid K100,000 for the work. DW1 heeded to the plea and released the keys on condition that Mr. Nkhata left his driver's licence. DW1 later gave it back to him upon his request that he needed it to travel for duty out of town and his offering an apology stating that he did not know he was entering private property.

The second surveyor DW1 was aware of, also came to the farm on a Sunday the 1st September 2013 at around 15:00 hours. DW1's brother and 7th Defendant in this case, called him to inform him people were carrying out a survey on the farm. When DW1 arrived at the farm he found the surveyor in the Company of PW1 and PW2. He asked the surveyor what he was doing and whether he had a letter authorizing him to do the work that he was doing. The

surveyor stated he was not on official duty but was engaged privately to do the work. PW1 thus could not allow them to proceed as they did not have any form of letter authorizing the surveyor to do the work.

DW1 testified further that in 2010 the Plaintiff commenced an action in the Livingstone High Court against him over the disputed property but the case was dismissed with costs. The matter was then later resurrected and is the one presently before the court. He insisted that his parents were in occupation of the land from 1974. Further that the Plaintiff has not at any time been occupying the property and that there is no farm 2038 as far as he was concerned.

When cross examined DW1 insisted that his father John Mulomba Hamukoye and his uncle Joel Kambwa Hamunkoyo purchased the farm. He explained that the 7th Defendant Mr. Robert Mulomba Hamunkoyo was his parent's dependent and stayed on the farm in that capacity. It is his son who lives there now and is one of the Defendants in the case. He acknowledged that the portion that Mr. Kennedy Mulomba (the 1st Defendant) occupies is a part of the land in dispute.

He agreed that he did give evidence about a Mr. Machila who left his uncle at the farm and his uncles' grandson is Hachiboola Mambo the 3rd Defendant. He did not know if Mr. Machila had any title but was certain that his parents rented some fields from him in 1972. DW1 further acknowledged that he did not know if the uncle left on the farm had any title for the portion of the land. He accepted as true the fact that Hachibola Mambo had no title to the land.

Cross-examined further, DW1 insisted that farm 2038 does not exist. When referred to the certificate of title on pages 21-26 of the Defendant's bundle of documents also 4 – 6 in the Plaintiffs bundle, the witness still insisted that he would not agree that the Ministry of lands cannot issue title on a property that does not exist. Asked to comment on page 24 of the Defendant's bundle of documents, the witness acknowledged that the diagram for the title on farm 2038 indicates the land was surveyed on 10th March 2009.

That the diagram also indicates the land is situated in the Southern Province. The witness agreed that by including this document in his bundle he was trying to cast doubt on the authenticity of the title arguing that at time the diagram was being approved in 2009, this case was already in the High Court in

Livingstone. Further that the diagram on page 20 indicates the land in situated in Lusaka whereas the one on page 24 states it is in Southern Province.

Referred to the lands print out on pages 3-5 of the Defendants bundle, the witness acknowledged that according to the register farm 2038 does exist in the lands registry. He however insisted that the register only indicates transactions that are purported to have happened. He testified further that he had a problem with the surveyors because of the length of time his family has occupied the land and the fact that the surveyors had no document to show that they were sent by any authorized persons. He added that he would not even accept the Surveyor General himself to come to survey the land because of the length of time his family has been on the land.

When re-examined DW1 testified that in the over 40 years that his family had lived at the farm there had not been a farm numbered 2038 as all the farms fell in logical sequence. The inclusion of pages 20-24 in the Defendant's bundle was therefore meant to show that this farm was not in the Southern Province, and therefore that farm 2038 does not exist in Mazabuka District. He maintained this position in spite of its appearance in the lands register.

The 2nd Defence witness was Robert Mulomba Hamunkoyo (DW2) also the 7th Defendant. He gave his age as 78 ordinarily resident in Lubombo area Mazabuka. His evidence was similar with that of DW1. He gave a history of the acquisition of farm 604. He testified that in 1972 Joel Kambwa Hamunkoyo and John Hamunkoyo approached Patson Machila and asked for a place to keep their animals. Mr. Machila accepted their request and leased some land to them. The agreement was only for 1 year.

DW2 came to know about this because his father Joel was given a part of the land to rent. The following year, Mr. Patson Machila asked his father Joel to go to Lima Bank over their continued stay on the land. DW2 accompanied his father to the bank and were informed they would receive a notice for the sale of the farm within a year. True to their word, the bank gave due notice.

DW1 testified further that his father and uncle bought the farm from the bank. The families lived on the farm without any knowledge that there was another farm known as farm 2038. Whilst on the farm which they occupied in 1976, Mr. Patterson Bob Hamane visited him at his house and stated he wanted him to make a request on his behalf to his father Joel and John

Hamunkoyo for a piece of land to build a house. DW1 did so and was told that Mr. Hamane needed to make the request on his own. Later Mr. Hamane approached his uncle Joel and was duly given a portion of land. It was then that DW1 knew for certain that Mr. Hamane did not have a farm. This was in 1986.

In 1994 Mr. Joel Hamunkoyo decided to put the names of the children on the certificate of title. It was during the same year that DW2 noticed that Mr. Hamane started bringing surveyors without informing anybody. The surveyors were asked what their business on the land was. Police officers who had accompanied these surveyors then apologized they were not aware that the land belonged to someone else. After Mr. Hamane died, Clayton Hamane (The Plaintiff) continued to bring surveyors to the farm.

When the surveyors were seen, Mr. Most Mulomba who was one of the picked registered owners of the property stopped them from doing any work. Things were quiet for a while but later culminated into a court action before the Livingstone High Court. Afterward, the Defendants were sued in the Lusaka High Court thus explaining his presence in court.

In response to the Plaintiff's claim that his family had encroached on the land, DW2 testified that the family have lived on the farm for several years and did not know about the existence of Mr. Hamane's farm. The only thing he did know was that the late Hamane had sought help from his uncles and was assisted with the land he had requested for.

Further that when Hamane died, he was infact buried in the remaining extent of farm 604 and that's where his house is. DW2 testified further that his family also knows the neighbours that reside within the area. As such that the family had no knowledge of when the late Patterson Bob Hamane acquired a farm. Following his passing, the family was not informed about the existence of the claimed farm. As far as DW2 is concerned the land fell within farm 604. It is also within this farm that the late Hamane was given land. He explained that Patterson Hamane was the son to his sister and it is his children who are now claiming the entire land.

He questioned why they now wanted a surveyor to come when the families have lived in the farm for 47 years. He insisted that Mr. Hamane and family only came to the area upon invitation by his father Joel and do not have any farm within 604 as claimed by the

Plaintiff. DW2 added that according to Tonga tradition, people get to know what a deceased person owned. However when Patterson Hamane died, the Family did not know what he owned apart from a few declared things which did not include the farm now claimed. The family and Defendants thus question the existence of this farm. DW2 further expressed the family's resolve not to allow any surveyor on the land.

When cross examined DW2 confirmed that he did stay at the farm from 1976 without any knowledge of the existence of farm 2038. He insisted he is not aware of its existence to date. He stated that he did not know that the land that Hamane was given is not the one that is in dispute in this case. When it was put to him that Patterson Hamane actually bought the claimed land from Lima Bank and invited to comment, DW2 stated that his late father Joel also purchased his land from Lima Bank. He insisted that he is staying at the same farm that the Plaintiff claims is his. He accepted that he did not know where all the beacons for the farm are.

He reiterated his resolve to oppose the Surveyor General coming to survey the land. According to him the land was already surveyed

and certificate of title duly issued. He would still refuse the surveyors coming to the farm even if sanctioned by order of the court so long as it affects his farm.

When re-examined DW2 testified that his father bought the remaining extent of farm 604.

The last of the Defendant's witnesses was Leman Michelo Mulambo. His evidence was that the late Patterson Hamane died in 1999 and was buried on DW3's father's farm. After the burial in accordance with Tonga tradition, the family sat down to discuss the property that he had left. The window and children were called so that they could inform the family or list down the things that Mr. Hamane had left. DW3 was asked to chair the meeting and the following were disclosed to be the property the deceased left.

1. A house in Kabwata
2. A plot in Mazabuka township.
3. 4 motor vehicles
4. A farm in Lusaka West

DW3 testified that this is all that was declared and the vehicles were physically shown to the family. The property was given to the

window and the deceased sister. The family was thus later surprised to learn of a claim for farm 2038 as this was not disclosed by the window and children. He was also surprised to learn that Mr. Hamane had arranged for a title deed on the piece of land that he was given to build on. Dw3 opined that this was a show of disrespect to the uncles that gave the land.

He insisted that the late Hamane did not buy that land. DW3 inquired from the 7th Defendant whether he had sold the land to Mr. Hamane. He said that he had not done so. This led to DW3's inescapable conclusion that the title Patterson Hamane obtained might have been forged. He explained that Pattersen Hamane was his cousin.

When cross examined DW3 insisted that farm 2038 was not on the list of declared properties. Therefore as far as he was concerned the fact that it was not declared meant that it did not exist. He insisted that his brother did not sell the land. When referred to pages 3-5 of the Plaintiff's bundle of document he agreed that the document suggests that the late Hamane bought land from Lima Bank.

He was not re-examined and that marked the close of the Defendant's case.

In the Plaintiffs final submissions dated 28th March 2019, it was the Plaintiffs position that the determination of this matter by the court must turn on addressing the question whether the Defendants had illegally encroached on the property known as farm 2038 and how such encroachment will be established. This question the Plaintiff argues, is at the center of the dispute between the parties.

I was referred to section 33 of the lands and deeds registry Act Cap 185 as the starting point for guidance on matters relating to the effect of a certificate of title in land. the section reads:

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

relating to such land but absolutely free from all other encumbrances, liens, estates or interests whatsoever:

(a) Except the estate or interest of a proprietor claiming the same land under a current prior Certificate of Title issued under the provisions of Parts III to VII; and

(b) Except so far as regards the omission or misdescription of any right of way or other easement created in or existing upon any land; and

(c) Except so far as regards any portion of land that may be erroneously included in the Certificate of Title, evidencing the title of such Registered Proprietor by wrong description of parcels or of boundaries.”

I was further referred to section 35 of the Act which reads:

“35. 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. ”

It was submitted that the effects of the above sections was discussed in the case of **Chilufya v Kangunda**¹ In which the Supreme Court stated that only fraud can vitiate the certificate of title once issued. The Plaintiff submitted further that although fraud is alleged in this case, the evidence adduced before the court

cannot support the claim. Further that it is trite that it must be specifically pleaded.

My attention was also drawn to the case of **Lumanyanda and Another vs. Chief Chamuka and Others**² where the Supreme Court considered sections 33 and 35 and explained the effect of a certificate of title on adverse possession. The court held that adverse possession may be described as the occupation of real property or land in a manner inconsistent with the right of the true owner.

That the court rejected the notion that adverse possession could supersede the rights of a registered owner. The court thus confirmed the Appellants ownership and ordered the Respondents to vacate the land. The Plaintiff submitted that although adverse possession had not been claimed in the present case, it would appear that the crux of the claim by the Defendants is based on the length of time their respective families have occupied the farms. It was argued that from the totality of the evidence the Plaintiff had demonstrated ownership of the land as per certificate of title.

It was argued that the Defendants on the other hand only claim that the property does not exist which was against the conclusive evidence adduced as per certificate of title on record. It was submitted further that the Defendants had in fact attempted to produce a doctored survey diagram appearing on page 20 of their bundle of documents purporting that farm 2038 is actually based in Lusaka. This is against the referenced Lubombo area which is in the Southern province as per diagram in the title deed.

The Plaintiff points to evidence of the farm 604 being leased out to Zambia Sugar which was uncontested that led to the encroachment. Further that the brother in law to Mr. Machila who remained on the land had no title as admitted in evidence. That the said 3rd Defendant clearly had no basis to be on the land. It was argued further that the Defendants by their own evidence had clearly demonstrated they were not prepared to have the boundaries of farm 604 and farm 2038 determined as the Plaintiffs have always contended encroachment. The Plaintiff's thus submit that this is a proper case in which the court should grant the reliefs sought in the statement of claim.

The Defendants filed submissions dated 18th April 2019. Reliance was also placed on section 33 of the Lands and Deeds Registry Act. I was also referred to section 54 of the said Act. It was argued that the Defendants had led evidence showing the acquisition of farm 604 in 1975 and that title was accordingly duly obtained. That this therefore proves the ownership of the property. It was submitted that in light of the evidence the Defendants are the true owners of farm 2038 which is in essence a part of farm 604.

Learned counsel also referred me to section 35 of the Lands and Deeds registry Act that makes provision for protection against adverse possession as cited above. In light of the said provision, it was argued that despite the Plaintiff adducing evidence of the title, the Plaintiff in fact acquired the land in question by adverse possession. This is because the land which the Plaintiff's late father acquired title for was already the subject of a certificate of title held by the Defendant's late father. The effect of section 35 it was submitted is that no right can be acquired against the Defendants by adverse possession. Reliance was further placed on the case of Lumanyando and another v chief Chamuka and Kabwe rural District Council and another Supra, where it was argued that in terms of

section 35 of the Lands and Deeds registry Act, adverse possession cannot be acquired against land to which there is a certificate of title.

It was submitted further that the Plaintiff had not shown the court any evidence that the farm which is subject of the dispute was properly purchased. That the evidence before court shows that when Mr. Hamane died, the claimed property was not listed by the widow as being amongst what he owned. The Defendants finally submit that the late Paterson Hamane was merely given a piece of land within farm 604 to build his retirement home and afterward left for Lusaka in 1986. At no point did Mr. Hamane own any farm adjacent to the remaining extent of farm 604. Further and as a point of emphasis that the Defendants acquired title to the land earlier than the Plaintiff and by virtue thereof have a better right of ownership to the land in dispute.

I have carefully considered the evidence before me and anxiously read the submissions. The Plaintiff claims ownership of farm 2038 as per certificate of title No L1249. He argues that the Defendants on farm 604 have encroached on his farm and seeks for amongst other things an order for a government surveyor to determine the

extent of both farms. The Defendants vehemently deny the existence of farm 2038. They contend that portion of land was a part of the farm 604 that was given to the Plaintiff's father to settle on and not to own. That they had obtained their certificate of title earlier and thus the Plaintiff's perceived rights obtained afterward amounted to seeking such rights by adverse possession.

They also in essence suggest that the certificate of tile obtained by the Plaintiff was forged as the location of farm 2038 going by a diagram exhibited on page 20 of the Defendants bundle of documents indicates the farm is actually in Lusaka. Further that the farm was not disclosed to a family meeting when the widow and children were invited to do so after the burial of the late Patterson Hamane as per Tonga custom. The question I am to resolve is, was farm 2083 a part of 604 as contended by the Defendants and if not has there been an encroachment as alleged by the Plaintiff? If so how am I to determine that encroachment?

It is common cause that the parties in this matter are to a large extent connected by blood ties. The Plaintiff and his brother (PW2) are the nephews to the 5th, 6th and 7th Defendants. The Plaintiff traces the acquisition of their claimed farm to a Mr. Floody Jacob

Bester who defaulted on a mortgage obtained from the then Land and Agriculture Bank of Zambia. The land print out on pages 3 – 5 of the Defendant's bundle of documents shows that later on the 3rd of April 1989, Lima Bank Limited assigned the property to Himane Patterson Bob Chinda and a certificate of title No. L1249 was issued in his favour on the same date.

He later obtained a mortgage from Meridian Bank of Zambia and the caveat placed on the property was subsequently withdrawn. There is also indication that a duplicate certificate of title was issued following the reported loss of the original. Following Mr. Hamane's passing, a Deed of assent was registered in Hamane Clayton Mulomba the Plaintiff herein and a certificate of title issued in his name on 31st October 2013. The documents contained in the Defendants bundle of documents also confirm this history and acquisition. I therefore have no basis to discount the existence of farm 2038 Mazabuka.

Farm 604 on the other hand has a history based on DW1 and DW2's evidence of acquisition through Lima Bank by siblings jointly. These were the parents to the named witnesses and the surviving parent decided in view of his age, to pass on the title to

his son and nephews to hold on to the property for the benefit of the family. There is a certificate of title in the names of Collins Mulomba Hamunkoyo Wilfred Mulomba and Robert Mulomba Hamunkoyo on page 10 the Defendants' bundle of documents. This also confirms the existence of farm 604.

Evidence on record confirms that some families settled on what is being contended to be a part of farm 2038 by the Plaintiff and argued to be 604 by the Defendants. In particular it was contended that a Mr. Machila's in laws remained on the farm currently occupied by a grandson (and 3rd Defendant in this case) as did DW2.

I am satisfied that there was an attempt to determine the extent of the land by the surveyors engaged by the Plaintiff. This was disrupted by the 5th Defendant and others who do not dispute this fact and maintain that the entire premises falls under farm 604. The submission that farm 2038 was part of the land that was given to the late Patterson Hamane to settle is rebutted by the evidence of acquisition through Lima Bank based on the printout from the Ministry of Lands. There is therefore nothing to dispel the

possibility of the land supposedly given to the late Hamane by his uncles still being in 604 as opposed to suggesting the whole of 2038 is a part of the said 604. For this reason I cannot accept the claim of adverse possession as presented by counsel for the Defendants.

The Plaintiff argues that farm 604 was leased out to Zambia Sugar at some point which left the owners with no land to farm on. The Plaintiff thus contends that the squatters on his farm moved to his land because they had nowhere else to go and the demarcation placed by Zambia Sugar clearly set out the boundary of farm 604.

The court was not moved to view the farms to have an appreciation of what is on the ground. This notwithstanding, one thing is clear in my mind, a resolution of whether or not there has been any encroachment can only be made by a determination of the beacons based on the 2 parties respective title deeds. I agree with the Plaintiff that there was an attempt to argue that the Plaintiff's title was acquired fraudulently primarily premised on the diagram on page 20 of the Defendant's bundle of documents and the fact that the existence of farm 2038 was not disclosed at a family meeting following the passing of the late Mr. Paterson Hamane.

In **Sablehand Zambia Limited v. Zambia Revenue Authority**³ the Supreme Court makes clear that where fraud is alleged it must be distinctly and clearly set out. The Defendant did not do so. It is also settled that the standard of proof to establish such fraud is much higher than a balance of probabilities. The failure to disclose the existence of the farm as alleged cannot necessarily amount to fraud. So too I find is the mere inclusion of the document on page 20 of the Defendants' bundle. The surveyors that were on site did not state anything in the reports questioning the Plaintiff's title or numbering of the farm. They instead indicated they requested to see the Defendant's title to determine if farm 2038 fell into their farm as contended. Evidence on record of course shows the surveyors were stopped as they set out to complete the survey.

What I therefore have before me is evidence of Defendants who are resolved that the entire land falls in plot 604 and in their words, are unwilling to allow any surveyor let alone the Surveyor General himself to determine the extent of the land based on the titles.

This is akin to anarchy and cannot be accepted. The dispute can only be meaningfully resolved if the surveyors are allowed to go on site. It is such a survey that would also show if farm 2038 falls in

604 as alleged or conversely if there is an encroachment of farm 2038 and the extent of such encroachment. This is what the Plaintiff is in essence praying for.

I therefore order that the Defendants do allow the Government surveyors to enter upon, resurvey and locate the beacons establishing the boundaries of the property known as farm number 2038 and farm 604 Mazabuka undisturbed. If it is established that the Defendants have encroached on farm 2038, I order that they vacate the parcel or portion of the farm upon which they have so encroached. Based on the facts before me and taking into account that the actual encroachment has not been established at this point. I would decline to award damages for wrongful entering and tiling of the land.

I award costs to the Plaintiff to be taxed in default of agreement.

Dated at Lusaka the ^{4th}.....day of ^{Feb}.....2020



HON. JUSTICE M.D BOWA