

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

2003/HP/0516

B E T W E E N

JOHN JOHANNES VLAHAKIS



PLAINTIFF

AND

CHIRUNDU BREAM FARMS LIMITED

1ST DEFENDANT

ALEX CHIKWARI

2ND DEFENDANT

**BEFORE HON. MRS. JUSTICE S. M. WANJELANI IN CHAMBERS ON 24TH
MAY, 2024.**

*For the Plaintiff: K.G. Chisanga, S. Chisanga Miti and M. Mwenya,
Messrs KMG Chisanga Advocates.*

*For the 1st Defendant: E.K. Mwitwa, with B.C. Kaluba, Messrs Mwenya
& Mwitwa Advocates*

For the 2nd Defendant: In person

JUDGMENT

Cases referred to:

1. *Prisca Lubungu v Obby Kapango and Others and Ndola City Council Appeal No. 216/2016*
2. *Hilda Ngosi (Suing as Administrator of the Estate of Washington Ngosi) V Attorney General and Lutheran Mission(Zambia) Registered Trustees Selected Judgment No.18 of 2015*
3. *Shell and BP Zambia Limited v Conidaris and Others (1975) ZR 174*
4. *Yusuf Valley v Ishmail Gheewales and the Attorney General, Appeal No. 50 of 2017*

5. *Umeanyi v Ezeobi* (1990) 2 LNR
6. *Peter Militis v Wilson Kafuko Chiwala*, SCZ Judgement (2009) ZR 41
7. *Valentine Webster Chansa Kayope v the Attorney General*, SCZ No.319 of 2007
8. *Frank Bwalya* (Suing on behalf of himself and in his capacity as Director of Change Life Zambia Limited) *v* *Attorney General, Katele Kalumba* (Sued in his capacity as Secretary General of the Movement of Multi-Party Democracy) and *Wiliam Banda*, (2012) 1 ZR354
9. *Maamba Collieries Limited v Southern African Delivery Company (PVTY) Limited*, Appeal No.122 of 2019.
10. *Bolan v Frien Hospital Management Committee* (1957) 1 WLR 582
11. *Investrust Bank v Ibrahim Diab* (SCZ 8 240 of 2016) [2019] ZMSC 321
12. *Attorney-General v Kakoma* (1975) Z.R. 212 (S.C.)
13. *W.R Willis v Umbria Company Limited*, SCZ Appeal No.172 of 1999
14. *Trevor Limpic V Rachel Mawere and Another*, SCZ Judgment No. 35 of 2014
15. *J.Z Car Hire Limited V Chala Scirocco, Enterprises Limited*, SCZ Judgment No. 26 of 2002
16. *Blyth v Birmingham Waterworks Company* [1856] 11 Ex 781 Alderson
17. *Attorney General v Mwanza and Another*, Selected Judgment No. 38 of 2017

Legislation referred to:

1. *The Land Survey Act Chapter 188 of the Laws of Zambia*
2. *Halsbury laws of England, 4th Edition Volume 45*
3. *Black's Law Dictionary 9th Edition*
4. *Clerk and Lindsell on Torts, 17th Edition*

1.0 INTRODUCTION

1.1 This Matter was commenced on 23rd May, 2003, by way of Writ of Summons and Statement of Claim. The Writ of Summons and Statement of Claim were amended a number of times, the last one being on 15th January, 2021. In the Amended Statement of Claim, the Plaintiff seeks reliefs couched as follows:

1.1.1A *declaration that Farm No. 9565 Chirundu, of which the 1st Defendant is registered leasehold owner, encroaches upon and is inside Farm No. 80a 'Demetra' Chirundu owned by the Plaintiff.*

1.1.2 *An order that the 1st Defendant do forthwith deliver up to the Plaintiff the property comprised in and known as Farm Number 9565 as it is wholly encroached on Farm Number. 80a 'Demetra' Farm' Chirundu.*

1.1.3 *A declaration that the 1st Defendant whether by itself or by its servants or agent or otherwise howsoever is not entitled to remain on that said land encroaching upon the Plaintiff's said Farm No. 80a 'Demetra' Chirundu, or otherwise obstructing or interfering with the Plaintiff's enjoyment of his said land.*

1.1.4 *Possession of the said land belonging to the Plaintiff encroached upon by the 1st Defendant.*

1.1.5 *Mesne profits from December 1998 until possession is delivered up.*

1.1.6 *Damages for trespass.*

1.1.7 Interest on mesne profits and damages

1.1.8 Damages and consequential loss caused by the negligent surveying of the 2nd Defendant as the 1st Defendant's Land Surveyor on or about July 1998, August 1998, September 1998 and December 1998 in surveying Farm No. 9565 Chirundu.

1.1.9 Interest on damages above, and

1.1.10 Further or other relief.

2.0 PLEADINGS

2.1 According to the Amended Statement of Claim, the Plaintiff is a registered leasehold owner of Farm No. 80a 'Demetra' Chirundu following the death the other Joint Tenant thereof and his brother late Nikitas James Vlahakis. It was stated that the 1st Defendant is a limited Company operating from Chirundu and that the 2nd Defendant is and was at all relevant times a Land Surveyor.

2.2 The Plaintiff averred that in or about July to December 1998, the 2nd Defendant was engaged by the 1st Defendant for reward to undertake the survey for Farm No. 9565 Chirundu and to establish its exact position on the ground. He stated that the 2nd Defendant was under a duty in undertaking the said survey to undertake the same in such a manner as would ensure accurate results and in accordance with the provisions of the **Land Survey Act**.

2.3 Further that the 2nd Defendant owed a duty of care to owners of adjoining land and owners of land in the area including the Plaintiff to exercise and use reasonable care and skill in undertaking the said survey, but that the 2nd Defendant acted negligently and in breach of the said duty of care to the Plaintiff as owner of land in the area.

2.4 The Plaintiff set out the particulars of negligence as:

2.4.1 Placing and positioning the 1st Defendant's Farm No. 9565 'Chirundu' inside Farm No. 80a 'Demetra' Chirundu resulting into an encroachment of Farm No. 80a 'Demetra' Chirundu by Farm No. 9565 'Chirundu'.

2.4.2 Failing to ascertain the boundary of Farm No. 80a 'Demetra' Chirundu and as a result giving the best part of Farm 80a to the 1st Defendant.

2.4.3 Failing to locate the exact physical location of Farm No. 9565 Chirundu.

2.4.4 Failing to heed or ignoring the warning and advise of one Dennis Vlahakis as to the encroachment of Farm No. 80a 'Demetra' Chirundu.

2.4.5 Failing or neglecting to take note of the Title belonging to the Plaintiff which Title dates almost 100 years.

2.5 The Plaintiff added that on diverse dates on or about 6th July, 1998, 12th August 1998, 1st September, 1998 and other dates, the Plaintiff's agent and

nephew, Dennis Vlahakis and his representatives interrupted the surveying operations by the 2nd Defendant as a result of the encroachment on Farm No. 80a 'Demetra' Chirundu.

2.6 He added that following the said survey undertaken by the 2nd Defendant, the 1st Defendant and its servants and agents wrongfully entered the Plaintiff's said Farm No. 80A 'Demetra' 'Chirundu' and took possession of a portion thereof and have wrongfully constructed buildings thereon.

2.7 He stated that the Plaintiff and his agents have on at least 3 occasions requested the Survey Department to undertake surveys of the two said Farms to confirm the encroachment and this had been confirmed with the last Survey being carried by the Survey Department on the 19th March, 2003 and 20th March, 2003, on the joint instructions and request of both the Plaintiff and 1st Defendant.

2.8 It was averred that the Plaintiff has requested the 1st Defendant to discuss terms of settlement but the 1st Defendant has neglected and refused to do so. By reason of the matter aforesaid the Plaintiff has been deprived of the use and enjoyment of the said land and has thereby suffered loss and damage.

2.9 In a Defence filed on 20th June, 2003, which the 1st Defendant stated it would rely on despite the Statements of Claim having been amended several time the 1st Defendant denied the Plaintiff's

allegations. It was stated that it lawfully entered onto its property being Farm 9565 Chirundu, situate in Southern Province of Zambia by virtue of Certificate of Title Number L332 issued under the hand and seal of the Registrar of Lands.

- 2.10 It was contended that no conclusive Survey Report has been presented to the Parties and that the 1st Defendant has not been witness to the alleged joint Survey carried out by the Survey Department.
- 2.11 The 1st Defendant averred that the Report of Mr. Chunga, Officer in-Charge and Senior Lands Surveyor at the Lusaka Regional Survey Office made in or about September, 2002, ruled out the fact of the 1st Defendants Property encroaching on the Plaintiff's Property.
- 2.12 The 1st Defendant stated that it has lawfully invested over Four Hundred Thousand United States Dollars (US \$ 400,000.00) on its Bream and Banana Farm on its Farm 9565 Chirundu and that the said Property is mortgaged to Norsad to secure the said investment.
- 2.13 The 1st Defendant contended that the Plaintiff is not entitled to any or all of the claims enumerated in his Statement of Claim and would put the Plaintiff of strict proof thereof.
- 2.14 In his Defence, the 2nd Defendant denied that the Plaintiff is entitled to any or all of the claims enumerated in the Statement of Claim.

2.15 The 2nd Defendant denied that he acted negligently as alleged in the Particulars of negligence, adding that he exercised all reasonable care and skill in undertaking the Survey. He stated that he was interrupted by the Plaintiffs' Agents which act was unlawful and contrary to the **Land Survey Act**.

3.0 THE HEARING

3.1 The first Plaintiff Witness, **John Johannes Vlahakis** (PW1) testified that his parents are deceased and he is the Administrator of the Farm 88a and the Estate of Demetra Farm Chirundu and that the Farm was owned by his father Nikitas James Vlahakis and Constantino Paul Vlahakis.

3.2 He averred that the promoter for the 1st Defendant was Mr. Fuller, who was working for Leopard and he was the Chairman of that Company. He added that Mr. Fuller, who wanted to start a bream Farm asked him where they could establish a business in Chirundu.

3.3 PW1 said that they went to Chirundu and he showed Mr. Fuller a place in Chirundu in Demetra Farm and did not see him after that till they met at the Lawyers' Office when he heard that the latter had encroached at Demetra Farm. He added that he was told of the encroachment by his brother, Dennis Vlahakis, who lives on the Farm, that the man he had brought was developing a bream Farm.

- 3.4 In cross-examination, PW1 responded that he was suing as an Administrator and that he was not aware of any Survey Report tendered by a Mr. Mwanza. He stated that he once had sight of the Certificate of Title for Farm 80a, though he could not recall when it was issued. The Witness could not be cross-examined further on the contents of the Certificate of Title for Farm 80a as he could not see.
- 3.5 The Second Plaintiff witness was **Shatis Basil Vlahakis** who testified that sometime in 1998, his brother Dennis Daniel Vlahakis, who resides on Farm 80a, informed him by phone that there were some activity on the northern end of the Farm. He averred that he asked him investigate the activity which he did and said the activities were within the boundaries of the Farm.
- 3.6 PW2 said that when he asked who was carrying out the activity, his brother responded that it was the gentleman who had been told by a Mr. T. Fuller to carry out the activities on the northern end of the Farm. He added that his brother said that there were bulldozers and were pulling some trees down.
- 3.7 PW2 averred that he told his brother to inform his uncle, Mr. Constantino Paul Vlahakis, the owner of the Farm. He said that Dennis later told him that he had been called by some Lawyers in Lusaka to ask why he had stopped the activities by their Client and that thereafter, he asked Dennis that they engage

Lawyers. He said that he attended a meeting with his brothers Dennis and John Vlahakis, the Defendants and Lawyers and it was amicable.

3.8 PW2 testified that it was agreed that they would send down Surveyors to have an idea of encroachment and that they agreed that once Mr. Fuller found Surveyors from Government he was comfortable with, they could travel to Chirundu. He stated that they were not informed by Mr. Fuller's Lawyers that they had found Surveyors to go down to Chirundu. He averred that the Surveyor did his work but that they were not aware as they were not informed.

3.9 It was PW2's testimony that he then engaged the assistance of a Surveyor, Mr. R. Mwanza to establish where the beacons of the Farm were and that a Report was given to him and the Surveyor General's Office. He said that the Report stated that Chirundu Bream Farms was 100% in Farm 80a. He added that the Lawyers discussed further and suggested that they seek Surveyors from the Surveyor General to go and re-survey the property and that permission was granted by the Surveyor General, and that both Parties were asked to contribute to the bill for the Surveyors to go to Chirundu.

3.10 PW2 said that payments were made and two Surveyors Glen Mwika, and Hastings Shamaoma travelled to Chirundu. He said that they accompanied the Surveyors with Dennis and they did the survey

on the first day and that on the second day, they went to Mr. Fuller's Farm where they were going to do the Survey from his residence.

- 3.11 He stated that the findings in the Report dated 24th March, 2003 from the two Surveyors were that Farm 9565 was inside Farm 80a Demetra. He added that he never dealt with the 2nd Defendant, Mr. Chikwari.
- 3.12 In cross-examination, PW2 stated that the Plaintiff and 1st Defendant put resources together to take the Surveyors to carry out the survey and that the 1st Defendant was a willing participant in the process. PW2 confirmed that the Plaintiff procured the services of R. Mwanza to survey the two Properties and that the Survey was done in the absence of the 1st Defendant. He added that they did not find any beacons that were earlier set up in 1913.
- 3.13 PW2 averred that there was a Site Plan drawn in 1913 although he had not produced it before Court and that in the absence of beacons and Site Plan he could not tell the extent of the Farm 80a.
- 3.14 PW2 stated that he could not remember changing the Survey Diagram to the Property after Mr. Mwanza's Survey. He said that in 2001, Mr Mwanza was engaged and that he was approving something that was approved in 1913 and that they did not issue a Notice to the 1st Defendant to agree to the change in the Survey Diagram.

3.15 He averred that the beacons were replaced by the Surveyors based on the original Title Deeds; that he did not know if Mr. Mwanza found those beacons but that he gave him a Report based on what he found on the ground. He stated that the Plaintiff's Certificate of Title was issued subject to the *Indenture* annexed to it, and that the Plaintiff was required to keep the beacons from 1913.

3.16 PW2 stated that at the time Mr. Mwanza conducted the Survey, the 1st Defendant was already there; that there was no Record or Survey of 1912 at the time of the Survey in March, 2023; and that the point of reference were beacons established by Mr. Mwanza, although some were missing. He said the Survey was not concluded because of the hostile situation and that Mr Mwanza is deceased. PW2 confirmed that the 1st Defendant has a Certificate for Farm No. 9565 Chirundu; that it was signed by Registrar; and that there was no claim before Court that the Certificate of Title was wrongly issue.

3.17 In re-examination, PW2 stated that Mr. Mwanza, may not have found the beacons but that he used the coordinates of 1913 to establish where the beacons could have been. He averred that the beacons by Mr. Mwanza had been tempered with according to Mr. Mwika and Shamaoma, as reflected on page 2 of Report; that the Farm 9565 was within Farm 80a, hence the difference in distance of 4.8km and 5.3km.

- 3.18 PW3 was **Dennis D. Vlahakis**, who testified that he received a letter from D. Fuller's Lawyers, Messrs Sharpe and Howard, asking why he was interfering with their client. He averred that he had stopped the Surveyor for Mr. Fuller who was encroaching on Farm 80a, Demetra Farm, because where he met the Surveyor, it was in Farm 80a Demetra Farm. That after the Surveyor left, he took it for granted that he stopped surveying.
- 3.19 PW3 averred that he didn't see anything apart from Mr. Fuller taking to him the Title Deed to the land showing that he had title to the land and that he did not attend any meetings with Chirundu Bream Farm, which is owned by Mr. Fuller.
- 3.20 In cross-examination, PW3 responded that Mr. Fuller showed him a Title Deed to the piece of land in respect of Farm 9565 Chirundu and that he had an encounter with the Surveyor between 1989-1999.
- 3.21 He vied that he had lived on Farm 80a from birth; that he was aware of what Chirundu Bream Farms was doing when they started operating from there; and that there are successful businesses of bream farming and bananas from the late 1990's. He stated that Farm 9565 is not adjacent or neighbours to Farm 80a but in Farm 80a, and that he had not ever seen the original beacons placed in 1913 by Mr. Fairweather.

3.22 PW3 responded that he was aware that the owners of Farm 80a had an obligation to erect beacons from as far as 1913 and that Mr. Mwanza did not find the original beacons by Mr. Fairweather. PW3 conceded that the 1st Defendant had been given a Certificate of Title as of January 1999. He added that the instructions to Mr. Mwanza were made by his brother Shatis; that the registered owner was his grandfather Demetra then to Nakitas and Paul. He said that Shatis Vlahakis has never been registered owner of Farm 80a Chirundu.

3.23 In further cross-examination, PW3 stated that as at May, 2001, Nakitas was alive and that if beacons had been on Site, it would have still been possible for another person to encroach. He averred that beacons are to determine boundaries and it is difficult to determine the boundary without them. PW3 said that he told the Surveyor that he was in Farm 80a; and that Mr. Mwanza conducted a Survey in 2001.

3.24 In re-examination PW3 testified that the 1st Defendant was wholly in Farm 80a, and partially in Farm 80a. He added that there was an encroachment because Chirundu Breams Farm was given elsewhere and not 9565.

3.25 The fourth Plaintiff Witness was **Glen Malwa Mwika**, (PW4) a licensed Land Surveyor who testified that he also consults with the Government on the Land Title Program. He stated that in 2001-2003, he was

serving as Land Surveyor under the Surveyor General's Office under Cadastral Surveying Section.

3.26 He said that he received instructions relating to the Properties Farm 80a and 9565 Chirundu to determine for Surveyor General, whether there was encroachment between the two Properties.

3.27 He said that in order to execute the exercise, the procedure they established was that they would only go and deal with an encroachment if both Parties or their representatives were present. He averred that he had to assemble the available Records relating to the two Properties. He stated that for Farm 80a, he run into problem because he could not find the originating documents anywhere. He said that there was an entry at Lands that the Farm did exist but no Record as to the origination of the Farm.

3.28 PW4 told the Court that he then recalled that National Archives would have Government Records and upon requesting, he found that they did have Records going all the way to 1907 and that there were Survey Records. He averred that upon checking those Records, he found that a Survey had been done by a Mr. Fairweather and that at the time, Mr. Fairweather did not have reference coordinates unlike today.

3.29 He vied that the Records referred to the confluence of the Kafue River and Zambezi River as a start point and that it was of utmost importance that the

significance of the confluence was noted because professional surveyors should not be ambiguous.

3.30 PW4 stated that Mr Fairweather specifically said that Farm 80a started 3 miles from confluence of these rivers and he was therefore able to complete a Desktop analysis, meaning that he was able to plot Farm 80a relative to the confluence of the 2 rivers and that he was able to plot Farm 9565.

3.31 PW4 testified that from the Desktop analysis, Farm 9565, is completely engulfed in Farm 80a. He averred that the next step was to go on the ground and engage the owners to show them and that he needed them to be present when he did the exercise.

3.32 He said that his first task was to allow the owners of the Farms to show him what they understood to be their boundaries because he wanted to capture what they understood and later show them the actual relationship. He vied that he also drew their attention to the fact that part of reference would be the confluence of the rivers.

3.33 He averred that three miles along the bank was about 4.8km and he was able to plot as Mr. Fairweather stated and that his task was to demonstrate to the owners of the two Farms their respective positions. He said that he explained to the Parties what he was going to do.

3.34 PW4 stated that one of the Parties was unwell but that he appointed a representative and that they went

to the confluence and he measured with a GPS Point. He said that he then asked the Vlahakis brothers to tell them where they understood their Farm started, bearing in mind that he was looking out for the 4.8 kilometres. PW4 stated that when they reached the 4.8 kilometres, Mr. Vlahakis took him to a point further to about 5.2 kilometres.

3.35 PW4 testified that after they did the exercise, they run into hostilities from villagers and as they were not safe, he did not complete the exercise on the ground. He, however, stated that he had sufficient information to guide him and other Surveyors that would come after him. He stated that it is their professional obligation to leave Record traceability and replications.

3.36 PW4 said that he was 100% sure that he had enough information even though he had not completed the physical exercise on the ground but from plotting the two Farms, it was clear that there was an encroachment.

3.37 PW4 testified that in his Report, he quoted and referenced documents that he had referred to. He stated that he noted the Survey Diagram which describes Farm 9565 shows the area around as the customary land. He stated that he did refer to the two Maps on page 15 of the Plaintiff's Bundle of Documents and also referred to the Certificate of Title

21144 for Farm 80a which had a Lease Agreement and a Diagram.

3.38 The Witness further stated that he also referred to Certificate of Title for Farm 9565; the Lease Agreement and Survey Diagram inside it. He vied that the original Diagram for Farm No. 80a, in the Survey of 1913 has old measurements. He added that referred to the Permit of occupation on No. 4, which he got from National Archives.

3.39 PW4 testified that he had an opportunity to scrutinise all the documents on Record, that is, items No. 7 and 8, and that Item 7 was Certificate of Title for 80a, and that of interest to him was the Survey Diagram which was captured on 1528 D₄ and 1628B₂. He averred that the Certificate of Title had the same diagram but that the Diagram on item 7 Supersede was the one under Item 5 on Page 15 of the Plaintiff's Bundle of Documents.

3.40 He explained that Supersede Diagrams are diagrams with empirical measurements that are used to replace the old Diagrams that had old measurements like feet, chains and acres. He vied that the 1913 Diagram had measurements in chains in the diagram originally produced by Mr. Fairweather but that the Diagram today is in units like meters and not feet.

3.41 He said that he was therefore not surprised to see the Supersede Diagram in the file Title Diagram No., 5356/2001, Supersedes Diagram of 80A on Page 23

of the Plaintiff's Bundle of Documents. He said that in creating a Supersede, they directly convert the figures and that there should be no change in the distances. PW4 vied that though he was the Lead Surveyor, his colleague, Dr. Hastings Shamaoma assisted and co-signed the Report.

3.42 In cross-examination on Site, and when asked if he had been able to put the measuring gadget at the confluence of the two rivers, PW4 responded that he did not, but that he was able to pick the point and started to work backwards. He stated that he referred to the Report of Mr Fairweather which said three miles from the confluence of the 2 rivers.

3.43 He stated that the Document on Page 23 of the Plaintiff's Bundle of Documents was part of the Survey Record which should have the Survey Report, Survey calculations in establishing the property, a Survey Diagram and a Working Plan which comes as a bundle. He stated that in his Report dated 19th March, 2003, he had referred to 8 documents as reflected on Page 15 of the Plaintiff's Bundle of Documents and includes the Permit for Occupation of Farm 80a in July, 1907, which also included a written description and a Sketch Plan for the Farm 80a.

3.44 PW4 stated that Mr Fairweather did place a beacon on the point three miles from the confluence marked "H" in the Survey Diagram at Page 32 of the Plaintiff's

Bundle of Documents but that he did not find it when he went there in 2003. He added that it was the responsibility of the owners of the land to make sure that the beacon was in place. He responded that *Clause 11* on Page 31 of the Plaintiff's Bundle of Documents required the Plaintiff to fence off the Property but that when he went there they had not fenced it and he could not confirm that all the 4 beacons were not there as he had not completed the physical work on the ground.

3.45 He averred that he physically went to the Property to ascertain and determine the features on the ground that the Surveyor had put in his Report to ensure consistency but that he did not succeed as he was interrupted and that he did not prepare a Survey Diagram.

3.46 With respect to the allegation by the Plaintiff in Paragraph 10 of the Amended Statement of Claim that there was a Survey Diagram prepared in 2003, the Witness responded that it was a Supersede. He said he had prepared the Report for the Surveyor General but did not know whether any action was taken.

3.47 In continued cross-examination, PW4 stated that he had come across a Certificate of Title for Farm 9565 belonging to the 1st Defendant, issued by the Registrar of Lands which was valid and that as part of the validity, it had a Survey Diagram prepared by

the 2nd Defendant and duly approved by the Surveyor General. Further that based on his vast experience, the Chirundu Bream Farm was in lawful possession of Farm 9565 and entitled all the associated rights as at the time of Survey in 2003.

3.48 PW4 explained the procedure of obtaining land under customary law to getting a Certificate of Title and that based on his Desk Analysis and the Records from Ministry of Lands, the 1st Defendant had followed with all requirements for it to obtain title. He admitted that the boundaries of the river shift over time including seasonally.

3.49 In responding to the Certificate of Title for Farm 80a and the Report by Mr Mwanza, PW4 reiterated that a Supersede Diagram has the same information as the original Diagram save that the units of measure change. PW4 stated that he could not confirm that there had been conflicting Reports with regards to the alleged encroachment of Farm 80a by Farm 9565.

3.50 When referred to page 47 of the 1st Defendant's Bundle of Documents containing a Report by a Mr Chunga, PW4 stated that the former had been his senior and that the former had indicated that he could not establish if Farm 9565 encroaches on Farm 80a because there were no beacons. When referred to the Diagram on Page 6 of the 1st Defendant's Bundle of Documents, PW4 also confirmed that the

Original Diagram had no beacon description while the Supersede Diagram by Mr. Mwanza had.

3.51 In continued cross-examination by Mr Chikwari, the 2nd Defendant, PW4 stated that the Survey which he got from the National Archives was prepared by Mr Fairweather but that he did not know who prepared the Sketch Map. He stated that Site Plans are prepared by different people and approved but the Survey has to be based on Approved Site Plans.

3.52 PW4 stated that after he reached the three miles point, he proceeded 4.8 kilometres because Mr. Fairweather had other description such as Umairi Island and another island one could refer to as it is a triangulation of the features. He said that the islands still exist in their original positions *albeit* they were under water and were not coordinated but reflected on the Sketch Plan. PW4 also stated that it was highly unlikely that he could find beacons placed on the Property in 1912 because of human activity.

3.53 PW4 also stated that a Surveyor would be able to approximate boundaries of a Property and its exact location when given a Survey Report and its details and that he used the Survey Records for the subject Farm from the National Archives.

3.54 In re-examination, PW4 testified that surveying is an exact science and that he was comfortable with the pre-work they had done and that although they did not complete the physical exercise, his conclusion

that Farm 9565 was enclosed in Farm 80a was on firm ground. PW4 added that he did not prepare a Survey Diagram as the survey is done once unless the Diagram is cancelled. He stated that the absence of physical description on the first diagram were of no effect on the Supersede as the Supersede Diagram was based on a new format.

3.55 The 1st Defendant opted not to call any Witnesses.

3.56 **Mr. Alex Chikwari**, (DW) the 2nd Defendant, testified that he is a Land Surveyor and that in 1998 he was contracted by Mr. Fuller of Chirundu Bream to carry out Cadastral Survey of Farm 9565. He stated that they drove to the proposed Farm area which was vacant at the time.

3.57 DW said that having done his research, he found out that within the vicinity of the Mr Fuller's Farm, there was an already surveyed Farm 80a so they went to a place called Machebele. He added that they were assigned Mr Dennis Vlahakis to show them the beacons of his Farm but that they searched to no avail, including along the Zambezi River bed and on the opposite side on the road going to Chiyawa.

3.58 DW added that they kept searching in vain but met Mr Constantino Vlahakis, who told him that the Farm 80a ends around the area near Machebele and that the boundary passed behind Harry's house going northwards. He said that he measured the distance from where they located Mr Fuller's Farm to see the

distance between the two Farms. He added that the distance he measured was more than the distance shown for Farm 80a and that with that measurement, he was satisfied that Mr Fuller's Farm is outside Farm 80a.

3.59 DW testified that they then continued with the survey, placed all the beacons and prepared all necessary documentation, that is, the calculations, field measurements, the Working Plan, Survey Diagrams and the Report itself. He added that these Survey Records were submitted to the Surveyor General's Office for examination and approval of final Diagrams.

3.60 DW stated that the first thing he did was to look for beacons of the Property which he needed to connect to and it later transpired that the beacons for Farm 80a were not placed and that is why there is no beacon description on the Diagram. He stated that the beacon description on the Diagram is very important so that no mistake could be made for the exact position of the beacon. He said that Farm 80a was not the only one that did not have beacon descriptions as there were some other properties where they did not place beacons and one could not find beacon description.

3.61 DW stated that his work included all the developments on Farm 80a, including the burial site which is within the subject Farm. He added there was

Farm 7059 on the southwest side on Farm 80a which had been surveyed and approved apart from Farm 9565, which means that Farm 80a is sandwiched between the two Farms. He also stated that if one had to verify the total hectarage of the land between the two Farms, that hectarage would be more or less equal to Farm 80a considering the changes in the river boundaries.

3.62 DW said that from what he knew, to replace the original Survey beacons is an uphill battle because there are changes and that the information available was not sufficient to do so.

3.63 On allegations of negligence, DW stated that if he had ignored the existing beacons, he would accept the negligence but that there was nowhere he could find beacons of Farm 80a. He also stated that he did not find any numbered and Approved Site Plans for Farm 80a to which he could have referred. He said that he had to use the information available to do his survey so as not to fail in his duties he had been hired to do.

3.64 He added that if he had relied on the beacons placed by Mr Mwanza, a lot of land would have been left out of Farm 80a. He stated that the Survey he carried out was proper hence the approval of the final diagrams. He reiterated that he was not negligent as he had consulted the owners of the Farm.

3.65 In cross-examination, DW stated that he has been practicing as a Land Surveyor from 1973; that he had

trained at the Zambia Institute of Technology (renamed Copperbelt University) and that he was senior to Glen Mwika (PW4).

3.66 He responded that before he went to the Farm, he used a Topographic Map whose actual number he could not remember and Sheet 1528D₄ and 1628D₄, as well as the Certificate of Title for Farm 80a which had dimensions in “chains”.

3.67 DW stated that there was no other Survey connected to Farm 80a within the vicinity as he could have used those to help replace the beacons for Farm 80a. He stated that if there had been a Survey on the next property connected to Farm 80a's beacons, they could have worked in reverse and placed the beacons for Farm 80a but that there was none. He added that there was Farm 7059 that was surveyed in 2000, but he did not know who surveyed it *albeit* the Diagram was signed by the late J.G Nyangulu. He stated that the responsibility of maintaining surveyed beacons lay with the owner of the Property.

3.68 DW added that it was difficult to re-allocate the boundaries of Farm 80a as the Coordinates on the Survey were localised and not in the National System. He added that in Mr Mwanza's Report, there was no mention of the confluence of the Zambezi and Kafue Rivers but only talks of the Kafue River. He testified that the confluence of the rivers shifts depending on

the time one goes there and that the confluence in 1910 and 2003 cannot be the same.

3.69 He averred that Mr. Mwanza's Report did not state which side of the Kafue River the 4.8. Kilometres was, or 3 miles, referred to and there was no mention of the Zambezi River. He responded that the document on Page 29 of the Plaintiff's Bundle of Documents did not refer to any property number; did not have a title, or the name Fairweather and appeared to have been prepared in 1910.

3.70 When referred to Pages 15-17 of the Plaintiff's Bundle of Documents and the Finding that there was encroachment, the Witness responded that to establish encroachment, the Surveyor needs to look at the existing beacons of a particular property, in this case, Farm 80a then plot them in relation to the Farm purported to be encroaching and not to use Sketch Plan. He added that before a Sketch Plan is numbered, there are a lot of checks to ensure that there are no encroachments. The Witness also explained what a Supersede Diagram is as alluded by PW4.

3.71 DW also testified that a comparison between the Original Diagram and the Supersede Diagram prepared on 29th October, 2001, showed the latter had river data while the other one did not. He added that the information is supposed to be same unless there are some new dimensions done by the

Surveyor. That Mr. Mwanza referred to a Resurvey of Farm 80a and that he had replaced the old beacons but at the time DW carried out the Survey, there were no beacons.

3.72 When referred to the Particulars of negligence in the Amended Statement of Claim, DW denied the allegations and stated that despite Denis Vlahakis telling him that he was in their Farm, he needed the actual physical position. He stated that the lack of beacon description by Mr. Fairweather meant that one would not know what type of beacon was put.

3.73 He responded that relying on Mr. Mwanza's Report meant leaving out the burial site and a big portion of the fertile land and that, that would essentially shift Farm 80a from its original position. He stated that when he started the Survey he was accompanied by representatives from the Plaintiff's family.

3.74 In cross-examination by the Plaintiff's Counsel, DW stated that he carried out research before embarking on the exercise, including getting the calculations for Farm 80a, but that he could not get the Sketch Plan and the work Plan; that he only got the consistency showing the coordinates and size of the Farm.

3.75 DW responded that he went to the owners of the Farm 80a and asked if they knew where the beacons were so he could start the survey. He said that Mr Dennis Vlahakis was helpful as he claimed to know where the beacons were but that what they found was not

a land survey beacon but a road sign post which was not up to the standard they use. He reiterated that they did not find any beacons and that he also met Mr Constantino Vlahakis who told him that the boundary was behind Harry's house. He stated that he used that information to measure the distance between Mr Harry and Mr Fuller's Farm and admitted that the measurements were solely done based on the information given by Mr Constantino Vlahakis.

3.76 When asked if it is practice to rely on the information as given by the owners, DW agreed, stating that those people had stayed on the Farm longer than anybody else. He added that having been satisfied of the distance between Harry and Mr Fuller's Farm and that he did not create an encroachment, he prepared a Survey Diagram.

3.77 DW stated that a Survey Record comprised field measurements, calculations and drawings relating to a particular property and these are submitted to the Survey Department and become Government Property. He averred that a Survey Report contains a Report on how the Survey was carried out and the findings but that his Report was not before Court

3.78 Regarding the information that he had gathered on Farm 80a, he stated that he got the definition from the Ministry of Lands, Survey Department to ascertain the boundaries of Farm 80a as shown in the Survey Diagram but that he was unable to do so

in the absence of beacons. DW said that Mr Vlahakis indicated that there was an encroachment on Farm 80a but for him to believe, he had to see the beacons although relied on the latter's information as regards the boundaries of the Farm 80a to do his measurements. DW stated that from the measurements he did, there was no encroachment.

3.79 DW in his continued testimony confirmed that at the time the Reports by Mr Mwanza and Mr. Mwika were prepared, he was working for the Ministry of Lands; that while working he never came across the information by Mr Fairweather; and that he did not agree with Mr Mwanza, Mwika and Shamaoma's Reports as he wanted proof that it was Mr Fairweather's writing.

3.80 Asked if he was disputing Mr. Fairweather's Report, DW stated that the document on Page 32 of the Plaintiff's Bundle of Documents did not indicate the distance of 3 miles but that he had it when he went to the Survey Department to gather information on Farm 80a, and when he met Mr. Vlahakis. He said that he did not go back to verify his data after reading Mr. Mwanza and Mr. Mwika's Reports.

3.81 The Witness stated that he had conducted the Survey for Farm 7059 on Mr. Harry Vlahakis' instruction and it is a Subdivision and that Farm 80a is sandwiched between Farm 7059 and Farm 9565.

3.82 DW stated that he was not negligent as he had exhausted everything in trying to find the original beacons; that the other Surveyors also could not find them; and that he did not want to delay his client in surveying the plot. He stated that he had taken a week in trying to verify the beacons and had only met Mr Vlahakis once in relation to the Survey but that they were staying at the latter's Lodge.

3.83 In re-examination, the Witness stated that while it was being made to show that the Reports of Mr. Mwanza and Mr. Mwika were 100% correct, the position of Mr. Chunga's Report was being ignored.

4.0 SUBMISSIONS

4.1 The Plaintiff and the 1st Defendant filed submissions in support of their respective cases while the 2nd Defendant opted to rely on the evidence on the Record. The Plaintiff, in his copious submissions averred that the Plaintiff has had Certificate of Title for Farm 80a for many years which contains a Survey Diagram indicating that it was surveyed by Mr. W.G. Fairweather in 1913 and also describes the total area of the Farm.

4.2 It was submitted the Plaintiff had produced two Survey Reports, Mr R. Mwanza who found that Farm 9565 encroaches on Farm 80a and that the Survey team adopted the data that was used by Mr W.G Fairweather. That the second Report by Mr Glen Mwika and Shamaoma which was commissioned by

the Plaintiff and the 1st Defendant considered, Mr Mwanza and Mr Chunga's Reports and determined that Farm 9565 had encroached on Farm 80a. Reliance was placed on the cases of **Lubungu v Obby Kapongo and Others** ⁽¹⁾ and that of **Hildah Ngosi v the Attorney General** ⁽²⁾, for the position that squatters build at their own risk and that the Plaintiff is entitled to possession of the developments made on the land.

- 4.3 Counsel submitted that the possession of Farm 9565 by the 1st Defendant was wrongful and that by virtue of the encroachment of the Plaintiff's land, the Plaintiff is entitled to recover damages for trespass.
- 4.4 The cases of **Shell and BP Zambia Limited v Conidaris and Others** ⁽³⁾ and that of **Yusuf Valley v Ishmail Gheewales and the Attorney General** ⁽⁴⁾ were adverted to for the definition of Trespass and that the Plaintiff does not have to prove actual loss suffered. Further, that it is of no consequence that the trespass was as a result of mistake of fact or law.
- 4.5 Reference was to the cases of **Umeanyi v Ezeobi** ⁽⁵⁾, **Peter Militis v Wilson Kafuko Chiwala** ⁽⁶⁾ and **Valentine Webster Chansa Kayope v the Attorney General** ⁽⁷⁾ support of the claim for mesne profit for a Party in possession of land without any legal right.
- 4.6 With respect to the claim for damages for negligence, it was argued that the 2nd Defendant owed a duty of care to the Plaintiff to properly conduct a Survey and

that the manner in which he conducted the survey of Farm 9565 resulted in an encroachment which occasioned in the loss of part of the Plaintiff's land. It was stated that the 2nd Defendant did not submit the Survey Record and Survey Report in order to verify his work as required by *the Land Survey Regulations*.

4.7 In response, the 1st Defendant submitted that the Plaintiff had not demonstrated sufficient *locus standi* to bring this action and that locus goes to jurisdiction of this Court to determine the Matter. In support of this assertion, Counsel made reference to the cases of **Frank Bwalya (Suing on behalf of himself and in his capacity as Director of Change Life Zambia Limited) v Attorney General, Katele Kalumba (Sued in his capacity as Secretary General of the Movement of Multi Party Democracy) Wiliam Banda⁽⁸⁾** and that of **Maamba Collieries Limited v Southern African Delivery Company (PVTY) Limited⁽⁹⁾**.

4.8 It was contended that there is no evidence submitted by the Plaintiff in this matter appointing him as the duly appointed Administrator for the late Mr Constantino Vlahakis and that although he had brought this matter in his representative capacity he referred himself as the beneficial owner of the land.

4.9 The 1st Defendant's Counsel also submitted that the Plaintiff has not adduced any cogent evidence to justify the claim for encroachment as the evidence on

Record shows that Farm 80a has no boundaries and that in the absence of beacons, it is impossible to determine the original location and boundaries of the Farm.

4.10 Counsel submitted that the Plaintiff's case hinges on the Survey of Report of Mr R. Mwanza and that of Mr Mwika and Shamaoma which Reports were unreliable because they are based on unlawfully conducted surveys, as well as erroneous and incomplete information.

4.11 It was argued that the first Re-survey by Mr Mwanza was produced at the instance of Shatis Vlahakis who was registered owner of Farm 80a at the time and that the 1st Defendant was not present which is contrary to **Section 16(1) of the Land Survey Act**. It was contended that the Report is purported to have been based on old Survey Records (S.R/13) supposedly used by Surveyor W.G Fairweather but that these documents were not produced in evidence.

4.12 It was submitted that the Reports stated that Farm 80a is 4.8 Kilometres from Kafue River but that it does not state its dimensions and that it was unlawful for Mr Mwanza to attempt to re-establish the original boundaries and re-allocate the beacons for Farm 80a.

4.13 In addition, it was argued that the errors were pointed out by Mr Chunga who stated that Mr. Mwanza did not indicate the basis to which the Re-

survey for the replacement of the beacons for Farm 80 were tied, in order to ascertain the validity and reliability of new beacons. He added that if Mr. Mwanza's Report is to be followed, then all developments of Fam 80a would be outside the Farm.

4.14 It was contended that this part of the Report was supported by the evidence of DW, Mr. Chikwari, who testified that the positioning of Farm 80a by Mr. Mwanza would shift its original position such that the developments including the burial site would remain outside the Farm. Further that Mr Mwanza's Report also violated **Section 40 of the Land Survey Act** and its *Regulations*. That therefore it is not a valid Report.

4.15 On Messrs Mwika and Shamaoma's Report, Counsel submitted that the Survey was not completed to include physical inspection on the ground and that therefore it was inaccurate. And further that Farm 80a has no original beacons as required by the **Land Survey Act** for surveyed land and thus its original location and boundaries could not be ascertained with certainty.

4.16 Counsel further stated that the 2nd Defendant performed his duties to survey Farm 9565 as a professional Surveyor and that the Plaintiff had not proved the alleged professional misconduct. The case of **Bolan v Frien Hospital Management Committee**⁽¹⁰⁾ was adverted to for the position that professional negligence can only be established by

expert testimonies from other Members of the Defendant's profession.

4.17 With respect to the 1st Defendant being termed a trespasser by the Plaintiff and therefore should pay damages, it was submitted that the 1st Defendant holds a valid Certificate of Title to Farm 9565 after following the due of the law in its acquisition. It was argued that even if there was encroachment, which was denied, the unlawful occupation would only be deemed to be from the date the Court made such a pronouncement and that the Plaintiff is not entitled to damages for trespass and mesne profits which can only be obtained against a trespasser.

4.18 It was further contended that it would be unjust enrichment for the Plaintiff to take possession of all the 1st Defendant's development without compensation, as the developments were done in the exercise of its rights as the Title holder of Farm 9565. That it would be unjust for the Plaintiff to benefit from its wrongful act as the entire problem was created by the Plaintiff's failure to erect and maintain boundary beacons for Farm 80a as required by the law.

5.0 CONSIDERATION AND DECISION OF THE COURT

5.1 I have considered the Pleadings and the Witness testimonies as well as the submissions by respective Counsel, to whom I am indebted. I note the submissions by the 1st Defendant that the Plaintiff lacks *locus standi* in this Matter having failed to

adduce evidence to prove that he is the duly appointed Administrator for the Estate of the late Paul Constantino Vlahakis.

5.2 Whilst I agree with the principle of *locus standi* goes to the jurisdiction of the Court to determine the Matter stated in the cited cases, it must be noted that the Plaintiff's Counsel had filed an *Ex-parte* application for alteration of Parties on 25th May, 2019, deposing that Constantino Paul Vlahakis had died on 12th July, 2012, and had in his Will dated 23rd July, 2008, appointed John Johannes Vlahakis as his Personal Representative.

5.3 Probate was granted by the High Court on 30th October, 2018, and consequently, this Court, in an Order dated 6th June, 2019, granted an Order for the alteration of Parties. Thus the Plaintiff, John Johannes Vlahakis is properly before this Court in his representative capacity for the Estate.

5.4 With respect to the substantive Matter, it is trite that he who alleges bears the burden of proving his allegation and in civil matters, this is on a balance of probabilities. This has been stated in a legion of cases including in the case of **Investtrust Bank v Ibrahim Diab**⁽¹¹⁾ wherein the Supreme Court stated that:

“it is of course peradventure that the burden of proof in civil matters lies with the Plaintiff or the party alleging, to prove his case on a balance of probabilities.”

5.5 After a perusal of the facts and evidence herein, I find that the following issues are common cause:

5.5.1 The Plaintiff is holder of Certificate of Title for Farm 80a while the 1st Defendant holds a Certificate of Title for Farm No. 9565; and both these properties located in Chirundu District of the Southern Province;

5.5.2A Permit of Occupation was issued to the Vlahakis brothers in respect to the land in dispute in 1907;

5.5.3 According to the Certificates of Title, the total area for Farm 80a is 518.0861 hectares while that of Farm 9565 is 105.5204 hectares respectively;

5.5.4 In 1998/1999, Farm 9565 was surveyed by the 2nd Defendant who stated that he did not find original beacons for Farm 80a;

5.5.5 The 2nd Defendant relied on information given to him by Mr. Constantino Vlahakis that Farm 80a ended around Machebele behind Harry's house;

5.5.6 The 2nd Defendant was warned by Mr. Dennis Vlahakis that he was encroaching on Farm 80a but that he proceeded with the Survey.

5.5.7 In 2001 Shatis Vlahakis requested for Government Surveyors to re-survey Farm 80a and determine if there was an encroachment and it was conducted by the late Mr. R Mwanza

who reported that Farm 9565 encroached on Farm 80a;

5.5.8 In 2002, Mr Fuller for the 1st Defendant requested for a re-survey, which resurvey was conducted by Mr Chunga also a Government Surveyor, who determined that in the absence of beacons for Farm 80a, it was difficult to determine its boundaries and whether or not there was an encroachment; and

5.5.9 Another survey was conducted by Messrs Mwika and Shamaoma in March, 2003 in the presence of the Plaintiff and a representative from Mr Fuller but they too failed to find beacons for Farm 80a and were not able to complete their physical resurvey due to disturbance by the villagers.

5.6 In my view, the following issues are in dispute:

5.6.1 Whether or not a determination can be made of the extent of Farm 80A in the absence of original beacons and other factors raised in evidence;

5.6.2 Whether in the circumstances a determination of whether or not Farm 9565 encroaches on Farm 80a can be made; and

5.6.3 Consequently, whether or not the 2nd Defendant was negligent in his survey of Farm 9565 entitling the Plaintiff to the reliefs sought.

5.7 The Plaintiff has alleged that the 1st Defendant's Farm 9565 encroaches on his land Farm 80a. In support of this allegation, the Plaintiff called four Witnesses and also filed various documentation to aid his case. The 1st Defendant did not call any witnesses but filed a Defence and submissions while the 2nd Defendant gave evidence in his defence and opted to rely on the Record for the Court to render its Judgment.

5.8 From the documents filed by the Plaintiff, it is evident the land in dispute was initially granted to the Vlahakis brothers in 1907 by way of a Permit of Occupation issued by the British South African Company (BSA). In 1914, the BSA issued an Indenture to Mr Demetrius Gregory Vlahakis in respect to the same land measuring 1280.223 acres and it was surveyed by Mr W.G Fairweather in 1913 showing that Farm 80a covers a total area of 518.0861 Hectares. I note the Certificate of Title dated 27th May, 1967 in the names of Nikitas Vlahakis and Constantino Paul Vlahakis who at the time were holding the property as joint tenants of the subject property.

5.9 The Record shows that in a resurvey of Farm 80a which was done by Mr R. Mwanza at the behest of Mr. Shatis Vlahakis, determined that Farm 9565 Chirundu encroaches on Farm 80a. In 2002, a Survey done on the request of Mr Fuller for the 1st Defendant and conducted by Mr Chunga indicates

that the Surveyor could not, in the absence of a Site Plan, any survey records or plans showing the location of Farm 80a, and in the absence of all the four original beacons or chains or stones on the ground, determine the actual position of Farm 80a. That it was his view that a fresh replanning of the area would be needed to come up with conclusive boundaries and that the existing beacons for Farm 80a as replaced by Mr Mwanza could not be relied on.

5.10 I also note that another Survey was done by Mr Glen Mwika and Dr. Hastings Shamaoma, and in his testimony, Mr. Mwika stated that in his Desk analysis, they were able to conclude that Farm 9565 encroached on Farm 80a. That they needed to conduct a physical Survey to confirm this in the presence of the Parties and that they were only able to do a preliminary survey on 18th March, 2003 but could not proceed with the full investigations due to the hostility from the villagers in the area.

5.11 Mr. Mwika listed the documents they had relied on for their preliminary investigation and came to the conclusion, *inter alia*, that based on the Sketch Plan for Farm 80a, the Topographic Maps and Survey Diagram, Farm 80a is located in the position as described in 1907, and that based on the proposed Site Plan of Farm 9565, the Topographic Maps and Survey Diagram showing the extent of Farm 9565, this latter Farm encroaches a 100% on Farm 80a.

5.12 The 1st Defendant and the 2nd Defendant vehemently dispute this position, alleging that the surveys relied on by the Plaintiff were unreliable or at best incomplete and ignored the findings in the Survey by Mr. Chunga.

5.13 In view of this conflicting evidence, the Supreme Court in the case of **Attorney-General v Kakoma**⁽¹²⁾ guide as follows:

“A court is entitled to make findings 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.”

5.14 From the Survey done in 1913 by Mr. W.G Fairweather, Farm 80a covers an extent of 518.0861 Hectares. In his evidence, PW4 stated that before conducting the Survey in 2003, and after failing to find Records for Farm 80a at the Ministry of Lands, he went to National Archives where he was able to retrieve documents in relation to Farm 80a which records go as far as 1907. That according to those Records, Farm 80a was 3 miles away from the confluence of the Kafue and Zambezi Rivers. He added that, with the Survey Diagram which was captured on 1528 D₄ and 1628B₂, and the topographic maps, he was able to plot the location of

Farm 80a which was on the same position as it was in 1907.

5.15 It is not in dispute that Messrs. Mwanza, Chunga, Mwika and Shamaoma did not find the original beacons for Farm 80a, and in this regard, the Supreme Court in the case of **W.R Willis v Umbria Company Limited**⁽¹³⁾, stated that:

“Beacons are very important in determining the extent of the land”

5.16 In the absence of beacons, how then does one determine the extent of a property? I have perused the documents referred to by Mr. Mwika as appear on pages 18 -33 of the Plaintiff's Bundle of Documents. The document on page 29 of the Plaintiff's Bundle of Documents shows that the location of the Property is 3 miles from the Kafue River as was stated in the evidence of PW4. I note this is a 1907 document which is the first diagram which was issued to the Vlahakis and shows the location of Farm 80a. Page 39 of the Plaintiff's Bundle of Documents also shows the Property was surveyed by Mr. W.G Fairweather.

5.17 I have also seen the Topographic Maps on pages 18 and 19 of the Plaintiff's Bundle of Documents which show the location of Farm 80a which Messrs. Mwika and Shamaoma stated that they used to plot the extent of Farm 80a. PW4 went further to state that he had used additional features such as Umairi

Island and another island he could not recall, and these exist albeit they are submerged in the water.

5.18 On the other hand, in his evidence Mr. Chikwari, stated that Mr. Denis Vlahakis showed him the beacon for the land in dispute but that he did not accept it as a standard beacon. That, he met Mr. Constantino Vlahakis who told him that the boundary was behind Harry's house. He added that he then measured the distance from Harry's house but left enough land to ensure that there was no encroachment and that this was the basis of his survey measurements.

5.19 He added that Mr. Denis Vlahakis told him that there was an encroachment but that he stated that he did not accept this. I have also considered the Report by Mr. L. Chungu that appears on page 47 of the 1st Defendant's Bundle of Documents where he undertook the survey, but it is bereft of detail as it does not refer to use of any documentation to establish the location of existing boundaries or lack thereof, save that he stated that the boundaries could not be established in the absence of original beacons.

5.20 I am also cognizance of the fact that the Surveyors that undertook the surveys are well qualified and did acknowledge each other's qualifications. I also note that Mr. Chikwari and Mr. Mwika both agreed that the river boundaries do shift over the years as well as being dependent on the season. It is not in dispute

that Mr. Fairweather did state that the starting point in determining the extent of Farm 80a was the confluence of the Kafue and Zambezi Rivers. According to Mr. Mwika, the three miles was translated into 4.8 kilometers and based on where Mr. Constantio Vlahakis pointed, this turned out to be 5.3 KM.

5.21 Taking to account these discrepancies in distances and measurements, it is my view that taking into consideration the size Farm 9565 being 105. 5204 hectares, these differences in distance would not greatly affect the findings that the latter Farm is completely inside or completely outside or partially encroaching on Farm 80a on the ground.

5.22 Thus on the totality of the evidence before me and despite the absence of the original beacons, I find that there is available documentary evidence including the documents of 1907, 1914 and the Topographic Maps produced by the Plaintiff to sufficiently show the extent of Farm 80a.

5.23 I am persuaded by Messrs. Mwika and Shamaoma, who did extensive research and relied on the various documents as appear on Page 15 of the Plaintiff's Bundle of Documents, that while they did not complete their physical survey, they have proved, on a balance of probabilities that Farm 9565 encroaches wholly on Farm 80a.

5.24 Consequently, I find that the Plaintiff is entitled to quiet possession of his land as per the holding of the

Supreme Court in the case of **Prisca Lubungu v Obby Kapango and Other and Ndola City Council**⁽¹⁾ wherein it was stated:

“that the Appellant as Title Holder to the property in question is entitled to quiet possession and enjoyment of the whole property.”

5.25 I also note that despite the issue of encroachment having raised early and prior to the issuance of the Certificate of Title to the 1st Defendant, the latter continued to put up developments on land that Plaintiff claimed to be his. The Supreme Court has stated in a number of cases the fate of those who build on someone else’s land and this was succinctly stated in the already cited case of **Prisca Lubungu**⁽¹⁾ and further citing the cases of **Trevor Limpic V Rachel Mawere and Another**⁽¹⁴⁾, and that of **Hilda Ngosi (Suing as Administrator of the Estate of Washington Ngosi) V Attorney General and Lutheran Mission (Zambia) Registered Trustees**⁽²⁾ as follows:

“In fact, we have in a number of cases in this jurisdiction held that a developer of land belonging to another does so at his/her own peril as he/she stands to lose the value of those improvements... we believe the principle in those authorities applies as much to situations involving fraud as to other forms of

unlawful occupation of land which could well be short of being fraudulent.”

5.26 Based on the principle of *stare decisis*, I accede to the Supreme Court authorities alluded to above and find that this a proper case in which to order the 1st Defendant to forthwith deliver up to the Plaintiff the property comprised in and known as Farm Number 9565 as it is wholly encroached on Farm Number. 80a ‘Demetra’ Farm’ Chirundu.

5.27 The next issue to determine is whether the Plaintiff is entitled to mesne profits. These have been defined in the *Black’s Law Dictionary* as:

“the profits of an estate received by a tenant in wrongful possession between two dates.”

5.28 This was elaborated on by the Supreme Court while citing the *Halsbury’s Laws of England* in the case of **Peter Militis v Wilson Kafuko Chiwala**⁽⁶⁾, that:

“What is mesne profits and when are they due? In Halsbury’s Laws of 3rd England, Vol. 28, 3 Edition at page 561, paragraph 1230, the legal position is that the landlord may recover in an action for mesne profits damages which he has suffered through being out of possession of the land. Mesne profits, being damages for trespass, can only be claimed from the date when the Defendant ceased to hold the premises as a tenant and became a trespasser. The action for mesne profits does

not lie unless either the landlord has recovered possession or the tenant's interest in the land has come to an end.”

5.29 The above explanations suggest that that mesne profits can only be claimed by a Landlord where a tenant continues to be on a property when the agreement has ceased. This was the position in all the cases cited by the Plaintiff's Counsel in support of this claim. In this matter and based on my findings herein, there was no such relationship as the 1st Defendant was not the Plaintiff's tenant which would entitle him to mesne profit. I therefore find no merit in this claim and I dismiss it accordingly.

5.30 The Plaintiff also seeks an Order for damages for trespass. Trespass was explained in the case of **Shell & B.P. Zambia Limited V Conidaris and Others⁽³⁾**; as follows:

“Trespass to land is an unlawful entry on land in the possession of another; a licence prevents the entry of the licensee from being a trespass and renders it lawful.”

5.31 Further according to the learned authors of the Halsbury Laws of England, at Paragraph 1396:

“Trespass is an injury to a possessory right and therefore, the proper plaintiff in an action for trespass to land is the person who was or who is deemed to have been in possession at the time of trespass.”

5.32 In the case in casu, the evidence shows that that the 1st Defendant was on the land owing to the Certificate of Title issued by the Commissioner of Lands.

5.33 However, it is my finding herein that the Certificate of Title was erroneously issued to the 1st Defendant as Farm 9565 is located on Farm 80a. This entails that there was trespass onto the Plaintiff's land. No evidence of the actual damage suffered by the Plaintiff, was adduced and thus it is my view that the Plaintiff is only entitled to nominal damages, for the trespass.

5.34 As to what nominal damages are, the Learned Author Harvey McGregor in McGregor on Damages cited Lord Halsbury who defined them at Page 281 as follows:

“Nominal damages is a technical phrase which means you have negative anything like real damage, but that you are affirming by your damages that there is an infraction of a legal right, which though it gives you no right to any real damages at all, yet give you a right to a verdict or judgment because your legal right has been infringed.”

5.35 Further, the principle on nominal damages was alluded to in a breach of contract by the Learned Authors of Halsbury's Laws at Page 567, *inter alia*, as follows:

“...while the innocent Party is entitled to damages as of right, to recover more than nominal damages, he must prove loss.”

5.36 The necessity to prove loss was also alluded to in the case of **J.Z Car Hire Limited V Chala Scirocco, Enterprises Limited**⁽¹⁵⁾, where it was stated:

“It is for the party claiming any damages to prove the damage.”

5.37 As earlier alluded to, the Record shows that no evidence was adduced to prove the damage by the Plaintiff as a result of the trespass. Thus, the only relief available to the Plaintiffs that can be awarded by this Court are nominal damages. Consequently, and taking into account all the facts in this case, it is my considered view that nominal damages in the sum of K5,000.00, are an adequate remedy.

5.38 The Plaintiff in his Pleadings alleges that the 2nd Defendant was negligent in the manner he conducted the Survey of Farm 9565, and listed the Particulars of the alleged negligence in the Amended Statement of Claim.

5.39 In the famous case of **Blyth v Birmingham Waterworks Company**⁽¹⁶⁾, Alderson B, defined negligence as follows:

“Negligence is the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human

affairs, would do, or doing something which a prudent and reasonable man would not do.”

5.40 According to the authors of Clerk and Lindsell at Paragraph 8-04, there are four requirements to prove the tort of negligence and they are as follows:

“The existence in law of a duty of care situation i.e. one in which the law attaches liability to carelessness. There has to be recognition by law that the careless infliction of the kind of damage in question on the class of Defendant belongs is actionable; Breach of the duty of care by the Defendant, i.e. that he failed to measure up to the standard set by law; A causal connection between the Defendant’s careless conduct and the damage; That the particular kind of damage to the particular claimant is not so unforeseeable as to be remote.”

5.41 Further in the case of **Attorney General v Mwanza and Another**⁽¹⁷⁾ the Supreme Court stated thus:

“The position of the law in an action for the tort of negligence is that in order to determine whether an act is negligent, a claimant should not only prove that he or she is owed a duty of care, he or she must

also prove that duty was breached resulting in damage.”

5.42 It is not in dispute that the 1st Defendant engaged the 2nd Defendant, a qualified Land Surveyor to Survey Farm 9565 and the latter testified that in doing this he set up to ascertain the boundaries of Farm 80a. Based on the testimonies and the Survey Reports that were done, it is undeniable that the original beacons for Farm 80a were cardinal as the starting point. All the Surveyors were unanimous that the original beacons for Farm 80a could not be found.

5.43 As to who was responsible for maintaining these beacons, the “*Permit of Occupation*” from the British South Africa Company to the Vlahakis Brothers dated 1st July, 1907 and the “*Conveyance of Farm 80a Chirundu between the British South Africa Company and Demetrius Gregory Vlahakis*” dated 20th January, 1914 appearing on Pages 27 to 29 and Pages 24 to 26, respectively of the Plaintiff’s Bundle of Documents have similar provisions and the latter provides in *Clause 10* as follows:

“The Company does not undertake to point out the boundaries of the said land and the purchaser shall be bound to have the limits of the said land marked by conspicuous and permanent beacons to be by him erected and kept in repair at all angles of the land.”

Quite clearly, this responsibility lay solely with the Plaintiff and was not adhered to.

5.44 I also note that, the **Land Surveyor's Act** provides for the duties of Land Surveyor in **Section 10**, *inter alia* as follows:

"(1) A land surveyor shall-
(a) carry out every survey undertaken by him in such a manner as will ensure accurate results and in accordance with the provisions of this Act and any regulations in force thereunder;..."

5.45 I have also perused the *Regulation 11(1)* in the *Land Survey Regulations* referred by the Plaintiff's Counsel, which provides as follows:

"Before carrying out any survey a land surveyor shall provide himself with all available information in respect of any previous surveys of the parcel of land to be surveyed, and of all adjoining parcels of land"

5.46 Although the 2nd Defendant was not contracted by the Plaintiff, the above *Regulation* makes it clear that he owed the Plaintiff a duty of care to ensure that as he surveyed Farm 9565, he did not encroach on the neighboring Farm 80a and other adjoining properties. The Record shows that the 2nd Defendant accepted and solely relied on the boundaries as told to him by Mr. Constantino Vlahakis and that he did

not carry out any further research including looking at the previous surveys despite knowing of the existence of Farm 80a. He further ignored the warning from Denis Vlahakis that there was encroachment. All the facts show that the 2nd Defendant did not comply with his duties as expected of him in line with the **Land Surveyor's Act** and the *Regulations* as alluded to herein.

5.47 I, therefore, find that the 2nd Defendant acted below the standard of care of an ordinary skilled man professing to have a special skill and breached the duty of care he owed to the Plaintiff that resulted in the encroachment onto the Plaintiff's Farm.


5.48 As earlier alluded to in Paragraph 5.36 above and in the already cited case of **Attorney General v Mwanza and Another**⁽¹⁷⁾, it is the duty of the person claiming damages to prove the damage suffered. In casu the Plaintiff has not adduced any evidence to show what he has suffered damage as a result of the 2nd Defendant's negligence. I find that this claim fails and I dismiss it accordingly.

6. CONCLUSION

6.1 In the sum, I find that the Plaintiff has proved his case to the extent that Farm 9565 encroaches on Farm 80a and I so declare. He has also proved trespass and I award nominal damages in the sum of K5,000.00. The rest of the claims have not been proven on a balance of probabilities and are dismissed.

6.2 With respect to costs and taking into account my findings under Paragraph 5.43 herein and noting that the Plaintiff is not entirely blameless, I order that each Party bears its own costs.

Delivered the 24th day of May, 2024.



.....
S.M. Wanjelani
JUDGE