

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



2015/HP/1652

BETWEEN:

BATES NAMUYAMBA

PLAINTIFF**AND**

KUNDA CHIMAMBO

DEFENDANT

**Before Honourable Mrs. Justice M. Mapani-Kawimbe on the 8th day of
November, 2017**

<i>For the Plaintiff</i>	:	<i>Mr. B. Mosha, Messrs Mosha & Company</i>
<i>For the Defendant</i>	:	<i>Mr. H.H. Ndhlovu S.C, Messrs H.H. Ndhlovu & Company</i>

J U D G M E N T

Legislation Referred To:

1. *Land Survey Act, Chapter 188*

By way of Writ of Summons and Statement of Claim, the Plaintiff seeks the following reliefs:

- i. *An order of injunction restraining the Defendant from closing the access road.*
- ii. *A declaration that the Plaintiff and other road users have the right to use the access way as a public road.*
- iii. *Any other relief the Court may deem fit.*
- iv. *Costs*

The Statement of Claim discloses that the Plaintiff is the proprietor of Subdivision 2 of Subdivision B of Farm 298a, Lusaka. The Defendant owns a property adjacent to his. The Plaintiff avers that access to the properties is through Musuku road that has been in existence since 1959. The Defendant is first positioned in proximity, while the Plaintiff's property and the others are located thereafter and they access the properties driving past the Defendant's. The Plaintiff states that he acquired his property in 2000 and found the access road.

The Plaintiff avers that all properties located in the area adjacent to the access road are subject to a lease which was executed by the British South African Company and Dirk Cernelius Uys, which provides for the preservation and uninterrupted existence of all existing roads including Musuku Road. The Plaintiff further avers that on 10th August, 2015, the Defendant unilaterally and without regard to the other road users and the public at large issued a notice of closure of the access road, which acts are unlawful and unjustified.

The Defendant settled a Defence and states that Musuku road is private and it has never been an access road. Further, there is no access road, which advances past his property. He avers that his property is not open to the general public and Musuku road is meant for his sole use and his licencees. He avers that the Plaintiff has his own access road which he can use.

At trial, the Plaintiff **Bates Namuyamba**, called two witnesses. He testified as **PW1**. His evidence was that he owns Subdivision B/2/298A State Lodge, Lusaka East. His property shares boundaries with Subdivision 1/B/298 and Subdivision 3/B/298A. Subdivision 1/B/298A is on the left side, while Subdivision 3/B/298A is on the right. Further, that these farms are on the front of his property. His farm is on the same line as the forest reserve and there are two farms bordering his behind, which belong to Mr. Sikota and Mr. Chibesakunda. PW1 testified that the Defendant's property is known as Remainder B of 298A.

It was PW1's evidence that he bought his farm in 2000 from Mr. Dean Mungomba and the property was subdivided in 1988. There was a house built on it. Before he bought his farm, he

inspected it and used Musuku road, which was already in existence. The Defendant never objected to his use of the road. He added that the owners of the properties adjacent to his also use the same access road.

PW1 stated that the contractors engaged to build former President Kenneth Kaunda's residence in 1996 also used the same access road. Making reference to the site map in the Defendant's Bundle, PW1 testified that his property is accessed from Musuku road through the Forest Reserve. He also testified that in 2015, the Road Development Agency (RDA) maintained the road. Before then, the road was maintained by him and the owner of Subdivision 3/B/298A through donations of K1,000.000 each, after the rainy season. In addition, the late Mr. Lawrence used to avail his grader for the maintenance works.

PW1 testified that the Defendant never made any donation for road maintenance but alleged that the access road was his private road. According to PW1, the Defendant gave notice to the public that he planned to remove the poster which read Musuku road to substitute it with Musuku close. He then stopped people from

using the road although he was never prevented. The Defendant further put up a stone where he indicated that Musuku road was a private road at points A and B of the site map. This was after RDA marked the road.

PW1 went on to state that the RDA's intention was to upgrade the road from point A to E on the site map but were prevented by the Defendant at point B, where his farm lies. Initially RDA ignored the Defendant but he wrote a letter to the Forestry Department alleging that the Forest Reserve had been encroached.

According to PW1, RDA stopped its work and the Forestry Department inspected the site. It asked RDA to build a new road along the fences of the farms, which would also act as a fire break. When RDA commenced its work, the Defendant wrote a letter of complaint to then Deputy Minister, Ministry of Environment and National Resources.

In response to the Defendant's letter, PW1 stated that the Deputy Minister constituted a team to verify the situation and later authorized the works. PW1 stated that the Defendant went to the

Zambia Environmental Management Agency (ZEMA), where he lodged another complaint and works were halted until an Environmental Impact Assessment was concluded. PW1 added that if Musuku road is closed, he would have no access to his property. Further, that the area marked by the Defendant on the site map as his access road was on someone's property. His access to this property was through Musuku road.

It was PW1's testimony that the lines between subdivisions 16 and 17 on the site plan were plotted by the Defendant and not the Survey Department. Besides, the space between the fences of subdivision 16 and subdivision 17 was less than a metre. PW1 testified that the Defendant never provided him proof that the access road was on his property nor survey diagrams to show the boundaries of his farm.

In **cross-examination**, PW1 stated that the site map at page 10 of his Bundle bore a date stamp of Lusaka City Council (LCC). He obtained it from the Defendant's Bundle and did not verify the documents with LCC. PW1 further stated that page 4 of his Certificate of Title did not show that his property had an access

road. Mr. Lawrence never told him that the Defendant contributed to the maintenance of the road. PW1 added that he requested the RDA to work on Musuku road after he complained that it had been omitted on the schedule of roads that were being upgraded in the area. He stated that it did not make sense for the RDA to spend public money to maintain a private road.

PW1 added that the Ministry of Lands could not create plots without access roads and the Defendant's site map was not prepared by the Surveyor-General. The letter at page 4 of the Defendant's Bundle was only brought to his attention fifteen years after he occupied his property. The Defendant never stopped him and the others from maintaining the road.

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

PW2 was **Joseph Mwiinga**, a Civil Engineer at the Roads Development Agency. He testified that in 2015, he was working at the Regional office of the RDA in Lusaka. He was tasked to manage the Musuku road project. The road was one of those earmarked for

upgrading to a standard gravel road being an access road with a number of users.

PW2 stated that Musuku road is 3 km long and it was graveled up to 1.5 km, where the Defendant's farm lies. He stated that the RDA worked on Musuku road following a request from farm owners to have it graded after the main road from Leopards Hill into State Lodge area had been upgraded to bituminous standard.

PW2 testified that as RDA was executing its works, it was asked to get authority from the Forestry Department, when it reached the Forest Reserve. The Forestry Department called for a stakeholders meeting and approval was given to build a road along the forestry boundary, which would act as a firebreak. PW2 stated that the RDA went on to build the road but were stopped by ZEMA because an EIA had not been carried out. PW2 stated that RDA carried out an EIA and submitted the report to ZEMA. ZEMA responded with comments and the report was resubmitted in April, 2017. RDA is awaiting ZEMA's response and the project is still ongoing.

PW2 stated that he not aware of the letter at page 4 of the Defendant's Bundle and added that the 1.5 km rehabilitation was funded by the National Roads Funds Agency (NRFA). Further, that RDA is mandated to build, construct and maintain public roads. PW2 stated that the Defendant did not protest when the road was constructed from point A to B, where his property rests. He added that it was not RDA's mandate to construct a road from point A to B on the site map because access would not be provided to reach point E.

In **cross-examination**, PW2 testified that PW1 was one of the persons who wrote to RDA to work on Musuku road. There was a meeting of stakeholders called by the Director of Forestry, which was attended by the Provincial Forestry Officer, Mr. Namulambe, Mr. Lawrence and PW1. The Defendant was also invited to the meeting. After the meeting RDA was given approval to construct the road along the Forest Reserve at the boundary and not in the forest.

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

The Defendant **Kunda Chimambo** called two witnesses. He testified as **DW1**. His evidence was that he moved onto his property in 1981 after he acquired it from the Commissioner of Lands. He was shown the dimensions of his property by the officials from the Ministry of Lands. The access road in dispute according to the site map lies from the east of State Lodge road and 800 metres into his property. The access road passes between subdivisions 19, 22 and 7 and subdivision 20, 21 and 6. DW1 testified that he created the road using his resources and with the help of his colleagues from his former work place, a civil engineering company.

DW1 testified that beyond his property, there was a gazetted Forest Reserve, which is the source of Chalimbana River and its tributaries. DW1 stated that when the Government started building former President Kaunda's house, there was no access road and they trespassed on his property and the Forest Reserve with heavy duty trucks. It was DW1's testimony that he complained to then Director RDA and Permanent Secretary, Transport, Works Supply and Communications, who promised to allocate K400 million to rehabilitate his road, which is 1.5 km from point A to B on the site map. He confirmed his evidence by reference to the letter at pages

3 and 4 of his bundle. DW1 stated that at the end of 2015, the RDA turned up to rehabilitate the 1.5 km stretch and he issued a notice to the public that he was closing his private road.

In **cross-examination**, DW1 stated that his property is the Remainder B of Subdivision 298A and he had title. The access road was in his property and there was no road reserve in front of his property. He got the site map from the Ministry of Lands and created the key on it, which proposed access roads on subdivision 16, 17 and 18. He did not consult the owners of the properties nor the Surveyor-General. He did not know how else PW1 could access his property. DW1 stated that his property was created in 1957 and Mr. Mungomba moved onto his property in 1989. He allowed Mr. Mungomba to access his property through his private road. DW1 testified that the owner of subdivision 3/B/298A and PW1 were trespassing through his property and the Forest Reserve. He conceded that he complained to then Deputy Minister over road construction works beyond his property.

DW1 added that the access road was not constructed to reach former President Kaunda's property. He could not prove that the

RDA allocated funds to rehabilitate 1.5 km of road. He testified that he, Mr. Barry Billcross and Mr. Miltay used to maintain the road.

In further **cross-examination**, DW1 stated that the dotted lines on the site map referred to a farm road, which was not an official road but used to patrol the Forest Reserve. DW2 stated that the official road led to Chalimbana in 1981, when he acquired his property and the path had disappeared. He added that the farm road was not on the survey diagram and all the persons using his private road were trespassing on his property.

In **re-examination**, DW1 stated that he produced the notices on the closure of his private road and distributed them to his neighbours. He maintained that the access road was a private road on his property.

Ethan Ngulube, a Senior Survey Examiner from the Ministry of Lands, testified as **DW2**. His evidence was that he is responsible for checking Government and private surveys for eventual approval by the Surveyor-General. DW2 testified that diagram 8421 produced in 1959, in the Certificate of Title showed the subdivisions

on the site map. Subdivision B of Farm 29a is bordered by two properties, namely Forest Reserve 27 and the Remainder of 298A. There was no road between B and C of subdivision B of Farm 298A. DW2 stated that the dotted lines on the Certificate of Title represented a public road picked at the time of the survey. It went beyond subdivision 9 of 298 towards farm 298A in the North and to the Remainder of 298A. The survey diagram showed that there is a road that separates the properties.

DW2 testified that the dotted lines were picked when the cadastral survey was done in 1959. He did not know if the road was still on the ground because he had not visited the site. DW2 stated that the site map at page 8 of the Defendant's Bundle was a draft and illustrated the number of subdivisions on Farm 298A.

In **cross-examination**, DW2 testified that the dotted lines on the survey diagram are for a motorable road, which could be used by vehicles. It is a public road even though it was described as a farm road and the public have a right to its use. He stated that the road cut through DW1's property and he did not know the current status of the Blauwbank extension. He added that there was a

fireguard or road reserve between the boundaries of the farms, which is also a road reserve. DW2 went on to state that, the fireguard was between the Forest Reserve and Farm 298A PW1's property did not have a road reserve according to the survey diagram. He testified that PW1's access to the property was through the forest front.

In **re-examination**, DW2's evidence was that where property owners do not agree on an access road, if none is provided, they could approach the planning authority to resolve the issue. DW2 reiterated that the farm road is a public road and it passed through surveyed properties. The road was in existence before DW1's survey diagram was drawn.

At the time of writing this judgment, only Learned Counsel for the Plaintiff filed written submissions for which I am grateful. I shall not reproduce them suffice to state that I will make reference to them.

I have seriously considered the pleadings, evidence adduced and the parties' submissions. It is incontrovertible that PW1 and

DW1's properties share boundaries and are located in the State lodge area. The access to PW1's farm is past DW1's farm. PW1's property is also surrounded by other properties including a Forest Reserve, which lays in front. DW1 does not deny that he closed the access road that leads to PW1's property. According to the cadastral survey, the access road has been in existence from 1959 and the occupants of Subdivision 1 of subdivision B of farm 298a and subdivision 3 of Subdivision B of Farm 298a and PW1 found the road on the ground.

It is further incontrovertible that the access road was maintained by some farm owners in the area until the Road Development Agency moved in to upgrade it to gravel standard. RDA did not complete its work because ZEMA demanded an EIA. From the evidence adduced, PW1 has all along used the access road, which passes in front of DW1's farm to get to his property. Thus, the issue that falls for determination is whether Musuku road is a private or public road?

DW2 testified that diagram 8421 in DW1's certificate of title was produced in 1959. It shows dotted lines, which represent a

public or motorable road picked at the time of the cadastral survey. He also testified that the public have a right to use the public road. DW2's evidence was corroborated by PW2 who testified that the RDA worked on Musuku road because it is a public road. Further, that the RDA only deals with public roads.

Section 2 of the Land Survey Act, defines a diagram as:

"A document containing geometrical, numerical and verbal representations of one or more parcels of land, the boundaries of which have been surveyed by a land surveyor, and which document has been signed by such surveyor or which has been certified by a Government surveyor as having been compiled from approved records of a survey or surveys carried out by one or more land surveyors, and includes any such document which at any time prior to the commencement of this Act, has been accepted as a diagram in the Registry or in the office of the Surveyor-General or his predecessors."

According to section 2 of the Survey Act, a survey diagram, is a document, which contains geometrical, numerical and verbal representations of a parcel of land and confirms the description of a property. Once certified by a government Surveyor, it becomes the authoritative description of a property.

In the present case, DW1 produced a certificate of title with a survey diagram showing the description of his property. I considered the survey diagram, which showed that provision was made for a farm or access road. This access road was created in 1959 and according to DW2 is meant for public use.

Based on that evidence, I find that DW1 misled himself into believing that the access road which passes through his farm onto portions of the forest reserve is his private road. According to DW2, an access road can take such course. DW1's site map is therefore of no value, moreso that he drafted it without the approval of the Surveyor-General. I find that the survey diagram remains valid and there is no basis upon which DW1 can convert a public road into his own private road.

I, therefore, hold and declare that PW1 and other road users have a right to use and access Musuku road. DW1 is immediately ordered to remove any obstructions that he has created on the public road.

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

Leave to appeal is granted.

Dated this 8th day of November, 2017.

M. Mapani-Kawimbe

M. Mapani-Kawimbe

HIGH COURT JUDGE