

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

2023/HP/1191

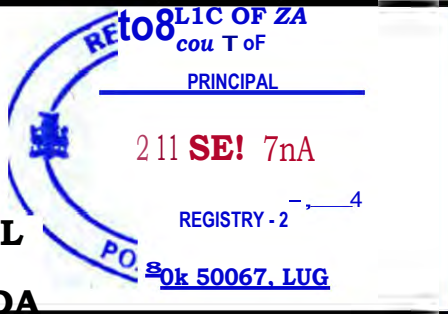
BETWEEN:

AARON BANDA

AND

LUSAKA CITY COUNCIL

SAYI KULEMELA BANDA



PLAINTIFF

1ST DEFENDANT

2ND DEFENDANT

**BEFORE THE HONOURABLE MR. JUSTICE S. V. SILOKA, ON
THIS 20TH DAY OF SEPTEMBER, 2024.**

For the Plaintiff *Mr. Chrispin Ng 'oma from Messrs. Chris &
Partners*

*For the 1st Defendant: Ms. V. M. Mwala & N Makungu - Lusaka City
Council*

*For the 2nd Defendant: Ms. M M. Banda, Legal Aid Counsel - Legal
Aid Board*

JUDGMENT

CASES REFERRED TO:

- 1. Victor Namakando Vs ZESCO (SCZ) Judgment No.18 of 2001;*
- 2. Zambia Revenue Authority vs Hitech Trading Company Limited
(SCZ) Judgment No 40 of 2000;*
- 3. Mutantika and Others Vs Chipungu (SCZ) Judgment No.13 of
2014;*
- 4. Lumanyanda and Another Vs Chief Chamuka and Others
(1988/89) ZR 194 SC;*

5. *Raphael Ackim Namung'andu Vs Lusaka City Council (1978) Z.R. 358 (H.C.);*
6. *JZ Car Hire Ltd Vs Malvin Chaala and Scirrocco Enterprises Ltd (2002) ZR 112 (SC);*
7. *Galaunia Farms Ltd Vs National Corporation Ltd (2004) R1(SC);*
8. *Antonio Ventriglia and Another Vs Finsbury Investment Limited*10 Appeal No 02/2019;
9. *Justin Mutale Vs William Mutale (SCZ Appeal No 141 2008) unreported;*
10. *Esnart Mumba vs Cosmo Mumba 2023/ HP/ 0092;*
11. *Owners of the Motor Vessel "Lillians Vs Caltex oil (Kenya) Limited 1989 KLR. 19;*
12. *Kansanshi Mining Plc Vs Zambia Revenue Authority SCZ Appeal No 143/ 2014;*
13. *Felix Mutati & Others Vs Winnie Zaloumis (suing as National Secretary of the Movement of Multi-Party Democracy) Selected Judgment No.31 2018;*
14. *Margaret Munenge Vs Mohameed Sinkala and Kenneth Mwila 2019/ HP/ 0820;*
15. *Hussein Safieddinne Vs Commissioner of Lands and 2 others Selected Judgement No. 36 of 2016;*
16. *Bank of Zambia Vs Tembo and Others SC No.5 of 200;*
17. *Zambia Railway Limited Vs Pauline S. Mundia Brian Sialumba (2008) Z.R 287; and*

18. *Development Bank of Zambia and KPMG Peat Marwick Vs Sunvest Limited and Sun Pharmaceuticals Limited 1995/ 97 ZR 187.*

LEGISLATIONS REFERRED TO:

1. *The Urban and Regional Planning Act No 3 of 2015;*
2. *The Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia;*
3. *The Housing (Statutory Improvement Areas) Act, Chapter 194 of the Laws of Zambia; and*
4. *The Subordinate Court Act chapter 8 of the Laws of Zambia.*

OTHER WORKS REFERRED TO:

1. *The Rules of Supreme Court of England, 1999.*

1.0 INTRODUCTION

1.1 This is a Matter commenced by a Writ of Summons dated 12th July, 2023, accompanied by a Statement of Claim seeking the following reliefs:

- i. An Order that the Defendants compensate the Plaintiff by paying K150,000.00 for illegal demolition of the wall fence, four roomed house as well as two roomed house.***
- ii. An order restraining the defendants or their agents or servants from trespassing or interfering with Plot***

Number 501k Chipata Overspill belonging to the Plaintiff.

iii. Costs of and incidental to these proceedings.

iv. Any other reliefs the Court may deem fit.

2.0 THE PLEADINGS

2.1 In his Statement of Claim, the Plaintiff averred that sometime in 2006, the 2nd Defendant sued his late father before the Lusaka Subordinate Court, claiming that Plot 501K had partly encroached his Plot.

2.2 He also averred that the Lusaka Subordinate Court dismissed the action for lack of merit and ruled that the said Plot 501K, belonged to the late Aaron Banda Senior and that no demolition of the building was to be carried out.

2.3 The Plaintiff averred that the 2nd Defendant, being dissatisfied with the Judgment of the Subordinate Court, went to complain to Lusaka City Council in 2012, five (5) years after the Judgment was passed.

2.4 The Plaintiff further averred that in 2012 the 1st Defendant called for a meeting between the Plaintiff and the Defendant. During the meeting the Plaintiff averred that the Judgment

delivered by the Subordinate Court was shown to the 1st Defendant, after which the 2nd Defendant was advised that he had lost the case and there was nothing the 1st Defendant could do.

2.5 The Plaintiff averred that after eleven (11) years, the 2nd Defendant and the 1st Defendant came to demolish the wall fence, 4 roomed house and a two roomed house all valued at ZMW150,000.00 erected on Plot 501K Chipata Overspill, which forms part of the estate of the late Aaron Banda Senior.

2.6 It was further averred that prior to demolishing the said structures on Plot 501K, the 1st Defendant was shown the Judgment which is in favour of the Plaintiff but the 1st Defendant ignored the Judgment and went ahead to demolish the structures, in order to satisfy the demands of the 2nd Defendant.

2.7 The 1st and 2nd Defendants entered appearance and filed their Defences. The 1st Defendant filed its Defence on the 17th of August, 2023 while the 2nd Defendant filed his Defence and Counterclaim on the 28th of July, 2023.

2.8 In its defence the 1st Defendant averred that it was not a party to the proceeding between the Plaintiff and the 2nd Defendant and as a Planning Authority, the Council has a mandate to ensure that developments are done in accordance with the law.

2.9 The 1st Defendant averred that the Plaintiff commenced construction of a wall fence, four bedroomed house, and a two roomed house without Planning Permission as per the requirements of the law.

2.10 The 1st Defendant further averred that a boundary verification and data search was conducted by its Land surveyors who indicated that Plot No. 501G on the Council layout had been encroached by Plot No. 501K.

2.11 Further, that Stand No. 0006/149 (which is Stand No. 501G) measures 30m by 57m on the Council layout plan and 45.6m by 30m on the ground. And that owners of Stand No. 0006/141 (501K) had encroached on Stand No. 0006/149 by 11.4m x 30m.

2.12 The 1st Defendant further averred that the Plaintiff was informed of the encroachment on Stand No. 0006/149 by Stand No. 0006/141 through a letter dated 16th November, 2022 and

was advised to take up the responsibility of demolishing the reported illegal structures.

2.13 The Defendant further averred that upon failure by the Plaintiff to comply with the enforcement notice, the 1st Defendant proceeded to demolish the structures.

2.14 The 2nd Defendant averred that he owns Plot 501G while the Plaintiffs father owned Plot 501K, which were two separate Plots.

2.15 The 2nd Defendant averred that he applied for a Plot through the 1st Defendant sometime in 1989 and 3rd October, 1989, he was offered a 57m x 30m Plot. The 2nd Defendant also stated that after receiving the offer he was taken on site by a surveyor from the 1st Defendant who showed him where his Plot started and ended.

2.16 The 2nd Defendant averred that he enjoyed quiet possession of his Plot from 1989 until sometime in 2004 when the late Aaron Banda erected a structure within his boundaries. When the late Aaron Banda was confronted, he stated that he was offered the said Plot.

2.17 The 2nd Defendant further averred that the 1st Defendant explained to him that the last Plot offered after his, was Plot 501H and that Plot 501K did not exist as the same was converted into a market area.

2.18 He further averred that when a survey was done by officers from the 1st Defendant, it was discovered that the Plaintiff had encroached into his Plot by 11.4m x 30m, leaving only 45m x 30m.

2.19 The 2nd Defendant further stated that, several attempts to resolve the issue by the 1st Defendant failed due to the fact that the Plaintiff refused to obey the guidance by the 1st Defendant.

2.20 The 2nd Defendant also averred that when he made a follow up at the 1st Defendant's office, he was informed that the Plaintiff was served with an enforcement notice only as a last resort as he had refused to cooperate.

2.21 The 2nd Defendant further averred that the Plaintiff and other beneficiaries have neither suffered any loss and damage nor have they been deprived of their right to quiet enjoyment of property, as the said buildings had been constructed on the 2nd Defendant's Plot to which they had no legal right or benefit.

2.22 The 2nd Defendant further averred that the demolition by the 1st Defendant was not illegal.

2.23 In his Counterclaim, the 2nd Defendant averred that he was offered Plot 501G, Chipata Overspill on 3rd October, 1989, measuring 57m x 30m.

2.24 He also averred that that since 1989, he had been enjoying quiet possession of the said Plot until the year 2004 when the late Aaron Banda encroached on the land and built his structures.

2.25 The 2nd Defendant further averred, that the Plot in question was acquired for business purposes and that he has not been able to expand his business by reason that the Plaintiff constructed a structure on his land.

2.26 He further averred that surveyors have been on site several times, confirming that the Plaintiff has encroached on his Plot by 11m x 30m.

2.27 And the 2nd Defendant claims the following:

i. A Declaration that the 2nd Defendant is the legal owner of property known as Plot 501G measuring 57m x 30m.

- ii. An Order of vacant possession of Plot No. 501G, Chipata Overspill.***
- iii. An Order of injunction to restrain the Plaintiffs whether by themselves, their agents, their servants or whomsoever they may employ from carrying out any activities at the said Plot.***
- iv. Damages for loss of use of the Plot.***
- v. Costs of and incidental to these proceedings.***
- vi. Any other relief the Court may deem fit.***

2.28 The Plaintiff filed the first reply to the 1st Defendant's defence on 25th October, 2023 and the second reply to the 2nd Defendant's Defence and Counterclaim on the 14th of August, 2023.

2.29 In his reply to the 1st Defendant Defence, the Plaintiff averred that there was no Surveyor assigned to survey the land in dispute and no Survey Report was conveyed to him.

2.30 The Plaintiff averred that as per the Judgment of the Subordinate Court, which was in favour of the Plaintiff, Plot No. 501G and 501K were different and that there was no encroachment.

2.31 In his reply to the 2nd Defendant's Defence and Counterclaim, the Plaintiff averred that the 2nd Defendant was arguing issues that had already been adjudicated upon in the Subordinate Court, a case the 2nd Defendant lost and did not appeal against.

2.32 The Plaintiff further averred that Plot No. 501K was his and the demolition of the structures therein was illegal and has caused him to suffer loss and damage.

2.33 In his defence to the counterclaim, the Plaintiff averred that the late Aaron Banda did not encroach on the land in question as per the Judgment of the Subordinate Court.

2.34 The Plaintiff further averred that he did not build any structures on the land in dispute that would hinder the Defendant's business. Further, that no loss has been occasioned on the 2nd Defendant by the Plaintiff as the 2nd Defendant is not the legal owner of the land in dispute.

3.0 THE EVIDENCE

3.1 EVIDENCE FOR THE PLAINTIFF

In support of his case, the Plaintiff called two Witnesses. The First Witness was the Plaintiff himself, herein after called **PW1**.

3.2 PW1 informed the Court that he filed a Witness Statement on the 8th of November, 2023, and would rely on the same.

3.3 In his evidence in chief, PW1 informed the Court that he was the Administrator in the estate of the late Aaron Banda Senior who died intestate leaving behind properties which included 501k Chipata Overspill, Lusaka.

3.4 PW1 informed the Court that in 2006, the 2nd Defendant had sued his late father before the Lusaka Subordinate Court claiming that Plot 501K had partly encroached on his Plot.

3.5 It was PW1's further testimony that the Lusaka Subordinate Court dismissed the action for lack of merit and ruled that Plot 501K belonged to the late Aaron Banda Senior.

3.6 It was the further testimony of PW1 that the 2nd Defendant being dissatisfied with the Judgment went to complain to the 1st Defendant in 2012. And that years later, the 2nd Defendant with the help of the 1st Defendant came to demolish the wall fence, 4 roomed house and 2 roomed house all valued K150,000.00, erected on Plot No. 501K Chipata Overspill, Lusaka.

3.7 He stated that Prior to demolishing the said structures on Plot 501K, the 1st Defendant was shown the Subordinate Court

judgment which is in his favour, however, the 1st Defendant ignored the Judgment and went ahead to demolish the structures.

3.8 **PW1** further testified that in spite of having been shown the Judgment passed by the Subordinate Court, the Defendants went ahead to demolish structures on Plot 501K.

3.9 It was PW1's further testimony that as a result of the illegal actions of the Defendants, the Plaintiff suffered loss and damage and was deprived of his right to enjoy quiet possession of the property.

3.10 In cross-examination, PW1 informed the Court that the issue of the Plot was resolved by the Subordinate Court and that the 1st Defendant was aware of it though he did not have that proof.

3.11 When asked on how he arrived at the sum of ZMW150,000.00, **PW1** told the Court that the property was valued by a private valuator, but that he had no proof.

3.12 When cross-examined as regards Planning Permission, **PW1** stated that his late father obtained Planning Permission to build from the 1st Defendant but that he did not have proof.

3.13 When further cross-examined in relation to the last paragraph of the Enforcement Notice on page 21 of his Bundles of Documents, **PW1** informed the Court that he was aware of the same but did not appeal to the Urban and Planning Appeals Tribunal as guided by the notice.

3.14 In re-examination **PW1** stated that upon being served with the Enforcement Notice, he went to the Lusaka city Council with the judgement and informed them that this matter was adjudicated on. When re-examined as regards Planning Permission, he stated that it was obtained before building.

3.15 The Second Plaintiff's witness was Mr. Gilbert Lungu, herein called **PW2**. **PW2** informed the Court that he filed a Witness Statement on the 8th of November 2023 and was entirely going to rely on it in his evidence in chief.

3.16 It was **PW2's** evidence in chief that he was a care taker of Plot No. 501k which was demolished. He further testified that he was on the said Plot on 30th May, 2023 around 15:00 hours when the two Defendants came and demolished the wall fence, 4 roomed house as well as a 2 roomed house.

3.17 According to **PW2** as the demolition was being carried out, he phoned **PW1** to inform him about the demolition.

3.18 In cross examination, **PW2** stated that he knew the boundary of the Plot as he had measured it with a tape and had lived there for 13 years.

3.19 In further cross-examination, **PW2** told the Court that no Surveyor came to the Plot until the date the structures were demolished.

4.0 EVIDENCE FOR THE 1ST AND 2ND DEFENDANT

4.1 In support of his case, the 1st Defendant called two witnesses.

4.2 The first Defence witness was Kenneth Monga (hereinafter called **DW1**). **DW1** informed the Court that he did file a Witness Statement on the 7th May, 2024 and would rely on it.

4.3 **DW1** in his evidence in chief informed the Court that the City Planning Department received a complaint from the 2nd Defendant that there was an encroachment on his land.

4.4 According to **DW1**, following receipt of the complaint, Surveyors were sent to the Plot, where structures built without Planning Permission were found.

4.5 It was DW1's further testimony that upon discovery of the illegal structures, a call out was prepared and delivered to the Plaintiff however, the plaintiff did not appear. Upon the non-appearance of the Plaintiff an Enforcement Notice was then issued to the Plaintiff but the same was ignored.

4.6 It was DW1's further evidence in chief that upon the lapse of 28 days, the 1st Defendant demolished the illegal structures that had been developed without Planning Permission.

4.7 When further cross-examined, DW1 stated that he was aware of the Judgment but did not know the outcome. In further cross-examination, DW1 stated that the 1st Defendant has no power to override the decision made by the Court and that he was not aware if the said Judgment was appealed against.

4.8 The Second Defence Witness was Masha Phiri hereinafter called DW2. DW2 informed the Court that he filled a Witness Statement dated 7th May, 2024 and would rely on the same.

4.9 In his evidence in chief, DW2 stated that the City Planning Department received a letter of complaint from the 2nd Defendant Mr. Sayi K. Banda complaining that his neighbour Mr. Aaron Banda had encroached on his property.

4.10 DW2 further informed the Court that following the complaint, he was instructed to conduct a boundary verification to confirm the alleged complaint.

4.11 According to the survey, DW2 told the Court that he found that Plot no 501K had encroached into Plot No. 501G by 11m x 30m.

4.12 In cross-examination, DW2 stated that he was unaware of the Judgement of the Court which held that there was no encroachment.

4.13 DW2, when further cross-examined stated that if the Judgement is not overturned, then it still remains valid.

4.14 In re-examination, DW2 admitted that a survey was very important and that a read of the Judgement shows that no survey was carried out to ascertain whether there was encroachment.

5.0 EVIDENCE FOR THE 2ND DEFENDANT

5.1 In support of his case, the 2nd Defendant called one witness who was himself herein after called **DW3**. **DW3** informed the Court that he filed a Witness Statement on the 10th of November, 2023 and would rely on the same in his evidence in chief.

- 5.2 In his evidence in chief **DW3**, stated it was him who complained about the encroachment to the 1st Defendant, after which a surveyor was sent to conduct a verification of boundary.
- 5.3 According to **DW3** the surveyor found that the late Aaron Banda had encroached into his land by 11.4m x 30m and that in fact the said Plot number could not be ascertained as it did not exist on the 1st Defendant's plan.
- 5.4 **DW3** further stated that he later commenced an action against the late Aaron Banda in the Lusaka Magistrate Court and that the Judgment clearly stated that the Plots in issue were No. 501G and 501K.
- 5.5 **DW3** further stated that he served the 1st Defendant the Judgment because he believed that the issue of boundary would only be resolved by the 1st Defendant.
- 5.6 In further cross-examination, **DW3** stated that when the Certificate of Title was issued, he discovered that it was the Ministry of Lands that occasioned the encroachment by Mr. Aaron Banda in that his Plot was measuring 45m x 30m instead of 57m x 30m.

501K on Council Records as the last Plot given by the Council was 501H, after which there is a market.

6.0 SUBMISSIONS

6.1 In his submission, Counsel for the Plaintiff submitted that the Judgment by the Subordinate Court was not appealed against and as such still valid.

6.2 It was also Counsel's submission that since the Judgement was still valid, this Court has no jurisdiction to hear this Matter since it has not come by way of Appeal.

6.3 It was Counsel's submission that any attempt by the Defendants to sneak in any evidence that aims to challenge the findings of the lower Court, which evidence was not placed before the lower Court cannot be entertained by this Honourable Court because such evidence is misconceived and incompetent.

6.4 Counsel referred the Court to the case of **Victor Namakando Vs ZESCO⁽¹⁾** where the supreme Court held:

"The findings made by the trial Court should not lightly be interfered with, in keeping with what this Court has said on numerous occasions in the past"

6.5 Counsel also referred the Court the case of **Zambia Revenue Authority Vs Hitech Trading Company Limited**¹ where the Court guided on the procedure to be followed if new evidence aimed at changing the findings of the lower Court is discovered, the Court held, *inter alia* as follows:

"For an application to introduce new evidence to succeed, it must be shown that the evidence could not be obtained with reasonable diligence"

6.6 Counsel also submitted that evidence of the 1st Defendant was supposed to have been called by the 2nd Defendant in the lower Court and the evidence produced herein cannot be allowed to persuade this Court to overturn the findings of the lower Court.

6.7 It was also Counsel's submissions that the evidence of the 1st Defendant should be considered with caution because the 1st Defendant is a witness with an interest to save as it has been sued.

6.8 Coming to the 1st Defendant, Counsel for the 1st Defendant submitted that the 1st Defendant has a statutory function to perform in line with **Section 13** of the **Urban and Regional planning Act No. 3 of 2015**.

6.9 It was Counsel's submission that pursuant to **Section 13** aforesaid, the Local Authority (Council) has authority to receive and process Planning Permission for the development of land. It was submitted that Planning Permission is important because it ensures that developments align with national policies, regulation and guidelines.

6.10 In support of this Counsel, referred the Court to **Section 49(1)** of the **Urban and Regional Planning Act No. 3 of 2015** which states:

"A person shall not carry out any development on land, change the use of land or subdivide any land without Planning Permission."

6.11 It was Counsel's submission that the provision of **Section 49 (1)** is mandatory and ought to be complied with as it does not give the Court any discretionary power. To emphasize the point Counsel further referred the Court to the Supreme Court Case of **Mutantika and Others Vs ChipunguP** in which it was held:

"Both provisions are couched in mandatory manner as such each uses words "shall". The two rules therefore are not regulatory as they do not give the Court discretionary power"

6.12 Further, it was submitted by Counsel for the 1st Defendant that the Plaintiff was fully aware that one cannot build without permission of the Local Authority and his failure to comply with **Section 49 (1)** above, cannot go without consequences.

6.13 Counsel further referred the Court to **Section 49 (3)** of the **Urban and Regional Planning Act No. 3 of 2015** which provides:

"A planning authority may, where a person carries out any development on any land, changes the use of land or subdivides any land contrary to this Act, demolish the structure on the land without the payment of compensation."

6.14 It was Counsel's submission that the Plaintiff cannot claim compensation from the 1st Defendant as his conduct of building structures without permission was illegal.

6.15 Counsel further submitted that the Plaintiffs reliance on a Subordinate Court Judgment that was not conclusive cannot debar a superior Court to rehear the Matter *denovo*.

6.16 Further Counsel submitted that the High Court is a Superior Court and ranks above the Subordinate Court and hence the Plaintiffs reliance on a decision that was concluded by the

Subordinate Court bears no effect on the decision of this Court which is a higher Court.

6.17 Similarly, Counsel for the 2nd Defendant also filed in his written submissions. It was Counsel's submission that the Plaintiff is not entitled to the relief sought because he occupied the land in question in a manner that was inconsistent with the right of the true owner.

6.18 In support of this proposition, Counsel relied on **Section 35** of the **Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia** and the case of *Lumanyanda and Another vs Chief Chamuka and Others*⁽⁴⁾.

6.19 Stressing on the same argument, Counsel submitted that by encroaching on the land of the 2nd Defendant, the Plaintiff committed an offence in line with the provision of **Section 44 (c)** of the **Housing (Statutory Improvement Areas) Act, Chapter 194 of the Laws of Zambia**.

6.20 It was Counsel's further submission that by virtue of the encroachment established against the Plaintiff, the Plaintiff is not entitled to any compensation as guided in the case of *Raphael*

Ackim Namung'andu v. Lusaka City Council¹ where it was held inter alia that:

"Squatters build on their own risk and if the owners of the land withdraw their permission or licence or if they decide to demolish a structure built in the absence of any permission or other lawful relationship, the squatters' losses though very much regrettable are not recoverable in a Court of law".

6.21 Coming to damages, Counsel submitted that the Plaintiffs claim for damages are unfounded because the Plaintiff has not proven his case on a balance of probabilities.

6.22 Counsel relied on the case of **JZ Car Hire Limited Vs Malvin Chaala and Scirrocco Enterprises Limited**⁽⁶⁾ and **Galaunia Farms Ltd Vs National Corporation Limited**¹ that the burden to prove any allegation is always incumbent on the one who alleges.

7.0 FINDING OF FACTS

7.1 I have found the following facts established:

- i. That the Plaintiff is the administrator in the estate of the late Aaron Banda, who owned Plot 501K Chipata Overspill, Lusaka.***

- ii. That the 2nd Defendant is the owner of Plot 501G Chipata Overspill, Lusaka.**
- iii. That the 2nd Defendant sued the late Mr A. Banda claiming that his Plot had encroached on his Plot.**
- iv. That there is a Judgment dated the 29th June 2006 from the Subordinate Court in which Mr. Sayi K Banda's Plot was found to be distinct from Mr. Aaron Banda's Plot.**
- v. That the 2nd Defendant made a complaint of an encroachment to the 1st Defendant in 2004.**
- vi. That an enforcement notice was served on the Plaintiff.**
- vii. That the Plaintiffs wall fence, 4 roomed house and 2 roomed house were demolished by the Defendants herein.**

8.0 ISSUES FOR DETERMINATION

8.1 The following issues have been framed for determination:

- i. Whether the High Court has Jurisdiction to hear a matter falling under the provisions of the Urban and Regional Planning Act No.3 of 2015?*
- ii. Whether the Counterclaim is properly before this Court and whether the same can be granted?*

9.0 ANALYSIS AND DECISION OF THE COURT

9.1 I am greatly indebted to the Parties for the submission filed before Court. I will proceed to determine the questions framed for determination.

9.2 ***i. Whether the High Court has Jurisdiction to hear a Matter falling under the provisions of the Urban and Regional Planning Act No.3 of 2015?***

9.3 It is trite law that jurisdiction is everything and without it the Court cannot make a valid pronouncement. This was the guidance laid down in the case of **Antonio Ventriglia and Another Vs Finsbury Investment Limited**⁸. The question to be determined is whether this Court has jurisdiction to hear the Matter?

9.4 This question has arisen because the land in contention falls under Statutory Improvement Area.

9.5 In answering the question posed above, resort will be had to the Supreme Court case of **Justin Mutale Vs William Mutale** ⁽⁹⁾ where the Court held that the Court of first instance to resolve disputes involving property situated in Housing (Statutory Improvement Areas) was the Subordinate Court.

9.6 Further in the case of **Esnart Mumba Vs Cosmo Mumba (cited for persuasive purpose only)**^(1°) the Hon. Mr. Justice Charles Zulu held that:

"After the repeal of the Housing (Statutory Improvement Areas) Act Chapter 194 of the Laws of Zambia, the Urban and Regional Planning Act No. 3 of 2015 was enacted. And section 2 of the Urban and Regional Planning Act, defines Court mentioned therein to mean, the Subordinate Court. Therefore, the Court of first instance having jurisdiction over the subject matter is the Subordinate Court. The case of Justin Mutale Vs William Mutale remains applicable in the present case, notwithstanding it was decided under the repealed regime".

9.7 In light of the above guidance, it is my considered view that the Court of first instance in matters connected to the **Urban and Regional Planning Act** is the Subordinated Court.

9.8 I have arrived at this conclusion because it has been established that both the Plaintiff and the 2nd Defendant hold occupancy licenses as per the **Housing (Statutory Improvement Areas) Act Chapter 194 of the Laws of Zambia**, which Act was repealed and replaced by the the **Urban and Regional Planning Act No. 3 of 2015**.

9.10 In light of the above undisputed fact, it is my considered view that this Court has no jurisdiction to hear this Matter because it has been established that the Plots in issue fall under the **Urban and Regional Planning Act**.

9.11 In saying the above, I am aware that this point was not raised by any of the Parties. However, as regards jurisdiction, the Court can move itself because jurisdiction is everything and without it, the Court cannot make a valid pronouncement, this was the guidance laid down in the case of **Antonio Ventriglia and Another vs Finsbury Investment Limitect**⁸(supra) in which the Supreme Court agreed with the Kenyan Court of Appeal's observation in the case of **Owners of the Motor Vessel 'Lillians Vs Caltex oil (Kenya) Limited'** that:

"Jurisdiction is everything [and that] without it a Court has no power to make one more step. Where the Court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing."

9.12 Further in the case of **Kansanshi Mining Plc Vs Zambia Revenue Authority**¹²⁾ the Supreme Court in a Judgment delivered by Malila JS, (as he then was) held:

"The High Court only has jurisdiction if a matter is correctly commenced before it."

9.13 Having established that this Court has jurisdiction to hear this Matter, I now turn to the second jurisdictional issue.

ii. Whether the Counterclaim is properly before this Court and whether the same can be granted?

9.14 **Order 15 rule 2** of the **Rules of Supreme Court of England 1999** provides that:

"(1) Subject to rule 5 (2), a defendant in any action who alleges that he has any claim or is entitled to any relief or remedy against a plaintiff in the action in respect of any matter (whenever and however

arising) may, instead of bringing a separate action, make a counterclaim in respect of that matter; and where he does so he must add the counterclaim to his defence.

(2) Rule 1 shall apply in relation to a counterclaim as if the counterclaim were a separate action and as if the person making the counterclaim were the plaintiff and the person against whom it is made a defendant.

(3) A counterclaim may be proceeded with notwithstanding that judgment is given for the plaintiff in the action or that the action is stayed, discontinued or dismissed." (emphasis mine)

9.15 Further, the Supreme Court in the case of **Felix Mutati & Others Vs Winnie Zalomis (suing as National Secretary of the Movement of Multi-Party Democracy**⁽¹³⁾ held that:

"Order 15 rule 2 of the Rules of Supreme Court of England which deals with Counterclaims is unambiguous and it states that a counterclaim is an action of the defendant independent from the claim made by the Plaintiff."

9.16 I must start by stating therefore that, even though this Court has no jurisdiction to hear the main matter, the counterclaim as per the position of the law shown above is an independent action and it proceeds notwithstanding that judgment is given for the plaintiff or the action is dismissed for want of jurisdiction.

9.17 The Plaintiff has submitted that the issues regarding the encroachment was resolved by the Subordinate Court and was not appealed against as such the counterclaim is misconceived.

9.18 The Defendants on the other hand have submitted that the lower Court's decision was inconclusive as no surveyor testified. The 1st Defendant further argued that this Court being a higher Court is not precluded from hearing the Matter *denovo*.

9.19 With these competing positions, the starting point as I see it, is laying down the law governing appeals from the Subordinate Court to the High Court.

9.20 **Section 28(1)** of the **Subordinate Court Act chapter 8 of the Laws of Zambia** provides that:

own fault, might have recovered in the first action, that which he seeks to recover in the second.

The Supreme Court went further to state that:

"The purpose of the principle of res judicata is to support the good administration of justice in the interest of both the public and the litigants, by preventing abusive and duplicative litigation. Its twin principles are often expressed as being (1) the public interest that Courts should not be clogged by re-determinations of the same disputes and (2) the private interest that it is unjust for a man to be vexed twice with litigation on the same subject matter. It is therefore important that parties to litigation bring forward their whole cases at once."

The same principle was stated in the case of **Bank of Zambia Vs Tembo and Others**¹¹⁶.

9.24 In the Matter before me, the case in the Court below and the case before me both arose out of the same circumstances, that involved the purported encroachment of Plot No. 501G by Plot 501K Chipata Overspill, Lusaka. The Plaintiff in this Counterclaim was the Plaintiff in the matter in the Court below.

9.25 It was the Plaintiff's responsibility in the Court below, to prove his case on balance of probabilities as it is trite law that he who

alleges must prove, this is as per **Zambia Railway Limited Vs Pauline S. Mundia Brian Sialumba**⁽¹⁷⁾.

9.26 The case of **Hussein Safieddinne Vs Commissioner of Lands and 2 Others**⁽⁵⁾ (supra) has clearly stated that for the defence of res judicata to succeed one of elements that must be shown is that the plaintiff has had an opportunity of recovering and but for his own fault, might have recovered in the first action, that which he seeks to recover in the second.

9.27 My reading of the lower Court's Judgment shows that the Plaintiff lost his case because of his failure to prove his case on a balance of probabilities. This is as shown on Paragraph 1 of page 7 of the lower Court's Judgment where the Court held as follows:

"...the Plaintiff in this case has failed to establish his case on the balance of probabilities."

9.28 Further my reading of the Judgment shows that the lower Court found the two Plots in question to be distinct because the Plaintiff failed to call a witness from the Survey Department of the Lusaka City Council to prove the purported encroachment.

9.29 Further, page 4 of the 2nd Defendant's Bundle of Documents shows that the Plaintiff herein made a complaint on the 7th of January, 2002 about the encroachment, and page 11 shows that on the 16th of September, 2004 the Survey Department of the Lusaka City Council made a Report that there was indeed an encroachment on Plot No. 501G.

9.30 However, the Plaintiff opted not to tender the same documents as evidence in the lower Court and call as a witness a Surveyor from the Survey Department to attest to the encroachment and prove his case.

9.31 It is for that reason that I find that the Plaintiff had the opportunity to recover all his claims that have been brought before this Court, in the lower Court, had he called the Survey Department to attest to his claim. The Supreme Court in the case of **Development Bank of Zambia and KPMG Peat Marwick Vs Sunvest Limited and Sun Pharmaceuticals Limited**) stated that multiplicity of procedures and proceedings or actions over the same matter is frowned upon by the Court.

9.32 I therefore find that determining this Counterclaim will be an abuse of Court process and will go against what the principle of *res judicata* intends to avoid.

10.0 CONCLUSION

10.1 From the above analysis both the main Matter and the Counterclaim fail for want of jurisdiction. I make no orders as to costs.

DELIVERED AT LUSAKA THIS 20TH SEPTEMBER, 2024.

A handwritten signature in black ink, consisting of a series of loops and a long horizontal stroke extending to the right.

.....
S. V. SILOKA
HIGH COURT JUDGE