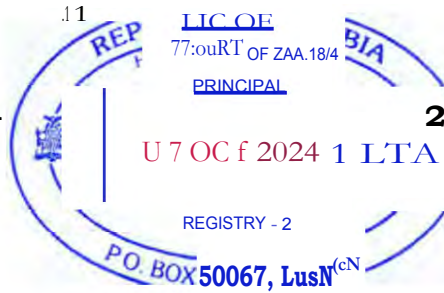


**IN THE HIGH COURT OF ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA**  
(Civil Jurisdiction)



**2 24/HP/0279**

**IN THE MATTER OF:**

**ORDER 113 OF MULES OF THE SUPREME  
COURT OF ENGLAND RSC VOLUME 1 (WHITE  
BOOK) 1999 EDITION**

AND

**IN THE MATTER OF:**

**AN APPLICATION FOR POSSESSION OF THE  
PROPERTY KNOWN AS STAND NO  
S/LUSAK/SLN-0003/1421 LUSAKA DISTRICT  
OF THE LUSAKA PROVINCE OF THE  
REPUBLIC OF ZAMBIA**

**BETWEEN:**

**GRINDOVER INVESTMENTS LIMITED**

**APPLICANT**

AND

**JONAS JAMES NYIRENDA  
GRACIOUS LUNGU**

**1st RESPONDENT  
2<sup>nd</sup> RESPONDENT**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 7th DAY OF OCTOBER,  
2024**

*For the Applicant : Ms. K. Kasonde, Messrs NCO Advocates*

*For the Respondents : Ms. M. Mpabalwani, Messrs Mazakaza Legal Practitioners*

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## ***JUDGMENT***

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**CASES REFERRED TO:**

- Holmes Limited v Buildwell Construction Company Limited 1973 ZR 97*
- Union Bank Zambia Limited v Southern Province Co-operative Marketing Union Limited 1997-1997 ZR 207*
- Dulton and others v Manchester Airport Plc 1999 2 ALL ER 675*
- Liamond Choka v Ivor Chilufya 2002 ZR 33*
- RTS Flexible Systems Limited v Molkerei Alois Muller GmbH & KG (UK Production) [2010] UKSC 14*
- Tijem Enterprises Limited v Children International Limited 2011 Vol 1 ZR*

7. *Kidinson Mwandila v Yotam Phiri SCZ No 33 of 2013*
8. *Kalusha Bwalya v Chadore Properties and Ian Chamunora Nyalugwe Haruperi 2015 Vol 2 ZR 100*
9. *Oscar Chinyanta and others v Alesia Building and Construction Limited and another Appeal No 158 of 2015*
10. *BP Zambia PLC v Expendito Chipasha and 235 others SCZ No 57 of 2018*
11. *Christian Brethren (also known as Christian Mission in many Churches) v National Heritage Conservation Commission and others Appeal No 188 of 2019*

LEGISLATION REFERRED TO:

1. *The Rules of the Supreme Court of England, 1965, 1999 Edition*
2. *The Money Lenders Act, Chapter 398 of the Laws of Zambia*
3. *The Banking and Financial Services (Cost of Borrowing) Regulations, Statutory Instrument No 179 of 1995*

OTHER WORKS REFERRED TO:

1. *Black's Law Dictionary, 8th Edition*
2. *Halsbury's Laws of England, Volume 27*
3. *Halsbury's Laws of England, Vol 77, 5th Edition*
4. *Trietel: Law of Contract, 13th Edition (1996)*

## 1. INTRODUCTION

1.1 The Applicant, Grindover Investments Limited, commenced these proceedings on 23rd February 2024, by Originating Summons which was accompanied by an affidavit and a List of Authorities and Skeleton Arguments seeking:

- i. *Possession of residential premises being Stand No S/ LUSAK/ SLN-0003/ 1421.*

## 2. AFFIDAVIT IN SUPPORT

2.1 In the affidavit which was filed in support of the Originating Summons, and which was deposed to by Abbess Bwalya, the Administrative Executive for Grindover Investments Limited, averment was made that by a contract of sale dated 14th May,

2022, Jonas James Nyirenda and Gracious Lungu offered for sale, the property known as Stand No S/LUSAK/ SLN-0003/1421 Lusaka to Grindover Investments Limited at a consideration of ZMW180, 000.00. The contract of sale was exhibited as `AB1'.

2.2 It was stated that on the said 14th May, 2022, Jonas James Nyirenda and Gracious Lungu received the sum of ZMW180, 000.00 as consideration for the property Stand No S/LUSAK/SLN-0003/1421 Lusaka, as evidenced by the acknowledgment which was exhibited as `AB2'.

2.3 Further averment was made, that Jonas James Nyirenda and Gracious Lungu applied for State's consent to assign the property Stand No S/LUSAK/SLN-0003/ 1421 Lusaka, which consent was exhibited as `AB3'. Abbess Bwalya also deposed that Jonas James Nyirenda and Gracious Lungu signed a specific Power of Attorney, in which Grindover Investments Limited was appointed Attorney for purposes of paying Property Transfer Tax on the property at the Zambia Revenue Authority (ZRA). The specific Power of Attorney was exhibited as `AB4'.

2.4 Therefore, pursuant to the Power of Attorney, Grindover Investments Limited, as shown by the exhibits 'ABS' and `AB6', paid the Property Transfer Tax in the sum of ZMW9, 000.00 in accordance with the assessment. It was deposed that Jonas James Nyirenda and Gracious Lungu also signed a Deed of Assignment relating to Stand No S/LUSAK/SLN-0003/ 1421 Lusaka, which was exhibited as `AB7'.

2.5 The averment was that thereafter, Grindover Investments Limited proceeded to obtain a certificate of title, which was exhibited as 'A.B8' for the property, Stand No S/LUSAK/SLN-0003/1421 Lusaka in its' name. However, Jonas James Nyirenda and Gracious Lungu are still in occupation of the property without the licence or authority of Grindover Investments Limited, and are squatters.

### **3. LIST OF AUTHORITIES AND SKELETON ARGUMENTS IN SUPPORT**

- 3.1 In the List of Authorities and Skeleton Arguments in support, the law in ***Order 113 of the Rules of the Supreme Court of England, 1965, 1999 Edition*** was cited. The case of ***Kidinson Mwandila v Yotam Phiri*** (7) was relied on, as having held that ***Order 113 of the Rules of the Supreme Court of England*** stipulates how an applicant employs the remedy for summary possession of land under that Order.
- 3.2 It was also argued that under ***Order 113 Rule 8 of the Rules of the Supreme Court of England***, stipulation is made, as to the circumstances that are confined to granting an Order for summary possession of land. These were named as that the occupier has to be in occupation of the property without the claimant's licence or consent.
- 3.3 Further argument was made, that the occupier need not have entered without the licence or consent of the owner, but that it suffices that they remain in occupation of the property without the licence or consent of the claimant.

- 3.4 In relation to this matter, argument was made, that the affidavit which was filed in support of the application, showed that Grindover Investments Limited entered into a contract of sale with Jonas James Nyirenda and Gracious Lungu for the property, Stand No S/LUSAK/ SLN-0003/1421 Lusaka, at a consideration of ZMW180, 000.00 which was duly paid.
- 3.5 Further, in keeping with the terms of the contract of sale, Jonas James Nyirenda and Gracious Lungu, applied for State's consent to assign the property, paid Property Transfer Tax and executed a Deed of Assignment to convey the property to Grindover Investments Limited. On that basis, Grindover Investments Limited obtained a certificate of title for the property in its' name.
- 3.6 Reliance was also placed on the case of ***Liamond Choka v Ivor Chilufya*** <sup>(4)</sup>, stating that it was held in that case that:  
***"The summary procedure under Order 113 can only be suitable for squatters and others without any genuine claim of right or who have since transformed into squatters."***
- 3.7 The contention was that Jonas James Nyirenda and Gracious Lungu had transformed into squatters. Further authority was sought from the case of ***Kidinson Mwandila Yotam Phiri*** <sup>(7)</sup> where the Supreme Court stated that:  
***"The rationale for the introduction of Order 113 admits of no doubt concerning the circumstances in which it is to be deployed. The objective is to***

***dispossess squatters of land, and that, speedily. This procedure avoids the length of time it takes to dispose of a matter commenced by writ, due to the steps that must be taken for a matter to come to trial. And it is confined to cases where a person is occupying land belonging to another without colour of right. Where, therefore it transpires that a person occupying land is also claiming ownership and pointing to what may appear to be a legitimate source of ownership, it is inappropriate to apply for summary possession, as the claims of both parties require interrogation."***

- 3.8 The case of ***Oscar Chinyanta and others v Alesia Building and Construction Limited and another*** <sup>(9)</sup> was further relied on, as having held that in Order for a claim for summary possession to be sustained under ***Order 113***, there must not be any dispute as to ownership of the land.
- 3.9 The argument was also that the Court of Appeal in the case of ***Christian Brethren (also known as Christian Mission in many Churches) v National Heritage Conservation Commission and others*** <sup>(11)</sup>, referred to the case of ***Dulton and others v Manchester Airport Plc*** <sup>(3)</sup> where *Laws LJ* in a matter concerning ***Order 113 of the Rules of the Supreme Court*** stated that in every case, the question must be, what is the breach of the right, and whether it has been shown that the defendant's acts violate its' enjoyment.

3.10 If they do, an Order for possession is the only remedy which should be granted.

3.11 It was also argued that in the said case of ***Christian Brethren (also known as Christian Mission in many Churches) v National Heritage Conservation Commission and others*** (<sup>11</sup>) the Court held that a claim for possession of land is not dependent on proof of an estate in the subject law, but rather on a demonstration of a right to possession, and that the defendant is interfering with that right.

3.12 Thus, possession of a certificate of title was not stated as being evidence of entitlement to land, and that doing so would entail that any person could occupy property that is subject to the control and authority of another without the possibility of being evicted.

3.13 However, in this case, Grindover Investments Limited holds a certificate of title to the property Stand No S/LUSAK/SLN-0003/ 1421 Lusaka, which was evidence of its' entitlement to possession of the property.

#### **4. AFFIDAVIT IN OPPOSITION**

4.1 In a joint affidavit in opposition, which was filed on 13th May, 2024, Jonas James Nyirenda and Gracious Lungu stated that contrary to the averments that had been made by Grindover Investments Limited, they obtained a loan facility from the said Grindover Investments Limited on 14th May, 2022, which credit facility was exhibited as 'JN/GL1'.

- 4.2 They contended that part of the requirements for accessing the credit facility was that they had to put up any assets whether moveable or immovable, as security for the credit facility. Jonas James Nyirenda and Gracious Lungu deposed that Grindover Investments Limited applied for State's consent to assign the property after the certificate of title for the property was deposited, and the funds were disbursed, with their approval and knowledge, although it was not their intention to sell the dwelling house.
- 4.3 With regard to the Power of Attorney, the averment that Jonas James Nyirenda and Gracious Lungu made, was that it was signed in the event of default on their part, and Grindover Investments Limited could exercise its' rights over the property as security, and the same did not give it authority to start the conveyancing process before the default occurred.
- 4.4 It was deposed that out of the ZMW180, 000.00, ZMW150, 000.00 was paid as shown on the acknowledgement which was exhibited as 'JJN2'. However, Grindover Investments Limited continued charging interest on the credit facility despite ZMW150, 000.00 being paid on the principal sum of ZMW180, 000.00 instead of on the ZMW30, 000.00.
- 4.5 The contention was that compound interest was being charged and the allegation was that Grindover Investments Limited is not a licenced money lender, or registered under the **Banking and Financial Services Act** for it to charge interest above the statutory limits. Jonas James Nyirenda



- 5.4 The argument was also that *Regulation 10 (1) of the Banking and Financial Services (Cost of borrowing) Regulations* specifically prohibits the imposition of any charges or penalties on borrowers for late repayments or payments that are made contrary to a contract governing a loan.
- 5.5 Also relied on, was ***Halsbury's Laws of England, Volume 27*** stating that it provides that:
- "If an amount due is tendered, interest ceases to run from that date."***
- 5.6 The case of ***BP Zambia PLC v Expendito Chipasha and 235 others*** <sup>(10)</sup> was stated as having guided that it is trite law, that once money is paid, it stops attracting interest and that it follows that once money is paid, there is no basis upon which interest on that money from that date that it is paid to the plaintiff, can be paid.
- 5.7 It was argued that Jonas James Nyirenda and Gracious Lungu entered into a contract with Grindover Investments Limited for a credit facility, and not for the sale of their house, and that no credit facility had been exhibited to support Grindover Investments Limited's assertion that it was a credit facility that was made pursuant to the ***Banking and Financial Services Act***.
- 5.8 The contention was that Jonas James Nyirenda and Gracious Lungu had paid the K150, 000.00, and what remained was the payment of interest from the date of default until the date of repayment of the principal sum. Thus, the claim for foreclosure and sale was unjust.

## **6. AFFIDAVIT IN REPLY**

- 6.1 In the affidavit in reply, Abbess Bwalya deposed that exhibit JJN/GL1' in no way revealed a credit facility. Therefore, no such facility was in existence, but rather there was a sale agreement for 'the property, Stand No S/LUSAK/SLN-0003/1421 Lusaka, and not a mortgage. It was also averred that had a legal mortgage been executed, it would have been exhibited to the affidavit in opposition.
- 6.2 The contention was that the certificate of title for Stand No S /LUSAK/SLN-0003/ 1421 Lusaka was given to Grindover Investments Limited, in Order that it could effect the conveyance of land rights, as evidenced by the contract of sale and the attendant documents, which had all been exhibited to the affidavit which was filed in support of the Originating Summons.
- 6.3 The averment was that Jonas James Nyirenda and Gracious Lungu approved the application for State consent to assign, and therefore they were aware of the nature of the transaction between them and Grindover Investments Limited.
- 6.4 It was also deposed that the Power of Attorney was specific in terms of the power that it granted to Grindover Investments Limited, being the payment of property transfer tax to the Zambia Revenue Authority for the conveyance of the property, Stand No S/LUSAK/SLN-0003/ 1421 Lusaka, and to do all such acts as were necessary to ensure the successful conclusion of the transaction.

6.5 It was stated that doing so, entailed accessing the Tax Payers Identification Account, and making the necessary changes to ensure that Property Transfer Tax was paid, and executing all the documents which were necessary on behalf of Jonas James Nyirenda and Gracious Lungu to ensure that the Property Transfer Tax was paid.

6.6 It was stated that exhibit `JJN2' was not exhibited to the affidavit in opposition.

## **7. LIST OF AUTHORITIES AND SKELETON ARGUMENTS IN REPLY**

7.1 It was argued in reply, that Jonas James Nyirenda and Gracious Lungu in opposition, had referred to **Sections 3 (3), 4 and 10 of the Money Lenders Act, Chapter 398 of the Laws of Zambia.**

7.2 However, the said Act did not apply to the facts of this case, and Jonas James Nyirenda and Gracious Lungu had assumed that Grindover Investments Limited dealt with them as a money lender, but without a licence, or that it took security in a name that is different from its' authorised name.

7.3 It was also stated that Jonas James Nyirenda and Gracious Lungu had further assumed that Grindover Investments Limited had charged them interest which the **Money Lenders Act** deems illegal.

7.4 Reference was made to **Section 2 of the Money Lenders Act** as defining a *money lender* as:

***"money-lender" includes every person whose business is that of money-lending or who advertises or announces himself or holds himself out in any way as carrying on that business, but shall not include-***

***(a) any pawnbroker in respect of business carried on by him in accordance with the provisions of any law for the time being in force in relation to pawnbrokers;***

***(b) any body corporate, in so far as it is empowered to lend money by any Act or by any British Act; or***

***(c) any person bona fide carrying on the business of banking or insurance or bona fide carrying on any business not having for its primary object the lending of money, in the course of which and for the purposes whereof he lends money; or***

***(d) any building society registered under the Building Societies Act; or***

***(e) any body corporate for the time being exempted under section two A;"***

7.5 The contention was that Grindover Investments Limited dealt with Jonas James Nyirenda and Gracious Lungu as a purchaser of a property, and not as a money lender.

7.6 As regards the reliance on ***Banking and Financial Services (Cost of Borrowing) Regulations, Statutory***

**Instrument No 179 of 1995** and in particular, **Regulation 10** of the said Statutory Instrument, which provides for charges and penalties on loans that are issued by an entity under the **Banking and Financial Services Act**, the reply was that **Section (1) of the Banking and Financial Services Act** applies to all financial service providers, and not to Grindover Investments Limited, as it did not deal with Jonas James Nyirenda and Gracious Lungu as a financial service provider, but as a purchaser of a property.

7.7 Therefore, the provisions of the **Banking and Financial Services Act** and the holding in the case of **Union Bank Zambia Limited v Southern Province Co-operative Marketing Union** <sup>(2)</sup> were inapplicable to this case. Further argument was made that **Sub section 2 (b) of the Banking and Financial Services Act** states that it does not apply to a person who is registered as a money lender under the **Money Lenders Act**.

7.8 The principle espoused in the case of **BP Zambia Plc v Expendito Chipasha and 235 others** <sup>PO</sup> was said be of no relevance in this matter, as Jonas James Nyirenda and Gracious Lungu had not established that Grindover Investments Limited had given them a loan.

7.9 Relying on the case of **Holmes Limited v Buildwell Construction Company Limited** <sup>(1)</sup>, the argument was that extrinsic evidence could not be admitted to contradict, add to or vary a written agreement. It was stated that a contract of sale, a deed of assignment and a Specific Power of Attorney

were executed in this matter, which embodied the intentions of the parties, which was to transfer the land to Grindover Investments Limited.

7.10 The argument was that this was freely and voluntarily done, and could be seen from the execution of the State's consent to assign, payment of property transfer tax, together with its' subsequent approval, assessment and payment.

7.11 It was stated that as Jonas James Nyirenda and Gracious Lungu had not provided any evidence to support their position that they obtained a credit facility from Grindover Investments Limited upon which a legal mortgage was executed, and which governed the relationship between the parties, they could not delve into the exceptions to the parole evidence rule.

7.12 The case of ***RTS Flexible Systems Limited v Molkerei Alois Muller GmbH & KG (UK Production)*** (5) was relied on, stating that the Supreme Court in that matter, noted that where there is a binding contract between the parties and if so, upon what terms, depends upon what they have agreed.

7.13 Further reliance was placed on ***Trietel: Law of Contract, 13th Edition (1996)*** which states that:

***"Behind all forms of contract, no doubt lies the basic idea of assent. A contracting party unlike a tortfeasor, is bound because he has agreed to be bound. Agreement however, is not a mental state but as an act, is a matter of inference from conduct. The parties are to be judged not by what***

***is in their minds, but by what they have said or written."***

7.14 The case of ***Tijem Enterprises Limited v Children International Limited*** <sup>(6)</sup> was also relied on, as having held that:

***"1. If there is one thing more than another which public policy requires it is that men of full age and competent understanding shall have the utmost liberty in contracting and that their contract when entered into freely and voluntarily shall be entered by Courts of justice."***

7.15 Further reliance was placed on the case of ***Kalusha Bwalya v Chadore Properties and Ian Chamunora Nyalugwe Haruperi*** <sup>(8)</sup> stating that the appellant in that matter, executed a contract of sale and an assignment in favour of the Respondents, as security for the payment of a sum of USD26, 250.00 that he obtained from them. It was stated that the Appellant argued that there was no intention to transfer or sell his house, but he simply did the same as security.

7.16 The holding by the Supreme Court in that matter, was stated as having been as follows:

***"The trial Judge found that fraud or misrepresentation had not been proved by the appellant and the Court on appeal had no reason to fault the finding. The intention of the parties was discernable from the documents signed by***

***them freely and voluntarily. The parties chose to embody their agreement in two documents, namely the contract of sale and the deed of assignment. They were bound by those documents. Extrinsic evidence was not generally admissible to vary the terms of the written contract. The documents were categorical and clear and did not call for extrinsic evidence to make sense of them."***

7.17 It was argued that the allegations of misrepresentation had to be proved, which Jonas James Nyirenda and Gracious Lungu had not done so, but rather the documents spoke to the conveyance of documents and not a credit facility.

7.18 ***Halsbury's Laws of England, Vol 77, 5th Edition*** was cited on what constitutes a mortgage, as well as the definition of a *mortgage* as given by ***Black's Law Dictionary, 8th Edition***.

7.19 It was reiterated that a contract of sale was entered into, and therefore, the prayer was that an Order for possession of the property should be granted.

## **8. SUBMISSIONS AT THE HEARING**

### **SUBMISSIONS BY COUNSEL FOR GRINDOVER INVESTMENTS LIMITED**

8.1 At the hearing, Counsel for Grindover Investments Limited submitted that they relied on the affidavit which was filed in support of the Originating Summons, together with the List of Authorities and Skeleton Arguments in support. Further reliance was placed on the affidavit in reply, and the List of



Authorities and Skeleton Arguments in reply, which were filed on 30th May, 2024. The prayer was that relief sought be granted.

**RESPONSE BY COUNSEL FOR JONAS JAMES NYIRENDA  
AND GRACIOUS LUNGU**

8.2 It was stated in response, that Counsel relied on the joint affidavit in opposition and the List of Authorities and Skeleton Arguments in opposition which were filed on 13th May, 2024.

**REPLY BY COUNSEL FOR GRINDOVER INVESTMENTS  
LIMITED**

8.3 There was no reply.

**9. DECISION OF THIS COURT**

9.1 I have considered the matter. It was brought pursuant to ***Order 113 of the Rules of the Supreme Court of England, 1965, 1999 Edition.*** Rule 1 of that Order provides as follows:

***"Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this Order."***

9.2 In terms of the scope of the Order, the explanatory notes in **Order 113/8/2 of the said Rules of the Supreme Court of England** state that:

***"The application of this Order is narrowly confined to the particular circumstances described in r.1, i.e. to the claim for possession of land which is occupied solely by a person or persons who entered into or remain in occupation without the licence or consent of the person in possession or of any predecessor of his. The Court has no discretion to prevent the use of this summary procedure where the circumstances are such as to bring them within its terms, e.g. against a person who has held over after his licence to occupy has terminated but of course the Order will not apply before the licence has expired (ibid.). The Order applies to unlawful sub-tenants.***

***This order does not extend to the claim for possession of land against a tenant holding over after the termination of the tenancy (r. 1).***

***Where the tenant of premises dies intestate, the landlord is not entitled to possession of the demised premises, even as against trespassers, unless and until the tenancy has been effectively terminated by service of a notice to quit on the President of the Family Division, in whom the***

compound interest on K180, 000.00 as opposed to K30, 000.00.

9.5 That on the face it, raises contentious issues which cannot be resolved in a matter that is begun by Originating Summons, but can only be resolved after evidence is called at trial.

9.6 In the case of ***Kidinson Mwandila v Yotam Phiri*** (7), the Supreme Court stated as follows:

***"Where, therefore it transpires that a person occupying land is also claiming ownership and pointing to what may appear to be a legitimate source of ownership, it is inappropriate to apply for summary possession, as the claims of both parties require interrogation."***

9.7 Order ***113/8/14 of the said Rules of the Supreme Court of England*** provides in part that:

***"If, on the hearing of the summons, it should appear that the claim of the Plaintiff is not within the ambit of this Order or that claims for relief or remedy have been joined with the claim for possession of land which could not or ought not to have been so joined or that the supporting affidavit is defective or that for some other reason the proceedings are irregular, the Court may dismiss the summons or give leave to amend to correct any irregularity on such terms as it thinks fit."***


***Moreover, if the Court should hold that there is some issue or question that requires to be tried, or that for some other reason there ought to be a trial, it may give directions as to the further conduct of the proceedings under 0.28, r.4, or may order the proceedings to continue as if begun by writ under 0.28, r.8."***


## **10. CONCLUSION**

10.1 Having noted that this matter was not suitable to have been commenced under ***Order 113 of the Rules of the Supreme Court of England***, and ***Order 113/8/14 of the said Rules of the Supreme Court of England*** empowering me to dismiss such a matter on that premise on hearing the matter, I accordingly dismiss the summons, with costs to Jonas James Nyirenda and Gracious Nyirenda which shall be taxed in default of agreement.

10.2 Leave to appeal is granted.

**DATED AT LUSAKA THE 7<sup>th</sup> DAY OF OCTOBER, 2024**

  
**S. KAUNDA NEWA**  
**HIGH COURT JUDGE'**

REPUBLIC OF ZAMBIA  
 HIGH COURT  
  
 OCT 20211  
 S. NEWA, J  
 P.O. 60X 60067. LUSAKA