

IN THE COURT OF APPEAL

Appeal No. 167/2021

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

STEVEN MAAMBO MOONGA NALUVWI

APPELLANT

AND

ATTORNEY GENERAL

RESPONDENT

CORAM: KONDOLO SC, NGULUBE, SHARPE-PHIRI

On 23rd August, 2023 and 6th November, 2023

For the Appellant:

In Person

For the Respondent:

*Mr. C. Watopa and Ms. M. Katolo –
Assistant Senior State Advocates –
Attorney General's Chambers*

J U D G E M E N T

KONDOLO SC JA delivered the Judgment of the Court.

CASES REFERRED TO:

- 1. Simon Lwando & Others v ZCCM SCZ/83/2002**
- 2. GDC Hauliers Limited v C & B Enterprises Limited (2010)**
ZR, Vol 3, 362

3. Attorney General v. Marcus Achiume (1983) ZR 1

**4. Wilson Masauso Zulu v Avondale Housing Project Limited (1982)
ZR 172**

LEGISLATION REFERRED TO:

1. Lands and Deeds Registry Act, Chapter 135, Laws of Zambia

2. Lands Survey Act, Chapter 188, Laws of Zambia

PUBLICATIONS REFERRED TO:

1. Snells Equity at page 53, paragraph 4

1. INTRODUCTION

1.1. This is an appeal against the Judgment of the High Court delivered by Zulu J on 28th May 2021, in which he dismissed the Appellant's claims in respect of Farm No.'s L/2105/M; L/21034/M; L/121033/M and L/13301/M.

1.2. The Appellant was the 1st Plaintiff in the Court below and the 2nd Plaintiff was Smart Kalonga. The Respondent was the 1st Defendant and the 2nd, 3rd and 4th Defendants were Patson Kunda, Edson Daka & Harry Kanyama respectively.

2. BACKGROUND

2.1. In the lower Court, the Appellant's amended writ of summons filed on 21st December 2016 claimed the following reliefs;

- i. Declaration that the 1st Plaintiff is entitled to the legal and/or equitable ownership of Farms L/21035/M; L/21034/M and L/13301/M.**
- ii. An order directing the Commissioner of Lands to issue Certificates of Title relating to Farms L/21035/M; L/21034/M L/21033/M and L/13301/M to the 1st Plaintiff.**
- iii. Alternatively, payment of Compensation for any of the 3 farms that this Court may not grant to the Plaintiff and what the 1st Plaintiff spent on the developments of the farms and the road leading to those farms.**
- iv. An Order restraining the 2nd to 4th Defendants from dealing with and/or selling the land in dispute pending determination of the matter.**
- v. Compensatory damages for inconvenience and mental anguish the 1st Plaintiff has been subjected to.**

vi. Interest

vii. Any other relief (s) the Court may deem fit

viii. Costs

- 2.2. The Plaintiff's statement of claim averred that in 1998, the Ministry of Lands allocated him Farm No. L/13310/M Chilanga which was later renumbered as L/21035/M Chilanga.
- 2.3. According to the Plaintiff, due to impassable hills in the area, the roads and boundaries were realigned at his request and Farm No. L/13310/M was repossessed to pave way for the realignment.
- 2.4. Following the realignment, the Plaintiff applied for ownership of Farms No.'s L/21034/M L/121033/M and L/13301/M.
- 2.5. Whilst he was waiting for offer letters, the 2nd and 3rd Defendants were allocated Farms L/21035/M and L/21034/M. He alleged that the allocation was fraudulent because his priority interest was not taken into account.
- 2.6. He further alleged that there was no dispute over Farm No. L/13301 but the Ministry of Lands unreasonably refused to issue him with a Certificate of Title.

3. DEFENCE

- 3.1. The 1st Defendant filed a defence alleging that the 1st Plaintiff was on 13th October 2005 issued with a Certificate of Title in respect of Farm No. L/13310 which was re-entered by advertising in Zambia Daily Mail.
- 3.2. That Farm No. L/13301 was owned by a Mr. C. Chitundu and was re-entered on 14th November, 2016 and there was no record of any link between the 1st Plaintiff and Mr. Chitundu. The said Farm never ceased to exist except that it was renumbered into subdivisions A to F.
- 3.3. That the renumbering of Farms No.'s L/21033/M L/21034/M and L/21035/M was not sanctioned by the Commissioner of Lands and the said land encroaches on other people's property.
- 3.4. It was further denied that the 1st Plaintiff ever owned Farms No. L13296/M and L/13297/M which had in fact belonged to John Zulu and Mushili Lillian respectively and had since been repossessed.

4. REPLY

- 4.1. The 1st Plaintiff stated that he was not aware that Farm No. L/13310 was re-entered.
- 4.2. That the Commissioner of Lands referred his application to realign the property to the Surveyor General who processed it and it was later approved by the Commissioner of Lands, Surveyor General and Lusaka Provincial Planning Authority.
- 4.3. In paragraph 5 of the reply, the 1st Plaintiff stated that Farm No. L/13301 was re-entered in 2010 and on 9th August 2010 the Minister of Lands confirmed that the said farm was given to him. However, in paragraph 7, the 1st Plaintiff alleged that Farm No. L/13301 was re-entered in 2009 to pave way for it to be allocated to him.
- 4.4. That the alleged subdivision of Farm No. L/13301 was only done after the 2nd and 3rd Defendants grabbed it from him and the 4th Defendants ownership of any part of the said property was based on a site plan which was cancelled by the Provincial Planning Authority in 2009.

5. PROCEEDINGS IN THE HIGH COURT

5.1. Plaintiff's Case

5.2. The 1st Plaintiff testified in person and the sum total of his evidence was that he was allocated Farm No. L/13310/M Chilanga. He exhibited a Certificate of Title in his name dated October 13, 2005 on a 14-year lease running from 1st January, 1999.

5.3. He referred the Court to a letter dated 3rd March 2008 from Mr. Zulu, the Provincial Planner, advising the Commissioner of Lands that the 1st Plaintiff had presented a plan for re-alignment of boundaries on Lots L/13294/M; L/13296/M; L/13297/M; L/13302/M, L/13303 and L/3310/M. The purpose of the plan was to relocate the access roads to make it easier to pass through the hills located in the area. That the 1st Plaintiff had informed Mr. Zulu that the plan was prepared with the assistance and advice of the Survey Department. That the plan had been forwarded to the Commissioner of Lands for consideration and it was recommended that it be approved.

- 5.4. The 1st Plaintiff told the Court that the new site plan resulted in the creation of four properties Farms No.'s L/21034/M L/21033/M and L/13301/M and L/21035/M.
- 5.5. He further explained that the re-planning had the following results;
- a. No. L/13301 spawned No. L/21035
 - b. No. L/13302 spawned No. L/21034
 - c. No. L/13303 spawned No. L/21033
- 5.6. The 1st Plaintiff stated that No. L/21035 automatically changed into his favour because it was part of his original farm No. L/13310/M.
- 5.7. He alleged that one Mirriam Mumba by-passed him and acquired Farm No. L/13303. He however stated that the Commissioner of Lands had no authority to realign the land except the Surveyor General.
- 5.8. The 1st Plaintiff further referred to an application his lawyers Kashewe and Company wrote on his behalf to the Commissioner of Lands requesting that he be allocated particular farms. The letter asked the Commissioner of Lands to recall that he had recently repossessed Farm No.'s L/21033/M (previously L/13303/M) and L/21034/M

(previously L/13302/M) and he was requested to allocate to the 1st Plaintiff, Farms No.'s L/21033; No. L/21034 and No. L/13301, to enable him execute a project being financed by the Citizens Economic Empowerment Commission. The letter further stated that the 1st Plaintiff was owner of L/21035 (previously L13310/M).

5.9. The 1st Plaintiff explained that the Commissioner of Lands granted the application verbally whereupon the 1st Plaintiff proceeded to pay for numbering and survey fees for the three properties. He stated that the then Commissioner of Lands was transferred to the Ministry of Justice before he could give him written consent.

5.10. The 1st Plaintiff stated that he had developed the land and invested heavily in it and it was he that put up the road infrastructure in the area which had now transformed from a bush into a suburb. That the 2nd Plaintiff who was his caretaker had suffered at the hands of the 4th Defendant.

5.11. His dispute with the 2nd & 3rd Defendants arose when the two of them invaded his farm with a mob of people and together with the 4th Defendant sold his land and they continued sub-dividing it even after the matter was in Court.

5.12. In re-examination he stated that he only became aware of the re-entry of Farm No. L/13310/M after the matter was in Court.

6. Defendant's Case

6.1. DW1 a legal officer at the Ministry of Lands testified on behalf of the 1st Defendant that the 1st Plaintiff was issued with a certificate of title for Farm No. L/13310 on a 14-year lease sometime in 2005. That sometime in 2011 an advertisement was put in the newspaper for repossession of the land because it was undeveloped and it was repossessed on 14th November, 2016.

6.2. DW1 testified that the re-entry was wrongly done because it occurred whilst a matter involving the land was actively before Court. That when a dispute involving land is in Court all land transactions must stop until the matter is resolved. The matter in Court was commenced on 11th July, 2011 and the re-entry happened on 14th November 2016.

6.3. He stated that Farm No. L/13301/M initially belonged to Cyprian Chitundu but was repossessed in 2011. That it had never belonged to the 1st Plaintiff.

6.4. That Farm No.'s L/21035/M; L/21034/M and L/21033 had never belonged to the 1st Plaintiff and had no owners.

6.5. DW1 told the Court that the re-numbering and re-planning was executed without the approval of the Commissioner of Lands and was thus null and void.

7. HIGH COURT DECISION

7.1. The trial Judge found the following as facts;

a. The 1st Plaintiff was allocated Farm No. L/13310/M in 1999 and issued with a certificate of title on a state lease of 14 years commencing from January 1999.

b. Despite the 1st Plaintiff's assertion that he made payments for numbering and survey fees after the Commissioner of Lands verbally approved the allocation of Farms No.'s L/21033; No. L/21034 and No. L/13301 to him, there was no official response to his application.

7.2. The trial Judge considered whether an equitable or legal interest was created in relation to the stated farms and with regard to the legal interest found that no certificates of title were issued in the 1st Plaintiff's favour with regard to any of them.

- 7.3. The lower Court further found that an equitable interest could, in the circumstances, only be established if the farms were offered to the 1st Plaintiff in writing and he had accepted the offer by paying the requisite fees. The case of **Simon Lwando & Others v ZCCM** ⁽¹⁾ was cited where it was held that the right to purchase a property arises from an initial offer.
- 7.4. That it was undeniable that the 1st Plaintiff had spiritedly pursued the creation of new site plans, re-numbering and re-alignment of the subject farms but in the absence of an offer, such activity cannot create an equitable or legal interest in leasehold tenure.
- 7.5. The trial Judge stated that an offer letter is important because it is accompanied by terms and conditions. That this fact was not lost on the Plaintiffs lawyers who on 9th August, 2010 wrote to the Deputy Minister of Lands seeking his help and complaining that the 1st Plaintiff had not received an offer letter in respect of the concerned lots. This was followed by a letter from the 1st Plaintiff to the Commissioner of Lands on 9th October, 2010 making a similar lament.
- 7.6. The trial Judge took judicial notice that the land policy and administration of land in Zambia is well established and it

was thus inconceivable that terms and conditions of the supposed offer could be communicated verbally. It was also noted that **section 4 of the Lands Act** provides that land for private use cannot be alienated without consideration in money value and ground rent being paid as stipulated in the offer letter. That the 1st Plaintiff had not produced any evidence of such payment.

- 7.7. In view of **section 35 of the Lands and Deeds Registry Act, Chapter 135, Laws of Zambia** which guarantees the rights of a certificate of title holder, the trial Judge wondered how the 1st Plaintiff expected to be offered Farm No. L/13301/M when, at the time, it was registered under the names Cyprian Chitundu and Christine Mulenga Chitundu.
- 7.8. The Court found that when the 1st Plaintiff applied to be allocated Farm No. L/13301/M in 2009, it had not yet been repossessed as the notice of re-entry was issued in 2010 and the certificate of re-entry was issued in 2011.
- 7.9. With regard to 1st Plaintiff's averments on the re-numbering of Farm No. L/13310 to Farm No. L/21035 the Court noted that this request also received no formal communication from the Commissioner of Lands. The trial Judge further found

that **section 2** of the **Lands Survey Act**, requires that a site plan, re-numbering or/and re-alignment be approved by a government surveyor. That there was no evidence of such approval.

7.10. The lower Court found that in the absence of approval from the Commissioner of Lands and the Surveyor-General Farm No. L/13310/M could not be said to have ceased to exist and that a new Farm No. L/21035 was created. The lower Court added that concomitantly, the re-entry on Farm No. L/13310/M could not result in the automatic creation of a new Farm No. L/21035.

7.11. The trial Judge decided that the re-entry of the 1st Plaintiff's Farm No. L/13310 was unjustified because as admitted by DW1 the Lands Officer, the land was the subject of a Court case at the time. He further noted that the 1st Plaintiff could not be described as an "absentee landlord" because the record shows that he was constantly in touch with the office of the Commissioner of Lands pursuing additional land and re-numbering and/or re-alignment of his farm. That his requests went unanswered by the Commissioner of Lands who *"in a paradoxical manner, was quick to re-enter the 1st*

Plaintiffs property and unconscionably accused him of wasting the land by not developing it”.

7.12. The trial Judge however observed that the 1st Plaintiff had not sought any relief against the re-entry, perhaps in the mistaken belief that that the re-entry was without legal effect because it was entered on a land that had ceased to exist.

7.13. The trial Judge dismissed the 1st Plaintiff’s claim that he was either legally or equitably entitled to be issued with title deeds to Farm No.’s L/21033; No. L/21034 and No. L/13301. The lower Court cited **Snells Equity at page 53, paragraph 4** where it says that, *“Purchaser who chooses to complete [a purchase] in reliance upon the assurance of the vendor or of the vendor’s solicitor that an equitable interest has been gotten or destroyed does so at his own risk.”*

7.14. The Court dismissed the 1st Plaintiff’s alternative claim for compensation for the alleged developments on the subject farms on the basis that having found that he had no title to the said Farms, the 1st Plaintiff had occupied and developed them illegally, in contravention of **section 9 (1) of the lands Act** which provides that a person shall not occupy or continue to occupy vacant land.

7.15. The claim for compensatory damages in respect of inconvenience and mental anguish allegedly suffered by the 1st Plaintiff was dismissed for the reason that in his evidence, the 1st Plaintiff stated that it was his caretaker, the 2nd Plaintiff who suffered mental anguish and harassment at the hands of the 4th Defendant but no claim was pleaded relating to the 2nd Plaintiff who, in this regard, could not be awarded a relief he did not plead.

7.16. The Court made no order as to costs.

8. APPEAL

8.1. The Appellant filed an amended Memorandum of Appeal with 19 grounds as follows;

- 1. The lower Court Judge erred in fact and law when he dismissed the matter on the ground that the site plan was not approved by the Commissioner of Lands.**
- 2. The lower Court Judge misdirected himself by dismissing the matter on the basis that Maxwell Zulu, Lusaka Province Planning Officer was not a government surveyor.**

3. The lower Court erred in fact and law by ignoring the right of the Appellant on the land he bought from private property owners to enable him construct the access road to his farm.
4. The lower Court Judge erred in fact and law by cancelling the site plan on the basis that it lacked the approval of the Commissioner of Lands.
5. The lower Court Judge erred in fact and law when he dismissed the matter for lack of a written land offer to the appellant by not taking into account of the cause of lack.
6. The lower Court Judge erred in fact and law for dismissing the matter on the basis that the appellant paid numbering fees without authority.
7. The lower Court Judge erred in fact and law for not taking into account most of the Appellants final written submissions which the respondent failed to reply.
8. The lower Court Judge erred in fact and law by finding that the road infrastructure the appellant constructed had no approval of the Commissioner of Lands.

9. The lower Court Judge erred in fact and law by depriving the Appellant of Farm No. L/21035/M On the basis that the site plan was not approved by the commissioner of Lands and overlooked the fundamental purpose of the land re-planning.
10. The lower Court Judge erred in fact and law when he revoked the site plan by not taking into consideration of the repercussions, importance and benefits of the road infrastructure created by the site plan to the Appellant, settlement community and general travelling public.
11. The lower Court Judge erred in fact and law when he found that the site plan was invalid without proof.
12. The lower Court Judge erred in fact and law by impliedly condemning the Appellant for allegedly occupying vacant land without authority, misdirected and contradicted himself when he described the Appellants action to develop the land before being offered as perilous.
13. The lower Court Judge misled himself by finding that the Surveyor General did not approve the site plan.

14. The lower Court misled himself when he found that Farm. No. L/M/13310 was never renumbered stating that there was no such proof.
15. The lower Court did not declare the rightful owner of the land under dispute between the Appellant and the three Defendants claiming it creating speculation about the lands ownership status amidst its current occupation by the invaders and beneficiaries of the invasion.
16. The lower Court Judge erred in law and fact for dismissing the Appellant's claims for compensation and mental stress.
17. The lower Court misdirected himself and erred in law and fact by dismissing the matter basing his findings on incompetent witnesses; on the site plan over which the Appellant had no jurisdiction and which is not the cause or basis of the land dispute.
18. The lower Court misdirected himself and erred by allowing Mwauchilke Kakubo who was not lined up as witness to testify and who is a member of the defence legal team based in the Respondent Ministry of Lands.

19. The lower Court erred in law and fact by suppressing the contempt matter brought in by the Appellant on the Respondents action to re-plan, demarcate and allocate the Appellants land which was subject of the matter in Court when the contempt matter had already started.

8.2. APPELLANT'S ARGUMENTS

8.3. The gravamen of ground 1 is that, as per date stamp on the site plan exhibited at page 198 of the record of appeal (ROA) the site plan was signed by the head of the Estates and Valuation Department in the office of the Commissioner of Lands. The Appellant argued that the Commissioner of Lands does not approve personally but internally through his officers. He pointed out that as shown on pages 333 and 336 ROA, the Defendants had at some point relied on similar documents. He also lamented that the Appellant had not proved that the Commissioner of Lands does not personally approve site plans and that the Surveyor General did not notify him that the application had been refused.

8.4. In ground 2 the Appellants argument consisted of providing the job description of Mr. Zulu as Provincial Planning Officer. He

stated that under his portfolio Mr. Zulu operated under the Ministry of Local Government and not under the Surveyor General and he therefore did not operate under the Land Survey Act and the Court therefore applied the wrong law. He opined that the lower Court erred by giving an impression that Mr. Zulu's role in land re-planning was irrelevant and incompetent.

8.5. In ground 3, the Appellant argues *inter alia* that the cancellation of the private road accessing the Appellant's farm is not justified because the road reserve land is on state land. He referred to his submissions in the lower Court and letters at pages 39, 150 189 and 203 of the record of appeal.

8.6. The essence of the arguments in ground 4 was that the Commissioner of Lands had over the years never disputed the site plan and the Appellant should not suffer for the Commissioner of Lands inefficiency.

8.7. In ground 5, it was argued that the failure to issue the appellant an offer letter, after years of not disputing his claim of ownership, was deliberate and aimed at denying the appellant the land.

8.8. The argument in ground 6 was essentially that the payment could only have been accepted if the Appellant was the owner

of the land. That the Appellants grave concern was that once payment was made the Appellant's name and description of the property would automatically come up. That the Court should have taken note of this fact and ordered that the land belonged to him.

8.9. In Ground 7, it was argued that the Respondent remained silent on a number of arguments raised in the Appellant's submissions and that silence amounted to an admission. That the trial Judge erred by not considering that fact and was biased as he placed more emphasis on the Respondent's narrow arguments whilst ignoring the detailed submissions by the Appellant.

8.10. The Appellants submissions on ground 8 insisted that the Commissioner of Lands approved the construction of the road infrastructure and added that he even visited the area and commended the Appellant's good work.

8.11. In ground 9, the Appellant submitted that the road was constructed with the approval of the Surveyor General so as to allow easy access to his property and other properties in the area. That if the access road is cancelled he will lose access to his farm.

- 8.12. In ground 10, it was submitted that the trial Judge erred by not looking at the benefits of the site plan to the public.
- 8.13. In ground 11, it was submitted that the trial Court should have received expert confirmation from the town and country planning tribunal before holding that the site plan was invalid.
- 8.14. In ground 12, the Appellant advanced a mixture of various arguments already presented in earlier grounds of appeal.
- 8.15. In relation to ground 13, it was submitted that the Lusaka Province Planning Authority would not have acted on the site plan if truly, it was not approved by the Surveyor General.
- 8.16. In ground 14, it was argued that the site plan shows all the farm numbers and the new numbering is supported by the Survey Department official stamp at the bottom left corner of the site plan.
- 8.17. In ground 15, it was submitted that the lower Court's failure to declare the owners of the land implied that the Respondent had succeeded as the land is occupied by people who bought land from them.
- 8.18. The essence of ground 16 has been argued and determined in ground 8.

- 8.19. In ground 17, the Appellant's arguments skirt around the main issue which was the invalid renumbering of farms in the area and was entirely subject to approval by the Commissioner of Lands and the Surveyor General which was absent.
- 8.20. In ground 18, the Appellant submitted that DW1 was an incompetent witness because he was not an expert in surveying and part of the Respondents defence team.
- 8.21. In ground 19, the Appellant submitted that the trial Court's failure to determine contempt proceedings arising from the matter before him prejudiced the Appellant in several ways including preventing the Surveyor General from clarifying the status of the site plan.

9. RESPONDENT'S ARGUMENTS

- 9.1. The Respondent reacted to grounds 1 and 14 together and it was submitted that the record shows that there was no reply from the Commissioner of Lands to the Appellant's lawyers when they enquired about approval of the site plans. That there was no evidence that Mr. Zulu, described as the Provincial Planner, who wrote to the Commissioner of Lands, was a government surveyor.

- 9.2. Grounds 2 and 13 were addressed together and the Respondent pointed out that **section 2 of the Lands Act** clearly defines a "Government Surveyor" and that **Administrative Circular No.1 of 1985** provides that the Surveyor General shall number and survey a property upon request by the Commissioner of Lands.
- 9.3. In response to ground 3, the Respondent submitted that the Appellant did not own any of the land he was referring to.
- 9.4. The Respondent responded to grounds 4, 10 and 11 together and stated that the site plan was not approved and the re-numbering of Farm No.'s L/21033; No. L/21034 and No. L/121035 was not approved and the fact that the Appellant constructed roads in the area could not correct the situation as the said properties do not exist.
- 9.5. On grounds 5 and 12 the respondent submitted that it was argued that the Commissioner of Lands is under no duty to ensure that written offers are given to clients. That the record shows that the Appellants requests for additional land went unanswered.

- 9.6. In ground 6, it was submitted that cashiers collect money from anyone who pays and the system automatically records the names of anyone who makes a payment.
- 9.7. In response to ground 7, it was submitted that according to the case of **GDC Hauliers Limited v C & B Enterprises** ⁽²⁾ the purpose of submissions is to assist the Court and Courts are not obliged to consider them.
- 9.8. On ground 8, the respondents reply was that the Court correctly held that the road infrastructure was done illegally because the land did not belong to the Appellant.
- 9.9. The Respondents response to ground 9 was that Appellant could not be compensated for work that was not approved and was carried out on land that did not belong the Appellant.
- 9.10. The Respondent did not file any response to grounds 13, 15, 16, 17, 18 and 19.

10. APPELLANT'S REPLY

- 10.1. In ground 1, the Appellant insisted that the Appellant should have led evidence to prove that the Commissioner of Lands did not approve the re-numbering and/or realignment.

- 10.2. In ground 2 and 13, the Appellant insisted that the site plan was approved by the Commissioner of Lands and the Surveyor General.
- 10.3. In ground 3, the Appellant reiterated that the site plan was approved and all he was awaiting was for his ownership of Farm No. L/21035/M.
- 10.4. The Appellant's response to the Respondent's arguments in grounds 2, 10 and 11 was to reiterate the question as to why the Respondent did not bring a competent witness to testify on its behalf.
- 10.5. In grounds 5 and 12, the Appellant asked the question that if he was not entitled to land, why did the Respondent did not answer him? According to him, the only conclusion was that the Respondent had a hidden agenda. That at trial the Respondent did not prove that there was any encroachment of other people's land.
- 10.6. The Appellant's response to ground 6 was that the fact is that the system accepted payments in relation to the numbering fees generated by the Survey Department.

- 10.7. In reply to ground 7, the Appellant simply stated that the Defendant never made any submissions and so to speak never defended the matter.
- 10.8. The Appellant's reply to ground 8 was that the Appellant could not be denied compensation because the re-planning transactions were done by the Appellant in good faith and the road boundaries were marked by the Ministry Surveyor.
- 10.9. The Respondent's reply to ground 9 was simply that the roads were approved and therefore not illegal.

11. ANALYSIS AND DETERMINATION

1. We have considered the record of appeal and the arguments advanced by the parties. We must state from the onset that the Appellant's arguments largely attack findings of fact of the lower Court without providing any reasons why we should interfere with them contrary to the directive in the case of **Attorney General v. Marcus Achiume** ⁽³⁾.
- 11.1. A number of the Appellant's grounds of appeal are identical and repetitive. We shall therefore cluster identical grounds in groups and address them as one. In this regard grounds 1, 2, 4, 9, 11, 13, 14 shall be addressed together followed by

Ground 3 and thereafter grounds 5, 6, 8 and 12 and then ground 7 and followed by grounds 10, 15 and 16 to be addressed individually and then grounds 17 and 18 together and finally ground 19.

11.2. Grounds 1, 2, 4, 9, 11, 13 and 14

1. In ground 1, the Appellant relied largely on what he described as the Respondents failure to prove that the Commissioner General and Administrator General had denied his application for re-alignment and/or re-numbering of the subject farms. The basic principle in litigation is that he who alleges must prove, and the duty to prove, applies even where the Defendant has not responded to the claims laid against him. See the case of **Wilson Masauso Zulu v Avondale Housing Project Limited** ⁽⁴⁾.

- 11.3. The Appellant argued that the signature of the Head of Estate & Valuation on the site plan indicated that it had been approved by the Commissioner of Lands. This argument is defeated by the Appellant's own evidence when he produced the letter from his lawyers to the Commissioner of Lands dated 14th December 2014 seeking approval of the re-numbering. The letter was sent two years after the site plan was signed

thus indicating that the Appellant understood that his application had not been approved. Ground 1 therefore fails.

11.4. The learned trial Judge did not dismiss the matter on the basis that Mr. Zulu was not a government surveyor. The trial Court stated that no evidence was presented to support the assertion that he was a government surveyor. Having held in ground 1 that there was no approval from the Commissioner of Lands, this point is mute and ground 2 fails.

11.5. In view of the finding, which we agree with, that the site plan was not approved by the Commissioner of Lands and the Surveyor General ground 4 cannot be sustained. The fact that the Commissioner of Lands had previously not disputed the site plan does nothing to legitimise it.

11.6. With regard to ground 9, the trial Judge was on firm ground to deny the Appellant's claim for compensation because he was unable to prove that he built the road with the Commissioner of Lands consent. Ground 9 therefore fails.

11.7. In relation to ground 11, we find that there was no need for the trial Judge to receive expert testimony as it had found that the site plan was invalid on account of not being approved by

the Commissioner of Lands and the Surveyor General. Ground 11 consequently fails.

11.8. In the face of the clear finding of fact by the trial Court that the site plan was not approved by the Surveyor General the argument that the Lusaka Province Planning Authority would not have acted on the site plan if truly, it was not approved by the Surveyor General is mute and ground 13 fails.

11.9. With regard to ground 14, as stated in earlier grounds the trial Court correctly found the site plan did not receive the required approval meaning that the renumbering was invalid. Ground 14 therefore fails.

11.10. **Ground 3**

11.11. With regard to the submission that the cancellation of the private road accessing the Appellant's farm is not justified, the Appellant has made a general statement and not shown which part of the Judgment he is referring to. The site plan was not approved and the trial Judge accepted DW1's evidence that there was no creation of a farm numbered Farm No. L/21035/M. Ground 3 equally fails.

11.12. **Grounds 5, 6, 8 and 12**

11.13. With regard to ground 5, we are aware of no law that compels the Commissioner of Lands to offer land to anyone who applies for it. The relevant question is really, not whether the Appellant encroached other people's land, but if he owned the land that he claimed was his even though he never received any offer for it. The answer is that he did not own the land and ground 5 fails.

11.14. The Appellant's submission in ground 6 is not tenable because accepting payment from the Appellant cannot rectify the absence of an offer letter from the Commissioner of Lands. In our view such circumstances point to a worrying irregularity.

11.15. Ground 8 suffers the same fate of the earlier grounds and fails because nothing could legitimise the Appellant's activity of constructing the roads on land he does not own without approval of the Commissioner of Lands.

11.16. In ground 12, the Appellant advanced a mixture of various arguments already presented in earlier grounds of appeal which all failed and this ground equally fails.

11.17. Ground 7

11.18. The Appellant's submission in ground 7 is not supported by law because trial Courts unlike appellate Courts are not obliged to reproduce or specifically respond to counsel's submissions because they are only filed to assist the court. Just because the court has not referred to them directly does not indicate that the trial court neither read nor considered them. Courts are only obliged to determine matters in controversy on the basis of the evidence presented. Ground 7 therefore fails.

11.19. Ground 10

11.20. Our finding on ground 10 is that the trial Court was called upon to decide on the very precise question of whether or not the site plan met the requisite approval and not to analyse its social benefits. Ground 10 consequently fails.

11.21. Ground 15

11.22. The Appellant's submission that the trial Judge erred by not declaring who the owners of the renumbered plots were cannot stand because the question before the trial Judge was whether the Appellant was the owner of the subject land and

the trial Judge made a finding that he was not the owner. The Court did not need to go further. Ground 15 equally fails.

11.23. Ground 16

11.24. The essence of ground 16 has been argued and determined in ground 8.

11.25. Grounds 17 and 18

11.26. In ground 17, the Appellant's arguments skirted around the main issue which was the invalid re-numbering of farms in the area and was entirely subject to approval by the Commissioner of Lands and the Surveyor General and which approval was absent. Ground 17 fails on that score.

11.27. In ground 18, the Appellant cited no authority to support his assertion that the DW1 was an incompetent witness. The Respondent was at liberty to call whoever it liked to present evidence on its behalf and; who better to call than one's own employee? Nothing prevented the Respondent from calling DW1 as a witness. Ground 18 consequently fails.

11.28. Ground 19

11.29. The Appellant's submissions on the contempt proceedings cannot be sustained because contempt proceedings and the main trial are quite separate. The main trial is in relation to

the claims whilst the contempt is generally in relation to disobedience or wanton disregard for the Court. The Appellant called no witness other than himself during the trial. Nothing prevented him from issuing subpoenas against the Commissioner of Lands or the Surveyor General or any other person. The fact that the contempt proceedings did not progress did not prejudice the Appellant in the main trial at all.

11.30. The Appellant's heads of argument included what he described as summary arguments. These were not included in the memorandum of appeal and can therefore not be considered.

11.31. Having been unsuccessful in all 19 grounds of appeal, this appeal is dismissed with costs to the Respondent to be taxed in default of agreement.


.....
M.M. KONDOLO SC
COURT OF APPEAL JUDGE


.....
P.C.M. NGULUBE
COURT OF APPEAL JUDGE


.....
N.A. SHARPE-PHIRI
COURT OF APPEAL JUDGE