

**IN THE HIGH COURT FOR ZAMBIA**

**2008/HP/766**

**HOLDEN AT LUSAKA**

(Civil Jurisdiction)

**BETWEEN:**

**FRANCIS CHIPALO & OTHERS**

**Plaintiffs**

**and**

**LUSAKA CITY COUNCIL**

**Defendant**

**Before the Hon. Madam Justice F. M. Lengalenga this 17<sup>th</sup> day of October, 2012 in open court at Lusaka.**

For the plaintiffs : Mr. W. M. Kabimba – Messrs W. M. Kabimba  
& Company

For the defendant : Mrs. M. Chocho – (In house Counsel – LCC)

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**JUDGMENT**

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**Cases cited:**

- 1. JONAS AMON BANDA v DICKSON MACHIYA TEMBO (2008) ZR 204**
- 2. GODFREY MIYANDA v THE HIGH COURT (1984) ZR 62**
- 3. MOHAMAD S. ITOWALA v VARIETY BUREAU DE CHANGE – SCZ Judgment No 15 of 2001**
- 4. JUSTIN CHANSA v LUSAKA CITY COUNCIL (2007) ZR 256**
- 5. WESLEY MULUNGUSHI v CATHERINE B. M. CHOMBA (2004) ZR 96**

## **6. GIDEON MUNDANDA v TIMOTHY MULWANI & ORS (1987) ZR 30**

This action brought by the one hundred and thirty-three (133) plaintiffs whose names are listed on the list attached to the plaintiffs' Writ of Summons filed on 1<sup>st</sup> August 2008. The said Writ of Summons was amended pursuant to an order of court granted on 5<sup>th</sup> June 2009, and the plaintiffs' claim as endorsed on the amended Writ of Summons is for the following reliefs:

- “(i) Specific performance of demarcated or subdivided plots on or portions of Lot Number 21/M Lusaka which is owned by the defendant or offer of alternative plots to the plaintiffs**
- (ii) An interim order of injunction**
- (iii) Any other relief the court may deem just**
- (iv) Costs.”**

The plaintiffs' claim is detailed in the amended Statement of Claim filed on 16<sup>th</sup> July, 2009 and wherein it states that, the plaintiffs were at all material times employees of the Lusaka Water and Sewerage Company Limited whilst the defendant was at all material times a corporation established under the provisions of the Local Government Act, Cap. 281 of the Laws of Zambia and lease of Lot Number 21/M Lusaka in the Lusaka Province of the Republic of Zambia. In paragraph 3 of the said

Statement of Claim, it is stated that by a written correspondence dated 28<sup>th</sup> July, 2006, the defendant confirmed to the plaintiffs' Managing Director and the Commissioner of Lands that after preparation of the layout plan for Lot Number 21/M, Lusaka the Commissioner of Lands would proceed to allocate the subdivisions thereof to the plaintiffs. It was stated further in paragraph 4 that following the preparation of the lay out plan by the defendant in consultation with the plaintiffs' land surveyor, the plaintiffs were issued with provisional letters of offer by the defendant and they paid service charges to the defendant. In paragraph 5, the plaintiffs claim that the defendant has now refused and/or neglected to complete the delivery of the plots in question or to offer alternative plots to the plaintiffs. As a consequence of the aforesaid, the plaintiffs claim the reliefs outlined in paragraph 5(i) to (iv) of the Statement of Claim which have already been referred to in the plaintiffs' claim.

The defendant filed a Defence on 20<sup>th</sup> August, 2008 in which the defendant admitted the contents of paragraph 2 of the plaintiff's Statement of Claim. The defendant denied the contents of paragraph 3 of the Statement of Claim and averred the plaintiffs' company to make submissions of the proposed creation for consideration by the defendant as a planning authority. The defendant further denied the contents of paragraph 4 of the plaintiffs Statement of Claim and the defendant averred that at no given time or at all did the defendant prepare the lay outs plan on

Lot Number 21/M Lusaka and issued provisional letters of offer to the plaintiffs. The defendant also denied the contents of paragraph 5 of the Statement of Claim and would aver that he defendant has not refused and/or neglected to complete delivery of the plots in issue which the defendant has no knowledge of their creation and existence and that there are no minutes from the defendants confirming the said creation of the plots in question whose numbers are also not known by the defendant. The defendant denied that the plaintiffs are entitled to any or at all of the claims stated under paragraph 5 of their Statement of Claim and prayed that this matter be dismissed with costs to the defendant for lack of merit. Save as specifically admitted, the defendant denied each and every allegation in the Statement of Claim as if the same were set out and traversed seriatim.

Only witness, Nerbert Mbao gave evidence on behalf of the plaintiffs as the evidence was said to be basically the same for all the plaintiffs. Nebert Mbao, Security Superintendent at the Lusaka Water and Sewerage Company testified to the effect that he is one of the 132 plaintiffs herein and that in the year 2006, he together with the 131 other plaintiffs being employees of the Lusaka Water and Sewerage Company, had entered into a verbal agreement with the Lusaka City Council, the defendant herein for the acquisition of Lot Number 21/M, Lusaka, the land around Lusaka Water Works in Libala South in Lusaka. He testified further that this was muted by their union and the Lusaka City

Council management and that thereafter the Lusaka Water and Sewerage Company management had a meeting with the defendant management where it was agreed that the land in question, Lot 21/M Lusaka should be demarcated to the employees of the Lusaka Water and Sewerage Company in conjunction with the defendant's surveyors and that thereafter, the Lusaka Water and Sewerage Company surveyor in conjunction with the defendant's surveyor went ahead and prepared the play-out plan. Nerbert Mbao added that to that regard, he together with the 131 other plaintiffs received letters of offer accompanied by the plot numbers from the defendant and he stated that the said letters stated that that they were supposed to pay service charges amounting to K591 500-00 and K150 000-00 for the land record and they paid the stated amounts. He referred to pages 36 to 38 of the plaintiffs' bundle of documents which contains a list of the 132 Lusaka Water and Sewerage Company employees that were allocated the land record and he identified his name at number 7. He also referred to different pages of the plaintiffs' bundle of documents containing copies of receipts of payment made by some of the plaintiffs and copies of letters of offers from the defendant. An example of this can be found at page 9 containing a copy of Francis Chipalo's offer letter dated 13<sup>th</sup> April, 2006 in respect of Lot Number 969, Libala; and a copy of the receipt for payment of the amount of K591 500-00 from Francis Chipalo which is exhibited at page 35 of the plaintiffs' bundle of documents. Nerbert Mbao referred to the copy of the Report of

the Director of City Planning to the defendant contained at page 6 of the plaintiffs' bundle of documents, and which report refers to the land applied for by the 132 Lusaka Water and Sewerage Company employees. He testified that the plaintiffs have not taken occupation of the plots and that they had not received or been given reasons for the defendant's failure to deliver the said plots to them. He also informed the court that the defendant had also not refunded the monies paid by the plaintiffs for service charges and land records. This plaintiff testified further that they had visited Lot Number 21/M Lusaka and they found that the plots had been taken up by some other people and that the plots are not vacant. He confirmed that the plots they were offered were no longer available and that as such, the plaintiffs would like the defendant to give them alternative land elsewhere in Lusaka.

In cross-examination, Nerbert Mbao informed the court that the property in question is in the name of the Lusaka Water and Sewerage Company and that they had documentation to show that and he referred to a letter dated 18<sup>th</sup> July 2007 written to Mr. George Ndongwe, the Managing Director of the Lusaka Water and Sewerage Company by the Acting Director of City Planning for the Acting Town Clerk, at pages 21 and 22 of the plaintiffs' bundle of documents. He, however, could not confirm whether there was title to show that the property is in the name of his employer but he said that they had copies of the lay-out plans even though they had not exhibited them in the plaintiffs' bundle of

documents. The plaintiffs' witness, Nerbert Mbao confirmed that his letter exhibited in the bundle of documents. When referred to page 6 of the bundle of documents, he confirmed that the proposed sites are part of the Lusaka Water and Sewerage residential infrastructure and that there are illegal encroachers on the said land.

With respect to the letters of offer, Nerbert Mbao explained that initially they were being given letters of offer from the Council through the union and he added that there were no interviews since this was done at management level. He also stated that the plaintiffs letters of offer were signed by the Director of Legal Services and that there were 133 letters in total but that the plaintiffs had only exhibited some copies of the 133 offer letters. He stated that there were about six (6) copies of the letters of offer in the plaintiff's bundle of documents and he added that the rest of the letters were with the plaintiffs.

In re-examination, the witness identified the list of plaintiffs at pages 36 to 38 of the plaintiffs' bundle of documents and he stated that the plaintiffs did not individually negotiate for the plots but through the union together with the defendant Council. He was further referred to the letter at page 24 of the bundle of documents and he identified it as a letter that was written by the Managing Director, Mr. George Ndongwe to the Director General of the Anti-Corruption Commission with reference to Lot Number

21/M Lusaka. He also identified the letter dated 21<sup>st</sup> November 2006, that was written by Mr. D. M. Sichombo, Director of Administration and Legal Services in the defendant Council to the Director General of the Anti-Corruption Commission (ACC). The plaintiff also referred to the letters of offer from the defendant Council exhibited at pages 9, 11, 13, 15, 17 and 19 of the plaintiffs' bundle of documents. When asked about the Stand numbers on the letters of offer, he explained that those were temporary plot numbers that were given.

The defendant called one witness, DW1, Roy Mwandunga, Senior Land Surveyor in the defendant Council and who testified that Lot Number 21/M Lusaka is situated in Libala area and that it used to be quite big as the current Libala Stage 3 and Farm Number 917, Kamwala South, Lusaka were part of it. He testified further that this Lot is under State land which means that the defendant as the planning authority can only plan the use of the land and the issuance of those subdivisions is done by the Commissioner of Lands, that is, offering or allocation of pieces of land. This witness informed the court that there are no lay-out plans prepared by the defendant Council and approved by the Council for submission to the Commissioner of lands for numbering and allocation.

This witness testified that the area in question had been squatted on and the defendant Council at one time went and



demolished the structures built on that piece of land because developments were carried out without planning permission. He confirmed that Lot Number 21/M Lusaka houses the Libala waterworks, the property of the Lusaka Water and Sewerage Company but because of the number of squatters prevailing on the ground, the defendant Council has decided to regularize the situation so that it becomes normal. He explained that regularizing involves marking out the boundaries, the physical measuring of the actual structures and opening up the register or records of the owners of the structures. He testified further that the defendant Council started this process in February 2010 and that they put up an advertisement in the Post newspaper for quotations for licenced surveyors and the Lusaka City Council chose Geo Survey even though the defendant Council was yet to sign a contract with Geo Survey for undertaking the boundary and physical measuring of the structures. He also confirmed that the defendant Council opened at a register of the owners of the structures even though he was not sure of the number. With respect to the allocations to the plaintiffs, he said that the allocations were done in error and he confirmed having seen the offer letter marked Libala waterworks with numbered plots and he was emphatic that they were issued in error by the Lusaka City Council. He further testified that there were two officers namely, Mukuka and Nkhata from the defendant Council's Directorate of Legal Services who used to prepare the offer letters on the Council's headed paper. The witness added that when the

defendant Council became aware of this syndicate that is the time when it carried out demolitions in the same area and put a stop to the receipt of service charges made to the Council and he testified further that Mukuka resigned from the defendant Council while Nkhata was charged and later dismissed.

In cross-examination by learned Counsel for the plaintiffs, Mr. Wynter Kabimba, the witness explained that he works in the Department of City Planning when he is involved in the numbering of Council properties preparation of base maps for planning identification of boundaries and boundary dispute resolution. He stated that he was not the head of the department but that he reports to the Director of City Planning. He stated further that the section heads of the department prepare the reports to the full Council but he added that he would not know if there was a report prepared by their department over Lot Number 21/M, Lusaka or if the money paid by the plaintiffs was refunded by the defendant Council. He further confirmed that the defendant Council was currently regularising the occupation of Lot Number 21/M, Lusaka by the squatters. He also admitted that he knew something about the plaintiffs' claim in respect of that piece of land. He, however, stated that he did not know about the negotiations between the Lusaka Water and Sewerage Company and the defendant Council over the said piece of land on behalf of the plaintiffs. He also informed the court that the plots surrounding Libala waterworks and the same plots that were

offered to the plaintiffs were numbered in error. The Senior Land Surveyor explained that the reason for regularizing the squatters as apposed to the plaintiffs whose money the defendant Council had received was aimed at bringing about orderly development by giving offer letters and certificates of title to the squatters, he, however, stated that as far as the defendant Council was concerned, the plaintiffs are squatters but he said that he did not know whether the plaintiffs were in occupation of Lot Number 21/M Lusaka. He confirmed that he was aware of the plaintiff's claim and that they were in possession of offer letters from the defendant Council and he stated that the said offer letters were given to them by the two officers he had earlier mentioned. He also said that they did not inform them of the error but he conceded that it is the defendant Council's responsibility to write to them. This witness informed the court that the plaintiffs were wrong in claiming ownership of the plots in the absence of a letter from the defendant Council and that the squatters are right in occupying the land illegally and he said that he said so because the offer letters were not there and that they have no claimed that as far as the defendant Council is concerned, the plaintiffs are the same squatters. He, however, stated he may not know why they were not in occupation of the piece of land and he stated further that they did not know why the plaintiffs were in court if the defendant Council was giving them the piece of land. He further stated that he did not know that they were not in occupation of the land and he also did not know the number of

squatters but he said that they were many. He also informed the court that they had not surveyed those plots on Lot Number 21/M, Lusaka as that is when they were entering into a contract with Geo Survey. He stated that he inspected this Lot as Senior Land Surveyor in February/March, 2011 in order to familiarize himself with the area and then a group of officers were tasked to come up with a register of occupants of the area. He added that this was within their department and he worked with officers within their department and he had seen the register but it was his evidence that he did not know the number of occupants despite having seen the register. He also said that he had never interviewed any of the squatters on that piece of land even though he met some of them when he was familiarizing himself with the area. He said that he met about ten or so squatters but he did not meet any of the plaintiffs then. He stated further that there was no contract with the defendant Council despite the Council still being in possession of the plaintiffs money for payments and he stated that the plaintiffs are entitled to the land as claimed.

In re-examination by Defence Counsel, Mrs. Chocho, the Senior Land Surveyor stated that he was only aware of the report to regularize the structures and that in the regularization of Lot Number 21/M Lusaka, they were targeting the people who had settled on Lot Number 21/M Lusaka and who the Council refer to as squatters. However, in relation to the plaintiffs, he said that they were not on the ground so they may consider them for

alternative allocation for pieces of land. He also informed the court that some squatters had documentation similar to the plaintiffs while others had none but he could not tell how many had documentation because they just moved around the area and he said that Lot Number 21/M Lusaka is fully occupied and that in the regularization of Lot Number 21/M Lusaka, they were targeting the people who had settled on Lot Number 21/M Lusaka and who the Council refer to as squatters. However, in relation to the plaintiffs, he said that they were not on the ground so they may consider them for alternative allocation for pieces of land. He also informed the court that some squatters had documentation similar to the plaintiff's while others had none but he could not tell how many documentation had because they just moved around the area and he said that Lot Number 21/M Lusaka is fully occupied.

In the plaintiffs' submissions, it was submitted on behalf of the plaintiffs that they were seeking specific performance of demarcated or subdivided plots or in the alternative, the offer of alternative plots to the plaintiffs by the defendant Council, as well as costs against the defendant.

Learned Counsel for the plaintiffs, Mr. Wynter Kabimba summarised the evidence adduced before the court in relation to this case and then he proceeded to apply the law. He referred

the court to the case of **JONAS AMON BANDA v DICKSON MACHIYA TEMBO**<sup>1</sup> where the Supreme Court held that:

**"A court will enforce a contract which had all formalities been observed, would be binding at law and in which case it would be specially enforced."**

In the present case, Counsel for the plaintiffs submitted that the evidence by the plaintiffs' witness shows that the plaintiffs were offered the plots in question by the defendant and that the plaintiffs paid consideration for the same in form of service charges. He submitted further that according to the evidence by the plaintiffs, the said monies had not been refunded by the defendant to-date. He submitted therefore, that a contract for the allocation of the said plots is in existence and that in view of the foregoing and on a balance of probabilities, the plaintiffs' claim should succeed with costs.

In the defendant's written submissions filed on 12<sup>th</sup> August, 2011, Counsel for the defendant Council, submitted that the plaintiffs' claim against the defendant is irregular misconceived as it lacks merit thus incompetent.

She submitted further that the defendant as the planning authority for the Lusaka City area under sections 5 and 24 of the Town and Country Planning Act, Cap 281 of the Laws of Zambia, has full delegated powers with respect to subdivision of land and

development and which provisions comprehensively outlines the law on the full power of the defendant as regard planning authority. She further submitted that the plaintiffs' Mr. Simusokwe prepared the layout plan and transmitted the same to the defendant who found it to be lacking in terms of planning standards and design. Counsel for the defendant thus denied that it at any time prepared the layout plan on Lot Number 21/M Lusaka or approved any layout plan. She referred the court to paragraph 3 of the defendant's letter dated 28<sup>th</sup> July, 2006 to the Managing Director of the Lusaka Water and Sewerage Company which stated that:

**“.....you may be aware that, the power of agency to alienate land has been withdrawn from Council by the Minister of Lands. In this regard, allocation of the resultant plots will be administered by the Ministry of Lands through the Office of the Commissioner of Lands.”**

Mrs. Chocho submitted that Lot Number 21/M Lusaka is under State land and that as such the defendant as a planning authority can only plan the use of the land and the issuance of those subdivisions can be done by the Commissioner of Lands through the Ministry of Lands and that fact was made known to the plaintiffs by the letter dated 28<sup>th</sup> July, 2006 as contained at pages 21 to 22 of the plaintiffs' bundle of documents. She contended

that, therefore, the plaintiffs' claim for specific performance of demarcation or subdivision of plots or portions of Lot Number 21/M Lusaka which is owned by the defendant or offer of alternative plots to the plaintiffs is irregular and misconceived as the defendant has no jurisdiction nor has it assumed such jurisdiction as the same is within the exclusive power of the Commissioner of Lands through the Ministry of Lands. She relied on the Supreme Court's holding in the case of **GODFREY MIYANDA v THE HIGH COURT**<sup>2</sup> where NGULUBE, DCJ (as he then was) in delivering the judgment of the court, stated that:

**“.....it is important to bear in mind the distinction between the right to relief and the procedure by which such relief is obtained. The former is a matter of substantive law; the latter is of adjective or procedural law.”**

Counsel for the defendant submitted that the dicta by Ngulube, DCJ was good law which this court was urged to follow as sound *stare decisis*. She argued that in so far as the question of procedural law is concerned, it was her submission that this court cannot entertain an application of specific performance of demarcation or subdivision plot on or portions of Lot Number 21/M Lusaka, which is not owned by the defendant or offer an alternative plot to the plaintiffs as the defendant has no jurisdiction to do so and cannot assume jurisdiction over State



land under the exclusive jurisdiction of the Commissioner of Lands. She submitted that the defendant can only plan the use of the land but has no jurisdiction to issue or alienate land.

Mrs. Chocho submitted further that there was an attempt to usurp the Commissioner of Lands' power, to alienate land by the defendant issuing provisional offers of land. She further submitted that, however, title deeds were not issued by the defendant because of the fact that the properties under dispute cannot be administered by the defendant. She added that the issuance of provisional offers in this regard was a temporary measure that was meant to end up in a formal process of issuance of certificates of title by the Commissioner of Lands and granting of planning permission by the defendant. Counsel for the defendant's contention is that no useful purpose would be served in granting the plaintiffs' claims as the defendant is statute barred to alienate State land.

She further submitted that the plaintiffs cannot pray for specific performance of demarcation or subdivision of plots or portions of Lot Number 21/M Lusaka or offers of alternative plots to them as this claim arises from a contract when in the circumstances the contract is affected by illegality. Mrs. Chocho submitted that it would be unlawful to allow the plaintiffs to benefit from the illegal contract and she relied on the case of **MOHAMAD S ITOWALA v VARIETY BUREAU DE CHANGE**<sup>3</sup>.

Counsel for the defendant submitted that the plaintiffs had not come to court with clean hands as was evidenced by the letter from the Director of Administration and Legal Services, Lusaka Water and Sewerage Company to the Director General of the Anti Corruption Commission dated 14<sup>th</sup> March, 2007 (as contained at page 23 of the plaintiffs' bundle of documents). She submitted further that by that letter, it was clear that the plaintiffs participated in the illegality of State land without the express authority of the Commissioner of Lands.

In conclusion, she submitted that the plaintiffs are neither entitled to rights legal nor equitable as the defendant has no power to offer them land nor subdivide the said land. She, therefore, prayed that the plaintiff' action be struck out with costs for irregularity and misconception.

I have carefully considered the plaintiffs' action, and all the evidence in its entirety and the submissions by Counsel which have been of great assistance to this court. From the plaintiffs' Statement of Claim, their evidence and the documents exhibited in the bundles of documents before this court, it is evident that the plaintiffs were issued letters of offer for the plots under dispute by the defendant and they paid consideration for the same in the form of service charges and according to the plaintiffs' evidence, the said monies have not been refunded by

the defendant. It is also worth noting that although the defendant has attempted to deny any involvement in any transactions with the plaintiffs, in its Defence, by written correspondence dated 28<sup>th</sup> July, 2006, the defendant's Acting Director of City Planning on behalf of the Acting Town Clerk confirmed to the plaintiffs' Managing Director and the Commissioner of Lands that after preparation of the layout plan for Lot Number 21/M, Lusaka, the Commissioner of Lands would proceed to allocate the subdivision of the piece of land to the plaintiffs. There was also evidence that the letters of offer were signed by the Director of Legal Services in the defendant Council and that as a result of the defendant's failure to deliver the plots to the plaintiffs or offer alternative plots, the Managing Director of the Lusaka Water and Sewerage Company, Mr. George Ndongwe wrote to the Director-General of the Anti-Corruption Commission with reference to Lot Number 21/M Lusaka. The defendant's witness DW1, Roy Mwandunga, Senior Land Surveyor in the defendant Council confirmed the plaintiffs' assertion that the plaintiffs were issued with letters of offer of plots on Lot Number 21/M Lusaka but he claimed that the said allocations were done in error by the defendant Council. He also explained the circumstances under which the said letters of offer were issued by the officers concerned. Therefore, from DW1's evidence, it is clear that letters of offer were issued in respect of the disputed plots and therefore, Counsel for the defendant cannot deny their existence by hiding behind legal provisions for whatever corrupt practices the defendant Council's

officials were involved in. It is also evident to this court from the defendant's Defence and submissions by Defence Counsel that the defendant Council is trying to deny liability of the consequences of their employees' or former employees' actions done in the course of performance of their duties by invoking the defence of illegality and the fact that the power to allocate land and make offers is vested in the Commissioner of Lands and not the Local Authorities.

This court is conversant with the position of the law in relation to alienation of land as the Supreme Court decision in the case of **JUSTIN CHANSA v LUSAKA CITY COUNCIL**<sup>4</sup> is instructive on this point. In that case, the Supreme Court held that:

- “(1) The authority to consider applications for land allocation from members of the public is vested in the President of Zambia who has delegated this authority to the Commissioner of Lands**
- (2) An applicant for land in terms of circular number 1 of 1985, an option either to apply directly to the Commissioner of Lands, or to apply through a Local Authority which has been delegated powers to receive application for land from members of the public**

- (3) Where a member of the public opts for the second route, a Local Authority is mandated to advertise any land available, receive applications from members of the public and make recommendation to the Commissioner of Lands**
- (4) The powers to allocate land and make offers to successful applicants is reposed in the Commissioner of Lands.”**

From the foregoing, it is undisputed and settled that the authority to consider applications for land allocation from members of the public is vested in the President of Zambia who has delegated the said authority to the Commissioner of Lands. An applicant may apply directly to the Commissioner of Lands or through the Local Authority such as the defendant herein. Therefore, that being the position the plaintiffs application for allocation of land through the defendant Council was not irregular, what was irregular, however, was the issuing of the letters of offer by the defendant Council's officials and hence the defendant Council's desire to distance itself from the irregular procedure. Nevertheless, the defendant cannot escape from the fact that its officials were involved in irregular and illegal transactions. Therefore, the issue that arises is what the way forward is and how best the defendant Council can redress the wrong done to the plaintiffs. In the case of **WESLEY MULUNGUSHI v CATHERINE B. M. CHOMBA**<sup>5</sup> it was held inter alia by the Supreme Court that the court will decree

specific performance only if it will do more perfect and complete justice than the award of damages.

In the present case, the question that arises is whether it would be proper for this court to order specific performance by the defendant Council when the defendant Council did not have the authority or power to allocate land and make offers to the plaintiffs that the defendant Council's officials purported to have by using letters of offer to the plaintiffs. The answer is that it would not only be improper but contrary to the law as it is undisputed that the powers to allocate land and make offers to successful applicants is reposed in the Commissioner of Lands. It follows, therefore, that this court ordering specific performance would not do perfect and complete justice than awarding damages to the plaintiffs. In any case, ordering specific performance would make such performance impossible as there was evidence by the defendant's witness DW1, Roy Mwandunga that Lot Number 21/M Lusaka had been invaded by squatters whose illegal structures the defendant Council's agents had to demolish and the defendant Council was in the process of regularizing the situation by marking out the boundaries.

In the circumstances, therefore, I am inclined to consider the issue of the award of damages for the monies paid by the plaintiffs to the defendant Council and which monies have not been refunded to the plaintiffs. I must, however, state that I am

alive to the Supreme Court's decision in the case of **GIDEON MUNDANDA v TIMOTHY MULWANI & ORS**<sup>6</sup> where the Court held, inter alia, that damages cannot adequately compensate a party for breach of a contract for the loss of an interest in a particular piece of land or of a particular house (however ordinary) but, nevertheless, this court's award of damages to the plaintiffs relates only to the refund of the monies spent by the plaintiffs in complying with the requirements of the purported offers together with interest.

However, with respect to the plaintiffs' loss of interest in land or opportunity to own pieces of land, I am of the considered view that it would do more perfect and complete justice for this court to order that the defendant Council do recommend the plaintiffs to the Commissioner of Lands for allocation of alternative pieces of land as they had earlier applied to the defendant Council. To that effect, I, accordingly, order that the defendant Council do make recommendation to the Commissioner of Lands for the allocation of alternative plots or pieces of land to the plaintiffs herein as they had earlier applied for plots on Lot Number 21/M, Lusaka and that the plaintiffs be advised of all the requirements for eligibility for such recommendation.

Secondly, I hereby order that the defendant Council do pay damages to the plaintiffs by way of reimbursement of the monies paid by the plaintiffs to the defendant Council. The said damages

to be paid with interest thereon at the average short deposit rate from the date of filing of the Writ of Summons to date of judgment and, thereafter at the average Bank of Zambia lending rate until payment. Costs to follow the event in default of agreement, to be taxed.

DATED this.....day of October, 2012 at Lusaka.

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F. M. Lengalenga  
**JUDGE**