

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

2005/HP/1108

BETWEEN:

EUSTACE SPAITA BOBO
ANNESIE BANDA BOBO

1st PLAINTIFF
2nd PLAINTIFF

And

THE COMMISSIONER OF LANDS
PANDE KAMPUKESA KABINGA

1st DEFENDANT
2nd DEFENDANT

***Before the Hon. Mr. Justice Justin Chashi in Open Court on
the 26th day of April, 2013.***

*For the Plaintiffs: SC Mwanashiku, Messrs M&M Advocates.
For the 1st Defendant: M Ndhlovu (Mrs) Assistant Senior State Advocate
For the 2nd Defendant: G Pindani, Messrs Lewis Nathan Advocates.*

J U D G M E N T

Cases referred to:

- 1. Nora Mwaanga Kayoba and Alizani Banda v Eunice Kumwenda Ngulube
-(2003) ZR 132.*
- 2. Wilson Masauso Zulu v Avondale Housing project Limited (1982) ZR
172*
- 3. Nkongolo Farms Limited v Zambia National Commercial Bank Limited,
Kent Choice Limited (In Receivership) and Charles Haruperi (2005) ZR
78.*
- 4. Justin Chansa v Lusaka City Council (2007) ZR 256*
- 5. Robert Chimambo and 2 Others v Commissioner of Lands and 3 Others
(2008) ZR 1.*
- 6. Chilufya v Kangunda (1999) ZR 166*
- 7. Anort Kabwe and Charity Mumba Kabwe v James Daka, The Attorney
General and Albert Mbazima (2006) ZR 12.*

8. *Nico Adonopoulos and Evangelos Antonpoulus v Awaji Farms Limited and The Attorney General (2010) ZR 414, Vol 1*

Legislation referred to:

9. *The Lands Act, Chapter 184 of The Laws of Zambia*
10. *The Lands and Deeds Registry Act, Chapter 185 of The Laws of Zambia*

The 1st and 2nd Plaintiffs namely **Eustace Spaita Bobo** and **Annessie Banda Bobo** commenced proceedings against The **Commissioner of Lands** and **Pande Kampukesa Kabinga**, the 1st and 2nd Defendants respectively by way of a Writ of Summons on the 23rd day of November 2005 seeking the following reliefs:

1. ***An Order declaring the purported cancellation of the Plaintiffs Certificate of Title by the 1st Defendant null and void,***
2. ***An Order declaring the purported allocation of Lot No. 9124/M Lusaka by the 1st Defendant to the 2nd Defendant null and void,***
3. ***An Order declaring the Plaintiffs the legitimate Owners of Lot No. 9124/M Lusaka,***
4. ***Any other relief that the Court might deem fit,***
5. ***Costs.***

The Writ of Summons was accompanied by a Statement of Claim in which the Plaintiffs averred that the 1st and 2nd Plaintiffs purchased **Lot 9124/M Lusaka** in 1993 from Hilda Kabilo, Flint Kabosha and Kawana Kabosha, joint Owners, which land was adjacent to the Plaintiffs residence in Makeni. That the Plaintiffs inspected the Original Certificate of Title and also conducted a search at the Ministry of Lands which revealed that there were no encumbrances.

The Plaintiffs further averred that they applied for State Consent to assign which was granted and proceeded to obtain the Certificate of Title in their names. That thereafter, they were surprised to receive a letter from the 1st Defendant requesting them to suspend the developments.

According to the Plaintiffs, when their Lawyers pursued the matter, the 1st Defendant told them that they had repossessed the land by way of re entry and the land had been re allocated to the 2nd Defendant. That however, there was no record of any Notice of Intention to re enter or a Certificate of re entry before the Plaintiffs purchased the land.

The 1st Defendant settled its defence on the 24th day of August 2012 and averred that **Lot 9124/M** was re entered on the 23rd day of October 2003 before it was sold to the Plaintiffs who registered their assignment on the 6th day of November 2003. Further that a record of the Notice of Intention to re enter and the Certificate of re entry existed before the Plaintiff purchased the property.

The 2nd Defendant settled his defence on the 18th day of August 2006 and averred that he is the registered proprietor of **Lot 9124/M** Lusaka having acquired the same on the 20th day of April 2004 after he had made an application on the 5th day of December 2002 after noticing that the land was vacant.

The 2nd Defendant further averred that he was offered the land on the 29th day of August 2003, he paid the consideration fees and the fees for preparation of diagrams relating to the Certificate of Title.

It is the 2nd Defendant's averment that when he was about to embark on construction he was confronted by the Plaintiffs who claimed ownership of the property. That he was on the 9th day of June 2004 advised by the 1st Defendant that the property had been re entered by the State and that an

employee of the 1st Defendant had been dismissed for deleting information relating to the re - entry.

At the hearing of the matter on the 31st day of October 2012, the 1st Plaintiff gave evidence on behalf of the Plaintiffs. It was his evidence that the Plaintiffs who are man and wife learnt about the sale of **Lot 9124/M** Lusaka and got interested because it was adjacent to their current plot. That they made contact with the Vendor's agent, Kasonde Mulenga and got copies of the Certificate of Title. Thereafter the 1st Plaintiff went and conducted a search at the Ministry of Lands and the search through a print out revealed that there was no encumbrances and further that the property belonged to the people who were selling.

The 1st Plaintiff testified that they paid K10,000,000 and executed an assignment and the documents were then given to the agent who did the rest of the work and obtained the Title Deeds. That in addition, the Plaintiffs paid K625,000 to facilitate the acquisition of Title Deeds.

According to the 1st Plaintiff, he is aware that State Consent was unconditionally issued and the Certificate of Title was obtained in the Plaintiff's names as joint tenants on the 6th day of November 2003.

The 1st Plaintiff further testified that on the 5th day of December 2003, there were people on the property trying to sight a borehole. When he approached them, they told him that they had been sent by the 2nd Defendant. That he then asked them to leave as the Plaintiffs had Title Deeds to the property.

That on the 8th day of December 2003 when the 1st Plaintiff went to attend to the correction of a typographical error on the Title Deeds he was informed that there had been a meeting over the same property which was chaired by a Mr. Makeleta an employee of the 1st Defendant, which meeting the 2nd Defendant attended.

The 1st Plaintiff further testified that the Plaintiffs were denied a meeting with the 1st Defendant and in late December 2003, they received a letter addressed to them and the 2nd Defendant stopping them from developing the land until further notice at which stage, the Plaintiffs engaged the legal firm of Watae Banda and Company to pursue the matter on their behalf. That their lawyers received a letter dated 4th day of June 2004.

According to the 1st Plaintiff, he never came across a Certificate of re entry, neither did he receive any correspondence from the 1st Defendant indicating that the Plaintiffs Title had been cancelled, nor to surrender the same. Further that the Plaintiffs did not receive any correspondence from the 1st Defendant indicating the land was being withdrawn from the Plaintiffs and being allocated to the 2nd Defendant.

It was the 1st Plaintiffs further evidence that he refused to be given an alternative piece of land. Further, that the agent has since died and he does not know the whereabouts of the persons who sold the Plaintiffs the land.

In cross examination by Counsel for the 1st Defendant, the 1st Plaintiff asserted that the Plaintiffs signed a Contract of Sale, although the same was not filed into Court. That the Consent to assign has also not been filed into Court.

The 1st Plaintiff further asserted that he did later ask the Sellers of the property if they had been served with any documentation relating to re entry and they responded in the negative.

In cross examination by Counsel for the 2nd Defendant, the 1st Plaintiff asserted that the Plaintiffs did not engage a lawyer to handle the transaction, but relied on the agent. That at the Ministry of Lands, he was not availed the green file, but the Officers confirmed that the position was as what the print out stated.

When shown pages (3) and (4) of the 2nd Defendants Further Supplementary Bundle of Documents, the 1st Plaintiff stated that, from the print out entry No. 5 is the Notice of Intention to re enter, which also appears on page (2) of the same bundle.

When referred to the document on page 12 of the Plaintiffs Bundle of Documents, the 1st Plaintiff asserted that the Ministry of Lands acknowledged that there was a complication regarding the repossession.

The 1st Defendant, did not call any witness.

The 2nd Defendant called two witnesses.

DW1, Nathaniel Nawa Inambao, a subpoenaed witness to testify as of record on issues which came to his attention when he was Commissioner of Lands from the 5th day of September 2002 to 24th day of April 2005 testified that sometime in July/August 2003, he caused a Notice of Intention to re enter **Lot No. 9124/M Lusaka** which according to the record was registered in the names of Clint Kabosha and Kawama Kabosha.

That the reason for the re entry was nonpayment of ground rent and non development in accordance with the lease agreement. That the notice was sent to the last known address of the registered owners by registered mail and it was not returned and neither was there a response. That at the expiry of the notice period of three months the ground rent remained unpaid and the property undeveloped.

DW1 further testified that he then caused a Certificate of re entry to be entered effectively repossessing the property and that this meant the property was free for re allocation. That the Notice of Intention to re enter appears on page (2) of the Defendants' Further Supplementary Bundle of Documents which was signed by DW1. And the land register appears on pages (3) and (4) of the same bundle. That entry No. 5 is the registration of the Notice of Intention to re enter which was registered on the 24th day of

August 2003. Further, that the land register on page (7) shows an assignment of the property from the Sellers and entry No. 5 at page (7) is strange in that you cannot have two No.5 entries, on the same property. It was DW1's testimony that the assignment could not have been registered on a property which had a notice to re enter.

Further, according to DW1, the record on page (7) appears totally different to that on pages (3) and (4), not only in font but also in style and also registration of the parties.

DW1 further testified that after the re entry, the property was then offered to the 2nd Defendant as per the letter of offer which was issued on the 23rd day of October 2003. That the Plaintiffs lawyers Banda Watae later appealed to DW1 as against the letter which was written by a Mr. Siansumo who was acting Commissioner of Lands dated 24th day of December 2003, which stopped the Plaintiffs from developing the land on the ground that it was repossessed.

According to DW1 he responded vide letter dated 24th day of June 2004 advising that the status quo of repossession remain and he later advised that the property had been re allocated to the 2nd Defendant and he offered the Plaintiffs alternative land which they declined.

In cross examination by Counsel for the Plaintiff, DW1 asserted that he was Commissioner of Lands up to 24th day of March 2005 when he was retired in national interest. He reiterated that the Notice of Intention to re enter was sent by registered mail and was not returned and that, that is proof enough, although he would not know if it was received. That he did not advertise the Notice in public newspaper.

When referred to pages (3) and (4) of the 2nd Defendants Further Supplementary Bundle of Documents, DW1 asserted that entry No. 5 on page (4) is a Notice to re enter. That, that is a land register which was

printed on the 25th day of August 2003. That the entry on page (7) starts on entry No. 5 which was printed on the 30th day of March 2009 and does not show the entire record and is therefore not helpful. That the two print outs are different and were printed on different dates, although they are both Computer generated.

It was DW1's evidence that a Computer can be set to generate print outs. DW1 conceded that the Lands registry had been problematic and therefore mistakes do happen.

According to DW1, a prudent search should not rely on the land registry but should go further to look on the green file as the Computer can be manipulated and as such print outs are not reliable as a prudent search. That the green file was not before the Court.

DW1 further testified that the Offer to the 2nd Defendant was dated 23rd day of October 2003. When shown page (7) of the 2nd Defendants Supplementary Bundle of Documents, DW1 asserted that the offer was made before the expiry of the three months notice. That the Bundles do not show the Certificate of re entry and neither is there evidence of re entry on the print outs.

According to DW1, the Certificate of re entry existed when he was in the office and that it guided him in arriving at the decision.

DW1 further asserted that he was not aware whether the Commissioner of Lands had challenged the legitimacy of the Certificate of Title held by the Plaintiffs. When referred to page (1) of the 2nd Defendants Supplementary Bundle of Documents, DW1 asserted that the Notice of re entry was made before the expiry of the notice.

DW2 was the 2nd Defendant who testified that in early 2003, he had applied to Ministry of Lands for land. That he was offered land on 23rd day of October 2003 in writing and the letter of offer appears on pages (7) and (8) of the

Defendants Supplementary Bundle of Documents. That he accepted the offer and made payments for the diagrams and was issued with receipts and a Certificate of Title on the 3rd day of December 2003, which appears on pages (1) to (3) of the 2nd Defendants Bundle of Documents. That he then constructed a storage house up to box level and later contracted a Driller to do a bore hole. That it was at this time that his workers were accosted by the Plaintiffs.

DW2's further testimony was that as he was in Mongu, he asked his father Kabinga Pande to follow up the matter with the Commissioner of Lands and he was advised that the land had been repossessed from the previous Owners and that the Title which was issued to the Plaintiffs was cancelled.

DW2 further testified that he later engaged Lawyers to assist him with the case. That they obtained print outs and noted that the two No. 5 entries were not the same. DW2 referred to pages (4) to (6) of the 2nd Defendants Bundle of Documents and pages (3) and (4) of the 2nd Defendants further Supplementary Bundle of Documents.

According to DW2 he became the Owner of the land in November 2003.

In cross examination by Counsel for the Plaintiffs, DW2 asserted that he applied for the land in 2002, although he did not file copy of the application letter. That he applied for this particular piece of land because it was vacant for some time. That before applying, a search was conducted and there was a re entry.

At the end of the trial all the parties indicated that they would be filling their respective written submissions.

The Plaintiffs filed theirs on the 15th day of February 2013. Counsel for the Plaintiffs after reviewing the evidence of the witnesses, submitted that the evidence of DW1 appears to have been designed to cover up the questionable transaction of the purported re entry on **Lot 9124/M**

Lusaka. That if the notice to re enter was indeed lodged on 20th March 2003 it would have been registered against the property at the time and it would have been a way of alerting the Owners at the time that there was an Intention by the State to re enter the property. That according to the print out appearing on page (4) of the 2nd Defendant's Further Supplementary Bundle of Documents, the Notice of Intention to re enter is dated 25th August 2003 and not 20th March 2003. That the same notice indicates that the Owners had three months notice to make representations which should have expired on 25th day of November 2003, however, the evidence available shows that before the expiry of the notice period the 1st Defendant purportedly issued an offer letter to the 2nd Defendant on the 23rd day of October 2003 as per page (7) of the 2nd Defendant's Supplementary Bundle of Documents.

According to Counsel for the Plaintiff, there is no copy of the letter before Court which was sent in March 2003 by the Commissioner of Lands for re entry.

Counsel submitted that the letter of Offer to the 2nd Defendant is a nullity because the property it purported to offer was still legally owned by the Owners as the Notice period had not expired since the letter of offer is the genesis of the 2nd Defendant's Certificate of Title and it also follows that even the Certificate of Title issued to the 2nd Defendant is a nullity.

Counsel further submitted that even if the Notice of Intention to re enter was actually issued and registered in August 2003 which fact is strongly denied, the expiration of the three months notice did not automatically mean that the Kabosha's had been reposed of the property. The 1st Defendant ought to have taken the further action of preparing a Certificate of re entry and having the same signed and thereafter registering it against the property. That though DW2 made reference to the existence of the Certificate of re entry, none was produced before the Court.

Counsel drew the attention of the Court to **Section 13 of the Lands Act** which states as follows:

“13(1) where a lessee breaches a term or a condition of a covenant under this Act, the President shall give the lessee three months notice of his intention to cause a Certificate of re entry to be entered in the register in respect of the land held by the lessee and requesting him to make representations as to why a Certificate of re entry should not be entered in the register.

(2) If the lessee does not within three months make the representation required under Subsection (1) or if after making representations the President is not satisfied that a breach of a term or condition of a covenant by the lessee was not intentional or was beyond the Control of the lessee, he may cause the Certificate of re entry to be entered on the register.”

Counsel submitted that it is not in all cases that a Notice of Intention to re enter has been issued that a Certificate of re entry is registered. Further that, the law required that a Certificate of re entry is registered, but in this case there is neither evidence of the existence of a Certificate of re entry nor its registration.

It was Counsel’s contention that the Notice to re enter and the Certificate of re entry did not exist, because if they did State Consent to assign could not have been issued and the assignment to the Plaintiffs could not have been approved and registered and a Certificate of Title issued and signed by the Registrar.

The 1st Defendant filed their submissions on the 4th day of March 2013 and after a brief review of the evidence, Counsel for the 1st Defendant submitted that if the 1st Plaintiff had conducted an extensive and diligent search at the Ministry of Lands, he would have discovered that the property in question

had been re entered. Counsel drew the attention of the Court to the case of **Nora Mwaanga Kayoba and Alizani Banda v Eunice Kumwenda Ngulube and Andrew Ngulube**¹ where the Supreme Court held inter alia that:

“....in purchasing of real properties parties are expected to approach such transactions with much more serious inquired to establish whether or not the property in question has no encumbrances. Buying real property is not as casual as buying house hold goods or other personal property.”

According to Counsel, it is not clear how State Consent to assign the property was obtained when there was a Certificate of re entry in force.

Further that under the principle of he who alleges must prove, the Plaintiffs should have produced a copy of the Consent. Counsel in that respect relied on the authority of **Wilson Masauso Zulu v Avondale Housing Project Limited**².

In was Counsels view that the Plaintiffs have failed to prove that the re entry was not validly done.

On the issue of the authenticity of the document from the Ministry of Lands, Counsel submitted that the documents are valid as there was no allegation of fraud against DW2. The case of **Nkongolo Farms Limited v Zambia National Commercial Bank Limited, Kent Choice Limited (In Receivership) and Charles Haruperi**³ where the Supreme Court held inter alia that:

“Where a party relies on any misrepresentation, fraud, breach of trust willful default or undue influence by another party he must supply the necessary particulars of the allegation in the pleadings. Fraud must be precisely alleged and strictly

proved. There is no presumption of fraud. In the instant case, fraud was not alleged.”

In concluding, Counsel for the 1st Defendant submitted that the Certificate of Title which was issued to the Plaintiffs was cancelled and therefore the Plaintiffs have no case against the 1st Defendant.

The 2nd Defendant's filed their submissions on the 16th day of March 2013. Counsel submitted that the Commissioner of Lands has the power to allocate any free land to any qualified person and the 2nd Defendant is one such allocatee. Counsel relied on the case of **Justin Chansa v Lusaka City Council**⁴ and the case of **Robert Chimambo and 2 Others v Commissioner of Lands and 3 Others**⁵ and also **Section 3 (2) of The Lands Act**⁹.

That the property was free for re allocation after DW1 sent a Notice of Intention to re enter by registered post in March 2003 to the Title holders and it was not returned.

Counsel submitted that the 2nd Defendant was an Innocent person who was merely allocated the property, which he accepted and paid consideration fees in accordance with **Section 4 (1) of The Lands Act**⁹ and was issued with a Certificate of Title by the Ministry of Lands and therefore falls under the category of a Bona fide purchaser for value without notice who went further and made improvements on the property.

According to Counsel, the Plaintiff did not fully investigate the Title held by the Vendors and they did not engage a qualified Lawyer to handle the transaction but relied on the services of an Estate Agent. That they did not conduct a search on the green file.

The **case of Kayoba**¹ (supra) was cited. It was Counsel's submission that the Plaintiffs through the Estate Agent had actual and constructive notice of

the existence of the Notice of Intention to re enter and should therefore not have gone ahead with the transaction.

Counsel also submitted that the Plaintiffs cannot disapprove the testimony of DW1 regarding the re entry and re allocation of the property as they were not the Owners at the time.

Counsel further submitted that the Plaintiffs Certificate of Title was cancelled by the Commissioner of Lands for being procured irregularly and that the Plaintiffs were aware of that.

Counsel contended that the 2nd Defendant has valid Title to the property which is conclusive proof of Ownership and the Plaintiffs have not pleaded any fraud at all against the 2nd Defendant to vitiate title. Counsel drew the attention of the Court to the case of **Chilufya v Kangunda**⁶ and **Section 33 of The Lands and Deeds Registry Act**¹⁰.

I have carefully considered and analysed the evidence of the witnesses and the written submissions by respective Counsel and the authorities cited and I am indebted to all the three Counsel for their spirited submissions. What we have in this matter are two competing interests of both Title holders to **Lot 9124/M Lusaka**. The Interests of the Plaintiffs, holders of **Certificate of Title No. 22617** dated the 6th day of November 2003 having purchased the land at K10,000,000 from the previous land owners competing against the interest of the 2nd Defendant claiming to have been allocated the said piece of land by the 1st Defendant after having had it repossessed and now holding Certificate of Title No. 26903 dated 30th April 2004.

It should be noted from the outset, that no fraud has been alleged or pleaded against the Plaintiffs nor the 2nd Defendant in the manner the Certificates of Title were procured. In my understanding the main issue to be resolved in this matter revolves around the 1st Defendant, the Commissioner of Lands,

who in his defence pleads that the Plaintiffs should not have had their interest registered as prior to the registration, the property had been repossessed by the 1st Defendant by way of re entry and therefore, the 1st Defendant had the right thereafter to re allocate the land to the 2nd Defendant. It is that re entry which has been questioned by the Plaintiffs in trying to assert their interests, in that the Notice of re entry was never served on the owners of the land at the material time and secondly that the re entry was not registered on the land register.

The starting point in resolving the issue therefore is to **determine whether the re entry by the 1st Defendant was valid at law**. If the re entry was valid at law, then the 1st Defendant had the right to allocate it to the 2nd Defendant. If not, the converse would be the position.

Reference again is made to the provisions of **Section 13 of The Lands Act⁹** which appears on page J13 of this Judgment.

The essence of **Section 13 of The Lands Act⁹** is to afford the lessee to either make representations or/and amends of the alleged breach. It is therefore mandatory that the lessee is served with the notice of the intention to cause a Certificate of re entry to be entered. This means that apart from ensuring that the notice is served on the lessee, there should be proof of such service. Further that only after the expiration of the three months notice period should the President consider whether there has been any representations and if so whether he is satisfied that the breach was not intentional or beyond the control of the lessee.

This provision of the law would seem to be in tune with the principles of natural justice in that the lessee ought to be afforded an opportunity to make representations.

As regards service of the notice, although this is not provided for in the main body of the provisions of **The Land Act**⁹, it has come to be accepted that and Judicial notice should be taken to that effect that service of notices is in line with Rule 27 of The Lands (The Lands Tribunal) Rules of **The Lands Act**⁹ and should therefore be by registered post to the lessee's usual address for service. It also follows that the evidential burden is on the Commissioner of Lands representing the President to provide proof of such service.

The 1st Plaintiff in his evidence testified that he asked the previous owners of the land from whom he had bought the land if at all they had been served with a Notice of Intention for re entry and they replied in the negative.

The Commissioner of Lands is a party to these proceedings and should therefore have played a more active and prominent role in assisting the Court to arrive at a decision. However for some unknown reason they decided to be passive. The 1st Defendant did not file any documents before this Court despite being the custodian of the Lands Register and the green file and neither was the current Commissioner of Lands called as a witness. The 1st Defendant took a very casual approach to this matter short of **being an "I don't care attitude."** It would seem the 1st Defendants were content with relying on the evidence of DW1 who was subpoenaed by the 2nd Defendant, who however had no documents in his possession.

DW1, Kept referring to the importance of the green file whose contents were not before Court. There is no evidence to support assertion by DW1 of the notice of re entry generated by him on the 20th day of March 2003. If any, was registered as it does not appear on the Land Register. The only Notice which appears is the one which was purportedly registered on the 25th day of August 2003, copy of which appears on page (2) and the entry on page (40 of the 2nd Defendant's Further Supplementary Bundle of Documents.

There is however no proof that the said Notice of Intention was ever sent to the lessees by registered mail as there was no proof provided to that effect in order to afford the lessees an opportunity to make representations.

Assuming that the Notice was sent, which is my finding of fact that it was not, the three months notice should have then expired on the 25th day of November 2003 after which the Commissioner of Lands would have considered the representations (if any) and only after then, if he was dissatisfied with the representations, could he have caused a Certificate of re entry to be registered in accordance with **Section 13 of The Lands Act** and at that stage the land can then be said to have been repossessed. It is evident that the Commissioner of Lands caused an offer to the 2nd Defendant on the 23rd day of October 2003 before the expiry of the Notice period and before the registering of the Certificate of re entry. Neither is there any evidence that a Certificate of re entry was registered.

The re allocation of the land should only have been done after the Certificate of re entry was registered. One would wonder what the urgency in the re allocation was if not for an ulterior motive.

In view of the aforesaid, it is my finding of fact and law that the purported re entry by the Commissioner of Lands was not valid at law. I am fortified in my finding by the authority of **ANORT KABWE AND CHARITY MUMBA KABWE v JAMES DAKA, THE ATTORNEY GENERAL and ALBERT MBAZIMA¹** where the Supreme Court exhaustively dealt with the conditions to be satisfied for a repossession to be valid. In the said case, they held as follows:

"1. The mode of service of the notice to cause a Certificate of re entry to be entered in the register for a breach of a Covenant in the lease as provided for in Section 13 (2) of The Land Act is cardinal to the validation of the subsequent acts of the Commissioner of Lands in disposing of the land to another person.

(2) If the notice is properly served, normally by providing proof that it was by registered post using the last known address of the lessee from whom the land is to be taken away, the registered owner will be able to make representations, under the law, to show why he could not develop the land within the period allowed under the lease.

(3) If the notice is not properly served and there is no evidence to that effect, there is no way the lessee would know so as to make meaningful representations.

(4) A repossession effected in circumstances where a lessee is not afforded an opportunity to dialogue with the Commissioner of Lands, with a view to having an extension of period in which to develop the land cannot be said to be valid repossession."

The aforestated principles were recently followed by Mutuna, J in the High Court case of **NICOS ADONOPOULOS and EVANGELOS ANTONOPOULUS v AWANJI FARMS LIMITED and THE ATTORNEY GENERAL**⁸ where he held inter alia that:

"1. The purpose of the requirement under Section 13 of The Lands Act is to afford a lessee who is in default to dialogue with the Commissioner of Lands with the intention to extend the period within which he is required to develop the property.

2. A repossession effected in circumstances where the lessee is not afforded an opportunity to dialogue is not valid."

It follows from the aforestated authorities, that whatever actions the Commissioner of Lands took in pursuance of the purported re entry which is not valid at law, such as the re allocation of the land to the 2nd Defendant are therefore not valid.

What is more damning in this matter is that none of the print outs produced by the 2nd Defendant shows the cancellation of the Certificate of Title held by the Plaintiffs or the previous owners before the registration of the Certificate of Title in favour of the 2nd Defendant and also no entry of a Certificate of re entry as having been registered.

Having dealt with the issue of the re entry I also wish to deal with the issue of whether the Plaintiffs can be said to be bonafide purchasers of the land without notice. To begin with were Plaintiffs diligent in their search so as to have properly discharged their search obligations.

According to the 1st Plaintiff, he examined the Certificate of Title and went and conducted a search at the Lands Registry and obtained a print out which appears on page 8 of the Plaintiffs Bundle of Documents and did not show any encumbrances. There is no dispute that this is an Official document obtained from the Lands Registry on the 22nd day of August 2003.

According to DW1, the Notice of Intention to re enter was only generated and registered three days later on the 25th day of August 2003 as shown of page 4 of the 2nd Defendants Further Supplementary Bundle of Documents. It is therefore not in doubt that at the time the Plaintiffs conducted the search, there were no encumbrance. However, if indeed a Notice of re entry was registered on the 25th day of August 2003, although the same does not appear on the print out on page 5 of the 2nd Defendants Bundle of Documents, on which the Plaintiffs Certificate of Title was registered, the Plaintiffs interests should not have been registered. It is inconceivable that the Ministry of Lands would have issued a Consent to Assign and accepted the Assignments and effected the change of ownership by registering the same and issuing a Certificate of Title in the face of a Notice to re enter on the Land Register without first concluding the process of re entry in one way or the other.

DW1 emphasized that, it is not enough to rely on a computer print out on the conducting of a search at the Lands Registry. That one also needs to look at the green file. However, at the same time, he also relied on the print outs before Court and no green file was over produced.

In my view, even if the 1st Plaintiff had an opportunity to look at green file on the 22nd day of August 2003 which he was denied, it would not have been of much help, since the purported Notice of Intention only came into being on the 25th day of August 2003.

The aim of the computerization of the Lands Register was to centralize the information and cut on voluminous paper work and in the process do away with the physical searches. This meant that all the information would be computerized and all what one needs is to fill in a request for a Computer print out, pay the requisite fees and be issued with a Computer printout which would bear an Official Stamp and that is what is said to be an official search.

I do not agree with DW1 that one needs to go further and also conduct a search on the green file. There is no such legal requirement. That would definitely defeat the all essence of computerization. It is also envisaged that a Computerized System would have security features to deter or stop any manipulation of data by employees and others.

If indeed there was such manipulation by the employees as DW1 seems to suggest, no printout before this Court can be accepted including those by the Defendants as they are all subject to manipulation, in the absence of the green file which was not made available to this Court. The Computer printout is provided for under Section 22 (1) of **THE LANDS AND DEEDS REGISTRY ACT**¹⁰ which provides as follows:

“22 (2) where a register or part of the register is kept other than in the form of a book, it shall be made available for search in a convenient written form as a printed document or by means of an electronic device.”

In my view the Plaintiffs discharged their obligation diligently in the manner they conducted the search and it would be absurd as outsiders, who had faith in the system at the Ministry of Lands to be lamed with the so called confusion, manipulations or shortcomings at the Ministry of Lands. If there is any one to blame, it can only be the Commissioner of Lands at the material time.

It should also be noted that the Commissioner of Lands having issued a Certificate of Title to the Plaintiffs on the 6th day of November 2003, he was precluded to issue a subsequent Certificate of Title to the 2nd Plaintiff which is dated the 24th day of April 2004.

Once the Certificate of Title was issued to the Plaintiffs, they became shielded under the provisions of Section 33 of **The Lands and Deeds Registry Act**¹⁰ except in case of fraud, which in the case in CASU was not pleaded nor proved and also enjoyed protection against adverse possession as provided for under Section 35 of **The Lands and Deeds Registry Act**¹⁰.

In view of the aforesaid, having found that the re entry was not valid and that the Plaintiffs had discharged their obligation to conduct a search diligently, **the Plaintiffs are hereby declared the legitimate and beneficial owners of Lot No. 9124/M Lusaka** and that their **Certificate of Title be restored to them.**

Consequently the Certificate of Title No. 26903 which was issued to the 2nd Defendant be accordingly cancelled.

I award the costs of these proceedings to the Plaintiffs to be borne by the 1st Defendant, same to be taxed in default of agreement.

Leave to appeal is hereby granted.

Delivered at Lusaka this 26th day of April 2013.

JUSTIN CHASHI
HIGH COURT JUDGE