

IN THE HIGH COURT FOR ZAMBIA
AT THE KITWE DISTRICT REGISTRY
(CIVIL JURISDICTION)

2010/HK/330

BETWEEN:

MOPANI COPPER MINES PLC - PLAINTIFF
AND
KITWE TABERNACLE END TIME MESSAGE MINISTRIES - 1ST DEFENDANT
THE COMMISSIONER OF LANDS - 2ND DEFENDANT
THE ATTORNEY GENERAL - 3RD DEFENDANT

Before the Hon. Mr. Justice I.C.T. Chali in Open Court on the 16th day of October,
2013

For the Plaintiff: Mr. C. Tafeni and Mr. G. Mateyo

For the 1st Defendants: Mr. F. Chalenga - Messrs Freddie & Company

For the 2nd & 3rd Defendants: No Appearance

JUDGMENT

Case referred to:

1. Lysaght vs. Edwards (1876) 2 Ch D 499
2. Gibson Tembo vs. Alizwani SCZ Judgment No. 6 of 1996
3. Chimambo and Others v. Commissioner of Lands (2008) 1 ZR. 1
4. Anti Corruption Commission vs. Barnnet Development Corporation Limited (2008) 1 ZR. 69
5. Sable Hand Zambia Limited vs. Zambia Revenue Authority (2005) ZR. 109

Legislation referred to:

1. Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia
2. Lands Act, Chapter 184 of the Laws of Zambia.

By a writ of summons and statement of claim taken out on 23rd July, 2010 the Plaintiff sought, inter alia, the following reliefs;

1. A declaration that the Plaintiff is entitled to ownership and possession of the piece of land known as Lot 515/M, Kitwe;
2. An order directing the cancellation of Certificate of Title No. 31257 wrongly issued to the 1st Defendant by the 2nd Defendant.
3. Damages for trespass; and
4. An order of injunction restraining the 1st Defendant from carrying on any or further development on Lot No. 515/M Kitwe pending the final determination of the matter.

Upon application by the Plaintiff, I did by my ruling of 2nd February, 2011 grant the Plaintiff the interlocutory injunction against the 1st Defendant in the terms prayed for.

The Plaintiff's case, according to the statement of claim, was that as part of the sale agreement relating to the privatization of the Nkana Division of the Zambia Consolidated Copper Mines Limited (ZCCM), Lot No. 515/M Kitwe was part of the assets sold to the Plaintiff by ZCCM. The said piece of land adjoins the eastern boundary of stand No. 1617 Kitwe which also belongs to the Plaintiff. In June, 2010 when the Plaintiff sought to extend the eastern boundary of Stand No. 1617 so as to enclose lot No. 515/M, the Plaintiff applied to the Kitwe City Council for planning permission, only to be informed that planning permission could not be granted to the Plaintiff because Lot No. 515/M was in the possession of the 1st Defendant. A visit to the site by the Plaintiff's servants confirmed that the 1st Defendant was indeed in occupation of the piece of land and had proceeded to clear the land of vegetation and trees and had moved in heavy earth-moving equipment in readiness for development of the property. Further, a search of the Lands and Deeds Registry by the Plaintiff revealed that the said piece of land had been allocated to the 1st Defendant by the 2nd Defendant without the knowledge or consent of the Plaintiff to whom the land belonged by virtue of the Plaintiff having purchased it from ZCCM. The Plaintiff's requests for the 1st Defendant to vacate the land were rejected

and the 1st Defendant continued its development activities thereon. Hence the Plaintiff's decision to commence this action.

For its part, the 1st Defendant in its defence challenged the Plaintiff's claim to the ownership of the disputed piece of land. The 1st Defendant pleaded that, firstly, it was not privy to the alleged sale agreement between ZCCM and the Plaintiff relating to the said piece of land. Secondly, the 1st Defendant averred that the Lands and Deeds Register showed that the piece of land had been surrendered to the State by ZCCM on 19th November, 1984. Upon application by the 1st Defendant, the land was allocated to the 1st Defendant on 24th August, 2004 by the President who granted the 1st Defendant a 99 year lease and caused Certificate of Title No. 31257 to be issued in favour of the 1st Defendant. The 1st Defendant further pleaded that following the said grant of title, it moved on site to start developing the land after having submitted to the Council its development plans and after paying the relevant fees. The 1st Defendant contended that at the time it obtained title to the said land the Lands and Deeds Register did not show that any assignment had been registered in favour of the Plaintiff in respect of that piece of land. The 1st Defendant counter claimed, inter alia, the following reliefs;

1. A declaration that it is the legal owner of that piece of land and entitled to quite possession thereof.
2. A further declaration that the 1st Defendant rightly acquired or obtained Certificate of Title No. 31257 in respect thereof; and
3. Damages for loss of use of the land and for trespass thereon by the Plaintiff.

At the trial of the action I heard evidence from three witnesses for the Plaintiff. PW1 was Mrs. KYANSENGA VUNDAMINA – CHITOSHI, the Plaintiff's Company Secretary and Head of Legal Department. She was the custodian of various contracts, deeds, bills of sale and documents emanating from the privatization of ZCCM from which the Plaintiff had purchased assets which included mining and other assets such as land and institutional houses. She said that among the assets the Plaintiff acquired in the process of privatization was Lot No. 515/M, Kitwe. The said property was among the assets sold

to the Plaintiff in a Sale and Purchase Agreement dated 18th February, 2000 made between ZCCM, the Government of the Republic of Zambia and the Plaintiff. The asset is listed in the second schedule to the Agreement under Part A for Institutional Houses as item No. 4, **“Jacaranda C. Director’s Lodge – Portion of Farm 1615 & Lot 515/M”**. The Agreement appears at pages 1 to 72 of the Plaintiff’s Supplementary Bundle of Documents.

PW1 said in furtherance to the Agreement of 18th day of February, 2000. On 31st March, 2000 ZCCM and the Plaintiff executed an assignment of 39 properties in Kitwe and 70 properties in Mufulira in favour of the Plaintiff. The first schedule to the said assignment includes, as the eighth item being assigned to the Plaintiff,

“ALL THAT piece of land in extent 3.869 acres (the equivalent of 1.5476 hectares) more or less being Lot No. 515/M situated at Kitwe in the Copperbelt Province of Zambia and being more particularly delineated and described in the Diagram No. 172 of 1963 annexed to the Certificate of Title relating to the said piece of land”.

PW1 also identified the Certificate of Title 29349 relating to Lot No. 515/M in the Plaintiff’s Bundle of Documents which is dated 21st September, 1970 in the name of NCHANGA CONSOLIDATED COPPER MINES LIMITED, the precursor to ZCCM.

PW1 said that the assignment of the properties, which included Lot No. 515/M, had not been registered at the time the dispute in this case arose. The dispute arose when the Plaintiff attempted to move the existing boundary of Stand No. 1615 in order to develop Lot No. 515/M when the Plaintiff applied for planning permission from the Kitwe City Council, only to be informed that a church organization, the 1st Defendant, was claiming ownership of Lot. No. 515/M. She said that when they inquired as to why there were two claims to the said piece of land they were informed by the Ministry of Lands that it had been allocated to the 1st Defendant in error as opposed to fraud. In good faith the Plaintiff asked the 2nd Defendant to find an alternative piece of land zoned for the development of a church, but the 1st Defendant refused to vacate the land.

PW2 was LOMBE MBALASHI who was a Legal Officer with ZCCM INVESTMENT HOLDINGS PLC, the successor to ZCCM. He was in charge of agreements and conveyancing whereby he oversaw the transfer of ZCCM properties to the beneficiaries. He said he was conversant with the dealing over Lot No. 515/M. He said it was initially owned by NCCM who, around 1970, granted a 14 year lease to ANGLO AMERICAN CORPORATION (AAC). At the expiration of the said lease in 1984 AAC surrendered the property. It remained ZCCM's until the time of privatization when it was sold to the Plaintiff as part of the institutional properties. He said he had previously had the Certificate of Title of the piece of land until 2010 when it was surrendered to the Plaintiff. He identified the Copy of Certificate of Title No. 29349 in the Plaintiff's Bundle of Documents. It is dated 21st September, 1970 and is in the name of NCCM for a term of 99 years from 1st January, 1963. He pointed out that Memorial No. 515/M/3 dated 15th day of June, 1970, on the said Certificate was the registration of the lease to AAC (Central Africa) Limited of a portion from 1st January, 1970 for a term of 14 years or until determined earlier by the lessee (NCCM). Further Memorial No. 515/M/7 dated 19th November, 1984 was the surrender of Registered No. 515/M/3 by AAC to ZCCM. The property therefore had reverted to ZCCM. He said that piece of land had never been surrendered to the State.

PW2 further testified as to how that land was among those that were sold to the Plaintiff in the Sale Agreement between ZCCM, GRZ and the Plaintiff, and the deed of assignment that formally conveyed it, together with other properties, to the Plaintiff. PW2 said that the assignment dated 31st March, 2000 was not registered because some of the properties that were assigned therein sat on large tracts of land which have thereon other interests such as houses which were sold to former ZCCM employees. It had been agreed that only after the other interests had been secured, for example, by issuance of title to the houses, would the assignment then be registered. This was because only one assignment had been executed for multiple properties.

The witness further testified that he was aware that in 2004 ZCCM decided to surrender unalienated and uncommitted land to the State. However, Lot No. 515/M was not part of the land that was surrendered because it had already been sold to the Plaintiff.

PW2 also said that he was aware of the 1st Defendant's claim to that piece of land. He said, however, that when the Kitwe City Council wrote to ZCCM about the proposed development of a church building on Lot 515/M, he responded by letter to the Council dated 15th July, 2010 that the said property "which was previously owned by ZCCM was sold to Mopani Copper Mines Limited as part of the institutional houses", and he advised the Council to note Mopani's interest. He said as far as ZCCM was concerned the land belonged to the Plaintiff.

The last witness for the Plaintiff was GEORGE SUSIKU SINDILA (PW3) who was the Chief Lands Officer with the 2nd Defendant at the material time and whose duties included overseeing land administration generally, and in particular to consider applications for land, executing land – related documents, and collecting revenue for Government.

He said that the matter concerning Lot No. 515/M had been brought to his attention. He said the records in his custody show that the land was initially owned by ZCCM. He went through the history of how ZCCM had granted a 14 year lease to AAC who later surrendered it as per memorials 515/M/3 and 515/M/7 respectively. He said the land was never surrendered to the State. However, he identified an application by the 1st Defendant to the 2nd Defendant for the same piece of land. According to the records, the Commissioner of Lands inquired if the land was available for allocation, and he was advised that it was available. It was on the basis of that advice from within the Ministry of Lands that the Commissioner of Lands offered the land to the 1st Defendant. PW3 said that the advice that the land was available for allocation was wrong, and the letter of offer dated 21st May, 2004 to the 1st Defendant ought not to have been generated, let alone the Certificate of Title, in favour of the 1st Defendant. PW3 said that the original

title holder of the land should be reinstated and the Certificate of Title for the 1st Defendant should be reversed.

Under cross examination PW3 said he had not been personally involved in the process of allocating that piece of land to the 1st Defendant. He said he had also been aware of the surrender by ZCCM of certain pieces of land, but ZCCM had in those instances executed deeds of surrender.

The 1st Defendant only managed to call one witness while the 2nd and 3rd Defendants did not adduce any evidence. The witness for the 1st Defendant was JOHN NKHATA, a Minister of religion and 1st Defendant's Church Secretary. He said that in about 2003 the church started looking for a piece of land on which to erect a church building. In due course they saw an article in the Zambia Daily Mail of 15th April, 2004 in which ZCCM-IH was said to have surrendered 51,320 hectares of virgin agricultural land to the State. He said the church then identified Lot No. 515/M which he said was vacant and virgin land as there was nothing on it to indicate that it belonged to anyone. The church approached the Kitwe City Council for the piece of land and were told that the Council did not have any jurisdiction over former ZCCM land. They were referred to ZCCM where they proceeded to inquire about the plot of land. The officer they met at ZCCM was one JOSEPH MWANZA. Mr. Mwanza in turn told them that ZCCM had handed over all virgin undeveloped an unencumbered land to the Ministry of Lands. The witness said they had specifically inquired about Lot 515/M and Mr. Mwanza had pulled out the diagram on which the piece of land was identified and he gave them a copy of the site plan. In May, 2004 the 1st Defendant's officers then applied to the Commissioner of Lands for that piece of land. The application letter the witness identified in the 1st Defendant's Bundle of Documents was not dated but they were informed around 20th May, 2004 that the land was available. The letter of offer was then generated and was dated 21st May, 2004 which the witness identified at the trial. The 1st Defendant immediately paid the initial annual rent and other fees to GRZ amount to K97, 263.

They then submitted the plans to the City Council before they could commence development. The witness said that initially Council was reluctant to grant development permission without a letter from ZCCM. After the matter was clarified to the City Council by the Ministry of Lands, the 1st Defendant was given the go-ahead to start developing the land.

After mobilizing labour, equipment and funds for development, they were ordered by the Council to halt developments on the ground that there were other people who were claiming ownership of the same piece of land. This was around July, 2010 after the 1st Defendant had cleared the land and put up some structures. They later received a letter from the Plaintiff who identified itself as the owner of the land. By then the Certificate of Title had been issued to the 1st Defendant which was dated 24th August, 2004 and which the witness identified at the trial. Prior to the Plaintiff's claim in July, 2010, the witness said, they had obtained a print out from the Lands and Deeds Registry which did not show that the Plaintiff had registered any interest in that piece of land. The witness said that as far as the church was concerned it had lawfully obtained the land as well as title to it, and would like to be declared the legal owners of the land.

Under cross examination, Mr. NKHATA said that they had been looking for former ZCCM land which was undeveloped, virgin and unencumbered and there was no sign that Lot 515/M belonged to anyone. He, however, said that when they conducted a search of the register in Lusaka, it showed that the land belonged to ZCCM. He said Mr. JOSEPH MWANSA of ZCCM had given them a sketch plan of the plot but they had not attached it to the application they made to the Commissioner of Lands although they identified the land they wanted by reference to its Lot number. He said he had not seen any document that ZCCM had surrendered back to the State that piece of land. The witness said they did not inquire from ZCCM about the availability of the land. Initially, the Council said the Council could not approve their building plans without a letter from ZCCM confirming the transfer of the plot to the 1st Defendant. He said by letter dated 7th July, 2010 the Council had ordered the 1st Defendant from carrying on any further development. He said the letter served as an enforcement notice, and that it was not the

first such notice. There had been one dated 17th day of November, 2004 which he identified in the Plaintiff's Bundle of Documents. But they had continued with the construction works any way. He said the enforcement notice was never officially withdrawn by the Council.

The witness said he did not know the exact date when the piece of land had been surrendered by ZCCM to the State. But he reckoned that it was in 2004. He admitted that prior to the privatization of ZCCM the land belonged to ZCCM. However, he said, the records at the Lands and Deeds Registry, and the site itself, did not show that the land belonged to the Plaintiff.

At the end of the evidence by Mr. NKHATA the matter was adjourned further to enable the Defendants to call other witnesses. When the matter came up on 21st September, 2012 for continued defence, Counsel for the 1st Defendant applied for a further adjournment, which was granted, on the ground that the 1st Defendant whom he had subpoenaed was out of the Country on Government business. When the matter again came up on 24th January, 2013, the parties indicated that they were in discussion to find a possible ex curia settlement. The case was again adjourned to 9th May, 2013. On that date, the parties said they had progressed well in their discussion but needed more time. The case was adjourned to 26th day of June, 2013. But on that day the parties had not settled. I then granted the final adjournment and ordered that I would proceed to hear the defence on 30th July, 2013 if the parties had not settled by then. Indeed on 30th July, 2013 when Counsel for the Plaintiff indicated that the parties had failed to reach settlement, I refused an application by Counsel for the 1st Defendant for a further adjournment to enable them mobilize their witnesses including the 1st Defendant. My order of 20th June, 2013 was specific, namely, that the parties were to be ready to proceed on 30th July, 2013 if they did not settle. I concluded that all the Defendants were not adducing any further evidence and deemed them to have closed their cases. The matter was accordingly only adjourned to enable me prepare the judgment, after considering any written submissions Counsel for the parties would file.

Counsel for the Plaintiff and the 1st Defendant filed written submissions which I have considered before arriving at my decision.

On the evidence before me, I am quite satisfied and I find it as a fact proved that Lot No. 515/M Kitwe was at all material times the property of NCCM, the fore runner to ZCCM, who had it for the unexpired residue of a term of 99 years from 1st January, 1963. This is evidenced by Certificate of Title No. 29349 dated 21st September, 1970. On 15th June, 1970 the said NCCM granted a 14 year lease to ANGLO AMERICAN CORPORATION (CENTRAL AFRICA) LIMITED (AAC) which was to run from 1st January, 1970. That lease was registered on 13th July, 1970 as appears in the Memorials to the Certificate of Title as entry No. 515/M/3. On 19th November, 1984 AAC surrendered the property to ZCCM as evidenced by Memorial No. 515/M/7.

I have also accepted PW1 and PW2's evidence, since there is no other evidence to the contrary, that on 18th February, 2000 an Agreement for Sale and Purchase of the Mufulira Mine, Smelter and Refinery, And the Nkana Mines, Concentrator and Cobalt Plant was executed between ZCCM, the Plaintiff, and GRZ in which the properties that were sold to the Plaintiff included a portion of Farm 1615 and Lot 515/M. Further, on 31st March, 2000 ZCCM, for monetary consideration, executed an assignment of 39 properties in Kitwe and 70 properties in Mufulira in favour of the Plaintiff. One of the properties assigned to the Plaintiff was Lot 515/M as per Part 1 of the First Schedule to the Assignment. It is also the evidence of PW1 and PW2 that the Assignment was not registered. PW2 explained that some of the properties contained in the Assignment sit on the large tracts of land which have properties belonging to third parties. He said that it was only after the third parties interests were secured or severed that the Assignment would be registered. There is correspondence at pages 73 to 83 of the Plaintiff's Supplementary Bundle of Documents to clarify and confirm this position.

I also find that at no time at all was Lot 515/M surrendered to the State. This was confirmed by Mr. Sindila (PW3) the Chief Lands Officer from the office of the Commissioner of Lands. And there was no evidence of re-entry by the Commissioner of

Lands. PW3 said that at the time the land was offered to the 1st Defendant, it was not available for re-allocation. I have already highlighted the evidence on behalf of the 1st Defendant by Mr. Nkhata (DW1). The witness said that they knew to whom the land belonged after they approached the Kitwe City Council over it who referred them to ZCCM. Counsel for the Plaintiff submitted that even before the 1st Defendant applied for that land, they knew to whom the land belonged. Counsel further submitted that had the 1st Defendant made a due diligence search they could have confirmed that the land belonged to ZCCM. I accept Plaintiff's Counsel's submission on that issue. A copy of the Lands Register produced by the 1st Defendant in its Bundle of Documents at pages 22 and 23 clearly shows that Lot 515/M belonged to ZCCM after the surrender of the 14 year lease by AAC in 1984. Although DW1 said under cross examination that they applied for the land before they saw the Lands Register, I noted in my transcript of the evidence that the witness did not appear to be telling the truth on the point. I concluded that he must have known, at the time they applied for the land, of ZCCM's interest in the land if not also of the Plaintiff's.

I have looked at the letter of application for the land from the 1st Defendant written to the Commissioner of Lands, which appears at page 2 of the 1st Defendant's Bundle of Documents, on which one of the officers confirmed to the Commissioner on 20th May, 2004 that the land was available. Hence the Commissioner's approval on the same day. The letter of offer was then generated on the same day and payment of the requisite fees was effected the same day. Dw1 said that they had followed all the procedures for acquiring the land. Hence the Certificate of Title No. 31257 dated 24th day of August, 2004 in favour of the 1st Defendant. However, DW1 admitted that very shortly after the 1st Defendant had entered upon that land the Kitwe City Council queried their ownership of the land and could not process their application for development permission. One such query was to the Commissioner of Lands by letter dated 18th day of June, 2004 appearing at page 15 of the 1st Defendant's Bundle of Documents. The Council was concerned that the 1st Defendant was developing someone else's land. The other query was the notice to stop illegal development dated 17th November, 2004 given to 1st Defendant by the Council appearing in the Plaintiff's Bundle of Documents, DW1 said in

fact that was not the only notice they had received. It was only on 15th June, 2010 that the Council wrote to the 1st Defendant that they could go ahead with the developments.

Mr. Chalenga, Counsel for the 1st Defendant, submitted, firstly, that the Assignment dated 31st March, 2000 on which the Plaintiff relies to claim beneficial ownership of Lot No. 515/M is null and void for not having been registered in compliance with the Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia, particularly sections 4, 5 and 6 of the Act. This was not pleaded in the 1st Defendant's defence although evidence was led on the issue. However, Counsel did concede in his next breath that the court may extend the time within which a conveyance may be registered **"if satisfied that the failure to register was unavoidable, or that there are other special circumstances which afford ground for giving such relief from the results of such failure, and that no injustice will be caused by allowing such registration"**.

In my opinion, a third party to such a document, such as the 1st Defendant, cannot take advantage of the non-registration of the Assignment to attack the assignee's rights thereunder, or to claim a superior right to the land in issue. These provisions under the Act in my view, only affect the parties to the document inter se and the State. I do not therefore accept that the 1st Defendant should derive any advantage from the non-registration of the Assignment. In any case, the party concerned may make the necessary application at an appropriate time.

The second issue taken by Mr. Chalenga was that prior State consent had not been obtained for the sale of Lot No. 515/M under the section 5 (1) of the Lands Act, Chapter 184 of the Laws of Zambia. This issue was not raised in the defence or in evidence at the trial. However, it was acknowledged in Recital D. at page 18 of the Assignment that **"the consent of the President of Zambia to (the) Assignment (had) been granted in accordance with the provisions of Section 5 of the Lands Act 1995"**.

In the absence of any evidence to contradict that statement, I find that such consent had indeed been obtained. However, I must again mention that a non-party to the

Assignment cannot challenge the legality of the transaction as being non-compliant with section 5 (1) of the Lands Act. Such non-party is not privy to it and derives no advantage or rights thereunder including for non compliance. That cannot therefore be a ground for depriving the Plaintiff of its beneficial interest in the land in issue.

Mr. Chalenga, argued further that, in accordance with section 33 of the Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia, a Certificate of Title such as the one held by the 1st Defendant is conclusive evidence that the holder of the Certificate of Title is the proprietor of the property described in the Certificate of Title. That is exactly the claim being made by the Plaintiff under the umbrella title of ZCCM. In other words the Plaintiff seeks protection because it is an equitable owner deriving beneficial interest from ZCCM the holder of Certificate of Title No. 29349 dated 21st September, 1970 which is prior to the 1st Defendant's Certificate of Title No. 31257 dated 24th August, 2004.

Counsel for the Plaintiff cited in aid of their client's case the old English case of LYSAGHT vs. EDWARDS (1876) 2 CH D 499 in which JESSEL, MR had this to say at page 506 of the report;

“.....the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase-money, a charge or lien on the estate for the security of the purchase money, and a right to retain possession of the estate until the purchase money is paid, in the absence of express contract as to the time of delivering possession”.

And at page 510 of the report the Master of the Polls concluded;

“It must, therefore, be considered to be established that the vendor is a constructive trustee for the purchaser of the estate from the moment the contract is entered into”.

In the instant case, to adopt the reasoning in the case of GIBSON TEMBO vs. ALIZWANI SCZ Judgment No. 6 of 1996 by GARDNER, A, J, S, I find that at the time the land was allocated to the 1st Defendant it was subject to the Plaintiff's equitable right under the earlier, though unregistered, Assignment. The principle in that case being that an equitable owner in possession, for example, a purchaser under a contract of sale, would be protected even though he had caused no entry to be made in the Register.

In the Supreme Court's decision in the case of CHIMAMBO AND OTHERS v. COMMISSIONER OF LANDS (2008)1 ZR 1 it was held that;

“The Commissioner of Lands can, on behalf of the President, make a grant or disposition of land that is free or unencumbered to any person who qualifies under the law”.

Counsel for the Plaintiff rephrased the said statement of the law by submitting that the Commissioner of Lands cannot, on behalf of the President, make a grant or disposition of land to any person that is not free or encumbered. In the instance case, they submitted, and rightly so in my view, that the land was not free or unencumbered at the time it was allocated to the 1st Defendant. The land was burdened or had an impediment in the form of a Certificate of Title to ZCCM. The Commissioner of Lands did not, therefore have power to alienate it to the 1st Defendant. I entirely agree with Counsel's submission on the point.

In my view some of the ways in which leased land can revert to the State include;

1. By Surrender of the lease by the title holder;
2. By re-entry under section 13 of the Lands Act, Chapter 184 of the Laws of Zambia;
3. By compulsory acquisition under the Lands Acquisition Act, Chapter 189 of the Laws of Zambia, with compensation to the title holder.

None of these provisions were at play at the time the land was allocated to the 1st Defendant.

Mr. Chalenga argued that on the authority of section 34 of the Lands and Deeds Registry Act the 1st Defendant's title to the land can only be challenged by proof of fraud. I do not accept that argument as an absolute and unequivocal principle of law. That is because the Supreme Court's decision in the case of ANTI CORPORATION COMMISSION V. BARNNET DEVELOPMENT CORPORATION LIMITED (2008) 1 ZR 69 cited by Mr. Chalenga held, inter alia, that **"Under section 34 of the Act, a Certificate of Title can be challenged and cancelled for fraud or reasons of impropriety in its acquisition"** (underlining is mine)

In other words there may be grounds, other than fraud in the conventional sense, on which a Certificate of Title may be successfully challenged and ordered to be cancelled by the Court.

It was canvassed by Mr. Chalenga that the Plaintiff had not pleaded or proved fraud and that, on the authorities relating to pleadings such as SABLE HAND ZAMBIA LIMITED v. ZAMBIA REVENUE AUTHORITY (2005) ZR. 109, it cannot be considered as a remedy. However, that was not an issue in this case. Indeed, even PW1 was magnanimous and conceded in her evidence that the Plaintiff was not alleging any fraud on the part of the 1st Defendant. She said that the land was allocated to the 1st Defendant in error. The Plaintiff did not therefore have to prove any fraud. On the evidence before me I am satisfied that indeed the land was allocated to the 1st Defendant in error, as also confirmed by PW3, the Chief Lands Officer from the office of the 2nd Defendant.

The question is: can such an error go uncorrected where the 2nd Defendant had no lawful authority to disregard ZCCM's title to the land and to grant it to the 1st Defendant? As counsel for the Plaintiff argued, allowing the error or mistake to stand would be to open a Pandora's box, so to speak, where no land title holder in Zambia would be safe

because the Commissioner of Lands would be at liberty to even capriciously re-allocate land already held on title without following the law. These are, in my view, the other “reasons of impropriety” in the acquisition of title which the Supreme Court envisaged in its decision in the case of ANTI CORRUPTION COMMISSION v. BARNNET.

Lastly the relevant part of section 34 (1) of the Lands and Deeps Registry Act which provides for restriction on ejectment after the issuance of a Certificate of Title reads;

“34 (1). No action for possession, or other action for recovery of any land, shall lie or be sustained against the Registered Proprietor holding a Certificate of Title for the estate or interest in respect to which he is registered, except in any of the following cases, that is to say;

((a.) to (d) not relevant).

(e). the case of a Registered Proprietor claiming under a Certificate of Title prior in date in any case in which two or more Certificates of Title have been issuedin respect of the same land”.

As already pointed out the Certificate of Title in the name of NCCM was issued o 21st September, 1970, while that of the 1st Defendant is dated 24th August, 2004 in respect of the same piece of land. Section 34 (1) (e) is, in my view, intended to cure such an anomaly by disallowing the latter Certificate of Title.

In the circumstances, judgment is entered for the Plaintiff. I hereby declare that the Plaintiff is entitled to ownership and possession of Lot. No. 515/M Kitwe. I further order that Certificate of Title No. 31257 dated 24th day of August, 2004 issued to the 1st Defendant be cancelled forthwith.

The Plaintiff had also pleaded for damages for trespass. No evidence was adduced at the trial as to what damage the Plaintiff suffered as a result of being deprived the use of their piece of land. In the premises I am unable to award any damages in that respect.

As for the 1st Defendant's counter claim, same is dismissed for lack of merit.

In conclusion, the Plaintiff is awarded the costs of the action against the Defendants in equal portions, said costs to be taxed in default of agreement.

Leave to appeal is granted.

Delivered at Kitwe in Open Court this 16th day of October, 2013

I.C.T. Chali
JUDGE