

IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
AT LUSAKA

2013/HP/1282

(Civil Jurisdiction)

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW;

AND

IN THE MATTER OF: ORDER 53 OF THE RULES OF THE
SUPREME COURT OF ENGLAND (1999)
EDITION.

BETWEEN:

AUGUSTINE LUBOZHYA

APPLICANT

AND

CHILANGA DISTRICT COUNCIL

RESPONDENT

Before the Hon. Mrs. Justice A. M. Sitali on the 30th day of May, 2014.

For the Applicant : Mr. C. M. Besa of
Messrs Besa Legal Practitioners

For the Respondent : Mr. M. Phiri of
Messrs Mwansa, Phiri and Partners

J U D G M E N T

Cases referred to:

- 1. Nyampala Safaries (Z) Limited and Others v. Zambia Wildlife Authority and Others (2004) ZR49**
- 2. Sablehand Zambia Limited v. Zambia Revenue Authority (2005) ZR 109**
- 3. Fredrick J T Chiluba v. The Attorney General (2003) ZR 153**

4. **Civil Service Union v Minister for Civil Service [1984] 3 All ER 935**
5. **Chitala v. The Attorney General (1995/1997) ZR 91**

Legislation referred to:

1. **The Rules of the Supreme Court, 1999 edition, Order 53**
2. **The Local Government Act, Chapter 281 of the Laws of Zambia, section 61, para 41 of Second Schedule.**

Other works referred to:

1. **Michael Allen and Brian Thompson Cases and Materials on Constitutional and Administrative Law Seventh Edition, (Oxford University Press, 2002).**

This is an application for judicial review by the Applicant made pursuant to Order 53 of the Rules of the Supreme Court, 1999 edition. The application is made by way of originating notice of motion. The reliefs sought in this application are an order of certiorari to remove into this Court for the purpose of quashing the decision of the Chilanga District Council to turn Stand No. L/8978/M Chilanga into a graveyard; an order of prohibition prohibiting the Chilanga District Council from constructing a mourner's shelter and beginning to bury human remains at Stand No. 8978/M Chilanga; a declaration that the decision by the Respondent to turn Stand No. L/8978/M Chilanga into a graveyard is unreasonable, irrational and is made without regard to the Applicant's constitutionally guaranteed property rights; a declaration that the decision to turn Stand No. L/8978/M Chilanga into a graveyard is illegal, irrational and null and void as the decision is without regard to consideration and requirements in town and country planning; a declaration that the decision by the Respondent to turn Stand No. L/8978/M Chilanga into a graveyard is illegal as the Commissioner of Lands who is the custodian of land has undertaken to offer the said land to the Applicant.

In his affidavit in support of the application, the Applicant Augustine Lubozhya stated that he is the registered owner of Lot No. 8977 Mapepe Chilanga and that next to his property is Lot No. 8978/M Chilanga whose initial owner has abandoned it after the newly created Chilanga District Council decided to gazette an illegal graveyard which was within meters of Lot No. 8978/M Chilanga. The Applicant stated that he has information that the Respondent plans to convert Lot No. 8978/M Chilanga into a graveyard and that, if the decision is implemented, the graveyard will be brought within ten meters or so of his residential house. The Applicant contends that converting Lot No. 8978/M Chilanga into a graveyard would make his property inhabitable as decomposing human remains would contaminate the underground drinking water in the bore holes and that, in addition to that, his family and he would be exposed to the horror of witnessing burial processions and watching wailing mourners every day.

The Applicant further contended that he believes it is wrong, even for purposes of town and country planning, for the Respondent to establish a graveyard within less than ten to twenty meters of human habitation. The Applicant went on to state that after failing to convince the Respondent to cooperate with him, he requested the Commissioner of Lands to allocate him Lot No. 8978/M Chilanga in order to protect his property. It is the Applicant's position that the Commissioner of Lands has assured him that he will offer him the said piece of land after the due process to re-enter the property is finalized. To support his claim the Applicant exhibited a copy of a letter marked "AL1" written by his advocates Messrs Besa Legal Practitioners to the Council Secretary of the Respondent advising that the matter relating to Stand No. L/8978/M Chilanga was being addressed by the Commissioner of Lands. He also exhibited copies of letters marked "AL2 (a)", "AL2 (b)" and "AL2 (c)" written to the office of the Commissioner of Lands imploring the Commissioner of Lands to offer the Applicant Lot No. 8978/M Chilanga. The

Applicant further exhibited a copy of a letter written by the Chief Lands Officer addressed to whom it may concern marked "AL3" advising that the Applicant had been authorized to take lawful measures to prevent the degrading and destruction of Lot No. 8978/M Chilanga while the office of the Commissioner worked out a lasting solution.

The Applicant argued that the Respondent's decision to turn the land next to his dwelling house into a graveyard is irrational and unreasonable and totally disregards his constitutional right to own and peacefully and quietly enjoy his property as the activities at the graveyard are totally inimical to normal human habitation at his property.

The Applicant went on to state that he has sufficient interest in Lot No. 8978/M Chilanga and is entitled to apply for judicial review due to his ownership of the adjacent land and the anticipated offer to him of the said land by the Ministry of Lands. It is the Applicant's contention that the Respondent as a public body should have due regard to the interest of private citizens and their property rights in making decisions on town and country planning and that the decision of the Respondent to turn Lot No. 8978/M, Chilanga into a graveyard is arbitrary, irrational and unreasonable.

The Respondent filed an affidavit in opposition to the originating notice of motion on 8th October, 2013 which was deposed to by Namakolo Mubiaelelwa Kalufyanya who is the Council Secretary of Chilanga District Council contesting the application for judicial review. The Respondent contended that the Applicant has no locus standi to apply for judicial review in relation to Lot No. 8978/M Chilanga as he is not the holder of a certificate of title for that property nor has he been offered the property. The Respondent further stated that the letters from the office of the Commissioner of Lands which the Applicant has exhibited do not confer on him sufficient interest in the

said property and that owning Lot 8978/M Chilanga would move him closer to the burial site which he is complaining about.

Further, the Respondent denied that it has made a decision to turn Lot 8978/M Chilanga into a graveyard since it was constituted as a Council for the new Chilanga District and contended that the Applicant does not state the date when L/8978/M Chilanga was turned into a graveyard. The Respondent went on to state that the decision to designate L/8978/M Chilanga as a graveyard and to gazette it as such was made by the Kafue District Council in the 1990s and that the graveyard has been in existence since then and is now three quarters full.

The Respondent went on to state that it is constructing a mourner's shelter on L/8978/M Chilanga and is preparing space for parking motor vehicles. There are also plans to erect an ablution block for mourners, which activities are for the greater good of the Chilanga community. The Respondent denied the Applicant's assertion that building a mourners' shelter and other facilities for mourners on L/8978/M Chilanga will make the Applicant's property, namely, Lot 8977 Chilanga inhabitable or contaminate his boreholes, and stated that an onsite visit will prove this. The Respondent stated that the graveyard is surrounded by three neighbours including the Applicant.

In conclusion, the Respondent contended that the application for judicial review against the respondent is not tenable at law as it lacks merit and is misconceived. The Respondent stated that it is inconceivable that the Commissioner of Lands would offer a graveyard to the Applicant and urged that the application be dismissed with costs.

In his affidavit in reply dated 25th October, 2013, the Applicant in response to the Respondent's assertion that he has no locus standi in respect of

L/8978/M Chilanga, stated that the Commissioner of Lands had confirmed his intention to offer him part of L/8978/M Chilanga after removing the portion which has already been used for burial in a letter dated 21st October, 2013, a copy of which is exhibited to the affidavit in reply marked "AL1". The Applicant stated that in the said letter the Commissioner of Lands had advised him that the formal offer was awaiting the completion of the process of re-entry of L/8978/M Chilanga and had urged him to protect that land from further adversity. The Applicant stated that the Commissioner of Lands had also advised the Respondent to respect his interest in the said piece of land by not allowing an illegal graveyard to continue unabated. The Applicant contended that by constructing a mourner's shelter, creating parking space and making plans to construct an ablution block on L/8978/M, Chilanga, the Respondent was perpetuating and promoting illegality.

Lastly, the Applicant stated that although the Respondent stated that the decision to turn L/8978/M Chilanga into a graveyard was made by Kafue District Council, the Respondent as successor in title to the Kafue District Council is responsible for the decisions of its predecessor and that it is continuing the illegal decision to turn L/8978/M, Chilanga, into a graveyard by attempting to erect infrastructure for mourners on that property.

At the hearing of the application the parties opted to rely on their affidavits and to file written submissions. In written submissions filed by the Applicant on 15th November, 2013, Mr. Besa counsel for the Applicant submitted that the Applicant brought this action to challenge the decision of the Respondent to turn Lot No. 8978/M, Chilanga in which he has an interest into a graveyard. Counsel went on to submit that the Respondent is successor in title to Kafue District Council and is, therefore, responsible for the rights and obligations created by Kafue District Council. Counsel stated that the fact that part of L/8978/M Chilanga has been utilized as a burial site with the full

approval of the Respondent is not disputed and that the Respondent's approval of the decision to turn L/8978/M Chilanga into the graveyard is demonstrated by the Respondent's decision to construct a mourner's shelter, an ablution block and a car park for mourners on the said piece of land as stated in paragraph 15 of the Respondent's affidavit in opposition.

Counsel contended that it is contradictory for the Respondent to deny that it is responsible for the decision to turn L/8978/M Chilanga into a graveyard and yet proceed to construct a mourners' shelter and other infrastructure on the said property thereby formalizing the graveyard. It is counsel's contention that if indeed the Respondent were opposed to turning L/8978/M Chilanga into a graveyard, the Respondent would have stopped the activity but it has continued to build. Counsel argued that the said decision is prejudicial to the Applicant as he has interest in L/8978/M Chilanga, which interest, according to counsel is clearly demonstrated by the letter written by the Commissioner of Lands entitled "offer of Lot 8978/M Chilanga" dated 21st October, 2013 and exhibited to the affidavit in reply marked "AL1".

Counsel drew my attention to paragraph 3 and 5 of the letter written by the Commissioner of Lands marked "AL1" and submitted that the only way a person can protect his rights as stated by the Commissioner of Lands, in a civilized society, is through the court system. According to counsel, it is abundantly clear from the Commissioner's letter marked exhibit "AL1" that the Applicant has sufficient interest in L/8978/M Chilanga which this court ought to protect. He contended that the Commissioner of Lands is the highest official in whom land vests and he administers it on behalf of the President and that there cannot be a superior claim to land than that conferred by the Commissioner of Lands.

It is counsel's contention that the Commissioner of Lands has directed the Respondent in the said letter to respect the Applicant's interest in L/8978/M Chilanga and that for the Respondent to continue using L/8978/M Chilanga as a burial site which the Commissioner of Lands has called an illegal graveyard is to perpetuate illegality. He contended that the Respondent is an agent of the Commissioner of Lands in administering land and the position of the Commissioner of Lands, therefore, is final.

Lastly, counsel submitted that in the case of Associated Provincial Pictures Houses v. Wednesbury Corporation (1948) 1 KB 223, the court established the Wednesbury principle to the effect that judicial review can be granted on the ground that the decision made is such that no person or body properly directing itself on the relevant law and acting reasonably could have reached that decision. It was contended that no local authority would promote the continued burial of human remains without the authority of the Commissioner of Lands to designate such piece of land for that purpose. It was counsel's contention that since the Commissioner of Lands has indicated his intention to offer the applicant part of the land in issue, the Applicant has demonstrated sufficient interest in the land in issue which this Court ought to protect. On that basis, counsel urged me to grant the applicant the reliefs he seeks with costs.

The Respondent filed written submissions on 11th December, 2013, in which Mr. Phiri Counsel for the Respondent submitted that the Respondent did not make a decision to turn L/8978/M Chilanga into a graveyard because upon its creation as a District Council, the Respondent found L/8978/M Chilanga being used as a burial site by the community in Chilanga. He reiterated that L/8978/M is almost full at present and that the only role the Respondent has played is to construct a mourner's shelter, an ablution block and parking space for motor vehicles on L/8978/M Chilanga. It was counsel's position

that there is no law that prohibits people from living near a graveyard and that L/8978/M Chilanga as a graveyard has three neighbours including the Applicant and cannot be offered to anyone in its current state.

Counsel further reiterated that L/8978/M Chilanga does not belong to the Applicant and therefore he does not have sufficient interest in the subject matter in terms of Order 53/14/24 of the Rules of the Supreme Court as read with Order 53 rule 3 (7) which states that the Applicant should have sufficient interest in the matter to which the application relates. Counsel argued that even if he had an interest in the matter to which the application relates, the question would be, when did the interest arise, taking into account the fact that the graveyard has been in existence for many years which is long before the Respondent was created as a council.

Counsel went on to submit that Order 53/14/28 of the RSC states the grounds upon which judicial review can be granted and argued that this application does not satisfy the grounds upon which judicial review can be granted as the Respondent has not made any decision to turn L/8978/M Chilanga into a graveyard nor has the Respondent gazetted the property as a graveyard as alleged by the Applicant. Counsel further submitted that the remedy of judicial review is concerned with reviewing, not the merits of the decision in respect of which the application for judicial review is made, but the decision making process itself. He contended that in this case the Respondent has not made any decision therefore, there can be no review of the decision making process. It was the respondent's further argument that the Applicant is dwelling on the merits and demerits of the purported decision allegedly made by the Respondent to turn L/8978/M Chilanga into a graveyard.

Turning to the reliefs sought by the applicant, learned counsel went on to submit that the relief of certiorari sought by the Applicant is misconceived because the decision to be quashed is not clear in terms of who made it, when was it made and against whom it was made and that, as earlier stated, the graveyard existed and was gazetted before the Respondent was constituted.

Counsel further contended that the relief of prohibition sought by the Applicant is also misconceived in that the Respondent has not acted outside its jurisdiction nor has the Applicant laid any evidence before the court to demonstrate how the Respondent acted outside its jurisdiction which is why the relief of prohibition is not tenable at law. It was Counsel's contention that since the Respondent has not made any decision to turn L/8978/M Chilanga into a graveyard, it cannot be said to be acting outside its jurisdiction.

According to counsel the declarations sought are also misconceived as a declaration is a discretionary remedy which courts grant with great caution. It is contended that the decision to turn L/8978/M Chilanga into a graveyard cannot be said to be irrational or illegal and the respondent's efforts to put up a mourners' shelter cannot be unreasonable. He reiterated that it is inconceivable that the Commissioner of Lands would offer L/8978/M Chilanga to the Applicant as the property is totally a graveyard. He contended that the issues of contamination of the applicant's boreholes lack supporting scientific evidence and are merely speculative and that a site visit by the Court would confirm that the claims of contamination are far-fetched and a mere imagination of the Applicant as the graveyard on L/8978/M Chilanga has existed since the 1990s.

It was further submitted that the letter written by the Commissioner of Lands dated 21st October 2013 which he exhibited in the affidavit in reply should be ignored because it was obtained while the proceedings were going on and its contents are contemptuous because they purport to usurp the powers of the Court. Counsel further observed that it is odd that the Commissioner of Lands undertook in the said letter to allocate L/8978/M Chilanga to the Applicant once the re-entry process is completed when the said land is a graveyard for all intents and purposes and is already three quarters full. He argued that the said letter is not an offer to the applicant which means the Applicant has no interest in L/8978/M Chilanga and his desperate attempts to create an interest in L/8978/M Chilanga have lamentably failed. Counsel further submitted that the Applicant's letter from the Commissioner of Lands wrongly stated that L/8978/M Chilanga has not defined boundaries and yet L/8978/M Chilanga was on title with survey diagrams defining the boundaries. He contended that it is, therefore, misleading to argue that the graveyard will keep expanding outside the defined boundaries. It is counsel's contention in fact that the management of the graveyard by the Respondent brings with it order in that it will not expand beyond its defined boundaries.

Counsel went on to submit that the Applicant failed to demonstrate that the Respondent made a decision to turn L/8978/M Chilanga into a graveyard and to gazette L/8978/M Chilanga as a graveyard. He has also failed to produce any documentary evidence of any such decisions.

In conclusion counsel submitted that in view of the foregoing observations, the Application for judicial review should be dismissed with costs.

I have carefully considered the affidavit evidence on record as well as the submissions by respective counsel for the parties. The Applicant in this

matter seeks an order of certiorari to quash the decision of Chilanga District Council to turn Lot No. 8978/M, Chilanga into a graveyard on the premise that the decision was made without regard to the fact that turning Lot 8978/M Chilanga into a graveyard would render the applicant's adjoining farm at Lot No. 8977 Chilanga inhabitable. The applicant also seeks an order of prohibition to prohibit the Chilanga District Council from constructing a mourner's shelter and beginning to bury human remains on Lot No. 8978/M, Chilanga on the premise that the Commissioner of Lands has undertaken to allocate the said L/8978/M Chilanga to him in order to safeguard his interests. The applicant further seeks declarations that the Respondent's decision to turn Lot No. 8978/M, Chilanga into a graveyard is illegal, irrational and null and void on the premise that it disregards the applicant's property rights as guaranteed by the constitution as well as his right to the peaceful and quiet enjoyment of his property. It is the applicant's further contention that the decision disregards the requirements in town and country planning not to establish a graveyard within metres of human habitation. The applicant further contends that the Commissioner of Lands has undertaken to offer him Lot No. 8978/M, Chilanga. The grounds upon which judicial review is sought are illegality and irrationality.

Before I consider the grounds upon which the application for judicial reviews is made, it is necessary for me to state the underlying principles that guide this Court's exercise of jurisdiction in an application for judicial review. In the case of Nyampala Safaris (Z) Limited and Others v. Zambia Wildlife Authority and others (1) and later in the case of Sablehand Zambia Limited v. Zambia Revenue Authority (2) the Supreme Court considered the parameters of the High Court's jurisdiction on an application for judicial review and restated the underlying principles as follows:

- a) *that the remedy of judicial review is concerned, not with the merits of the decision, but the decision making process itself;*

- b) that the purpose of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is not part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question; and*
- c) that a decision of an inferior court or a public authority may be quashed (by an order of certiorari) where that court or authority acted -*
- i) without jurisdiction;*
 - ii) exceeded its jurisdiction*
 - iii) failed to comply with the rules of natural justice where these rules are applicable;*
 - iv) where there is an error of law on the face of the record; or*
 - v) the decision is unreasonable in the Wednesbury sense, namely, that it was a decision which no person or body of persons properly directing itself on the relevant law and acting reasonably, could reasonably have reached."*

I am guided by these principles in determining the application for judicial review before me.

The first ground upon which the Applicant seeks judicial review is that the respondent's decision to turn Lot 8978/M Chilanga into a graveyard is illegal. In that regard the applicant contends that the newly created Chilanga District Council has decided to gazette an illegal graveyard which is within metres of Lot 8978/M Chilanga and that he has information that the respondent council intends to convert Lot 8978/M Chilanga which is next to his property, namely Lot 8977 Chilanga, into a graveyard and that implementing those plans will bring the graveyard within ten or so metres of

his residential house, which situation he contends will render his property inhabitable. The applicant asserts that he believes that it is wrong even for purposes of town and country planning for the respondent to set up a graveyard within twenty metres of human habitation and that the Commissioner of Lands has undertaken to allocate to him Lot 8978/M Chilanga once the process of re-entry of the said property is completed.

On the other hand, the respondent denies that it has made any decision to turn Lot 8978/M Chilanga into a graveyard since it was constituted in the year 2012. The respondent's position is that the decision was made way back in the 1990s by the Kafue District Council under whose jurisdiction the Chilanga area fell before Chilanga district was established. The respondent's evidence is that the graveyard is three-quarters full at present and that the previous owner of L/8978/M Chilanga abandoned it because it has always been a graveyard. The respondent asserts that the only role it has played in relation to L/8978/M Chilanga is that it is building a mourner's shelter, a car park and an ablution block for mourners on the premises of the graveyard, which developments it says are for the greater good of the community in Chilanga. The respondent asserts that there is no law which prohibits people from living near a graveyard and that the applicant's property is only one of three neighbouring properties to the graveyard.

Regarding the ground of illegality the learned authors, Michael Allen and Brian Thompson, state on page 576 of their book entitled *Cases and Materials on Constitutional and Administrative Law* Seventh Edition Oxford University Press, 2002, that an authority must not exceed its jurisdiction by purporting to exercise powers which it does not possess and must direct itself properly on the law. That the authority must not use its power for an improper purpose; it must take into account all relevant considerations and disregard all irrelevant considerations and that an authority to which the exercise of a discretion has been entrusted cannot delegate the exercise of

its discretion to another unless clearly authorized to do so and it must not fetter its discretion. The learned authors further state that an authority acts unlawfully if it fails to fulfill a statutory duty and that an authority must not excessively interfere with fundamental rights. The learned authors hasten to state that the list is not exhaustive and that the grounds overlap to some extent.

In *Fredrick J T Chiluba v. The Attorney General* (3) the Supreme Court cited with approval the decision of the court in *Civil Service Union v Minister for Civil Service* (4) to the effect that in order to succeed under the ground of illegality, the applicant must prove that the decision “*contravened or exceeded the terms of the law which authorized the making of that decision or that the decision pursues an objective other than that for which the power to make the decision was conferred. By looking at the wording of the power and the context in which the power is to be exercised, the court’s ultimate function is to ensure that the exercise of the power is within or intra-vires the statute.*”

In determining whether or not a decision is illegal, the Court must construe the contents and the scope of the law conferring the duty or power on the decision maker. The decision which is being challenged is the respondent’s alleged decision to turn Lot 8978/M Chilanga into a graveyard. The law which governs the establishment of cemeteries is the Local Government Act Chapter 281 of the Laws of Zambia. Section 61 of the Act provides as follows:

“61. Subject to the provisions of this Act, a council may discharge all or any of the functions set out in the Second Schedule.”

Paragraph 41 of the Second Schedule to the Act provides, in relation to the functions of a council, as follows:

“41. To establish and maintain cemeteries, crematoria and mortuaries and otherwise to provide for and control the burial of the dead, and destitute persons who die in the area of the council.”

A consideration of the above provisions of the Act reveals that the power to establish cemeteries and to provide for, as well as control, the burial of the dead in the area of a council vests in the council for the area. Thus in the present case the power to establish cemeteries and to provide for the burial of the dead in Chilanga District vests in the respondent, Chilanga District Council. In the present case, although the Applicant contends that the respondent’s decision to turn Lot 8978/M Chilanga into a graveyard is illegal, the applicant does not state which provision of the law the respondent has contravened in making the said decision. Going by the affidavit evidence on record, the applicant’s contention that the respondent’s decision is illegal is premised on the letter dated 21st October 2013 marked “AL1” which was allegedly written by the Commissioner of Lands purporting to assure him that he will be offered the property in issue once the process to re-enter the property is complete. The applicant’s major grievance as I understand it is that converting L/8978/M Chilanga which is right next to his property, into a graveyard will make his property, namely Lot 8977 Mapepe Chilanga inhabitable as decomposing human remains will contaminate the underground water in his boreholes and will expose him and his family to what he calls “the horror of witnessing funeral processions and watching wailing mourners” on a daily basis. It is also the applicant’s position that the decision disregards the requirements of town and country planning not to establish a graveyard within meters of human habitation and that the Commissioner of Lands has undertaken to offer him the said land.

The respondent denies that the newly created Chilanga District Council has made any decision to turn Lot No. 8978/M Chilanga into a graveyard and contends that contrary to the applicant's assertions the decision to turn the said piece of land into a graveyard was taken by the Kafue District Council way back in the 1990s. It is the respondent's contention that the said parcel of land is three quarters full and that it is inconceivable that the Commissioner of Lands would offer the said piece of land which is a cemetery to the applicant. The respondent states that the only role it has played in recent times is that it has begun to construct a mourner's shelter on the said property and that it has plans to construct an ablution block and a car park for mourners for the common good of the community in Chilanga on L/8978/M Chilanga.

I should state here that the applicant has not refuted the respondent's contention that Lot 8978/M Chilanga has been a graveyard since the 1990s and that most of the land comprising the graveyard is filled with graves. In fact, the applicant in his affidavit evidence confirmed that part of Lot 8978/M Chilanga has been used as burial ground. In addition to this, the letter dated 21st October, 2013 purportedly written by the Commissioner of Lands which is exhibited to the affidavit in reply marked "AL1" confirms that Lot 8978/M Chilanga has been used for burial and according to that letter, the Commissioner of Lands undertakes to "subdivide Lot 8978/M Chilanga to take away the portion which has already been used for burial and allocate to the applicant the remaining subdivision of the portion not currently affected". This in my view is an admission that Lot 8978/M Chilanga is a graveyard and has been a graveyard for a longer period than the applicant would like me to believe.

Although the applicant contends that the decision to turn Lot 8978/M Chilanga into a graveyard is illegal, he has failed to substantiate his claim as

he has not demonstrated that the Chilanga District Council in making the alleged decision to turn L/8978/M Chilanga into a cemetery (which the respondent council denies making) exceeded its jurisdiction by purporting to exercise powers which it does not possess, or that it has failed to direct itself properly on the law or that it has used its power for an improper purpose or taken into consideration irrelevant considerations or that it has acted ultra vires the provisions of the Local Government Act, Cap. 281 in establishing the cemetery or constructing a mourner's shelter and other facilities for mourners at the said cemetery.

Counsel for the applicant conspicuously failed to state what is illegal about the decision to turn L/8978/M Chilanga into a graveyard whether it was made by the respondent or its predecessor Kafue District Council in the execution or discharge of its statutory functions. And rather surprisingly, Counsel for the applicant argued that the applicant has interest in Lot 8978/M Chilanga, which interest is not supported by any documentary evidence.

The underlying objective of the remedy of judicial review is the power of the court to ensure that the exercise of administrative authority by public bodies or public officers is done within the confines of the law. I find, in the present case, based on the evidence before me, that the Respondent did exercise its authority to develop Lot 8978/M Chilanga as a graveyard within the confines of the provisions of the Local Government Act. I, therefore, hold that the decision of the respondent was not illegal as the respondent Council acted within its powers conferred on it by section 61 and paragraph 41 of the Second Schedule to the Act. That being the case there is no basis on which I can grant the orders of certiorari and prohibition sought by the applicant.

The second ground on which the Applicant seeks judicial review is irrationality. In the case of Council of Civil Service Unions v. Minister for the Civil Service (4) which I referred to earlier, Lord Diplock stated that:

“By irrationality I mean what can now be succinctly referred to as “Wednesbury unreasonableness”. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer...”

In the case of Chitala v. The Attorney General (5) Ngulube CJ, as he was then, in addressing the question of “irrationality”, at pages 97 to 98, stated that:

“In law, a decision can be so irrational and so unreasonable as to be unlawful on ‘Wednesbury’ grounds – see Associated Provincial Picture Houses v. Wednesbury Corporation. The principle can be summarised as being that the decision of a person or body performing public duties or functions will be liable to be quashed or otherwise dealt with by an appropriate order in judicial review proceedings where the Court concludes that the decision is such that no such person or body properly directing itself on the relevant law and acting reasonably could have reached that decision.”

His Lordship Chief Justice Ngulube cautioned that the principle should be applied with circumspection. This is because the remedy of judicial review is concerned not with the merits of the decision but the decision making process itself and the purpose of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and it is not part of the purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question as stated by the Supreme Court in the

case of *Nyampala Safaries (Z) Limited and Others v. Zambia Wildlife authority and others* which I have already cited in this judgment.

The Applicant's basic contention under this ground is that the respondent's decision to turn Lot 8978/M into a graveyard without regard to the applicant's property rights and the requirements of town and country planning not to establish cemeteries within metres of human habitation is irrational. However, although the applicant asserts that it is against the requirements of town and country planning for a cemetery to be established within twenty metres or less of human habitation, the applicant did not produce any rules or regulations to that effect before this court. My own research to establish what rules regulate issues of the distance to be left between residential properties and cemeteries did not yield any positive results. I should hasten to state that it is the applicant's responsibility to avail to the court any authorities that he seeks to rely on in support of his case, which in this case he did not do. In the circumstances, I have considered the evidence adduced by the applicant under the ground of irrationality in the light of the provisions of the Town and Country Planning Act, Cap 283 generally as well as those of section 61 and paragraph 41 of the Second Schedule to the Local Government Act, Cap. 281 which confer power on the respondent council to establish cemeteries in areas under its jurisdiction as already observed.

Having said that, in order to succeed under the ground of irrationality, the Applicant must demonstrate that the Council's decision to turn Lot 8978/M Chilanga into a graveyard and to construct infrastructure for mourners, in exercise of its mandate pursuant to section 61 of the Act as read together with paragraph 41 of the Second Schedule to the Local Government Act, was so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. On a careful consideration of the evidence on

record, I find that the Applicant has not demonstrated that the decision made by the Respondent to that effect is so outrageous that no person or body properly directing itself on the relevant law and acting reasonably could have reached that decision.

The respondent's evidence that it has not made any decision to turn Lot 8978/M Chilanga into a graveyard since it was constituted as a council in 2012 and that the said cemetery is an old cemetery which was established in the 1990s has not been disputed or rebutted by the applicant as I already observed. Neither has the applicant disputed the evidence that the only role that the respondent has played with regard to the cemetery is to commence construction of a mourner's shelter and other infrastructure on Lot 8978/M Chilanga. I agree with the respondent that the developments being undertaken to provide appropriate infrastructure for mourners at the said cemetery is indeed for the greater good of the community in Chilanga. It is trite that good administration requires a proper consideration of the public interest and in the context of this case the respondent as the local authority for the area in which Lot 8978/M Chilanga is located is the custodian of the public interest and it cannot be faulted for upholding that public interest through the construction of appropriate infrastructure at the cemetery as I have already stated.

As the graveyard is an old cemetery according to the undisputed evidence of the respondent, I have every reason to believe that the Kafue District Council took into consideration all relevant factors before designating and gazetting Lot 8978/M Chilanga as a cemetery and that the site was found suitable for that purpose. Further the applicant's assertion that decomposing bodies will contaminate his boreholes is not supported by any evidence, expert or otherwise, as Counsel for the respondent rightly submitted. Infact counsel for the respondent confidently submitted that a visit to the site by the Court would confirm that there is no danger whatsoever of the applicant's

boreholes being contaminated and that in any case the cemetery having been in existence for years, the fear of contamination cannot be raised now. However, given the nature of judicial review proceedings, a site visit by the Court was not necessary as the Court in these proceedings is not sitting as an appellate Court. On the evidence before me, I hold that the Council's decision to develop Lot 8978/M Chilanga which is a cemetery was not in any way irrational.

Before concluding this judgment I wish to state that although the Applicant relied heavily on the letter purportedly written by the Commissioner of Lands which advised that the Commissioner would consider allocating him the said land after subdividing it, the letter as rightly submitted by Counsel for the Respondent did not cloth him with interest in Lot 8978/M Chilanga as he alleged. The law relating to ownership of land is clear and I need not restate it here. Suffice it to state that the Applicant is not a holder of a certificate of title for that property nor has any offer been made to him with respect to the property so that he can expect to be issued with a certificate of title to the land if he satisfies all the necessary requirements. And contrary to Mr. Besa's submission that the Commissioner of Lands as custodian of land in Zambia has power to designate land for cemeteries, this is not the case as clearly can be seen from the provisions of section 61 as read together with paragraph 41 of the Second Schedule to the Local Government Act, Chapter 281.

It is also important for me to clearly state that the Commissioner of Lands does not perform his functions in total disregard of the functions vested in local authorities nor does he have power to overrule them in the performance of their functions except as provided by the law. In any case this Court has in the past guided that although the Commissioner of Lands is empowered to alienate State land to deserving applicants, he or she can do so only as long as the said land is not encumbered. In the present case the land which is the subject of these proceedings is a graveyard. It is,

therefore, clearly encumbered as it is dedicated to the Chilanga community as the burial site for their beloved. The Court has further guided that the power which the Commissioner of Lands wields over land is limited to the Lands Act, Cap 182, which Act does not give him or her any power to override the provisions of other Acts of Parliament, such as the Local Government Act, which are at par with the said Lands Act and which together constitute Zambia's statute book. The laws should not be read in isolation from each other. In the circumstances, sentiments such as those expressed by Mr Besa that the Commissioner of Lands is the custodian of all land in Zambia and so his word in land matters is final, are not entirely accurate especially when considered in the light of the law.

In view of the foregoing observations, it was totally inappropriate for any officer in the office of the Commissioner of Lands to have written the letter dated 21st October, 2013 while these proceedings were ongoing as the action was potentially contemptuous. I would urge the Commissioner of Lands, because I do not believe he wrote that letter, to caution his officers to desist from such conduct that has the potential to bring his office into disrepute. I say so because I do not see how the Commissioner of Lands could undertake to subdivide a property which is designated by the Council as a graveyard in accordance with its mandate under the Local Government Act and offer it to the applicant herein. If this were to be done it would be contrary to good administration.

Having said that the net result is that the Applicant's application for judicial review under Order 53 of the Rules of the Supreme Court, 1999 edition has failed on both grounds and I accordingly dismiss it. I award costs to the Respondent to be agreed and to be taxed in default of agreement.

Leave to appeal is granted.

Dated this 30th day of May, 2014.

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A. M. SITALI
JUDGE