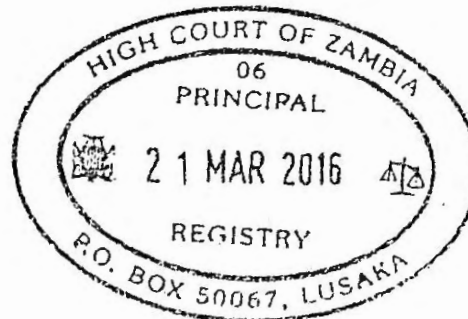


IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
AT LUSAKA
(Civil Jurisdiction)

2009/HP/1093

BETWEEN:



BONIFACE SIMBULE

1ST PLAINTIFF

(suing as Administrator of the Estate of the Late Duncan Simbule)

CONTRACT HAULAGE LIMITED

2ND PLAINTIFF

AND

JULIUS CHILIPAMWAWO SINKALA

1ST DEFENDANT

NAKONDE DISTRICT COUNCIL

2ND DEFENDANT

SDV ZAMBIA LIMITED

3RD DEFENDANT

COMMISSIONER OF LANDS

4TH DEFENDANT

Before the Honourable Mr. Justice C.F.R. Mchenga SC

For the 1st and 2nd Plaintiff: J. Mwalongo with A Kalikiti and Z. Simposya, MSK
Advocates

For the 1st Defendants: T.T. Shamakamba, Shamakamba & Company and C.N. Nhari, Nhari
Mushemi and Associates

For the 2nd Defendants: G. Lungu, Muleza Mwimbu and Company

For the 3rd Defendants: S. Chisanga with I. Siame, Corpus Legal Practitioners

For the 4th Defendants: M. Muntanga, Assistant Senior State Advocate, Attorney
Generals Chambers

J U D G M E N T

Cases referred to:

1. David Nzoona Lumayendo and Goodwins Kafuko Muzumbwa v Chief Chamuka, Kabwe Rural District Council and Zambia Consolidated Copper Mines [1988-1989] Z.R. 194
2. Zambia Telecommunications Company Limited v Valsons Pharma Zambia
3. Galunia Farms Limited v National Milling Company Limited and Another [2004] Z.R. 1
4. Anti Corruption Commission v Barnet Development Corporation Limited [2008] Vol. 1 Z.R. 69
5. United Engineering Group Limited v Mackson Munsalu and others [2007] Z.R. 30
6. Mitchell v Harris Engineering Company Limited [1967] 2QB 703
7. Bramwell v Bramwell [1942] 1 ALL ER
8. GF Construction (1976) Limited v Rudnap (Zambia) Limited Arthur [1999] Z.R. 134
9. Khalid Mohamend V Attorney General [1982] Z.R. 49
10. Wilson Masuso Zulu v Avondale Housing Project Limited [1982] Z.R. 172
11. My Kinda Town Limited v Soll [1983] R.P.C. 15
12. Rosemary Phiri Madaza v Awad Keren Coleen [2008] 1 Z.R. 12
13. Peter Militis v Wilson Kafuko Chiwala SCZ Judgment 3 of 2009

14. Valentine Webster Chansa Kayope v Attorney-General [2011]
 Vol. 2 Z.R. 424

Legislation referred to:

1. The Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia
2. The British Act Extension Act, Chapter 10 of the Laws of Zambia
3. The Limitation of Actions Act of 1939 of the United Kingdom
4. The Lands Act, Chapter 184 of the Laws of Zambia (Customary Tenure) (Conversion) Regulations Statutory Instrument No. 89 of 1996

Works referred to:

1. Halsbury's laws of England, 4th Edition, Vol. 36
2. Black's Law Dictionary, 6th Edition

By writ of summons supported by a statement of claim, the 1st plaintiff seeks the following reliefs:

- (i) *An order that the 1st defendant yields vacant possession of land held under customary tenure given to the late Duncan Simbule by Chieftainess Nawaitwika which said land is in next to Stand 211 Nakonde and office block building to the 1st plaintiff and a declaration that the 1st plaintiff is the rightful owner of the land in dispute.*
- (ii) *An order that the 1st defendant immediately excavates and removes his fuel tanks from the 1st plaintiff aforesaid land.*
- (iii) *An order that the 1st defendant accounts for and pays the 1st plaintiff all rental income on the said land paid by SGC Investments Limited from 2004 to the date of file and final settlement.*
- (iv) *An order that the 1st defendant pays mesne profits to the 1st plaintiff from 1991 to the date of yielding vacant possession of the land.*

- (v) *An interlocutory injunction restricting the 1st defendant from getting rentals from the tenants of the said premises and that the rentals be paid to court.*
- (vi) *Further and other relief*
- (vii) *Costs*

The 2nd plaintiff's claim is for the following reliefs:

- (i) *That the certificate title relating to Stand No. 211 Nakonde be cancelled as it was erroneously obtained.*
- (ii) *The 1st and/or 3rd defendant yields vacant possession of the property referred, to as Stand No. 211 and that 2nd plaintiff is the rightful owner of Stand No. 211.*
- (iii) *An order that the 3rd and/or 1st defendant account to the 2nd plaintiff all received from the lease by the 2nd plaintiff's of the 80,000 litres fuel tank to Sable Transport Limited from 2002 to date of yielding vacant possession of the tanks.*
- (iv) *An order that the 3rd defendant pays mesne profits to the 2nd plaintiff as from 2002 to the date of yielding vacant possession of the land.*
- (v) *Further and other relief*
- (vi) *Costs*

Alex Makapa was the 2nd plaintiffs' first witness (PW1). He is their Human Resource Officer and his evidence was that in 1970 or in the early 1970's, the 2nd plaintiff approached Headman Mwenitindi under Chief Nawaitwika, in Nakonde District, for land to store fuel and park trucks. They were given land close to the border with Tanzania which was 100 x 80 metres in size. To the north of that land, there was a filling station for Mr. Simbule, while in the south were premises for Zambia-Tanzania Road Services.

They secured the premises with a wire fence and in 1975 they mounted an 80,000 litres tank for diesel. They also built a temporal structure and operated from the premises until 1985. That year, Zambia-Tanzania Road Services was liquidated and they bought their property. Since it had a permanent structure, an office block and 2 x 80,000 litres storage tanks, they moved into it. Their original property remained dormant but the tank remained there.

In 1995, the 2nd plaintiff was placed under liquidation. At the time, he was manager of the Nakonde branch a position he held until March 1998 when the branch was closed and he was retrenched. In 2002, he was recalled and when they started accounting for the 2nd plaintiff's property, they discovered that the receiver sold one of them in 2001. They also discovered that the property they were given by Headman Mwenitindi was under the charge of the 1st defendant and he was renting out the fuel tanks to Sable Transport.

They wrote to the 1st defendant and demanded that he surrenders the tanks and the premises. His response was that he bought the tanks and the premises from Mobil Oil; he referred to the document at page 41 of the Plaintiff's Bundle of Documents as being a copy of the letter they received from him. When they followed up the matter with Mobil Oil,

they discovered that the sale did not take place because Mobil Oil never operated on that piece of land nor owned the tanks.

The 2nd plaintiff decided to sue the 1st defendant because the certificate of title for Stand 218 was in his personal name. He referred to the document at page 46 of the Plaintiff's Bundle of Documents, a copy of certificate of title No. 9047 and said the 1st defendant referred to it in his letter. According to that document, the land is 11.8 hectares while the land they acquired from the headman was 100x80 meters in size. The Tanzania-Zambia Road Services land was less than a hectare.

Pw1 also testified that the 3rd defendant is claiming ownership of the same land and has a certificate of title. He did not know when they got it but he is certain that they have one. The 2nd plaintiff does not have any title deed because both pieces of land are under customary tenure. Finally, he testified that the 1st defendant did not put up any structure on the land and they want their tanks and land returned. They also want the rentals paid by Sable Transport paid back.

When he was cross-examined by Mr. Nhari, Pw1 said he joined the 2nd plaintiff on 10th July in 1973. They conducted a property audit in 2002

after the receiver was removed and it was discovered that the property was in the hands of the 1st defendant. He believes he has a certificate of title issued in 1993.

In his continued cross-examination by Mr. Chisanga, Pw1 said he knows the person who represented the 2nd plaintiff when the property was acquired from the headman in 1970. Though no letter written in the 1970's has been exhibited in the Plaintiffs Bundle of Documents, he knows that one was written to the headman. According to him, Stand 211 and Stand 218 are the same, Stand 211 is 100x80 meters and was given to them by the chief. He believes the 3rd defendant got the certificate of title for the same property as a result of a mistake. He admitted that the Commissioner of Lands has not indicated that there was a mistake when the certificate was issued. He admitted being aware that the District Commissioner for Nakonde confirmed that Stand 211 belonged to the 3rd defendant.

When he was re-examined, Pw1 confirmed that paragraphs 15 and 16 of the 2nd Plaintiff's Statement of Claim make reference to an error in the issuance of the certificate of title to the 3rd defendant. He also referred to page 40 of the Plaintiff's Bundle of Documents and page 56

of 3rd Defendant's Bundle of Documents and said there was correspondence on the mistake in the allocation of the land.

According to the letter at page 41 of the Plaintiff's Bundle of Documents, the 1st defendant occupied the land in 1993. Page 46 of the same bundle indicates that Stand 218 is 11 hectares while the size of Stand 211 is 100x80 metres. He also referred to pages 21 and 22 of the Plaintiff's Bundle of Documents and said the document at page 21 is dated 29th January 2007 and indicates that the land was allocated to the Zambia Tanzania Road Services between 1972 and 1973.

Pw1 was the only witness called by the 2nd defendant.

Boniface Simbule, the 1st plaintiff, gave evidence on his own behalf. He testified that before his demise, on 3rd February 1980, his father used to be in the transport business and was running a filling station. It was run on a dealer owned site with Mobil Oil providing the equipment which included tanks and pumps. The filling station was closed two years after his father's death because he fell back on payments to Mobil Oil. Though they subsequently managed to pay the K28,000 he owed, it remained dormant for some years.

Subsequently, he left Nakonde and came to Lusaka. After staying for a number of years, his relatives in Nakonde called him and informed him that changes had taken place at the filling station. It had been painted in colours other than those for Mobil Oil and they asked if he had sold it to the 1st defendant who was claiming to be its owner. He travelled to Nakonde and the SGC employees at the filling station told him they had leased it from the 1st defendant. The 1st defendant attempted to have contact with him but he refused to meet him.

The 1st plaintiff then travelled to Mobil Oil Lusaka and met Martin Meleki. He gave him receipts for the sale of the pumps to the 1st defendant. He referred to documents at page 10, 11 and 12 of the Plaintiff's Bundle of Documents as being a document relinquishing the pumps; the 1st defendant's cheque paying for the payment and a document setting out the serial numbers of the pumps. He was also given the document at page 13 of the Plaintiff's Bundle of Documents which relates to the sale of pumps and tanks. They denied selling the land to him.

After a family meeting, they resolved to approach the 2nd defendant and demanded that they cancel the certificate of title the 1st defendant had for the land. He also gave them the letter at page 16 of the

Plaintiff's Bundle of Documents and the 2nd defendant resolved to send some counsellors to Lusaka. Following representations to the 4th defendant, the certificate of title was cancelled but it was later reinstated. Finally, he prayed that the land be returned and that the court grants him the other reliefs endorsed on the writ.

When he was cross examined by Mr. Nhari and referred to the document at page 16 of the Plaintiff's Bundle of Documents, the 1st plaintiff denied giving the 2nd defendant documents indicating that the 1st defendant was renting the premises from his father. The statement in the document that the 1st defendant was renting from his father is not correct.

The documents at pages 10 to 12 of the Plaintiff's Bundle of Documents were given to him at Mobil Oil but not the one at page 13. According to the letter dated 22nd March 1991, which is at page 13, the 1st defendant paid K1,200,000 for the tanks and pumps only. However, the document at page 11 indicates that he bought the pumps at page K400, 000. He did not know who was operating the filling station in 1991 because he was in Lusaka. While he cannot confirm that the 1st defendant started operating in 1991, the documents he has come across

indicate that it is the case. He discovered that he was operating it in 2004 when he was contacted by his relatives.

The 1st plaintiff admitted that the writ was filed on 18th February 2011, which was 20 years after 1991. He also admitted that the letter on page 28 of the Plaintiff's Bundle of Documents was not copied to the 1st defendant.

When he was re-examined, the 1st plaintiff said he did not lease out the property. The letter at page 10 of the plaintiff's Bundle of Documents was from Mobil Oil and that the 1st Defendant's Bundle of Documents had a copy of the same document. Finally, he said that the defendant's defence makes no mention of when the action was commenced.

Dickson Singoyi was the 1st plaintiff's second witness (Pw2). He recalled the year 1968 when his brother used to be good friends one Duncan Simbule, a business man. Through their interaction he learnt that Mr. Simbule was running a bar, guesthouse, supermarket and minimarket. He also had a transport business. He learnt that he wanted to establish a filling station and that he had acquired customary land through village Headman Mwenitindi from Chieftainess Nawaitwika. He was

then given a dealership and he started constructing an office block. He saw him ferry sand and burnt bricks to the site.

In 1970, he invited Mobil Oil to bring fuel pumps and tanks to the site. The filling station became operational and run very well between 1970 and 1980 when he died.

When he was cross-examined, Pw2 said Mr. Simbule acquired the land in 1968. He was not aware that the pumps and tank were sold to the 1st defendant and that he took over the running of the filling station between 1985 and 1991.

Darlington Mwaba Chalikosa was the 1st plaintiff's third witness (Pw3). His evidence was that he joined Mobil Oil in 1979 and left in 1982. He was employed as a sales agent and dealt with Mobil Oil business in Nakonde. When they received information that Mr. Simbule was buying kerosene, petrol and diesel, they approached him and provided him underground tanks and pumps. The dealer provided the land, labour and had to buy their fuel and other products.

When he left Mobil Oil (in 1982), they were still operating but were behind in payments. He believed the business arrangement with Mobil

Oil ended around 1984. When a dealership ended in such cases, Mobil Oil would recover the equipment and take it back to Ndola. It did not happen in this case because someone was ready to buy it. They sold the equipment to the 1st defendant.

It was also his evidence that the letters at pages 10 to 13 of the Plaintiff's Bundle of Documents relate to the relinquishing and sale of the equipment by Mobil Oil to the 1st defendant and they have nothing to do with the sale of land.

When he was cross examined by Mr. Nhari, Pw3 said he left Mobil Oil in June 1982 and at the time he left he was Sales Manager. He was not working for Mobil Oil in 1991 and the first time he saw the documents at pages 10 to 13 of the Plaintiff's Bundle of Documents was in court. He admitted not witnessing the transactions between Mobil Oil and the 1st defendant and that his testimony was based on what he was told by others. He did not know when the 1st defendant started operating the filling station.

Enos Sichinga who is Headman Ntindi was the plaintiff's fourth witness (Pw4). His evidence was that he knew Duncan Simbule and although they stayed in the same village between 1956 and 1980, they are not

related. Mr. Simbule asked for land from his late father because he wanted to start selling fuel. He was given land along Malawi Road where he constructed a filling station and operated it until he died in 1980. When he died, his son took over but he never interacted with the son.

In 2004, he received a group of people who wanted to know if he had signed documents to enable the 1st defendant obtain a certificate of title for the land where Mr. Simbule had been operating a filling station. He told them that the 1st defendant never approached him for that purpose and he advised them to sue.

Later, he gave documents to the 1st plaintiff so that he could obtain a certificate of title; he identified the document at page 25 of Plaintiff's Bundle of Documents. Evans Sichinga, his young brother was the secretary at the meeting that resolved to allow him to obtain a certificate of title. The letter was to be taken to the chief who sent his indunas to inspect the land. The 1st plaintiff was cleared because he recognized the allocation that his father, Paul Sichizya, made to Mr. Simbule when he became headman.

When he was cross-examined by Mr. Nhari, Pw4 said only the 1st plaintiff came to ask for authority to obtain title to the land. He was aware that there was filling station run by Mobil Oil and it was connected to Mr. Simbule. He did not see any document signed by the two parties and did not know the arrangement between them. There was a building and 5 storage tanks at the filling station. He became headman in 2002 and Thomas Sichinga was village headman in 1991. Between 1983 and 1991, he was in Mufulira working as a miner. He found the 1st defendant operating the filling station in 1983.

When he was cross examined by Mr. Chisenga, Pw4 said his late father gave the land to Duncan Simbule but he was not party to the transaction. He confirmed that there was no written document for the transaction and said it was because they did not give documents at the time. He is aware that in 1993 the 4th defendant issued certificates of title to the same land but they were not consulted.

When he was re examined, Pw4 said he wrote a letter for Boniface Simbule in 2004. His testimony marked the close of the plaintiffs' case.

The first witness for the defendants was the 1st defendant. His evidence was that following a visit between 1981 and 1983, it came to his attention that there was no filling station in Nakonde. He approached Mr. Cliff Wider the Managing Director of Mobil Oil after identifying a filling station that was intact but not functional. It was agreed that he could run it as long as he got fuel from Mobil Oil. He started trading in 1985 and he is still operating but the filling station is now leased out to SGC.

In 1991, Mobil Oil offered to sell the filling station to him. He paid K1,200,000 cheque and they gave him a letter a copy of which is at page 6 of the 1st Defendant's Bundle of Documents confirming the sale. He was also given a document that came from Isoka District Council allowing Mobil Oil to construct the filling station. It was copied to the Commissioner of Lands and copies appear at pages 3 and 4 of the 1st Defendant's Bundle of Documents. Further, they handed him a document through which Mobil Oil informed Isoka District Council that they were moving on site. Finally, he got an advert from the Times of Zambia of 3rd March 1970, which appears on pages 1 and 2 of the 1st Defendant's Bundle of Documents. He brought the letters to the 4th defendant because Mobil Oil did not have a certificate of title and he was later given a 14 years lease.

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said the K1,200,000 he paid was for the land and not tanks. He started trading in 1985 but it is now leased out. At page 11 of the Plaintiff's Bundle of Documents is the cheque that he paid. He paid for the pumps in March, 1991.

The letter at page 6 of the 1st Defendant's Bundle of Documents was written to the Commissioner of Lands by Mobil Oil and he took it immediately. That was in about 1991 and he denied going there in 1984. He admitted that the letter makes no mention of land and indicates that he bought tanks. He maintained that the K1,200,000 he paid was not purchase of tanks and pumps only.

The 1st defendant admitted signing the letter at page 10 of the Plaintiff's Bundle of Documents and that it was from Mobil Oil. He admitted that the letter does not mention the relinquishing of land. He maintained that he started trading in 1985. He admitted that the letter at page 13 of Plaintiff's Bundle of Documents shows the purchase price as being K1,200,000 for 5 tanks. It makes no mention of land. He bought the land from Mobil Oil but did not execute a contract of sale.

When he was re-examined, the 1st defendant said the letter at page 10 of the Plaintiff's Bundle of Documents relates to the replacement of pumps. The one applicable to him is the one at page 13 of the Plaintiff's Bundle of Documents which indicates that he bought the pumps and the land on which they were. The document at page 1 of the 1st Defendant's Bundle of Documents shows that he did not just buy the pumps but also the land on which they were.

He maintained that Stands 218 and 1236/M are the same piece of land. He bought the land because the sunken tanks and administrative block are on the land. The 4th defendant pulled out the file on which they were corresponding and said the letter from Mobil Oil was sufficient. They did not sign a contract of sale because they said it was not necessary.

Webster Nonde, a former employee of Mobil Oil was the 1st defendant's first witness (Dw1). His evidence was that he worked for Mobil from September 1993 to December 2005, as distribution Manager and Managing Director. They had files for customers that included historical details. The filling station in Nakonde was developed following the acquisition of the land by Mobil Oil in 1973. There were two buildings, storage tanks and fuel pumps on it. In 1991, they decided

to sell it to the 1st defendant but continued to supply fuel to it. What was sold was the land, the storage tanks, buildings and pumps and this is why it was not included in the assets transferred to Total Zambia in 2005.

The Nakonde filling station, at the time he dealt with it, was dealer owned and dealer operated. The whole property was owned by the dealer but Mobil was in an arrangement to supply products. For the period 1993 to 2005 the filling station did not appear as an asset in their books. The letter of sale his predecessor wrote about it referred to the number on the sketch diagram because the survey diagrams had not yet been processed. In the letter at page 6 of the 1st Defendant's Bundle of Documents, they informed the 4th defendant that the property had been transferred to the 1st defendant with effect from September 1991.

Stands 1236/M and 218 Nakonde is the same property. As regards its being referred to as Nak/2/DP and 218, it was his evidence that one refers to the number on the surveyed diagram and whilst the other refers to the sketch number. He was not aware that the land belonged to Mr. Simbule and the records do not show ownership by a third party.

Mobil Oil got the land from the local authority which had invited the public to apply in 1970.

When he was cross examined, Dw1 confirmed that the document on page 2 of the 1st Defendant's Bundle of Documents is the advert for the land Mobil Oil was allocated. He admitted that there was no property number in the advert and the number "1236/M" only appears in the second line. He also admitted that the document at page 5 of the 1st Defendant's Bundle of Documents is what he referred to as "Diagram No. Nak/2/DP" and that he referred to it using the plan number because it was not surveyed. He did not see any survey diagram at the time he was with Mobil Oil because the land was not surveyed.

The letter at page 6 of the 1st Defendant's Bundle of Documents makes reference to the sale of the property in two ways. The first is through the transfer of the filling station, plant and facilities while the second paragraph it makes reference to the storage tanks and forecourt.

When he was referred to pages 9, 10, 11, 12 and 13 of the 1st Plaintiff's Bundle of documents, he said document No. 9 was signed by the company's Retail Territory Manager and by it they were selling the

pumps in 2002; at page 11 is a cheque for what looks like K400,000; page 13 refers to the sale of tanks while page 10 refers to the sale of pumps; and the document at page 12 refers to two dispensing pumps in December 2002, at the time the 1st defendant owed the land.

He confirmed that Nakonde was dealer owned. He also confirmed that the document at page 13 of the Plaintiff's Bundle of Documents refers to the sale of 5 tanks to the 1st defendant on 22 March 1991; so does the document at page 6 of the 1st Defendant's Bundle of Documents dated 25th September 1991. He denied the suggestions that they were sold twice and said they were only sold once, in December 2002. He admitted that the 1st entry on page 9 of the 1st Defendants Bundle of Documents is dated 10th June 2002 and the pumps were sold in December 2002.

Dw1 confirmed that Nakonde filling station was dealer operated and between 1993 and 2005 and it did not appear in the register of assets for Mobil Oil. The 1st defendant owned it in 1993 when he joined. There were no title deeds at the time it was sold but only an offer letter from the local authority, provincial authority and the Ministry of Lands. Cliff Widah was the Managing Director at the time of sale and no contract of sale was signed with the 1st defendant. The document at page 5 in the 1st Defendant's Bundle of Documents, the sketch diagram

was approved in April 1973. Though the number 1236/M is not on the diagram, it relates to the same land where the filling station is.

When he was re-examined, Dw1 said they used to replace pumps every five years and the pumps referred to in the letter of December 2002, where 19 years and at the time the station was sold. There could have been subsequent replacement and so the pumps referred to in the letter of 2002 are not the ones referred to in 1991 letter.

The 1st part of the document at page 6 of the 1st Defendant's Bundle of Documents refers to the transfer of the filling station and the land. At page 5 of the same bundle, is the site diagram and its plan or diagram number is NAK/2/DP. The document at page 13 of the Plaintiff's Bundle of Documents and the one at page 6 of the 1st Defendant's Bundle of Documents are related. They set out the sequence of events, the sale took place in 1991 and the subsequent letter itemises all that was sold. Finally, he said Mobil Oil had documents that indicated that they had title to the land but they went away with all of them at the time they left the country.

Mr. Lungu informed the court that the 2nd defendant was not going to call any witnesses.

Namani Mwanza (Dw2) gave evidence on behalf of the 3rd defendant. He is from Bollori African Logistics Zambia previously known as SDV. His evidence was that in December 1990, management at AMI the forerunner to SDV, applied for a Stand in Nakonde from Isoka District Council. This was because at the time, Nakonde was not a district. On 21st January 1991, they were advised to submit an application through the Development Committee and he referred to page 1 of the 3rd Defendant's Bundle of Documents.

In June 1991, the 2nd defendant's Development Committee for Nakonde sat and approved their application. The application was also approved by a full council meeting on 10th June 1992. They submitted the approved plans in August 1992 and after making payments the 4th defendant issued them a certificate of title in May 1993. He referred to the documents at pages 1, 5, 12, 16, 32 and 36 of the 3rd Defendant's Bundle of Documents as being documents that set out the steps they took to acquire the land. He said Stand 211 belongs to them and there is no claim on it apart from the encroachment.

They have not developed the land because of encroachment and there has been litigation on it 2002. Though the 4th defendant advised that they be given another piece of land, the 2nd defendant has objected to doing

so indicating that there are no grounds on which a new plot should be given to them.

When he was cross-examined, Dw2 said they applied for the land in 1990. They have not put anything on the land other than small structures put up by Mr. Sichone and another person. The land was given to them by the Commissioner of Lands after an application to the 2nd defendant. He has not heard of the 2nd plaintiff's claim and there is no tank within the boundary of Stand 211. If SDV was given alternative land, the matter would have been resolved but they were not given nor have they been compensated. He admitted that the page 40 of the 3rd Defendant's Bundle of documents shows that the 1st defendant's Stand 218 has encroached on SDV's Stand 211. He is aware that the 1st defendant claims that Stand 211 is part of his land. He is also aware that the 1st defendant and the 3rd defendant have been to court before.

When he was re-examined, Dw2 said he was shown the boundaries of Stand 211 in 2009 by the officers of the 2nd defendant and there is no tank on it. The 2nd defendant claims that the 1st defendant's land has encroached on their land but it does not take up the entire stand.

Paul Kalumba (Dw3) a legal officer in the office of the Commissioner of Lands gave evidence on behalf of the 4th defendant. His evidence was that according to their records, Stand No. 218 was issued title in the names of the 1st defendant after he submitted the standard forms. These included a council recommendation letter from the 2nd defendant and land application forms. The property was not surveyed at the time the initial application was made but they relied on a sketch plan and gave him a 14 years lease.

In 2005 they received a letter from the 2nd defendant requesting them to cancel the certificate of title because it was encroaching on Stand 211. They were also informed that three other properties existed within Stand 218 which was 11 hectares. These were Stands 221, 338 and 332. The Commissioner of Lands proceeded to cancel the certificate. The 3rd defendant who owned Stand 211 opted for settlement out of court. They indicated that if given an alternative piece of land, they would surrender Stand 211.

The certificate of title for Stand 218 Nakonde was later reinstated on the belief that the matter had been resolved when the 3rd defendant had opted out. It was a mistake on their part because it still encroached on Stand 211. They have not entirely cancelled the certificate of

title for Stand 218 because of court proceedings. He was not sure of the documents that the 3rd defendant submitted to obtain the certificate of title.

When he was cross-examined, Dw3 said the documents from the 2nd defendant indicate that that both Stands 218 and 211 were formerly under customary tenure. He has seen a recommendation letter from the 2nd defendant on the file for Stand 218 had Annexure A forms. The documents at pages 23 and 24 of the Plaintiff's Bundle of Documents, dated 27th January

2007, do not mention the 2nd defendant but the 1st and 2nd plaintiffs. He was familiar with the land at the Zambia Tanzania boundary.

The document on page 51 of the 3rd Defendant's Bundle of Documents is the letter that recommended the cancellation of the certificate of title for Stand 218 Nakonde. To his knowledge, the 1st defendant did not follow what was suggested in the letter. He is not aware that following the letter at page 53, the title for Stand 211 was cancelled. He is not aware of the 3rd defendant approaching the local authority. He is not aware of who wrote the notes on the documents on pages 54 and 55 of the 3rd Defendant's Bundle of Documents. The 3rd

defendant refused an alternative land and the title to Stand 211 remains cancelled.

He was not aware of any advertisement relating to Stand 218 Nakonde. As regards the document on page 2 of the 1st Defendant's Bundle of Documents, he has come across L/1236/M and it belongs to a Mr. Dickson Singoyi and he believes it is on title. He maintained that the 1st defendant's land is Stand 218 Nakonde. The land at page 3 of the Defendant's Bundle of Documents was land under customary tenure and he believes the certificate of title was issued on the basis of the letter dated 23rd May 1973. The entry at page 9 of the 1st Defendant's Bundle of Documents, dated 10th June 2002, does not refer to any sale of land to the 1st defendant nor does it indicate that the previous owner was Mobil Oil. The 4th defendant does not effect changes to an entry affecting ownership on the basis of letters but contracts of sale and assignments.

When he was cross examined by Mr. Shamakamba, Dw3 said as of now, the certificate of title for Stand 218 Nakonde is not cancelled as the entry was reversed. According to the 1st defendant's document, the land where Mobil Oil built the filling station is the same land known as Stand 218. They got it after writing to the Commissioner of Lands and

he leased it to them. According to the same records, Mobil Oil was the owner and they surrendered the lease to the 1st defendant. Though there is mention of a lease, no title existed at the time they were not supposed to surrender title.

He admitted that the document at page 6 of the 1st Defendant's Bundle of Documents confirms that the 1st defendant purchased the structures on the piece of land from Mobil Oil. It was his evidence that even if the land was not surveyed, Mobil Oil would have obtained a 14 years lease but there are no documents of ownership. The 2nd defendant prepared minutes recommending that title to the land should be given to him.

The sketch plan at page 5 of the 1st Defendants Bundle of Documents was prepared by Kasama Provincial Survey Office. The certificate of title for Stand 218 was cancelled because it was 11 hectares and it was swallowing Stand 211. Since they cannot prove fraud, they assume that the certificate of title was issued by mistake on the part of their officers. Had Stand 218 been state land, the 4th defendant would have resolved the difficult administratively by giving the 1st defendant 1 hectare and returning the land to the claimants.

While chiefs are represented in the rural council, it is not true that the chief consented to the 1st defendant being given a certificate of title. The standard procedure of conversion of land under customary tenure was not followed in the case of Stand 218. He was not aware that Government requested the Isoka Council to find land to be given to Mobil Oil to build a filling station. The Ministry of lands are at fault for issuing a certificate of title for Stand 218 when the procedure for converting land under customary tenure was not followed.

The complaint over Stand 218 was received in either 1990 or early 2000's. The only document the complainants had was a letter from one of the headmen. The claim that it was land under customary tenure was confirmed by the Kasama Regional Office. The letter at page 23 of the Plaintiff's Bundle of Documents dated 27th January 2007, confirms that the lease was in 1973; Mobil Oil wrote to them but there was no written response from the 4th defendant. The 4th defendant did not give the property to Mobil Oil because he has not come across any document to that effect.

The document on page 27 of the Plaintiff's Bundle of Documents is an extract of minutes of the council at Nakonde. The 1st plaintiff was

given title to the same land after he got permission to convert it from customary tenure. The permission was in order.

He was not aware that the Governor requested for valuation of the land before it was given to Mobil Oil. He denied coming across a Mr. Chipasha when dealing with Stands 211 and 218. He also denied coming across information that authority was obtained from the traditional authority before the land was given to Mobil Oil. He said it was possible that some documents were lost from their file for Stand 218. He learnt that the 1st plaintiff occupied the property as far back as 1979 and sought the consent of the chief. While they cannot prove fraud on the part of the 1st defendant, there was a mistake on their part.

When cross-examined by Mr. Nahri, Dw3 said he could not establish when Mobil Oil took possession of the property. In 1973, Mobil Oil communicated their intention to erect a filling station and it is the same filling station that the 1st defendant bought. They became aware of the dispute over the two properties sometime in 2000 and the council wrote them in 2005. He has not seen any document between Mobil Oil and the 1st defendant concerning the land transaction.

At the time they were processing the application for title for Stand 218, they had not established the Folios Section where they are now comparing all applications for title against existing properties before issuing certificates of title. They relied on the 2nd defendant who they believed had given them the correct position on the status of the land. When the 2nd defendant recommended the 1st defendant for a certificate of title without the consent of the chief they thought it was state land, it only came to their attention a few years later that it wasn't.

Their records have not established how Mobil Oil ended up on that land. All they received before processing the application for title for Stand 218 was a letter from the 2nd defendant and the land was not surveyed at the time. It is only after it was surveyed that its correct extent was determined.

When he was re-examined, Dw3 said it is the responsibility of an applicant for a certificate of title to land under customary tenure to obtain the chief's consent.

Written submissions were filed in on behalf of the plaintiffs, the 1st defendant and the 3rd defendant.

On behalf of the plaintiffs, Mr. Mulongo submitted that the issue for determination is the ownership of Stands 218 and 211 Nakonde, as between the two plaintiffs on one hand and the 1st and 3rd defendants, on the other hand.

He submitted that Sections 33 and 35 of the Land and Deeds Registry Act provide that a certificate of title is conclusive evidence of proof of ownership unless the contrary is proved. He referred to the case of David Nzoona Lumayendo and Goodwins Kafuko Muzumbwa v Chief Chamuka and Kabwe Rural District Council and Zambia Consolidated Copper Mines (1) and submitted that though no right by adverse possession can be acquired after land becomes the subject of a certificate of title, Section 32 of the Lands and Deeds Registry Act provides that if proved, any rights or benefits that existed at the time of the issuance of the certificate will override those created after it was issued. He argued that while the plaintiffs cannot challenge the certificate of title for 218 Nakonde after 10th June 2001 and in the case of 211 Nakonde, after 26th May 1993, the plaintiffs have proven possession for 12 years prior to their issuance.

There is evidence that the land was given to the 1st plaintiff's father for the establishment of a filing station in 1968. He put up an office

block with the help of Pw2 and ran it up to 1980 when he died. The 1st defendant took possession in 1991 and the certificate of file was only issued 32 years later, in 2002. He submitted that as for Stand 211 Nakonde, village Headman Mwenitindi gave the land to the 2nd plaintiff in 1973. They put up a slab and storage tank in 1975. Ten years later, in 1985, they acquired the former Zambia-Tanzania Road Services yard with two more storage tanks. The certificate was only issued twenty years later in 1993.

Counsel referred to the case of Zambia Telecommunications Company Limited v Valsons Pharma Zambia(2) and submitted that when considering the question of adverse possession with physical developments, the relevant period is that prior to the issuance of the certificate of title. As soon as there is notice that the land is encumbered, issue should be raised with the Commissioner of Lands. The unchallenged evidence in his case is that the pieces of land are still under customary tenure under Chieftainess Nawaitwika.

Finally, counsel submitted that the procedure for converting land under customary into leasehold tenure was not complied with. He argued that the plaintiff's interest in Stands 218 and 211, respectively, are

better than those of the 1st and 3rd defendants. He urged the court to cancel the two certificates of title.

Submitting on behalf of the 1st defendant, counsel pointed out the 1st defendant's position against the 1st plaintiff is that the land on which former Mobil Oil Zambia Limited filing station is was acquired by the state and is no longer customary land. It is also his position that he purchased the filing station including the buildings, tanks and pumps.

Counsel referred to the case of Galunia Farms Limited v National Milling Company Limited and Another (3) and submitted that the onus is on the plaintiff to prove his claims and where he fails to do so, the mere failure of the defendant's defence does not entitle him to succeed. He submitted that the plaintiffs' claims that the land is under customary tenure has not been proved. The land was acquired by the state and an advertisement was placed in the newspaper. There is evidence from Dw1, the former Managing Director of Mobil Oil, supporting that fact. He also testified that Mobil Oil leased the land and no one raised any claim on it.

It was also submitted that the 1st defendant has produced the relevant documents relating to the land when the plaintiff's have provided none. Most of the documents presented by the plaintiffs were prepared subsequent to the 1st defendant obtaining the certificate of title. There is no documentary proof that Mobil Oil had a business relationship with the 1st plaintiff that related to the disputed land. The plaintiff has not provided proof that other than the 1st defendant's filing station, there was another filling to which his documents (the 1st defendant's documents) relate. He referred to Section 33 of the Lands and Deeds Registry Act and the case of *Anti Corruption Commission v Barnet Development Corporation Limited* (4) and submitted that a certificate of title can only be challenged on the grounds set out in Section 34 of the Act.

Further, counsel submitted that according to the *Halsbury's laws of England* 4th Edition Vol. 36, paragraph 36 (2), a party alleging fraud must set out the particulars of such fraud in their claim. The plaintiffs have not set out any particulars of fraud in their pleadings. In fact, Dw3's evidence is that all the documents required for the processing of the certificate of title were submitted and the 1st defendant cannot be faulted for the Commissioner of Lands' failure to ensure that the chief's consent was obtained.

Counsel also submitted that the document at page 6 of the 1st Defendant's Bundle of Documents and the evidence of Dw1 confirms that what Mobil Oil sold to the 1st defendant was the filling station. The plaintiffs have failed to call the former Managing Director to prove that what was sold was only the pumps and tanks though they had a letter purporting that it was the case. He referred to the evidence of Dw1 that the fuel tanks were fixed to the ground and referred to the Latin Maxim "*quic quid plantatur solo solo cedit*".

Finally Counsel submitted that the action is statute barred. He referred to the case of *United Engineering Group Limited v Mackson Munsalu and others* (5) and submitted that statute bar can be raised either as a preliminary issue or as a defence. He referred to the words of Lord Denning in the case of *Mitchell v Harris Engineering Company Limited* (6) that the statute imposes a time limit on the plaintiffs.

According to Section 4 (3) Limitation of Actions Act which is applicable to Zambia by virtue of Section 2 of the British Acts Extension Act, this action should have been commenced within 12 years from the date when the cause of action accrued. That period runs from the time when adverse possession was taken. The 1st defendant first

took possession in 1985 and in 1991 he bought the premises and took steps to obtain title deeds. This action was commenced in 2009 which was 23 years later.

Counsel also commented on the plaintiff's reference to the cases of David Nzoona Lumayendo and Another v Chief Chamuka (1) and Zambia Telecommunications v Valsons Pharma Limited (2). He submitted that they have been applied in a misleading way. He submitted that there cannot be adverse possession of land that is the subject of a certificate of title.

As regards the claim for mesne profits, he referred to the cases of Bramwell v Bramwell (7) and GF Construction (1976) Limited v Rudnap (Zambia) Limited Arthur (8) and submitted that since there was no landlord and tenant relationship between the plaintiff and the 1st defendant, the plaintiffs cannot claim mesne profits. Further, a claim for mesne profits is based on the law of torts and going by Section 2(1) (9) of the Limitation of Actions Act should be claimed within six (6) years. The action in this matter was commenced in 2009 which is well beyond the 6 years. He urged the court to dismiss the action in total.

Submitting on behalf of the 3rd defendant, counsel pointed out that it is not disputed that: the 1st plaintiff's father operated the filing station at Nakondé having acquired the land from the local headman; the 2nd plaintiff once operated from Stand 211 Nakonde; that the 1st defendant was the registered holder of Stand 1236/M Nakonde and that acquired a certificate of title for Stand 218 Nakonde and that the said certificate was cancelled by the Commissioner of Lands; and that the 3rd defendant has a certificate of title for Stand 211 Nakondé which was lawfully issued by the 4th defendant.

He submitted that the 2nd plaintiff is not entitled to any of the reliefs they are seeking because the 3rd defendant acquired their certificate of title after following the procedure prescribed by the law. He submitted that a certificate of title can only be cancelled if obtained fraudulently or by mistake. There is no evidence that the 3rd defendant acted fraudulently or that the certificate was issued by mistake.

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prayer that the certificate be cancelled cannot stand because there is no evidence of fraud.

As regards the claim that the 3rd defendant yields vacant possession to the 2nd plaintiff, Counsel referred to the case of Khalid Mohamend V Attorney General (9) and Wilson Masuso Zulu v Avondale Housing Project Limited (10) and submitted that the plaintiff has failed to establish the existence of a lease between Sable Transport and the 3rd defendant. The claim must therefore fail. Further, counsel referred to the case of My Kinda Town Limited v Soll (11) and submitted that claim must also fail because the 2nd plaintiff has failed to show that the 3rd defendant is illegally occupying the land or has committed any breach.

Coming to the claim for mesne profits, he submitted that since the 3rd defendant is the holder of the certificate of title for Stand 211 Nakonde, they cannot be required to pay mesne profits. He referred to Black's Law Dictionary 6th Edition where it is deferred as.

"Mesne profits refer to the value of use or occupation of and during time it was held by one in wrongful possession and is commonly measured in terms of rent or profits".

Reference was also made to the cases of Rosemary Phiri Madaza v Awadh Keren Coleen (12) and Peter Militis v Wilson Kafuko Chiwala (13) and submitted that the plaintiff has failed to show that the 3rd defendant

was in illegal possession. He submitted that all the claims must fail and the action must be dismissed with costs.

I am indebted to counsel for their submissions and I have taken them into account in arriving at my decision.

From the evidence before me, I find that it is common cause and not disputed that the Commissioner of Lands issued certificates of title to the 1st and 3rd defendants for Stands 218 and 211, respectively, following recommendations from the 2nd defendant. The certificate of title for the 1st defendant (for Stand 218) was issued on 10th June 2002, while that for the 3rd defendant was issued on 27th May 1993. Prior to the 1st defendant being issued the said certificate of title, a 14 years lease was issued to him on the basis of an un-surveyed diagram.

Further, it is not dispute that on Stand 218 Nakonde, there is a filling station which is now being operated by SGC Investments Limited but was formerly run as a Mobil Oil filling station. It is agreed that in 1991 the 1st defendant purchased the fuel storage tanks on the stand from Mobil Oil at K1,200,000. It is also not disputed that in 2002, he

was in illegal possession. He submitted that all the claims must fail and the action must be dismissed with costs.

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owned filling station with Mobil Oil being the provider of the equipment and lubricants. This evidence is supported by Pw3 who is the current Headman Mwenitindi. His evidence is that his father was Headman Mwenitindi at the time and gave the land to the plaintiff's father. Pw3 admitted that he has no documentary proof of the transaction and said this is because the land was under customary tenure and they were not giving documents after giving out land at the time.

On the other hand, the 1st defendant's position is that he bought Stand 218 from Mobil Oil in 1991. Though he paid K1,200,000, no contract of sale or assignment was executed. He was given a letter which he presented at the 4th defendant to obtain his certificate of title. His evidence is supported by Dw1, a former manager at Mobil Oil. His testimony was that Mobil Oil leased the land from the 4th defendant after responding to an advertisement in 1970. They then built the filling station which they subsequently sold to the 1st defendant.

The advertisement that the 1st defendant says the Commissioner of Lands placed in 1970 is at page 2 of the 1st Defendant's Bundle of Documents. It is dated 19th February 1970 and titled "APPLICATION FOR A SERVICE STATION AND GARAGE SITE AT NAKONDE". It describes the land as ".....1236M

(30,000 square feet in extent) at Nakonde Isoka for a period of 99 years....." The 1st defendant also referred to the letter at page 3 of the same bundle of documents dated 23rd May 1973 and titled "Re: Nakonde Petroleum Installation". The first paragraph, in part, reads as follows:

"Attached to this letter you will find a diagram of Nakonde which was supplied by the Regional planning office, Kasama on this diagram we have circled the area of the ground we wish to lease which will be just for providing a service station facility to the public and the balance of the area....."

in the last paragraph, which is at page 4 of the bundle of documents, the letter reads as follows:

"In view of the fact that the volume of heavy traffic has increased considerably following the border closure we are anxious to provide these facilities as soon as possible and in this regard would appreciate your early attention."

The diagram "NAK/2/DP", which Dw1 referred to as being the diagram number for Stand 218 before it was surveyed, was attached to this letter. Finally, he referred to the letter from Mobil Oil to the 4th defendant dated 25th September 1991. The relevant parts of the letter read as follows:

"RE: TRANSFER OF NAKONDE FILLING STATION - MR. JMCC SINKALA

We wish to confirm the transfer of Filling Station plant and facilities situated on Plot No. NAK/2/DP Nakonde to Mr. JMCC Sinkala with effect from 25th September, 1991. This is following the purchase of the storage tanks by Mr. Sinkala from Mobil Oil.

The propriety consists of the following:-

- (a) Administration office*
- (b) 5 storage tanks and ancillary*
- (c) Forecourt and adjoining part*

We would be grateful for any assistance rendered to Mr. Sinkala in the transfer of the said property."

There is evidence from Dw3 that Stand L/1236/M does exist and it belongs to one Dickson Singoyi. Other than the advertisement and the two letters I have just referred to, the 1st defendant has not provided any proof that Mobil Oil applied for the land advertised in the 1970 advertisement or that the 4th defendant approved the application, if it was made. The only evidence supporting his claim is the testimony of Dw1 that Mobil Oil applied for the land and their application was successful.

In the 1970 advertisement, the Commissioner of Lands clearly indicated that Stand 1236M was up for lease as a filling station. This being the case, if Mobil Oil was responding to that advert in their letter, at pages 3 and 4 of the Defendant's Bundle of Documents, there would have been no need for them to indicate that the same piece of land was suitable for use as a filling station and ask the Commissioner of Lands to allow them lease it for that purpose. The two paragraphs of the letter that have been reproduced do not suggest that Mobil Oil was

responding to the advertisement. They make no reference to the advert and clearly indicate that Mobil Oil had identified a piece of land that was suitable for use as a filling station.

Further, the land in the advertisement is described as being "30,000 square feet" which is equivalent to 0.27870912 hectares, yet the size of Stand 218 is set out as being 0.9999 hectares in all of the 1st defendant's documents. Stand 218 is more than 3 times the size of the land advertised by the Commissioner of Lands in 1970 and there is no explanation of how the size of land Mobil Oil leased in 1970 increased threefold in size in 2002.

The 1st defendant's produced a print out for Stand 218 is at page 9 of his bundle of documents. The first entry in the documents reads as follows:

"ENTRY NO. 1	DATE OF DOC 10-JUN-02	DATE OF REG. 10-JUN 02
Lessor	THE PRESIDENT OF ZAMBIA	
Lessee	SINKALA JULIUS CHILIPAMWAO	
NATURE OF DOC	STATE LEASE 14 YEARS FROM 01-JUN 029047	
		AREA .9999 HECTORS"

it is true that Stand 218 is the land was leased out to Mobil Oil in 1970, one would have expected that the first entry in the print out would have indicated Mobil Oil as lessee. Dw3's evidence, which I

accept, is that had the land been earlier leased out to Mobil Oil, they would have been given a 14 years lease even if the land was not surveyed. In fact, the 14 years lease referred to in this entry was given to the 1st defendant before the land was surveyed.

Consequently, it is my finding Stand 218 and Stand 1236/M; advertised by the 4th defendant in the 1970's, is not the same piece of land. I also find that though Mobil Oil applied for a piece of land to use as a filling station, their application in the letter at pages 3 and 4 of the Defendant's Bundle of Documents, did not relate to the land advertised to as 1236/M. Though I find that Mobil Oil applied for land to use as a filling station in their letter dated 23rd May 1973, there is no evidence that the application was approved. This being the case, I find that the 1st defendant and Dw1's evidence that Mobil Oil leased the land which is now Stand 218 and built the filling station that is on it after responding to the 4th defendant's advertisement, is not true and is without basis. I dismiss it.

I will now deal with the 1st defendant's letter of sale dated 25th September 1991. It was his evidence that after paying Mobil Oil, he took the letter to the 4th defendant who issued him with the certificate of title after accepting the letter. Dw3's evidence, which

accept, is that letters have never been used to change entries relating to title at the Lands Registry. Only assignments and contracts of sale are used for that purpose.

In fact, in this case, it is not the letter from Mobil Oil that enabled the 1st defendant to obtain the certificate of title. Dw3's evidence, which I accept, is that the 1st defendant was issued with the certificate of title after he submitted an application for land which was supported by a recommendation from the 2nd defendant. Had the letter been used and the claim that Mobil Oil was the previous title holder, the 1st entry in the print out would have made reference to Mobil Oil's prior ownership of the land and the fact that it was assigned to the 1st defendant.

Although Dw3 did not present the forms or recommendation that the 2nd defendant prepared to enable the 1st defendant obtain the certificate of title, I accept his evidence and find that the 1st defendant was being deceitful when he claimed that he used the letter to obtain the certificate of title. It is a notorious fact that letters have never been used to effect changes in record dealing with title at the lands registry. In any case, as previously noted, the print out indicates

that he is the initial recipient of the land and it was not transferred to him after a sale.

Even though I have found that contrary to his testimony in court, the 1st defendant's did not use the letter dated 25th September 1991 to obtain the certificate of title for Stand 218, I am going to comment on it because his case is anchored on it. It was his evidence that after buying the filling station, Mobil Oil gave him the letter and did not execute a contract because they said it wasn't necessary. The letter indicates that following his purchase of fuel tanks the oil company "transferred" the filling station and other facilities to him. The letter is clear and unambiguous, it indicates that what the defendant bought were the fuel tanks. After he bought the fuel tanks, they gave him the filling station and the other facilities on it.

If the 1st defendant really bought the filling station I see no reason why Mobil Oil could have not simply said they had sold him the filling station and indicated the facilities on it. Is it a coincidence that Mobil Oil found it unnecessary to sign a contract for the sale?

Coming to the status of Stands 218 and 211 before the certificates of title were issued to the 1st and 3rd defendants respectively, Dw3's

evidence was that following complaints over the two plots and other related plots in the area, the Ministry of Lands Kasama Regional Office physically inspected the land. They found that the land was under customary tenure prior to the two certificates being issued. The 1st defendant's position is that Stand 218 was state land and formerly referred to as 1236M while the 3rd defendant's position is that they conducted a due diligence search at the time they applied for the land. There was no indication during the search that the land was under customary tenure at the time.

First of all, I have taken into account submissions on behalf of the 1st and 3rd defendants that the plaintiffs have not brought any proof that the land was under customary tenure. Land under customary tenure, unlike that under leasehold, generally has no documentation. That being the case, the testimony of a headman or chief, depending on the circumstances, may be sufficient. In this case, there is additional evidence from Dw3 that their regional office went on the ground and found that the land fell under customary tenure.

I have already found that Stand 218 is not the same as the property referred to as 1236M in the 1970's. The 1st defendant cannot therefore use the 1970's advertisement to support his claim that Stand 218 was

state land at the time he applied for his certificate of title. In the absence of any evidence contradicting Dw3's evidence that investigations established that prior to the certificates of title for both Stand 218 and 211 being issued, both pieces of land were under customary tenure, I accept his evidence. His evidence is supported by that of Pw1, the 1st plaintiff and Pw4 that the land fell under customary tenure. Consequently, I find that both Stand 218 and 211 fell under customary tenure prior to the certificates of title being issued by the 4th defendant.

The Land (Customary Tenure) (Conversion) Regulations, of the Lands Act, deal with the procedure for converting land under customary tenure into leasehold tenure. They provide as follows:

2. (1) A person-

- (a) who has a right to the use and occupation of land under customary tenure; or
- (b) using and occupying land in a customary area with the intention of settling there for a period of not less than five years;

may apply, to the chief of the area where the land is situated, in Form I as set out in the Schedule, for the conversion of such holding into a leasehold tenure.

(2) The Chief shall consider the application and shall give or refuse consent.

(3) Where the Chief refuses consent, he shall communicate such refusal to the applicant and the Commissioner of Lands stating the reasons for such refusal in Form II as set out in the Schedule.

(4) Where the Chief consents to the application, he shall confirm, in Form II as set out in the Schedule.

- (a) that the applicant has a right to the use and occupation of that land;
- (b) the period of time that the applicant has been holding that the land under customary tenure; and
- (c) that the applicant is not infringing on any other person's rights;

and shall refer the Form to the Council in whose area the land that is to be converted is situated.

3. (1) The Council shall, after receiving the Form referred to in sub-regulation (4) of regulation 2, and before making a recommendation to the commissioner of Lands, consider whether or not there is a conflict between customary law of that area and the act
 - (2) If the council is satisfied that there is no conflict between the customary law of that area and the Act, the council shall make a recommendation to the commissioner of Lands in Form III as set out in the Schedule.
 - (3) The Commissioner of Lands shall accept or refuse to accept the recommendation, and shall inform the applicant accordingly.

4. (1) Where a council considers that it will be in the interests of the community to convert a particular parcel of land, held under customary tenure into a leasehold tenure, the council shall, in consultation with the Chief in whose area the land to be converted is situated, apply to the Commissioner of Lands for conversion.
 - (2) The council shall, before making the application referred to in sub-regulation (1),-
 - (a) ascertain any family or communal interests or rights relating to the parcel of land to be converted; and
 - (b) specify any interests or rights subjects to which a grant of leasehold tenure will be made.

It follows, that both the 1st defendant and 3rd defendant should have sought the consent of Chieftainess Nawaitwika to convert the parcels from customary to leasehold tenure. It is only then that the 2nd defendant's could have approved and forwarded their applications to the 4th defendant.

The 1st defendant did not lead any evidence suggesting that he obtained or even sought the chief's consent before applying for the certificate of title. In fact, his evidence is that he used the letter from Mobil Oil to obtain it. I have already found that the certificate of title was not issued on the basis of that letter but documents from the 2nd defendant. There is evidence from Dw3 that the 4th defendant received a recommendation letter and application form for land from the 2nd defendant. The 4th defendant was made to believe that Stand 218 was state land and that is why the certificate was issued even though the chief's consent had not been obtained. In the face of this evidence, I find that the 1st defendant did not obtain the chief's consent before the land that is now Stand 218 was converted from customary tenure to leasehold tenure.

In the case of Stand 211, the 3rd defendant's position is that the correct procedure was followed when they obtained the certificate of title. The 3rd defendant's development committee sat and approved their application which was endorsed by a full council meeting. He referred to the documents at pages 1, 5, 12, 16, 32 and 36 of the 3rd Defendant's Bundle of Documents as being documents that set out the steps they took to acquire the land.

I have already found that Stand 211 fell under customary tenure before the certificate of title was issued. Regulation 2 (b) of The Land (Customary Tenure) (Conversion) Regulations, clearly provides that the responsibility of obtaining the chief's consent rests on the applicant for title. In this case, the 3rd defendant followed all the procedures less obtaining the chief's consent. It cannot, in the circumstances be said that there was compliance with the regulations for conversion of land under customary tenure to leasehold property. The requirement that the chief's consent is obtained before land under customary tenure is converted to leasehold land is mandatory.

It is my finding that the 3rd defendant did not comply with the procedure set out for converting the land in Stand 211 into leasehold property. The fact they acted in good faith does not help their situation because the 2nd defendant had no power to recommend the conversion of land to which they had no title as title to the land in issue was vested in Chieftainess Nawaitwika.

After considering all the evidence before me, I accept the 1st plaintiff's evidence that the filling station was built and run by his father. His evidence is supported by that of Pw2 and Pw3. It was submitted that the 1st plaintiff has failed to provide any documentary

proof of title to land. It is a notorious fact and I take judicial notice that persons who live or have real property on customary land do not ordinarily have documents of title. It therefore does not come as a surprise that the 1st plaintiff and Pw3 have no documentary proof that the late Duncan Simbule was given the land on which the filling station sits. Even if there is no evidence that there was another Mobil Oil filling station to which the 1st defendants documents relate, I find that he has failed to prove that he obtained title by virtue of the documents.

Further, even if the 1st plaintiff denied it, I believe that the 1st defendant leased the filling station from either him or members of his family following the demise of this father. This must have been 1980 and 1983. He operated the filling station, under the Mobil Oil dealership until the tanks were sold to him in 1991.

I will now deal with the submission on behalf of the 1st defendant that the 1st plaintiff's claims against the 1st defendant are time barred because the action was commenced 23 years after the 1st defendant took adverse possession in 1985 and subsequently purchased the property in 1991. Counsel submitted that Section 4(3) of the Limitation Act, provides that such a claim must be filed with 12 years of the cause of

action arising. As regards the claim for mesne profits, it was submitted that Section 2(1)(9) of the Limitation Act, Section 4(3) of the Limitation Act, requires that the claim should have been filed within 6 years of the cause of action arising but it was similarly filed after 23 years.

Section 4(3) of the Limitation Act, provides that:

"No action shall be brought by any other person to recover land after the expiration of 12 years from the date on which the right of action accrued to him or, if it is first accrued to some person through whom he claims, to that person:

....."

The 1st defendant's evidence is that he started operating the filling station in 1985 and that he paid Mobil Oil for the fuel tanks in 1991. This is uncontested and I accept it. However, I have found that the 1st defendant obtained his certificate of title for Stand 218 Nakonde by virtue of representations made by the 2nd defendant and not on the basis of the 1991 Mobil Oil letter. There is no evidence before me of when the 1st defendant went to the 2nd defendant and obtained their approval or recommendation for him to obtain the certificate of title but the entry in the print out shows that he obtained his 14 years lease in June 2002.

This being the case, I find that the cause of action accrued on 10th June 2002 when the 1st defendant obtained the 14 years lease and not in 1985 or 1991. This being the case, I find that the action is not time barred because the writ was filed within 12 years from June 2002.

In the case of the claim for mesne profits, it was submitted that Section 2(1)(9) of the Limitation Act, Section 4(3) of the Limitation Act, requires that the claim should have been filed within 6 years. The proposition is correct and it follows that only claims for the period before 1996 are time barred. Mesne profits for the period 1996 to date can be claimed.

As I conclude, I will now deal with the plaintiffs' claims as they have been set out in the writ. The first claim by the 1st plaintiff is for the 1st defendant to yield vacant possession of the land given to the late Duncan Simbule by Chieftainess Nawaitwika which is now more or less Stand 211 Nakonde. He also seeks a declaration that he the rightful owner of that land.

Subsection 1 of Section 34 of the Lands and Deeds Registry Act provides that:

"No action for possession, or other action for the 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)
- (b)
- (c)
- (d)
- (e)

Further Section 33 of the Lands and Deeds Registry Act provides that:

"A Certificate of Title shall be conclusive as from the date of its issue and upon and after the issue thereof, notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the President or otherwise, which but for Parts III to VII might be held to be paramount or to have priority; the Registered Proprietor of the Land comprised in such Certificate shall, except in case of fraud, hold the same subject only to such encumbrances, Liens, estates or interests as may be shown by such Certificate of Title and any encumbrances, Liens, estates or interests created after the issue of such Certificate as may be notified on the folium of the Register relating to such Land but absolutely free from all other encumbrances, Liens, estates or interests whatsoever:

- (a) Except the estate or interest of a proprietor claiming the same Land under a current prior Certificate of Title issued under the provisions of Parts III to VII; and
- (b) Except so far as regards the omission or misdescription of any right of way or other easement created in or existing upon any Land; and
- (c) Except so far as regards any portion of land that may be erroneously included in the Certificate of Title, evidencing the title of such Registered Proprietor by wrong description of parcels or of boundaries."

In the case *Anti Corruption Commission v Barnet Development Corporation Limited* (4), it was held, *inter alia*, that:

"under Section 33 of the Lands and Deeds Registry Act, a certificate of title is conclusive evidence of ownership of land by a holder of a certificate of title. However, under Section 34 of the same Act, a certificate of title can be challenged and cancelled for fraud or reasons for impropriety in its acquisition"

It follows, that the order for possession sought against the 1st defendant can only be granted if the 1st plaintiff successfully challenges the certificate of title and it is cancelled.

I have found that the 1st defendant is in occupation of Stand 218 that was formerly owned by the 1st plaintiff's father by virtue of a certificate of title issued to him following the 2nd defendant's recommendation to the 4th defendant. Dw3's evidence was that there is no evidence of fraud on the part of the 1st defendant in the course of obtaining the certificate. But he pointed out that there was a mistake by the 4th defendant's officers when they issued him with the certificate of title even though he had not obtained the chief's consent. They did so because they believed the land was state land.

I accept Dw3's evidence and it is my finding that there was impropriety in the manner in which the certificate of title was issued to the 1st defendant. Though he was converting land under customary

tenure to leasehold tenure, he was allowed to do so even though he had not complied with the mandatory requirement that he obtains the chief's consent. There was also impropriety when the 4th defendant accepted the 2nd defendant's recommendation to convert it in the absence of the chief's consent. Consequently, I find that even though there is no evidence of fraud, the 1st plaintiff has successfully established that there was impropriety in the manner in which the certificate (No. 9047) for Stand 218 Nakonde was issued and I order its cancellation. I also find that 1st plaintiff is the rightful owner of the filling station and the land it sits on because it was built by his father. I order that the 1st defendant immediately vacates the property.

His second claim is that the 1st defendant immediately excavates and removes his fuel tanks from the filling station. It is not disputed that it was once operated by Mobil Oil and that the 1st defendant bought the fuel tanks and fuel pumps that are on it. Since the tanks belong to him, the 1st defendant should immediately excavate them.

Coming to the third claim, the 1st plaintiff seeks an order that the 1st defendant accounts for and pays him all the rental income he has received from SGC Investments Limited from 2004 to the day of final

settlement for the use of the filling station. I have found that Mobil Oil were not the owners of the filling station, they therefore had no right to sell it to the 1st defendant. Neither did he have the right to register the property in his own name and lease it out. Consequently, the 1st defendant must account for and pay to the 1st plaintiff all the rentals he has received from SGS Investments Limited from 2004 to date.

The next claim is for an order that the 1st defendant pays mesne profits to him from 1991 to the day of yielding vacant possession of the land. In the case of *Valentine Webster Chansa Kayope v Attorney-General* (14), the situations in which one is entitled to mesne profits was considered. The Supreme Court, at page 428, noted as follows:

"We have considered the arguments in relation to the judgment appealed against. In deciding that the appellant should pay the respondent mesne profits, the learned trial judge relied on the passage at paragraph 255, of Volume 27, of the 4th Edition, of Halsbury's Laws of England. The passage reads as follows:

"Mesne Profits. The landlord may, recover in an action for mesne profits the damages which he has suffered through being out of possession of the land, or if he can prove no actual damage caused by him by the defendant's trespass, the landlord may, recover as mesne profits the amount of the open market value of the premises for the period of the defendant's wrongful occupation. In most cases the rent paid under any expired tenancy will be strong evidence as to the open market value. Mesne profits being a type of damages for trespass can only be recovered in respect of the defendant's continued occupation after the expiry of his legal right to occupy the premises. The landlord is not limited to a

claim for the profits which the defendant has received from the land, or those which he himself has lost."

We accept the foregoing as the correct law on mesne profits and on the evidence on record, we uphold the learned trial judge's finding of fact that the period 1st January, 2002, to 30th November, 2004, the appellant had no legal right to occupy the respondent's house. We would add that he kept the respondent out of the house, without lawful justification. In the premises, the law governing mesne profits states that he must pay the mesne profits to the respondent for his continued occupation of the house, after the expiry of his legal right to occupy it. The fact that he was granted a stay of execution against eviction, while he was pursuing his vain claim to purchase the house, did not confer on him a legal right to occupy it, free of charge."

It follows, that the payment mesne profits is not limited to defaulting tenants and any person who has been in illegal occupation of a property can be required to pay them. The 1st defendant's evidence is that he has been running the filling station since 1985. It was also his evidence that he bought the property from Mobil Oil in 1991. Since Mobil Oil were not the owners he had no right to buy the property from them and continue to occupy it up to now. He must therefore pay mesne profits.

However, since claims for mesne profits are based on the law of torts, claims for the period between 1991 and 1995 are time barred. Further, I have already ordered that he accounts and pays to the 1st plaintiff all

the rentals he has received from SGS Investments Limited from 2004 to date. He will therefore only be required to pay mesne profits for the period 1996 to 2003. The amount payable is referred to the Deputy Registrar for assessment.

Coming to the 2nd plaintiff's claims, the first relief they seek is that the certificate title for Stand 211 Nakonde be cancelled as it was erroneously obtained. Though there is no evidence of fraud on the part of the 3rd defendant, I have found that there was impropriety in the manner the certificate of title was obtained. The 2nd defendant recommended that they be given the certificate without indicating that the land was under customary tenure and being satisfied that the consent of Chieftainess Nawaitwika had been obtained.

There is also evidence from Pw1 that part of Stand 218 and Stand 211 form the property which they previously operated from having either obtained it from Chieftainess Nawaitwika or bought it from Zambia Tanzania Road Services. The evidence of the overlap in the properties was confirmed by Dw3. I accept their evidence and find that the 2nd plaintiff has proved that they the owners of Stand 211 and part of Stand 218 and I order the cancellation of the certificate of title for Stand 211.

Coming to their claim that the 1st and 3rd defendant vacates the property, I find that there is no evidence that the 3rd defendant has been in occupation of the property. However, there is evidence that the 1st defendant has been in occupation and I order that he immediately vacates the property.

Having found that the 3rd defendant has not been in occupation of Stand 211, the 2nd plaintiff's claim that they pay mesne profits and account for the proceeds of the lease of the 80,000 litres fuel tank to Sable Transport fails. But I find that Pw1's evidence that the 80,000 litres fuel tank has been leased to Sable Transport is uncontested and I accept it. There is no evidence before me on who has leased it out but since the 1st defendant has been in occupation, I find that he is the one who has leased it out. Consequently, I find that the 2nd plaintiff is entitled to mesne profits from the 1st defendant for the period from 2002 to date. I also order that he accounts for and pays to the 2nd plaintiff all the rentals he has received from Sable Transport for the lease of the fuel tank from 2002 to date. The assessment of the mesne profits payable is referred to the Deputy Registrar.

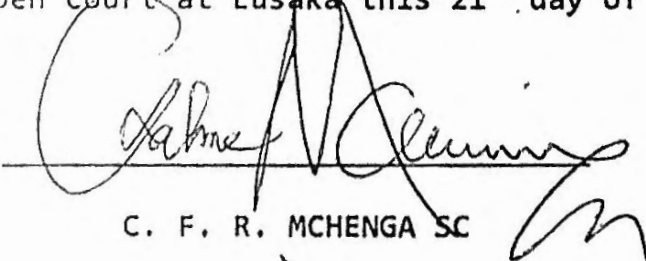
Having found that 3rd defendant acted in good faith and was misled by the 2nd defendant when they applied for Stand 211, I order that the 2nd

defendant replace the said property with another piece of land of a similar size and which can be used for the same purpose for which Stand 211 was acquired. The replacement will be at the 3rd defendant's cost.

I also award the 1st and 2nd plaintiffs interest on all mesne profits and rentals payable by the 1st defendant, at the short term deposit rate from the date of the writ until full payment.

Costs to the plaintiffs payable by the 1st and 2nd defendants equally, to be agreed and in default, to be taxed.

Delivered in open court at Lusaka this 21st day of March, 2016


C. F. R. MCHENGA SC

JUDGE