

**IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA  
(CIVIL JURISDICTION)**

**2012/HP/1373**



BETWEEN:

**BRIDGET CHOOKA** (Suing as Administrator of the Estate of the late Robinson Nkaba Chooka) **1<sup>ST</sup> PLAINTIFF**  
**MARIA MILOSI CHOOKA (Widow)** **2<sup>ND</sup> PLAINTIFF**  
**JEREMIAH NKABA** **3<sup>RD</sup> PLAINTIFF**  
**JONATHAN CHALWE** **4<sup>TH</sup> PLAINTIFF**

**AND**

**STEPHEN CHALWE** (Sued as administrator of The Estate of the late Chalwe Nkaba) **1<sup>ST</sup> DEFENDANT**  
**JOSEPH TUUSI** **2<sup>ND</sup> DEFENDANT**

**Before Hon Mrs Justice M.S. Mulenga on 29<sup>th</sup> day of January 2016**

For the Plaintiffs : Mr. F.H.M. Namakando of Messrs Bakota Chambers  
For the 1<sup>st</sup> Defendant : Ms. M. Kalyabantu – Soko and Mr. C. Sianondo of  
Messrs Malambo and Company  
For the 2<sup>nd</sup> Defendant : In person

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## **J U D G M E N T**

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The Plaintiffs commenced this action by way of writ of summons dated 13<sup>th</sup> November, 2012 claiming the following:

1. *An order of mandatory injunction, restraining the Defendants herein, their agents or servants, from farming, trespassing or evicting the Plaintiffs from, or carrying out any nuisance on the said piece of land.*
2. *A declaration that the Plaintiffs are the rightful owners and beneficiaries to the estate of the late Robinson Nkaba Chooka.*
3. *Possession of the portions of the said land being occupied by the Defendants.*

4. *Any other relief as the court may deem fit or reasonable.*
5. *Costs.*

It is stated in the statement of claim that the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Plaintiffs are daughter and administrator, widow, and cousin to the late Robinson Nkaba Chooka, respectively and the 3<sup>rd</sup> Plaintiff is the brother of the late headman Chalwe Nkaba.

The 1<sup>st</sup> Defendant is a child of the late headman Chalwe Nkaba and the 2<sup>nd</sup> Defendant is a squatter on the land belonging to the late Robinson Nkaba Chooka. It is averred that the Plaintiffs are owners of a surveyed piece of land measuring 30.8 hectares situated in Nkaba village, chieftainess Mungule in the Chibombo District of the Central Province. The subject land was recommended by chief Mungule to Chibombo District Council on or about 1<sup>st</sup> November 2007 for the late Robinson Nkaba Chooka to apply for title deeds from the Commissioner of Lands. The Defendants and their siblings were threatening the Plaintiffs with violence, intimidation and eviction from the subject land and intend to demolish a modern house valued at more than K100,000.00 hence the claims.

Initially three Defendants were sued but later an application was made and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were substituted with Stephen Chalwe as the administrator of the estate of the late Chalwe Nkaba and the 3<sup>rd</sup> Defendant consequently became the 2<sup>nd</sup> Defendant.

The 1<sup>st</sup> Defendant in his Defence and Counterclaim disputes the claim and states that the 2<sup>nd</sup> Defendant is not a squatter but a subject of Nkaba village who was invited by the late Chalwe Nkaba on to one of the Mulonda fields. That the surveyed land measuring 30.8 hectares belongs to the estate of late Chalwe Nkaba who bought it in 1960 from one Rice Mulonda and was never sold or gifted to the late Robinson

Nkaba Chooka. That the late Robinson Chooka and his family never lived on the disputed land during the life of the late Chalwe Nkaba but forcibly came thereon after his death and after Robinson Chooka retired from the police service. That the field was utilised for farming by the children of the late Chalwe Nkaba who died on 14<sup>th</sup> April, 1987. After his funeral a meeting was held about 20<sup>th</sup> April, 1987 and with the concurrence of seven headmen, it was made clear to all present including the late Robinson Chooka that the deceased's fields rightly devolved and belonged to his children and Mr. Mango'omba was appointed headman Nkaba.

The 1<sup>st</sup> Defendant further avers that without the consent and knowledge of the children of the late Chalwe Nkaba, one David Chooka caused letters of administration to be issued to him over the late Chalwe Nkaba's estate following which the said David Chooka and his brother Robinson Nkaba Chooka and other members of the Chooka family took for themselves property such as animals, a tractor, gun and other goods to the exclusion of Chalwe Nkaba's children. The relationship between the Chalwe Nkaba family and that of Robinson Nkaba Chooka and his relatives continued to deteriorate and violent attacks continued to be made on Chalwe Nkaba's children. After the death of David Chooka on 27<sup>th</sup> August, 2007, the late Robinson Chooka finally settled on the disputed land stating that Mulonda field belonged to him. The children of Chalwe Nkaba sought the intervention of Chieftainess Mungule whose finding was that Mulonda field belonged to the Chalwe Nkaba family. Being dissatisfied with the same, the late Robinson Chooka fraudulently caused a certificate of Judgment dated 5<sup>th</sup> June, 2007 to be issued to the effect that Mulonda field belonged to him. The particulars of fraud were that the certificate of Judgment was never endorsed by the then Chieftainess Mungule by

either signature or thumb print and the Defendants were never notified of the hearing or heard.

That the late Robinson Chooka proceeded to obtain a land survey permit from the chief's retainer on 1<sup>st</sup> November, 2007 and built on the land despite the children of Chalwe Nkaba warning him not to build. He also unlawfully caused Chibombo District Department of Agriculture to survey and prepare a diagram for the 30.8 hectars portion in January 2008. The children of Chalwe Nkaba being dissatisfied with the state of affairs appealed the purported Judgment of 5<sup>th</sup> June, 2007 in favour of Robinson Chooka and Chieftainess Mungule's Judgment of 11<sup>th</sup> October, 2012 clearly states that Mulonda field belongs to the children of Chalwe Nkaba. That therefore the said land does not form part of the estate of the late Robinson Chooka.

With regard to the counterclaim, the 1<sup>st</sup> Defendant repeats the contents of his defence and adds that the Plaintiffs have trespassed on the Mulonda field and illegally built a house without the consent of lawful beneficiaries and have thus suffered damage. The reliefs sought are:

- 1. A declaration that the disputed land rightfully belongs to the Estate of the late Chalwe Nkaba for the benefit of the beneficiaries thereto.**
- 2. An order of possession of the disputed land.**
- 3. An order for the Plaintiffs to vacate the disputed land.**
- 4. An injunction restraining the Plaintiffs by themselves, their agents or whoever from taking any action for the purpose of issuing a Certificate of Title in favour of themselves or any other person, and or selling any part thereof.**
- 5. Damages for trespass.**
- 6. Costs.**

The 2<sup>nd</sup> Defendant in his defence dated 5<sup>th</sup> February, 2013 states that he is a licensee invited on to the disputed land by the late Chalwe Nkaba to carry out subsistence farming since 1983. That this was before Robinson Nkaba Chooka came to the said land. That after the death of Chalwe Nkaba in 1987, his licence was never revoked by the

1<sup>st</sup> Defendant as administrator. However, on 27<sup>th</sup> August 2007, Robinson Chooka forcibly ousted him from the said portions of land he was farming by placing a herd of cattle which destroyed his crops. That the disputed land belongs to the late Chalwe Nkaba and not the late Robinson Nkaba Chooka.

In reply, the Plaintiffs joined issue with the two Defendants on their respective defences and in defence to the 1<sup>st</sup> Defendant's counterclaim the Plaintiffs aver that they are entitled to the disputed land as the said Mulonda field forms part of the estate of the late Robinson Chooka. The assertions by the 1<sup>st</sup> Defendant are denied. They also deny that they have trespassed on the land and further state that they did not need consent from the 1<sup>st</sup> Defendant to build a house on the same land. That the 1<sup>st</sup> Defendant has not suffered damage and is not entitled to any of the reliefs sought.

At the trial, the 1<sup>st</sup> Plaintiff, Bridget Chooka, testified as PW1 that she was the administrator of the estate of Robinson Nkaba Chooka, her late father, who died on 6<sup>th</sup> February, 2009. The letters of administration are produced on page 5 of the Plaintiffs' bundle of documents. She testified that among the property left by her deceased father was a piece of land measuring 30.8 hectares as per sketch map on page 4 of the documents.

Her father built a fifteen (15) roomed house on the said land and left 42 heads of cattle. That to her knowledge the subject land belonged to her late father and this is supported by the Judgment from Chieftainess Mungule of 2007 on page 1 and the letter from Chieftainess Mungule authorising surveyors to go ahead and survey her father's land as shown on page 3 of the Plaintiffs' bundle of documents. That she got the sketch map of the land from the Kabwe

Department of Agriculture. Her late father was in the process of obtaining title but did not conclude because of illness and the subsequent death. After his death, she and her siblings and mother were being chased from the land by her aunty, Lauder Nkaba and her uncle. Because of the dispute she went with the 2<sup>nd</sup> Plaintiff to Chieftainess Mungule's court but the reception was hostile and they did not want to hear them or look at their documents hence their seeking legal redress from this court.

Under cross-examination, she stated that her father was a commissioner of police prior to his retirement in 2008 upon which he went to the subject farm. Prior to this, the 3<sup>rd</sup> Plaintiff, her father's uncle, was looking after the place for him as he was living near the subject land. Her father started building on the land in 2002. She came across the diagrams and other documents when her father died. That her aunty Lauder Nkaba was the current headwoman and has been harassing them since her father's death. She was not aware of the Judgment of 2012.

PW2, Jeremiah Lumamba Nkaba, the 3<sup>rd</sup> Plaintiff and the younger brother to the late Chalwe Nkaba (deceased) testified that he left the village and joined the deceased in 1955. In 1958 in Mubwanka village Chief Mungule's area, he used to farm with the deceased across Mwembeshi streams in the field that originally belonged to Rice Mulonda and is called Mulonda field. The deceased explained to him that he had bought it using three (3) herds of family cattle. He told PW2 that in case he died the family members, namely his two sisters and brother were to inherit the Mulonda field. He had other fields which he said were for his children. The Mulonda field was for the mother to Harrison Mweemba, Rodia Nkaba and Jonathan Nkaba. The late Robinson Nkaba Chooka was the son of Rodia Nkaba. This

field was then possessed by David Chooka, the elder brother to Robinson Chooka, and it was after his death that Robinson Chooka inherited the land and built a house, servants quarters and a shop on the land. He was in the process of obtaining title deeds and had the land surveyed and it measured 30.8 hectars. A week after the burial of Robinson Chooka, Lauder Chalwe the daughter of the deceased Chalwe Nkaba put a structure in the middle of the Mulonda field and she and Frasser Chalwe started chasing Robinson Chooka's children from the field. He together with headman Chalwe tried to resolve the dispute but failed. They did not take the matter to the chief. To his knowledge the field belongs to Robinson Chooka's children as Robinson Chooka's mother cattle was among the cattle used to buy the field. The deceased Chalwe Nkaba distributed land to all his children from all his wives including Fraser and Lauder Chalwe.

Under cross- examination he stated that it was their custom for family members to entrust some cattle to their siblings so that a person is not stranded when nephews come to visit and the cattle could be used in case such a nephew wanted to marry or when there is a funeral. The deceased Chalwe Nkaba wanted his siblings to have a place near him. The deceased Nkaba bought the Mulonda field in 1960. That Robinson Chooka was the right person to inherit the field as the children of Jonathan Nkaba and mother to Harison Mweemba have land in the village. That he knew that the deceased Chalwe Nkaba did not use his cattle as he used to herd those cattle at that time and knew who they belonged to. That the deceased Chalwe Nkaba's family are aware of these facts. That prior to Robinson Chooka's death, there was a time they went to Chieftainess Mungule were a final Judgment or decision was made that the field belonged to Robinson Chooka as produced on page 1 of Plaintiffs' bundle of documents. This was after

Robinson Chooka presented his case against Tuusi, Lauder and Stephen Chalwe at appeal as the initial Judgment was that Tuusi and Lauder Chalwe were entitled to the field. At that appeal even the then headman Nkaba testified as well as all the parties concerned. The problems started in 2004. He was not aware of any other Judgment afterwards.

PW3 was Johnson Chalwe the first born son of the deceased Chalwe Nkaba and accordingly related to the 1<sup>st</sup> Defendant as step brother. That his two aunties and an uncle, namely mother to Harrison Mweemba, mother to Robinson Chooka and Jonathan Nkaba, contributed three cattle and the deceased Nkaba added a little money on top to buy the Mulanda field. That it was PW3 and Jeremiah Nkaba who gave the Mulonda field to Robinson Chooka. That after the deceased Chalwe Nkaba's death in 1987, David Chooka inherit the field and was administrator. When David Chooka died the field went to Samson Nkaba and then to Jeremiah Nkaba who was headman at that time. Jeremiah Nkaba and PW3 later handed it over to Robinson Chooka sometime in 2002 when he wanted to build. That sometime later, Lauder Chalwe went to the chief to claim the land and headman Kanyemba chaired the case and in 2004 gave a judgment that the field belonged to the deceased Nkaba's children. That PW3 disagreed with the Judgment and appealed and the subsequent Judgment was passed in 2007 giving the field to Robinson Chooka. No one did anything about this Judgment till Robinson Chooka died. That is when Lauder Chalwe built a structure in the Mulonda field while they were still mourning. That she wanted to sale the field as it is near Great North Road. Lauder Chalwe was later appointed headwoman and she started selling fields including the one belonging to PW3. PW3 and Lauder Chalwe are from different mothers but share the same father,

the deceased Chalwe Nkaba. That he was seeing the 2012 Judgment on page 6 of the Defendant's bundle of documents for the first time. That his name is listed as Defendant but he was not aware and the procedure is that they are always called when there is a deliberation or Judgment. That the 2012 date stamp is not genuine as they did it without the chief knowing. That before his death Robinson Chooka had the land surveyed after being given a letter to that effect by the chief on page 3 Plaintiff's bundle. PW3 was the one who moved with the said surveyor from Kabwe.

Under cross-examination, PW3 stated that he was the one that informed his deceased father that Rice Mulonda was selling the field and they went together to inspect it. His father did not have money at that time and he was told to inform his aunties and uncle who said they could use the three herds of cattle that came from Southern Province. This is what they did and his father added a little money on top. He testified as a witness for Robinson Chooka leading to the 2007 Judgment which states that the field belongs to Robinson Chooka. He maintained that the land belongs to the family. PW3 further stated that the procedure was for all parties including the Defendants to sign even if they did not agree with the Judgment. That he was present at the Judgment in 2007 and knew it was a true one. He was seeing the 2012 Judgment for the first time and stated that they should have been all called for the same and he did not know why it was done in private.

PW4, Marriot Chikwende testified that he was chairman of the traditional court on behalf of Chieftainess Mungule from 2003 to 2012. He would receive complaints or disputes from within the chieftom and including disputes on ownership of fields. That in 2007 there was a dispute between Lauder Chalwe, who is the current headwoman, her

other siblings and Joseph Tuusi against Robinson Chooka over the Mulonda field. The parties were heard including the then headman Chalwe Nkaba, the son of the late Chalwe Nkaba, who was the first headman Nkaba. The committee visited the site and headman Nkaba then testified that he had allocated the said Mulonda field to Robinson Chooka as a nephew. That at that time there were some structures built by Robinson Chooka using concrete blocks and Joseph Tuusi had a garden on the river bank behind Robinson Chooka's house. The parties were later given the Judgment appearing on pages 1-2 of the Plaintiffs' bundle of documents that Mulonda field belonged to Robinson Chooka. The Judgment was read out and the parties including Lauder Chalwe were present and told that any aggrieved party could appeal until 14 days. To his knowledge there was no appeal to the 2007 Judgment even up to the time he left his position at the palace in 2012. The chief signed the original copies which were date stamped and the one on pages 1 and 2 of the Plaintiff's bundle was the translated Judgment of the original hence the absence of the signature.

Under cross examination, PW4 stated that in 2003, there was a dispute between Joseph Tuusi and Joster Chooka over Mulonda field where Tuusi was gardening and where Joster had built a building and Judgment was rendered in 2004. Tuusi was a resident of Mukwanka village and was only farming in Nkaba village. That Mulonda field was bought by the initial headman Chalwe Nkaba and his son who succeeded him as headman gave the field to the nephew Robinson Nkaba. That all the children of the deceased Chalwe Nkaba including the then headman Chalwe Nkaba were all given their own fields or land. The dispute in 2007 was between some of the children of Chalwe Nkaba and Robinson Chooka over the Mulonda field.

This marked the close of the Plaintiffs' case. The Defendants called three (3) witnesses. The Defendants' witnesses were not cross examined as the Plaintiffs' counsel never appeared.

DW1, Stephen Chalwe, the 1<sup>st</sup> Defendant testified that he was told by his late father, the deceased Chalwe Nkaba, that he bought the Mulonda field from Rice Mulonda in 1960 using cattle which he bought from his terminal benefits. The deceased Chalwe Nkaba died in 1987 leaving three (3) wives and 28 children. After his burial it was stated in the presence of four headmen that the village was for the children as they were many. His father's young brother Mangomba was chosen as headman and his father's nephew David Chooka was chosen as administrator. At that time the one staying at Mulonda fields was Joster Chooka another nephew to the to the father who built on the field by force and chased Tuusi who was farming there. DW1 and his siblings together with Joseph Tuusi took the matter to the traditional court and obtained the Judgment of 2004 produced at page 2 of the Defendants' bundle of documents. The Judgment was to the effect that Joster Chooka should leave the field as it was for the children and that the headman should give land to Joster Chooka to settle. When Joster Chooka died, Robinson Chooka started building and they showed him the 2004 Judgment.

In 2007, they received a Judgment from the committee which stated that DW1, Joseph Tuusi and Lauder Chalwe should vacate the land as it belonged to Robinson Chooka. That as a family they appealed against the Judgment and the 2012 Judgment was given that the land was for the Chalwe children. The 2007 Judgment and 2012 Judgment are produced at pages 4 to 7 of the Defendants bundle of documents. That as beneficiaries of the estate of their deceased father, they never gave the land to Robinson Chooka.

DW2, Alexander Mwachilwana testified that the deceased Chalwe Nkaba came to area in 1939 and in 1947 he started buying fields and cows from his salary. In 1960 he bought the Mulonda field using cows in exchange. That he was close to the deceased Chalwe because he was also a teacher but not very close. When the deceased Chalwe Nkaba first settled in Kwanka village, they were both keeping cattle in one kraal. He did not know the year when the deceased Chalwe Nkaba died and did not also know Robinson Chooka.

DW3, Joseph Tuusi, the 2<sup>nd</sup> Defendant narrated that he was looking for land in 1983 when the deceased Chalwe Nkaba, the headman, gave him land to settle and he started cultivating. That when the headman saw that the land was small for DW3, he gave him 150 yards in the Mulonda field in 1986 to cultivate cotton and sunflower. The deceased Chalwe Nkaba told him that the land was for his children and he should hand it over to them when leaving. The deceased Chalwe Nkaba then died in 1987 and Joster Chooka went and settled near where DW3 was cultivating. When he reported this to DW1, DW1 and six of his siblings and DW3 took the matter to the chief and they were given a judgment that since DW3 had left the field, the same belongs to the children. After the death of Joster Chooka, his brother Robinson Chooka went and settled on the same land. He also told DW3 that he should not cultivate there and the matter was again taken to the chief and the Judgment was given as at page 3 of the Defendants' bundle of documents dated 2005. This was after some people were sent to view the land.

This marked the close of the trial and the parties were given opportunity to file submissions but they both did not do so. In this case the burden of proof is on the Plaintiffs to prove their claims to the required standard of the balance of probability.

The facts which are not in dispute are that the deceased Chalwe Nkaba bought the subject Mulonda field from Rice Mulonda sometime in 1960 using three (3) herds of cattle. The 2<sup>nd</sup> Defendant was assigned a portion of the said land by the deceased Chalwe Nkaba in 1986 to use for farming on a temporary basis. After the death of Chalwe Nkaba in 1987, another person ascended the headmanship of Nkaba village founded by the deceased Chalwe Nkaba as first headman. There are four Judgments produced by the parties. In 2004 there was a dispute between the 2<sup>nd</sup> Defendant and Joster Chooka over the building by Joster Chooka in the field that was being used by the 2<sup>nd</sup> Defendant. The Judgment of 5<sup>th</sup> June, 2004 stated that the 2<sup>nd</sup> Defendant was only given the field temporarily and that the land was for the Chalwe family and that Joster Chooka should move out from the field. There is also a Judgment of 6<sup>th</sup> September, 2005 in the case involving the 1<sup>st</sup> and 2<sup>nd</sup> Defendant and Raphael Hakoomo over eviction from two gardens where it was stated that the gardens belonged to the 2<sup>nd</sup> Defendant. The third Judgment of 5<sup>th</sup> June, 2007 was between the 2<sup>nd</sup> Defendant, Lauder Chalwe and one Phiri and Robinson Chooka in which it was stated the Robinson Chooka was the bonafide owner of the Mulonda field. The fourth Judgment is dated 11<sup>th</sup> October, 2012 between the 1<sup>st</sup> Defendant Lauder Chalwe and their siblings and Lilian Hakalangu and others who were indicated as nephews to the deceased Chalwe Nkaba, wife to Robinson Chooka and Johnson Chalwe Chisuta. The Judgment is over land dispute and headpersonship and is to the effect that the village register be given to Chalwe Nkaba's children and that all fields, the Mulonga field inclusive, belong to the children of Chalwe Nkaba. The other facts are that Robinson Nkaba Chooka has built a house and other buildings on the said Mulonda field and had been in

occupation for some time before his death. He also obtained authority from Chieftainess Mungule to have the subject land surveyed and the survey was done as evidenced by the survey diagram. This was part of the process of obtaining title to the said land which is said to measure 30.8 hectares.

It is further not in dispute that after the 2007 Judgment which declared Robinson Chooka as the beneficial owner, there was no appeal within the given time frame up to the time he died on 6<sup>th</sup> February 2010. The 2012 Judgment was obtained after a complaint by the 1<sup>st</sup> Defendant and his siblings on the claim of land dispute and headpersonship.

Having outlined the findings of fact I will now consider the Plaintiffs' claim and the 1<sup>st</sup> Defendant's counterclaim. The burden of proof is on the Plaintiffs to prove their claim and for the Defendants to prove their counterclaim to the required standard of the balance of probabilities.

### **Plaintiffs' claim**

The Plaintiffs' main claim is for a declaration that the Plaintiffs are the rightful owners and beneficiaries of the estate of the late Robinson Nkaba Chooka and for possession of portions of the subject land being occupied by the Defendants. I must state that it is not in dispute that the Plaintiffs are beneficiaries of the estate of the late Robinson Nkaba Chooka and therefore a declaration on this point will not serve any purpose. What is in dispute is whether the Mulonda field measuring 30.8 hectares on which the late Robinson Chooka built and was staying forms part of his estate. In other words, whether Robinson Chooka was the owner of the Mulonda field that was surveyed measuring 30.8 hectares.

The Plaintiffs' position is that Robinson Chooka was the bonafide owner while the Defendants argue that the same belongs to the estate of the deceased Chalwe Nkaba and thus to the 1<sup>st</sup> Defendant and siblings as beneficiaries of his estate. The 2<sup>nd</sup> Defendant in his evidence said he was not contesting the land as his but that he was given permission to cultivate a portion of it by the deceased Chalwe Nkaba who told him that it belonged to his children and that when he was to leave the land he should hand it over to the children. That he did this at some point. The 2005 Judgment at page 3 of the Defendant's bundle of documents between the 2<sup>nd</sup> Defendant and the 1<sup>st</sup> Defendant and one Raphael Hakoombo was to the effect that the two gardens belonged to the 2<sup>nd</sup> Defendant. This however does not prove that the 2<sup>nd</sup> Defendant owns the land in issue or the gardens in light of his own evidence that he was given the same on a temporary basis by the deceased Chalwe Nkaba and that the understanding was that he would hand them over to the family of Chalwe Nkaba. Hence his claim, if any, is tied to the 1<sup>st</sup> Defendant's claim.

The Plaintiffs in respect of their claim rely on the 2007 Judgment over the Mulonda field which states:

**"This is a matter, which the court heard over a dispute on the Mulonda field in Nkaba village, which this court has been charged to determine. The final verdict of the case mentioned above has finally been resolved that Robinson Chooka is a bonafide owner of the Mulonda field and further orders that there should be no interferences from the other party.**

**The court also heard that Joseph Tuusii and Phiri encroached by making gardens into the fields, which end at the banks of the Mwembeshi stream, which fields have no provision for gardens. The court has arrived at this conclusion after critically examining the minutes during the sharing of the estates of the deceased.**

**Also the testimony given by Mr. Jonathan Chalwe Nkaba the elder son of the late Trywell Chisuta Headman Nkaba and that of Jeremiah Nkaba young brother to the late who told the court that the field belongs to the nephew, which evidence the court accepted as a current version and current position that the field was given to the nephew as their property.**

**Ruling**

**Since we have already stated the reasons as to how the Mulonda field came to be the property of the nephew, Rauder Chalwe, Joseph Tuusii and Phiri should vacate from the field and stop gardening immediately after harvesting their crops. This order should be observed by both parties.**

The Defendants have challenged the 2007 Judgment stating that it was fraudulently obtained, the particulars being that it was not endorsed by the Chieftainess by either signature or thumb print and that the complainants were never notified of such a hearing and were never heard. The evidence of PW2 and PW3 as uncle and step brother to the 1<sup>st</sup> Defendant, respectively and that of PW4 a former chairman of Chieftainess Mungule's advisory committee, is uniform that the 2<sup>nd</sup> Defendant and the 1<sup>st</sup> Defendants' sister, Lauder Chalwe, were present as complainants during the 2007 proceedings and delivery of the Judgment. That the 1<sup>st</sup> Defendant's sister was representing her other siblings as well and the Judgment was read to them and the one signed by the chieftainess given. That the other copies were stamped. This evidence effectively counters the allegation that the 2007 Judgment was fraudulently obtained. I note that the 2<sup>nd</sup> Defendant did not comment on this or dispute having been heard in the 2007 proceedings. The 1<sup>st</sup> Defendant also did not call his sister Lauder Chalwe whom the Plaintiffs' witnesses said was present and heard and was also the complainant as reflected in the Judgment. The said 2007 Judgment has also been produced by the Defendants indicating that they were aware of it and its contents. The mere fact that it were not signed by the parties is not relevant as the 2004 and 2005 Judgments are also not signed by the parties and the 2012 Judgment is not signed by the defendants in that case. On the issue of the signature of the chief, the same is indeed not on both the 2007 and 2012 Judgments but the 2012 Judgment has a visible thumb print. The same stamped signature appears on both the 2007 and 2012 Judgments. The absence of a thumb print alone does not prove that

the Judgment was fraudulent in light of the evidence highlighted above including that of PW4. Fraud has to be proved on a higher standard than the balance of probability and that standard has not been met. I thus find that the 2007 Judgment is a valid Judgment.

The further evidence of the Plaintiffs, particularly PW2 and PW3, is to the effect that the deceased Chalwe Nkaba bought the subject Mulonda field using three herds of cattle that had come from his two sisters and a brother in Southern Province. PW3 stated that he was actually the one who informed the deceased Chalwe Nkaba about the Mulonda field being on sale and he positively knew the said three cattle that were used to purchase it and that the deceased Chalwe Nkaba added a bit of money on top. Both PW2 and PW3 stated that the deceased Chalwe Nkaba told them that that field was for his said siblings as family property as he wanted his relatives near him and that the same did not belong to him and his children. PW2 and PW3 further stated that they testified in the 2007 case and even the minutes of the meeting after the death of the deceased Chalwe Nkaba reflected that Mulonda field did not belong to him or his children and it was for that reason that he apportioned fields to all his children including the 1<sup>st</sup> Defendant elsewhere. The issue of the minutes is also attested to by PW4 and referred to in the 2007 Judgment . That as a result the Mulonda field was occupied by Samson Nkaba. That when Robinson Chooka wanted to build, the then headman Nkaba and Jeremiah Nkaba apportioned the Mulonda field to the late Robinson Chooka and that is how he settled on the land. That the mother to Robinson Chooka was among the siblings of the deceased Chalwe Nkaba whose cattle was used to purchase the subject field from Rice Mulonda.

The Defendants' argument on the other hand is that the deceased Chalwe Nkaba purchased the Mulonda field using his own cattle and money. The 1<sup>st</sup> Defendant stated that he was later told this fact by his father as he was barely one year old in 1960 when the field was bought. This is in contrast to his step brother's (PW3) testimony. DW2 who was called as a witness on this fact was not of much assistance as he stated that he was not very close to the deceased Chalwe Nkaba and that all that he knew was that the deceased bought the Mulonda field using cows. That he used to see the deceased buy cows from his salary and at one time they were keeping their cattle in one kraal. The 2<sup>nd</sup> Defendant stated that the deceased informed him in 1986 that he had bought the field for his children and that he should hand it over to his children.

Considering the two versions, I am inclined to believe the eye witness account of PW3 and that of PW2 and PW4 that the cattle used to purchase the Mulonda field did not belong to the deceased Chalwe Nkaba but were the ones from the deceased's siblings who included the mother to the late Robinson Chooka. Following from this finding, it is apparent that the Mulonda field did not form part of the estate of the deceased Chalwe Nkaba and therefore does not devolve on the 1<sup>st</sup> Defendant and his siblings as children of the deceased Chalwe Nkaba.

Further, in our system, there is no statutory provision on what should happen when there is conflict relating to unregistered land. The principles of common law and equity thus become applicable. In Megarry and Wade, The Law of Real Property, Seventh Edition, Sweet and Maxwell London at Paragraph 4-007 talks of possession as a root of title and in part states:

**"It is possession that forms the recognized root of title. Ownership as between two rival claimants, is the better right to possession."**

**Possession is a legal concept which depends on the performance of overt act, and not on intention. It requires an appropriate degree of physical control of the land and it must be a single and exclusive possession..."**

This passage is instructive in these kinds of cases where land is unregistered. If the issue of possession was to be considered, the Plaintiffs as the persons in effective possession would have better claim to ownership as against the Defendants. However, in this case we do not need to go that route in light of the evidence that the cattle used to purchase the field did not belong to the late Chalwe Nkaba.

The Plaintiffs have therefore proved their claim that the Mulonda field whose extent is 30.8 hectares as surveyed belongs to the estate of the late Robinson Nkaba Chooka.

### **Counterclaim**

The Defendants counterclaim is for a declaration that the disputed land rightly belongs to the estate of the late Chalwe Nkaba and the beneficiaries of his estate for and an order of possession of the land and eviction of the Plaintiffs as well as damages for trespass.

In view of my findings above that the subject Mulonda field measuring 30.8 hectors does not belong to the estate of the deceased Chalwe Nkaba but to the estate of the late Robinson Nkaba Chooka, this counterclaim fails and is hereby dismissed.

I however wish to address the issue of the 2012 Judgment relied upon by the Defendants which states as follows:

#### **"CLAIM: LAND DESPUTE AND HEADPERSONSHIP**

#### **SUMMARY OF THE CASE:**

**The complainants came to the palace to complain to the chieftainess against the judgment passed in favour of the late Robinson Chooka the Defendant. The judgment which was not signed by the complainants as well as the chief dated 5<sup>th</sup> June 2007. Also the judgment dated 5<sup>th</sup> June 2004 stated clearly that children of late Chalwe Nkaba won the case.**

**Deliberations:** were carried out and complainants stated that, the late Chalwe Nkaba came into this chieftdom of chief Mungule in 1939 as a teacher stationed at Chombela School and when he retired from the teaching service and at that time, he had three wives and he was blessed with 28 children, complainants inclusive and started buying fields for his own and legitimate children.

By that time nephews and nieces were not yet born, but Joseph Chalwe was picked by the late Chalwe Nkaba from Southern Province because he was an orphan, a son of his late brother David Mulangwa and fields were already in existence.

The father (late Chalwe Nkaba) of the complainants in 1947, he started buying fields while other fields were already bought from Mukwanka village with his own money. In 1970s he was given village status by Chief Manfred Mungule and a village register was issued accordingly.

The village created by him, children and wives, minus nephews who came recently. The complainants also demand a register and install one of the children as a village headperson because the land under dispute was bought by their father, late Chalwe Nkaba.

Children of the late Chalwe Nkaba have no other place to go apart from the place bought by their father late Chalwe Nkaba and they claim leadership of the village so that sanity is restored.

### **Judgment**

**After a careful study of the case at issue:-**

- **Village register be given to one of late Chalwe Nkaba's children**
- **Whoever wishes to remain in Nkaba's village must be registered by a new headperson.**
- **No giving of land by individuals without the knowledge of the new headperson.**
- **All the fields belongs to the legitimate children of late Mr. Chalwe Nkaba, Mulonda field inclusive.**
- **Peace and harmony in Nkaba village must be promoted.**
- **The field which Raphael Hankombo is claiming that it belongs to Nkaba village is for headman Mukwanka**
- **The judgment must be read by all parties and respected by the concerns.**

The Plaintiffs' position is that they were not aware of this Judgment and were never called to any such proceedings. Bridget Chooka who is indicated as wife of the late Robinson Chooka is actually the daughter of the late Robinson Chooka and administrator of his estate. The Defendants did not counter this position that the Plaintiffs were never aware of these proceedings. This shows that the said 2012 Judgment was obtained in the absence of the Plaintiffs and the Plaintiffs were thus not heard. Therefore, the aspect of the decision which states that the subject Mulonda field belongs to the children of the deceased

Chalwe Nkaba's estate cannot stand. It is also odd that the Defendants never challenged the 2007 Judgment until after over five (5) years and way after the late Robinson Chooka had died in 2010. All this while the late Robinson Chooka was in occupation and possession and later his family.

As already stated above, the counterclaim fails.

In summary, the Plaintiff's case succeeds.

I hereby grant the declaration that the Plaintiffs are the rightful owners of the Mulonda field which belongs to the estate of the late Robinson Nkaba Chooka. The mandatory interlocutory injunction restraining the Defendants, their agents or servants from farming, trespassing or evicting the Plaintiffs from or carrying out any nuisance on the said piece of land is also confirmed. The Plaintiffs are further granted the order of possession of portions of the said land that are being occupied by the Defendants.

Costs are for the Plaintiffs to be taxed in default of agreement.

Leave to appeal is granted.

**Dated 29<sup>th</sup> day of January 2016.**



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**M. S. MULENGA**  
**HIGH COURT JUDGE**