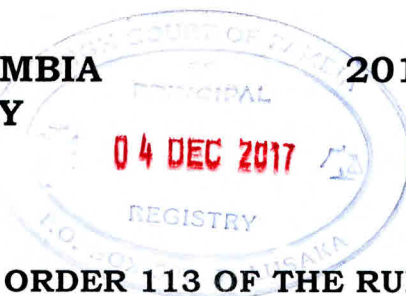


**IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA**

*(Civil Jurisdiction)*



**2017/HP/1259**

IN THE MATTER OF:

**ORDER 113 OF THE RULES OF THE  
SUPREME COURT 1999 EDITION**

IN THE MATTER OF:

**AN APPLICATION FOR SUMMARY  
POSSESSION OF THE PROPERTY  
KNOWN AS FARM NO. 10811 MUNGULE  
AREA, CHIBOMBO DISTRICT OF THE  
CENTRAL PROVINCE**

**B E T W E E N :**

LAWRENCE ROBIAM SILI MUSIPA

**APPLICANT**

**AND**

DAVIES SIMBARASHE TEMBO

**1<sup>ST</sup> RESPONDENT**

AMANDA MWABI NYIRONGO

**2<sup>ND</sup> RESPONDENT**

THE COMMISSIONER OF LANDS

**3<sup>RD</sup> RESPONDENT**

**Before Honourable Mrs. Justice M. Mapani-Kawimbe in Chambers on the  
4<sup>th</sup> day of December, 2017**

*For the Applicant* : *In Person*  
*For the 1<sup>st</sup> Defendant* : *No Appearance*  
*For the 2<sup>nd</sup> Respondent* : *No Appearance*

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

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**Cases Referred To:**

1. *Khalid Mohamed v The Attorney general (1982) ZR 49*

**Legislation Referred To:**

1. *Rules of the Supreme Court, 1999 Edition*
2. *Lands and Deeds Registry Act, Chapter 187*
3. *Lands Act, Chapter 184*

By originating summons, the Applicant seeks the following

reliefs:

- i. *An order for summary possession of part of Farm No. 10811 and customary land under Lot No. 26869/M*
- ii. *An order directing the 3<sup>rd</sup> Respondent to cancel Certificate of Title No. 14412, Chibombo District, Central Province issued to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents as the same was erroneously issued.*
- iii. *An order that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents should compensate the Applicant a sum of K12,500 for the damage they have caused to the Applicant's farm.*
- iv. *Costs and any other relief the Court may deem fit.*

In the supporting Affidavit, **Lawrence Robiam Sili Musipa**, states that Farm No. 10811 was allocated to his family in 1960 by Headman Mutakwa of Mutakwa Village, Chief Mungule. That in 2009, Headman Mutakwa authorized the Applicant to apply for a title deed and on 29<sup>th</sup> October, 2009, the deponent was recommended for the allocation of the property exhibited in **"LRM2."**

The deponent states that the property was surveyed and a sketch map produced showing the size of his land as 128 hectares. That he applied for the conversion of his customary land from leasehold tenure and authority was given as shown in the exhibit marked "**LRM1**." The deponent states that he was issued an offer letter in exhibit "**LRM3**." That in 2011, several complaints were laid against him on land encroachment, which were unsubstantiated as shown in the exhibits marked "**LRM3**" to "**LRM11**."

The deponent avers that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in October 2015, illegally encroached his property and uprooted all the metal fencing posts erected with concrete at the edges and on the area which is not yet under title. That in the process of uprooting the fencing posts, they broke 2 posts, damaged 8 and 6 were unaccounted for.

The deponent avers that he reported the matter to Kabangwe Police Post who summoned the 1<sup>st</sup> Respondent and he admitted the transgression. That at a meeting arranged by Headman Mutakwa on the disputed property ended in a deadlock and the 1<sup>st</sup> and 2<sup>nd</sup>

Respondents threatened violence. He states that he reported them to the Police and on 13<sup>th</sup> January, 2016, the Respondents produced their Certificate of Title at Kabangwe Police Station on the disputed property.

The deponent states that he involved the office of the Surveyor-General who summoned the 1<sup>st</sup> Respondent to a meeting but never appeared. That instead the 1<sup>st</sup> Respondent summoned him to Chieftainess Mungule's Traditional Court, which has no jurisdiction over state land and where a docket was opened against him. In turn, he reported the matter to the Anti-Corruption Commission.

The deponent avers that his certificate of title was issued before the Respondents' Certificate of Title No. 14412 dated 5<sup>th</sup> October, 2015 for Lot No. 26869/M. That their title includes an area inside his titled farm which is in dispute. The deponent states that the Respondents obtained their title on the documents produced by the deceased Augustine N. Chella for 11.7 hectares, the extent of their land. He avers that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents

have no documentary evidence of their own to prove ownership of their property. Further, that while there is an offer letter for Lot No. 26869/M issued in the name of Augustine N. Chella, the Certificate of Title is in the names of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

The deponent avers that both Augustine N. Chella and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents acquired their land dubiously because Augustine N. Chella wrote a receipt of K5,000,000.00, in exhibit "**LRM10**", showing payments to Mr. Alfred Mutakwa of Mutakwa Village, which the latter disputed. He also avers that Mr. Alfred Mutakwa denies that his signature is on the receipt and that he received money from the deceased. That this information is based on a statement, which he gave at Kabangwe police on 10<sup>th</sup> December, 2015.

The deponent states that the Respondents are impersonating the late Augustine Chella by presenting his documents as theirs. That they do not have an offer letter and cannot suddenly possess a Certificate of Title.

The deponent also states that he conducted a search on the Lands and Deeds Register and established that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents did not follow the legal procedures in converting their land from customary to leasehold tenure. That a further search at the Council Secretary's office, Chibombo District Council revealed that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents did not apply for the land. He prays to the Court to order the 3<sup>rd</sup> Respondent to cancel their certificate of title, which he states was irregularly and fraudulently obtained and to remove their entry from the Lands and Deeds Register.

The Respondents did not enter appearance.

At the hearing, the Applicant relied on his Affidavit, which I have anxiously considered. The facts are not in dispute and can be briefly summarized thus: The Applicant and his family have been living on Farm No. 10811 since 1960. On 8<sup>th</sup> June, 2012, the Applicant was issued a Certificate of Title for Farm No. 10811 in extent of 125.9113 hectares by the Ministry of Lands. In October 2015, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants allegedly encroached on his

property and uprooted some fencing posts, which bordered his farm including his other customary land, which is not on title.

It is also stated that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are in possession of a Certificate of Title, in which they hold 11.7 hectares of land. The Applicant contends that their Certificate of Title was dubiously acquired through Augustine N. Chella now deceased. The Applicant also contends that the Respondents and their deceased accomplice did not follow the legal procedures in acquiring land because the records at Chibombo District Council show that they never applied for land. Equally, the records at the Ministry of Lands are suspicious because they show that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents did not follow the legal procedures in converting customary land into leasehold tenure.

In my view, the issue that falls for determination is whether the Applicant is entitled to summary possession of the land in dispute.

To begin with, I wish to state that the Affidavit in Support was not happily pleaded. It was mixed with hearsay and extraneous material, which I shall not make reference to. Be that as it may, the Applicant raised a number of issues, which I shall now address.

Order 113 of the Rules of the Supreme Court states that:

**“Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this Order.”**

Order 113 of the Rules of the Supreme Court entitles a person who claims possession of land, which has been occupied by persons without his licence or consent to eject such persons. Such persons are considered as squatters or trespassers and have no claim of right.

In the case of **Khalid Mohamed v The Attorney General**<sup>1</sup>, the Supreme Court held that a Plaintiff must prove his case and if he fails to do so the mere failure of the opponent’s defence does not entitle him to judgment. It therefore follows that for the Applicant



to succeed, it would not be enough to say that the Respondents have completely failed to provide a defence but that the evidence adduced establishes the issues raised to the required standard of proof, that is on a preponderance of probabilities.

The only evidence before court is from the Applicant and it has not been opposed by the Respondents. The Applicant produced his Certificate of Title and according to section 33 of the Lands and Deeds Registry Act, a certificate of title serves as conclusive proof of ownership of land. Section 33 of the Lands and Deeds Registry Act provides that:

**“33. 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, estate 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.”**

In his Affidavit, the Applicant alleges that his land is about 128 hectares when his title deed describes a hectarage of just over 125 hectares. He claims that some of his land is not yet on title.

Although the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have not entered appearance, they do possess a certificate of title and for the purposes of Order 113 of the Rules of the Supreme Court, I cannot consider them as squatters and evict them from the land.

From the material record, it is not obvious that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents encroached the Applicant's land. A determination can only be made by the Surveyor-General. The Applicant has not adduced evidence from that office and I find it difficult to accept his claim.

The Applicant contends that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents fraudulently obtained title because they did not follow the laid down legal procedures at Chibombo District Council and the Ministry of Lands. In my view, this argument is rather vague because the illegality has not been demonstrated. The applicant's searches at Chibombo District Council and on the Lands and Deeds Register cannot be the basis of imputing fraud and assailing the 1<sup>st</sup> and 2<sup>nd</sup> Respondents title. There must be substantive evidence to prove the

claim. This evidence can only be adduced from the officials from the Ministry of Lands and Chibombo District Council.

The Applicant contended that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents encroached his traditional land, which is not on title. By that fact, I cannot consider disputes on land, which falls outside the purview of Order 113 of the Rules of the Supreme Court.

I find no merit in the Applicant's cause and accordingly dismiss it. I make no order as to costs.

Leave to appeal is granted.

Dated this 4<sup>th</sup> day of December, 2017.



M. Mapani-Kawimbe  
**HIGH COURT JUDGE**