

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

2016/HP/2360



IN THE MATTER OF:

Order 113(1) of The Rules of the
Supreme Court (RSC) 1999 Edition
Volume 1

IN THE MATTER OF:

The Property known as CHILUFYA
FARM situate in Komo Village of the
District of Kapiri Mposhi of the
Republic of Zambia

BETWEEN:

**MABLE CHILEYA
ESIYA LUPAPULO
JULIET BWALYA
JUDITH KALABA**

**1ST APPLICANT
2ND APPLICANT
3RD APPLICANT
4TH APPLICANT**

AND

**SINCLAIR KOMO
SANFORD KOMO**

**1ST RESPONDENT
2ND RESPONDENT**

Before Hon. Mrs. Justice A. M. Banda-Bobo on the 16th day of
October, 2017

**FOR THE APPLICANTS: Mrs. V. K. Chitupila of Messrs AB
and David**

FOR THE RESPONDENTS: N/A

JUDGMENT

Cases referred to:

1. Choka v. Chilufya (2002) ZR 33 (SC)
2. Khalid Mohamed vs. The Attorney General (1982) ZR 49 (SC)

Legislation and other Works referred to:

- Rules of the Supreme Court (RSC) 1999 Edition
- Fredrick S. Mudenda, Land Law in Zambia: Cases and Materials – Unza Press – University of Zambia
- The Lands Act, Cap 184 of the Laws of Zambia

By way of Originating Summons, and an affidavit in support, the applicants sought the following reliefs:-

- (i) A declaration that the applicants are the legal and rightful owners of the property known as Chilufya farm situate in Komo Village of Kapiri Mposhi District
- (ii) An Order of possession in their favour of this property
- (iii) An Order of injunction restraining the respondents and their employees and or agents from interfering with the applicants' quiet enjoyment and possession of the property
- (iv) Delivery up of possession by the respondents to the applicants of the portion of the property they are currently occupying and using
- (v) Damages for trespass
- (vi) Any other relief the Court may deem fit
- (vii) Costs and incidental to the action

In the affidavit in support sworn by one Mable Chileya, it was deposed that the subject property herein was bequeathed to the applicants by Mrs. Kasuba Chileya in 2008. This was by virtue of

her being the administrator of the Estate of Dimas Mulutula Chilufya who died intestate in 2006 as shown on exhibit "MC1" to the affidavit.

That the deceased Mulutula was a brother to the applicants and had been the legal and beneficial owner of the property after purchasing it from one Hope Komo around 1999 for nine million kwacha (K9,000,000). Exhibit MC2 (a) (b) was an offer letter from his Royal Highness Chief Nkole and a statement witnessing the payment of the purchase price.

That to that effect, his Royal Highness issued a farm certificate to the applicants on 30th August, 2010; as exhibited at "MC3" being a true copy thereof. It was deposed that that certificate sufficed to prove that the applicants are the legal and beneficial owners of the property.

It was avowed that the respondents expressed an interest in utilizing a portion of the property for farming, and to that effect, numerous land lease contracts were entered into between the applicants and the respondents for the respondents to lease the property for agreed periods of time. To that effect, the applicants exhibited copies of the lease agreements as appear at MC4(a) – (c).

The applicants said they never sold the property to the respondents, and they remain the legal and beneficial owners thereof. It was

deposed that without consent of the applicants, and illegally the respondents had taken possession of a portion of the property to the detriment of the applicants who have been deprived of the opportunity to use, lease or otherwise deal with the property in exercise of their rights as owners of the property.

It was asserted that the respondents are using the property that they are illegally in possession of for farming purposes and yet there has been no lease agreement entered into between them and the applicants allowing the respondents to use the said portion for farming or at all. The applicants stated that all entreaties to the respondents to cease their activities on the property and vacate the same have failed as these people have deliberately ignored the pleas, and have continued their illegal and unlawful farming activities. That these acts being illegal and unlawful, the respondents have no defence to the applicants' claims, hence the application before Court.

The matter came up on 7th June, 2017 but there was no appearance by the respondents. I could not proceed as there was no proof of service, so I adjourned the matter.

On 1st August, 2017, there was filed a notice of appointment of Advocates; but nothing else. On the same day, the applicants filed submissions in support of originating summons. In the submissions, the applicants gave a background to the action and how

the applicants found themselves owners of the property and basically rehashed the contents of the affidavit in support.

It was then argued that by virtue of the farm certificate, the applicants are legal and beneficial owners of the property, which land is held under customary law. It was submitted that the proceedings are premised on Order 113 Rule 1 of the Rules of the Supreme Court 1999 Edition, which, it was submitted provides for summary procedure for possession of land and is couched:-

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

My attention was drawn to the case of Choka v. Chilufya (2002)¹ for the holding that:-

“The summary procedure provided under Order 113 of the Rules of the Supreme Court can only be suitable for squatters and others without any genuine claim of right or who have since transformed into squatters.”

It was contended that the cited order, particularly at 113/8/11 required the applicant to satisfy certain criteria before he or she can succeed in the claim. The first criteria were an interest in land. The applicant reiterated how the interest in the land arose. That the Court must take judicial notice of the fact that land in Zambia is held either by the President in which case a Certificate of Title will be issued by the Commissioner of Lands on behalf of the President, setting out the terms and conditions of the lease. That such land is State land. Further that in Zambia, land can be also held under customary tenure in which instance the chief under whose jurisdiction the land falls will issue a title document setting out the terms and conditions under which the land is to be held. This land type, it was said is referred to as Customary land.

It was contended that the applicants were granted ownership by the Chief which was evidenced by the farm certificate dated 30th August, 2010, which is exhibited at MC3. It was contended that the effect of that document is that it is recognition of ownership akin to a CoT, and essentially conferring legal and beneficial ownership rights over property to the exclusion of all others. Further, that this right can only be challenged by production of a similar document by the respondent. It was said that in casu, no such document has been produced by the respondents; and there has been no contest to these proceedings and against the applicant's interest in the land, as asserted by the applicants. It was submitted that therefore, the applicant's ownership of the

property is an uncontroverted fact, and the applicants are the legal and beneficial owners of the property.

The second criteria which it was submitted ought to be fulfilled, was that of the circumstances under which the land had been occupied without licence. It was argued that the respondent had been granted occasional licence as per exhibit MC(a) – (c) to utilize a portion of the property for farming activities. Further, that it was a licence and not an agreement to sell a portion of the land. That the exhibits clearly showed that the licence was granted for a specific period at the payment of an agreed fee. That the last licence granted was for a period of one year from 24th November, 2014 to 24th November, 2015. It was argued that in the absence of a licence granting the respondents to use or occupy the portion of the property any such acts by the respondents are illegal.

It was argued that the respondents had taken possession of the portion of the property without any legal authorization, claim or right or otherwise. That they had not shown Court any justifiable or legal claim or interest in the property to continue their illegal occupation and continued use thereof. It was submitted that their illegal act should not be allowed to the detriment of the legitimate and rightful owners of the property, the applicants herein.

The Court was implored, in the interest of justice to grant the reliefs claimed by the applicants.

When the matter came up for hearing, counsel for the applicants, Mr. Chitupila of Messrs AB and David told Court that he had been served with the notice of appointment of counsel and had hoped said counsel would be before Court.

I guided that this process had been filed on 6th December, 2016. It came up for hearing on 7th June, 2017 after two status hearings. Further, there is evidence on record that the process was collected from counsel on 6th June, 2017 on behalf of the respondent. I gave them the benefit of the doubt and adjourned the matter to 2nd August, 2017. However, there was still no appearance. Even counsel who had put himself on record did not appear. No reason for non-attendance was given. I deemed it expedient to proceed with the hearing.

Counsel proceeded and relied on the affidavit in support and the accompanying exhibits, as well as the skeleton arguments earlier filed into Court. I must state that the oral submissions were a rehash of the contents of the affidavit in support and the skeleton arguments and authorities.

I have carefully considered the affidavit evidence, skeleton arguments, authorities to which my attention was drawn and the oral submissions by counsel.

According to the evidence on record, it is a fact that on 25th November, 1999, Chief Nkole of Mkushi District, Kapiri Mphoshi gave a piece of land to one D.L. Mulutula, whose next of kin was Kasuba Mulutula. It is also not in dispute that on 30th August, 2010, the said Chief Nkole gave a farm certificate to M. Chileya. It is also not in dispute that the said farm had originally been purchased by Mr. Mulutula from one Hope Komo at a consideration of K9,000,000 (nine million kwacha unrebased). Further that Mable Chileya and family entered into a one year lease agreement with Galamukani farms in 2011.

It is also not in dispute that subsequently, the applicants entered into a land lease agreement with Mubalashi farm and Sinclair Komo (1st respondent) for a period of 12 months from 24th November, 2014 to 24 November, 2015. It is also not in dispute that the applicants do not hold a certificate of title as this is not State land, but rather a farm certificate issued by the chief, as this is land under customary law.

The question to determine is whether in view of the fact that they do not hold title, they can still be considered as the legal and rightful owners of the property on the basis of the farm certificate.

As already pointed out, the respondents did not file any affidavit in opposition nor did they make any submissions. I will therefore determine this matter on the basis of the evidence before me.

Although there was no evidence adduced by the respondents, I must still satisfy myself that the applicants have proved their case. In the case of **Khalid Mohamed v. Attorney General** (1982)², and indeed a plethora of subsequent decisions, where this case was approved, it was held that:-

“An unqualified proposition that a plaintiff should succeed automatically whenever a defence has failed is unacceptable to me. 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. I would not accept a proposition that even if a plaintiff’s case collapsed of its inanity or for some reason or other, judgment should nevertheless be given to him on the ground that a defence set up by the opponent has also collapsed.”

That reasoning remains good law upto now.

The applicants herein claim their right to the property in issue based on the farm certificate issued to Mr. Mulutula on 25th November, 1999 and subsequently to them on 30th August, 2010 by his Royal Highness Chief Nkole of Kapiri Mposhi as per the exhibits in the application.

It is trite that land in Zambia is held by the President on behalf of the people of Zambia and is administered by the Commissioner of Land. This is state land for which a certificate of title will be issued to prove title and ownership thereto. The other type of land is the one held under customary tenure. Fredrick S. Mudenda, in his

book, Land Law in Zambia: Cases and Materials – Unza Press – University of Zambia stated at page 12 paragraph 1.2.4 that:-

“The Law that existed in Zambia before the advent of colonialism was the (unwritten) indigenous law of the tribes. This is generally referred to as customary law. ... As regards land law, customary law as a source of law still plays a vital role in the settlement of land disputes that may arise under land held under customary tenure. The law that generally governs customary tenure in Zambia is the customary land law of the area or district where the land is situate.”

Further that:-

“The Lands Act recognizes customary land law in a number of provisions or sections.”

In the preamble to the Lands Act, Cap 184 of the Laws of Zambia, it states *inter lia* that:-

“... to provide for the statutory recognition and continuation of customary tenure.”

Section 7 of the Act is also pertinent as regards the recognition of a person to hold land under customary tenure, their rights and privileges.

From the above, it is obvious that conferring of rights on customary land rests in the traditional leadership of the area in which such customary land is situate. In casu, the farm certificate issued by his Royal Highness on 30th August, 2016 is a recognition of the ownership of the land akin to the CoT; thus conferring legal and beneficial ownership rights over the property to the exclusion of all others.

As counsel said, no other document of a similar nature has been produced to challenge the applicants on their entitlement to this property.

Further, I have perused the record and found that on 24th November, 2014, the applicants and Mbalashi Farm and Sinclair Komo entered into a one year lease agreement for lease of 65 hectares of land. The same was for a period of twelve months subject to review for a further twelve months subject to terms and conditions to be agreed upon by both parties. The document at exhibit MC 4(c) is categorical that the arrangement entered into was nothing but a lease for a stipulated time frame. There is nowhere where the same can be said to have been a sale of the property. The licence was granted for a specified period, at a stipulated consideration. No other licence, from the record was entered into. I agree with counsel that in the absence of a licence granting the respondents to use or occupy the portion of the property, they

occupy it illegally. They have no legal authorization, claim, right or otherwise.

In the cited case of **Choka v. Chilufya** (supra), it was held that:-

“the summary procedure under Order 113 can only be suitable for squatters and others without any genuine claim of right or who have since transformed into squatters.” (underline mine for emphasise only)

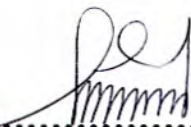
The effect of the Order 113 is that where a person is in occupation of a piece of land not having either a licence or consent, the owner of the said piece of land can successfully claim possession.

I have found that the respondents herein are occupying the land without licence or consent. Having found thus, I declare that the applicants are the legal and rightful owners of the property known as Chilufya farm situate in Komo village, and grant them the reliefs prayed for in their application. They should take possession of that portion of the land occupied by the respondents as they are entitled to possession. I also grant them all the other reliefs prayed for and remit the record to the Deputy Registrar to assess the damage the applicants have suffered for being deprived of the use of the property. The respondents and any person in occupation of that land should vacate it within sixty (60) days from the date of this judgment.

Costs follow the event to be taxed in default of agreement.

Leave to appeal is granted.

DELIVERED AT LUSAKA THIS 16TH DAY OF OCTOBER, 2017



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HON. MRS. JUSTICE A. M. BANDA-BOBO
HIGH COURT JUDGE