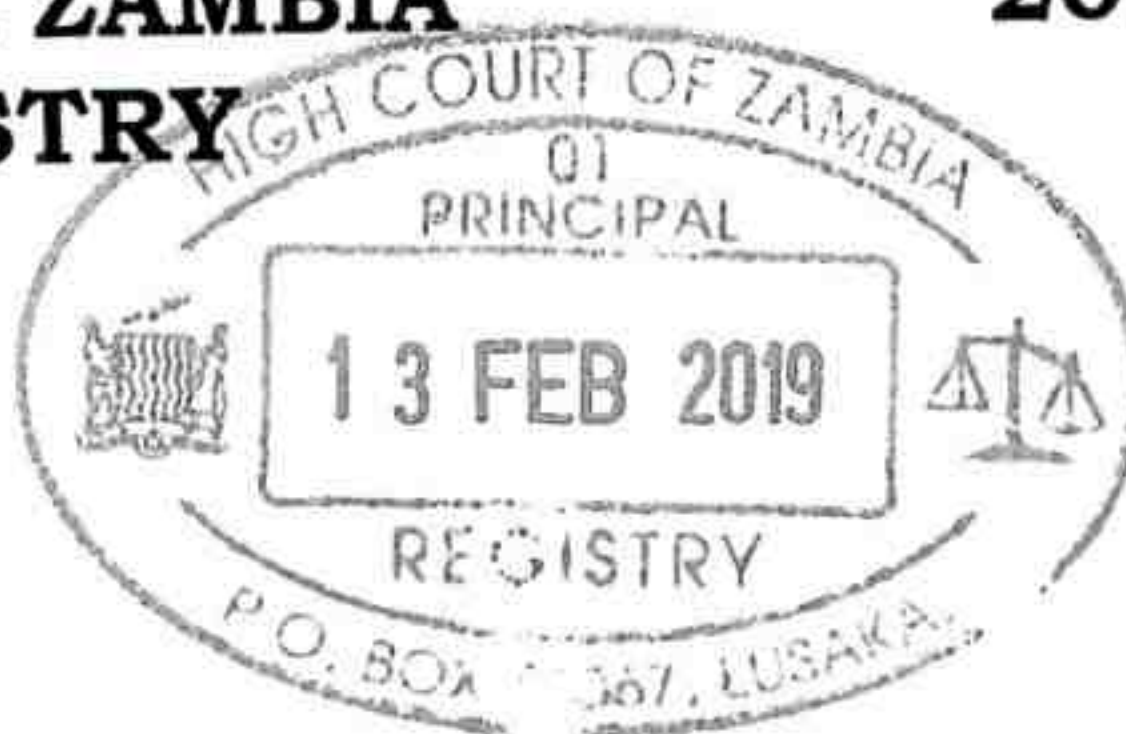


**IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA**  
(Civil Jurisdiction)

2017/HP/0587

**BETWEEN:**

MIKE MSANIDE PHIRI

**1<sup>ST</sup> PLAINTIFF**

COMFORT LOZILILO PHIRI

**2<sup>ND</sup> PLAINTIFF****AND**THE REGISTERED TRUSTEES OF THE  
CATHOLIC DIOCESE OF MPIKA**DEFENDANT**

**Before Honourable Mrs. Justice M. Mapani-Kawimbe on the 13<sup>th</sup> day of  
January 2019**

*For the Plaintiffs:**Mr. L. Kabaso, Messrs KBF and Partners**For the Defendant:**Mr. N. Ng'andu, and Mr. M. Musukwa, Messrs  
Shamwana & Co.*


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

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**Legislation Referred to:**

1. *Lands Act, Chapter 184*
2. *Lands and Deeds Registry Act Chapter 185*

**Other Works Referred to:**

1. *Fredrick S. Mudenda, Land Law in Zambia: Cases and Materials. Lusaka: UNZA Press (2006)*

The Plaintiffs, **Mike Msanide** and **Comfort Lozillilo Phiri**, are the children of the deceased Charles David Phiri. The deceased owned farm no. 8377 in Kanchibiya, Mpika on a fourteen-year state



lease from 1<sup>st</sup> December, 1993 under certificate of title No. 8377/1. The lease expired on 1<sup>st</sup> December, 2007 and Charles Phiri died without renewing it. On 17<sup>th</sup> February, 2009, the Department of Resettlement in the office of the Vice President allocated 30 hectares of farm no. 8377 to the Defendant. In the meantime, the Plaintiffs renewed the old lease granted to their father on 24<sup>th</sup> August, 2015 for a term of 99 years and were issued certificate of title no. 12110. A dispute arose between the parties over ownership and by writ of summons and statement of claim dated 14<sup>th</sup> June, 2017, the Plaintiffs sued the Defendants seeking the following orders:

- "i. An order that the Plaintiffs are the legal and title holders of Farm No. 8377, Mpika, Muchinga Province, Zambia by virtue of the certificate of title issued to them by the Ministry of Lands;*
- ii. An Order that the Plaintiffs are the legal and title holders of Farm No. 8377, Mpika, Muchinga Province, Zambia by virtue of the Certificate of Title issued to them by the Ministry of Lands;*
- iii. An Order for possession;*
- iv. Any other reliefs that the Court may deem fit; and*
- v. Costs"*

In their statement of claim, the Plaintiffs described their deceased father, Charles David Phiri as the initial owner of farm no. 8377 under a 14 year lease. They averred that after the lease expired on 1<sup>st</sup> December, 2007, their father tried to renew it with



the Ministry of Lands but passed away before completing the process. The Plaintiffs further averred that after they were granted letters of administration for their father's estate, they begun the process of renewing the lease. It was eventually renewed for a term of 99 years after they fulfilled all the procedures at Ministry of Lands. They obtained certificate of title no. 12110 for farm no. 8377.

The Plaintiffs stated that sometime in 2011, their uncle Mr. Kaonga told them that the Defendant had encroached a part of the farm and their efforts to resolve the matter amicably with Father Thomas proved unsuccessful. The Plaintiffs averred that the Defendant's unlawful occupation greatly inconvenienced them and they suffered loss and damage.

The Defendant entered appearance and filed a defence and counterclaim into Court on 6<sup>th</sup> July, 2017. It denied all the Plaintiffs' allegations and contended that it was the beneficial owner of the suit property. The Defendant contended that it was in legal occupation of the suit property because the Plaintiffs' father's 14 year lease expired in 2007 and it was subsequently allocated the



suit land in 2009. The Defendant averred that the Plaintiffs' father never lived on the farm nor developed it. It however, conceded that the Plaintiffs approached it for an amicable settlement which did not materialise because it did not require the Plaintiffs' licence to occupy the farm.

The Defendant counterclaimed that its development office, Caritas Mpika Diocese facilitated its allocation of land from the Department of Resettlement in the officer of the Vice President in February, 2009. It was allocated virgin land, which it developed according to the conditions of allocation. The Defendant only became aware that the farm was previously owned by Charles David Phiri in 2010. Notwithstanding, its site plans for 20 hectares of the land were approved by the Provincial Department of Resettlement and the Provincial Planning Office in August, 2011 and March 2012 respectively. The Defendant had various correspondence with the Commissioner of Lands and the Director Resettlement, which showed it attempted to obtain title.

The Defendant averred that on 19<sup>th</sup> May, 2015, the Director of Resettlement informed the Principal Lands Resettlement Officer



about the Defendant's full site plan for 30 hectares of land. However, unknown to it, the Plaintiffs obtained a certificate of title, which included its land. The Defendant approached the Department of Resettlement, the Deputy Minister in the Office of the Vice President, the Council Secretary and the Commissioner of Lands for a solution.

On 23<sup>rd</sup> February, 2016, the Chief Lands Officer at Ministry of Lands wrote a letter to the Council Secretary, Mpika where he requested him to inspect the suit land. On 25<sup>th</sup> May, 2016, the Council Secretary Mpika wrote to the Commissioner of Lands informing him that a land inspection was carried out and he recommended that the certificate of title issued to the Plaintiffs be cancelled and an alternative piece of land allocated to them. The matter however, stalled without resolution and the Plaintiffs sued the Defendant. As a result, the Defendant counterclaimed the following orders against the Plaintiffs:

- i. *An order that the Defendant is the beneficial owner of farm no. 8377, Mpika, Muchinga Province;*
- ii. *An order that the Plaintiffs surrender certificate of title No. 12110 to the Commissioner of Lands for cancellation;*
- iii. *An order that the Commissioner of Lands cancel certificate of Title No. 12110;*



- iv. *An order that a new certificate of title for farm no. 8377, Mpika be issued by the Commissioner of Lands in the name of the Defendant;*
- v. *Costs; and*
- vi. *Any other relief the Court may deem fit*

The Plaintiffs filed a reply and defence to the counterclaim on 17<sup>th</sup> July, 2017 in which they insisted that they were the registered owners of farm no. 8377. They averred that they successfully renewed their father's lease though the process was marred by bureaucracy and delays. They also contended that the Defendant had no right to be on their land because the Department of Resettlement, which allocated it land had no jurisdiction. They asserted that only the Commissioner of Lands had power to allocate land while the Vice President's office only acted in cases of disaster. Since the Defendant never suffered disaster, it was wrong to allocate it their land.

The Plaintiffs insisted that they developed the farm and grew crops on it. Mr. Katongo, their caretaker had lived on it all the time and the Defendant through the doctrine of '*proprietary estoppel*' could not claim their land.



The matter came up for trial on 5<sup>th</sup> December, 2018 and the Plaintiffs' only witness **Mike Msanide Phiri** testified as **PW**. His evidence was that on 1<sup>st</sup> December, 1993 his father, Charles David Phiri (deceased), was granted a 14 year lease for farm no. 8377, Mpika. During that period, his father carried out agricultural activities through his caretaker Mr. Katongo. According to PW, the deceased who was in gainful employment was transferred to Tanzania for work but managed his farm from that distance. In 2007, the deceased's lease expired and he began process of renewing it. In 2010, the deceased received information from his relatives that part of his farm had been occupied by the Defendant. The deceased approached Father Thomas in 2011 to resolve the dispute but he declined to deal with him because he claimed that the Defendant owned the land.

PW further testified that his father died in 2013 and the Plaintiffs were granted letters of administration of his estate. The Plaintiffs continued to pursue the renewal of lease and engaged Mr. Justin Japau under the instruction of the Ministry of Lands to survey the property. It was 108 hectares in size and the Defendant encroached part of it. On 23<sup>rd</sup> April, 2015, were issued an



invitation to treat. The offer letter subsequently followed on 15<sup>th</sup> May, 2015 and later a certificate of title was issued by the Commissioner of Lands on 24<sup>th</sup> August, 2015.

In **cross-examination**, PW testified that his father was the first lessee of farm no. 8377 and made efforts to renew the lease before his death in 2013. The efforts of renewal did not begin with the survey diagram dated 25<sup>th</sup> November, 2014 but approached the Ministry of Lands on numerous occasions. It was PW's evidence that he was 12 years old when his father's lease expired but was aware that his father was making efforts to renew it. He however, never accompanied him to the Ministry of Lands because the family was based in Tanzania.

The witness was not **re-examined**.

In response, the Defendant called **Father Thomas Matthaei (DW)** who was the Treasurer of Mpika Diocese at the material time. He testified that in 2009, Father Chibuye (Caritas Director) attended interviews for farming land at the Kanchibiya Resettlement Scheme, TAZARA Corridor to secure land for the Defendant. It was



desirous of buying land to farm Macadamia nuts for its sustenance in Mpika. The interview was successfully conducted and the Department of Resettlement issued the Defendant an offer letter dated 17<sup>th</sup> February, 2009 for 30 hectares of land.

It was DW's evidence that the Defendant tasked him to develop the farm. An officer from the Department of Resettlement showed him the farm and beacons. According to DW, the Defendant was allocated virgin and undeveloped land, which was full of trees. He arranged for the trees to be uprooted in order to establish the farm. A caretaker's house was built and 4000 Macadamia nut trees were planted on 20 hectares in compliance with the conditions of the offer letter.

DW further testified that he met the Plaintiff's father in 2011. He showed DW his expired 14 year lease document and his response was that the Defendant owned the suit land and had developed it. DW stated that since the Defendant was in the process of obtaining title, it could only deal with the deceased afterwards. After sometime, the Defendant obtained site plans for



20 hectares of land, which were submitted to the Provincial Planning office in Kasama and the Resettlement office in Chinsali.

DW further testified that he informed the Commissioner of Lands in a letter dated 23<sup>rd</sup> April, 2012 of the deceased claims and asked him to consider its application for title. He never received a response and was told that the Council Secretary had recommended the Defendant for title while the Plaintiffs were to be given alternative land. DW prayed to Court to urge the Commissioner of Lands to execute the Council Secretary's recommendation.

In **cross-examination**, DW responded that the Defendant was offered land in 2009 by the Department of Resettlement. He did not produce evidence to show that the Defendant acquired virgin land. The Defendant did not know that the land belonged to Charles David Phiri at the time it was acquired. It never made any enquiries nor conducted a search to ascertain if the land was encumbered. According to DW, the Defendant believed that since the Government owned the land, the allocation was legal. He maintained that the Defendant was the rightful owner of the land by virtue of the offer



given to it by the Office of the Vice President and it begun the process of obtaining title before the Plaintiffs.

In **re-examination**, DW replied that he asked the Court to execute the Council Secretary's recommendation because the Council Secretary did not have authority to order the Commissioner of Lands.

After the close of trial, Learned Counsels for both parties indicated that they would file written submissions. In the case of the Plaintiff submissions were expected by 17<sup>th</sup> December, 2018 but were only filed into Court on 29<sup>th</sup> January, 2019. On 25<sup>th</sup> January, 2019, the parties filed a consent order to extend time within which to file their final submissions. I decided to ignore the application because in both instances the parties were clearly out of time and in any case, the judgment had been substantially drafted. The submissions were therefore of no value to the Court.

I have considered the pleadings and evidence adduced. It is indisputable that Charles David Phiri was allocated farm no, 8377, Kanchibiya, Mpika on a 14 year lease under certificate of title no.



8377 from 1<sup>st</sup> December, 1993 to 1<sup>st</sup> December, 2007. When the lease expired, the Department of Resettlement in the office of the Vice President allocated 30 hectares of the land to the Defendant on 17<sup>th</sup> February, 2009. The Defendant developed the land by constructing a caretaker's house and planted 20 hectares of Macadamia nuts. On 24<sup>th</sup> August, 2015, the Plaintiffs obtained a certificate of title for farm no. 8377.

It is also not in dispute that the Plaintiffs received an invitation to treat followed by an offer letter and paid various fees to the Ministry of Lands. They were issued a certificate of title under section 33 of the Lands and Deed Registry Act, which established them as the registered proprietors of the suit 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, 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."**



My understanding of the dispute in casu is not whether the Plaintiffs lawfully obtained their certificate of title but rather a determination ***whether the Defendant settled on vacant land and thereby obtained beneficial interest in farm no. 8377 in Kanchibiya, Mpika?***

In support of their case, the Plaintiffs contended that they rightfully owned farm no. 8377 because they were in possession of a certificate of title. Their interest in the land arose from their father's initial 14 year lease, which he tried to renew before his death. The Plaintiffs averred that after the lease expired, they remained on their land through their caretaker, Mr. Katongo who lived on it and undertook agricultural activities on their behalf. They also averred that since the Commissioner of Lands never issued a notice of re-entry, they remained the beneficial owners of the suit land. They further contended that the Defendant squatted on their land without claim of right and was liable to be evicted as a squatter.

In response, the Defendants argued that at the end of the 14 year lease, the Plaintiffs' father's lease expired and the land had no



owner. If the Plaintiffs' father was desirous of renewing the lease, he should have written to the Provincial Lands Officer, Muchinga Province to request the Commissioner of Lands to renew the lease. Instead, the Plaintiffs only attempted to renew the lease seven years after it expired and after becoming aware of the Defendant's presence. The Defendant denied that it was a squatter having been legally allocated land by the Department of Resettlement. In any case, the Plaintiffs never lived on the land nor developed it. The Defendant contended that it acquired virgin land and following the recommendation of the Council Secretary to the Commissioner of Lands, it was established as the preferred candidate for the suit land.

Having considered the contested positions of the parties, I find it necessary to cite section 3 of the Lands Act, which vests all land in Zambia in the Republican President as follows:

**"3. (1) Notwithstanding anything to the contrary contained in any other law, instrument or document, but subject to this Act, all land in Zambia shall vest absolutely in the President and shall be held by him in perpetuity for and on behalf of the people of Zambia."**

The power of the President under section 3 of the Lands Act is exercised through the Commissioner of Lands. However, the



Department of Resettlement in the Office of the Vice President is also mandated to administer land and derives its powers from the Statutory Functions Act, Chapter 4 and Gazette Notice No. 42 of 1992. According to the Learned **Author Fredrick S. Mudenda**, on **Land Law in Zambia: Cases and Materials** at page 520, the purpose of resettlement under the Department of Resettlement is to assist in making land available for increased agricultural productivity as a means of reducing poverty in the country.

The Learned Author recognizes that the Department of Resettlement is ill-equipped to handle issues of land alienation and it normally recommends prospective developers for title to the Commissioner of Lands. However, for the purposes of this case, I find that the inefficiencies of the Office of the Vice President have little bearing in that they border on policy and calls for the Government's intervention. Thus, a person who acts on the belief that the Office of the Vice President is mandated to administer land under the Statutory Functions Act cannot be faulted.

It has already been stated that the Plaintiff's father's 14 year lease expired on 1<sup>st</sup> December, 2007. On 17<sup>th</sup> February, 2009, the



Defendant was offered the suit land by the Department of Resettlement. There was no evidence laid before Court to show that the Plaintiffs' father or the Plaintiffs tried to renew the lease immediately after it expired. For a gap period of seven years, it can be safely stated that the land had no registered owner. This being the case, I find that when the suit land was allocated to the Defendant, it had no owner *per se*.

The Plaintiffs contended that they remained in occupation of the suit land at all material times even after their father's lease expired. Further, the Commissioner of Lands did not re-enter their property. If their land had been lawfully re-entered, then they would have lost their interest in it. Section 13 (1) of the Lands Act provides the circumstances under which the Commissioner of Lands can re-enter land as follows:

**"13 (1) Where a lease breached a term or a condition of a covenant under this Act the President shall give the lease three months notice of his intention to cause a certificate of re-entry to be entered in the register in respect of the land held by the lessee and requesting him to make representations as to why a certificate of re-entry should not be entered in the register."**

Flowing therefrom, my view is that section 13 (1) of the Act lays a presumption that the Commissioner of Lands can only re-



enter land when a person who is in possession of it has breached a term, covenant or a condition of the lease. It would therefore not be fair to interpret section 13 (1) to include the circumstance of an expired lease. However, section 10 of the Lands Act is more appropriate and provides for the renewal of a lease in the following terms:

**"10 (1) The President shall renew a lease, upon expiry, for a further term not exceeding ninety-nine years if he is satisfied that the lease has complied with or observed the terms, conditions or covenants of the lease and the lease is not liable to forfeiture."**

Admittedly, under section 10 (1) of the Lands Act, the President is under an obligation to renew a lease which has expired. However, he (the President) must be satisfied that the lessee has complied with terms, covenants and conditions of the lease. What amounts to a satisfaction is not defined, however, as far as the Court is concerned, satisfaction is not automatic. In my opinion, before a lease is renewed, the Commissioner of Lands is required to inspect the land in order to ascertain whether the terms, conditions or covenants of a lease have been complied with. In addition, after the inspection, the Commissioner of Lands is equally required to follow the procedure on land allocation.



Applying those principles to the facts of this case, I find that the Commissioner of Lands never inspected the suit land to discover if the Plaintiffs had complied with the lease terms, covenants or conditions. I am fortified in my finding by the Chief Lands Officer, Mr. Chazya Silwimba's letter dated 23<sup>rd</sup> February, 2016, addressed to the Council Secretary, in which he requested him to inspect the suit property and render a report. Had the Commissioner of Lands conducted an inspection or due diligence of the suit land, he would not only have confirmed the lessee's compliance of the lease terms but would have also discovered any encumbrances on the ground such as the Defendant's presence.

In my view, the Commissioner of Lands was in any case aware of the Defendant's presence on the suit land as conveyed in its letter dated 23<sup>rd</sup> April, 2012. Further, the Plaintiffs were fully aware of the Defendant's presence and should have in the least informed or reminded him. The consequence is that the Commissioner of Lands should not have issued the Plaintiffs a certificate of title without resolving the dispute. By failing to carry out an inspection which is an integral element of satisfaction in the renewal of a lease, I hold that the Commissioner of Lands wrongly renewed the



Plaintiffs' lease and order the cancellation of certificate of title No. 12110 in respect of farm no. 8377, Kanchibiya, Mpika. I further hold that the Defendant is the bonafide offeree of the suit land and order the Commissioner of Lands to issue a certificate of title for the 30 hectares of land it occupies.

I award costs to the Defendant to be taxed in default of agreement.

Dated this 13<sup>th</sup> day of February, 2019.

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