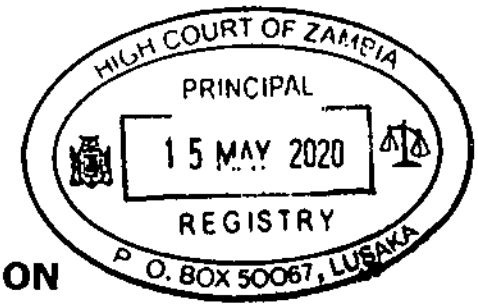
IN THE HIGH COURT FOR ZAMBIA **2015/HP/A24**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

MATRIDAH NGULUBE Appellant

AND



HILDAH MALASHA 1st Respondent
GIVEN MWANGO 2nd Respondent
WILLY SEKELETI 3rd Respondent
PATRICK SAKALA 4th Respondent
ALL ILLEGAL SQUATTERS ON LOT 2659/M, LUSAKA 5th Respondents

Coram: Hon Lady Justice F. M. Lengalenga in open court at Lusaka.

For the Appellant: Dr. O. M. M. Banda – Messrs O. M. M. Banda & Co.

For the Respondents: Mr. L. Mukande, SC – Messrs M. L. Mukande & Co.

J U D G M E N T

Cases referred to:

1. **CHILUFYA v KANGUNDA (1999) ZR 66 (HC)**
2. **MAKWATI v SENIOR CHIEFTAINESS NKOMESHYA LAT/60/97**
3. **SIWALE v SIWALE (1999) ZR 84 (SC)**
4. **HEADMAN MUPWAYA v MBAIMBI – SCZ Appeal No. 41 of 1999**
5. **TREVOR LIMPIC v RACHEL MAWERE & ORS – SCZ Appeal No. 121 OF 2006**
6. **UNDI PHIRI v BANK OF ZAMBIA (2007) ZR 186 at 196**

7. **EDITH NAWAKWI v LUSAKA CITY COUNCIL & ANOR – SCZ Appeal No. 26 OF 2001**
8. **RAJAN PATEL v THE ATTORNEY GENERAL (2002) ZR 59 at 63**
9. **OSSIE MANGANI ZULU v LUSAKA CITY COUNCIL & ORS – 2008/HP/0388**
10. **MWENYA & ANOR v KAPINGA (1998) ZR 17**
11. **NORA MWAANGA KAYOBA & ANOR v EUNICE KUMWENDA NGULUBE & ANOR (2003) ZR 132**
12. **VALENTINE KAYOPE v ATTORNEY GENERAL 2 (2011) ZR 425**
13. **DATSON SIULAPWA v FALESS NAMUSIKA (1985) ZR 21 (HC)**
14. **GEORGE CHISHIMBA v ZAMBIA CONSOLIDATED COPPER MINES (1999) ZR 198**
15. **KAMBARAGE KAUNDA v THE PEOPLE (1990 – 1992) ZR 32**
16. **NKUMBULA & ANOR v THE ATTORNEY GENERAL (1979) ZR 267**
17. **MUVUNA KAMBANJA SITUNA v THE PEOPLE (19B2) ZR 115**
18. **J. W. BILLINGSLEY v J. A. MUNDI (1982) ZR 11**
19. **MWENYA & ANOR v KAPINGA (1998) ZR 17**
20. **GREAT PEACE SHIPPING LIMITED v TSAVLIRIS SALVAGE (INTERNATIONAL) LIMITED (2002) EWCA Civ. 1407.**

Legislation referred to:

1. **THE LANDS ACT, CAP 184 OF THE LAWS OF ZAMBIA**
2. **THE LANDS (CUSTOMARY TENURE) (CONVERSION) REGULATIONS**
3. **THE LAND CIRCULAR NO. 1 OF 1985**
4. **THE EVIDENCE ACT, CAP 43 OF THE LAWS OF ZAMBIA**

Other works referred to:

1. **HALSBURY'S LAWS OF ENGLAND, 4th Edition, Vol. 27.**

This is an appeal against the judgment of the Lands Tribunal delivered on 12th May, 2015.

The background to the appeal is that the Appellant herein commenced an action before the Lands Tribunal by way of Complaint against the Respondents herein claiming the following reliefs:

1. **A declaration that she is entitled to the whole of Lot 2659/M, Lusaka on Certificate of Title of No. 207916;**
2. **An order that any structure on Lot 2659/M Lusaka belonging to the Respondents was built at the Respondent's own risk;**
3. **An order to demolish any illegal structure on Lot 2659/M Lusaka;**
4. **An order that any transaction relating to any portion of Lot 2659/M Lusaka is illegal, null and void, and was at the parties' own risk;**
5. **An order to cancel any offer letter, lease and certificate of title if any, relating to any portion of Lot 2659/M Lusaka;**
6. **An order to compel the Respondents to repair any damage caused to any portion of Lot 2659/M, Lusaka to its original status;**
7. **Damages for loss of use of the portions of Lot 2659/M, Lusaka illegally occupied by the Respondents from the date of illegal occupation to date of vacating;**
8. **Damages for trauma;**
9. **Damages for trespass and encroachment on Lot 2659/M Lusaka;**
10. **An order of interim injunction restraining the Respondents from erecting new structures, continuing with any unfinished structure to any portion of Lot 2659/M Lusaka, planting of**

crop and selling any portion of the said land until final determination of the matter, or until further order of the tribunal;

11. **An order that traditional courts have no jurisdiction over state land and their decision is null and void; and**
12. **Costs, interest and any other relief the tribunal may deem fit.**

The complaint was supported by an affidavit filed by the Appellant in which she averred that the land in issue, Lot 2659/M and 2660/M Lusaka, were on 14 year lease held by one Abuite Tembo under Certificate of Title No. 51918. Upon expiry of the lease, the Appellant applied for Lot 2659/M and was later issued a Certificate of Title No. 207916. She complained that the Respondents later trespassed, encroached, moved the beacons and illegally settled on part of the land with support of the traditional courts. She averred that the 1st Respondent has sold part of the property to the 2nd Respondent.

The 1st Respondent filed an affidavit in opposition to the complaint in which he claimed that the land was under customary tenure and was given to his grandfather. He averred that he took possession of the land in 1991 upon the death of his grandfather and upon a resolution of the Chingwele Village Development Committee. He later sold the land to the 2nd Respondent. It was averred that the 3rd Respondent was initially allocated the land in 1975 but that this allocation was finalized in 1991 through a resolution of the Chingwele Village Development Committee. The 4th Respondent was said to have bought the land from the estate of one

Elizabeth Mulenga, the sister to George Chingwele, who is also Headman Chingwele. The Respondents thus denied knowledge of the existence of any certificate of title for the land in issue. They alleged fraud in the acquisition of the title to the land.

At the hearing, the parties agreed that the Lands Tribunal should determine the matter by way of affidavit evidence. Based on the said evidence, the Tribunal found that the property was originally part of customary land within Chingwele Village in Chibombo District before Abuite Tembo facilitated its alienation from customary land through its conversion into a 14 year lease in 1982 that expired in 1995. With the succession of new chiefs and village headmen, the Chingwele Village Development Committee continued allocating portions of the property to various people, notwithstanding. In 2000, the 1st Respondent sold a portion of the land she occupied to the 2nd Respondent.

Subsequently, a caveat was lodged on 15th May, 2002 by Abuite Tembo's wife disclosing the existence of divorce proceedings and a beneficial interest in the matrimonial farm. The caveat was later withdrawn on 18th May, 2011 by the administrator of the estate of the late Abuite Tembo. The administrator shortly afterwards advertised his intention to apply for a duplicate certificate of title in relation to Lots 2659/M and 2660/M, Lusaka in the Gazette and Times of Zambia on 23rd May, 2011. Consequently, the Commissioner of Lands issued an expiration of lease certificate, thereby allowing the Appellant to apply for and obtain a 99 year lease for the slightly reduced property.

The traditional authorities, through the advisory council held that the law was not followed when the lease was obtained, and thus ordered the Appellant to sublet the land she holds under statutory leasehold to the Respondents occupying portions of the disputed land.

The Tribunal identified the following five legal issues for determination:

1. **Whether State land can revert to customary tenure after it has been alienated by the President and converted into a statutory leasehold;**
2. **Whether the same piece of land can be the subject of both customary and statutory tenure;**
3. **Whether there was procedural impropriety in the manner the complainant obtained her certificate of title to the disputed property;**
4. **Whether there was fraud in the manner the complainant obtained her certificate of title; and**
5. **Whether the Respondents were encroaching, trespassing and illegally settled on the complainant's property?**

With regard to the first question whether State land can revert to customary tenure after it has been alienated by the President and converted into a statutory leasehold, the Tribunal took the view that Lot 2659/M Lusaka ceased to be under customary tenure upon the issuance of the 14 year lease. The Tribunal stated that the effect of section 2 of the Lands Act Cap 184 is prospective in nature and not retrospective. Therefore the intention of the Lands Act is that all land that was subject to

leasehold tenure before the commencement of the Act, would remain under leasehold tenure.

In relying on the decision of the Supreme Court in the case of **CHILUFYA v KANGUNDA**[1], the Tribunal held that by section 10 of the Lands Act, it is mandatory for the President to renew a lease upon expiry, for a further 99 years if he is satisfied that the lessee has complied with the terms, conditions or covenants of the lease and that the lease is not liable to forfeiture. On the facts, the Tribunal found that there was no major default on the part of the lessee and therefore, the disputed land did not revert to customary tenure.

On the question whether the same piece of land can be the subject of both customary and statutory tenure, the Tribunal found that the preamble to the Lands Act as read together with sections 3(1) and 7(1) of the Lands Act recognises and continues to vest land both under customary and statutory tenure. The Tribunal further relied on its decision in the case of **MAKWATI v SENIOR CHIEFTAINESS NKOMESHYA**[2] where it held that once customary land had been converted to leasehold, a Chief had no control over the land and could not thereafter withdraw the consent to convert.

It thus concluded that there was no duality of tenure in Zambia in that once land had been converted to leasehold tenure, it is no longer subjected to customary tenure.

On the third issue of whether there was procedural impropriety in the manner the Appellant obtained her certificate of title to the land in dispute,

the Tribunal considered the provisions of **sections 3, 8 and 54 of the Lands Act, the Lands (Customary Tenure) (Conversion) Regulations and the Land Circular No. 1 of 1985**. The Tribunal was further guided by the Supreme Court decisions in the cases of **SIWALE v SIWALE**[3] and **HEADMAN MUPWAYA v MBAIMBI**[4] which espouse the principle that the failure to consult any person whose interest might be affected by a grant of land before alienating land situate in a customary area is fatal and renders the allocation or grant null and void.

In this regard and based on the facts, the Tribunal found that only the letter from Headman Mapili and the certificate of title point to the procedure that was followed when the disputed land was converted to leasehold tenure. The Tribunal took the view that Headman Mapili's letter did not satisfy the exceptions to the rule of hearsay laid out in section 3 of the Evidence Act Chapter 43 of the Laws of Zambia. The evidence by the then Chieftainess Mungule and Headman Chingwele were equally discounted on the basis that it was their predecessors, and not themselves, that had personal knowledge of the transactions relating to the disputed property.

The Tribunal found that the burden of showing that there was compliance in obtaining the land lay upon the President and the late Abuite Tembo, and not on the Appellant. Based on the documents exhibited by the Appellant, the Tribunal was satisfied that after the lease expired, the Appellant complied with the correct procedure for obtaining the State Lease.

With regard to the fourth issue whether there was fraud in the manner in which the Appellant obtained her certificate of title, the Tribunal found that the Respondents had not produced any evidence showing that there was fraud in the manner in which the property was converted to leasehold, extended to a 99 year lease or that the Appellant knew or participated in any fraud. The Tribunal further found that the Appellant had proved her case that she was a *bona fide* offeree of a legal estate for value and that it was reasonable to assume that she believed that the law had been complied with prior to her attainment of leasehold title to the property in 2013.

With respect to the fifth issue whether the Respondents were encroaching, trespassing and illegally settled on the Appellant's property, the Tribunal found that the contracts of sale between the 1st Respondent and the 2nd and 4th Respondents, as well as that between the 4th Respondent and the estate of Elizabeth Mulenga were *void ab initio*. This was on the basis that there was a common mistaken assumption of fact (that the legal and beneficial estates in the land being contracted for vested in the vendors having been erroneously allocated to them by the Chingwele Village Development Committee) which rendered the performance of the contracts in accordance with the terms something different from the performance that the parties contemplated. The Tribunal then set aside the contracts of sale for nullity.

The Tribunal however found that the Appellant had notice of the Respondent's occupation of the land in that she was aware of the

developments they had undertaken on it. On the authority of the case of **TREVOR LIMPIC v RACHEL MAWERE & ORS**[5], the Tribunal was of the view that to allow the Appellant to take vacant possession of the land without compensating the Respondents would be inequitable. It thus ordered that there be assessment of the improvements done by the Respondents for payment by the Appellant.

The Tribunal rejected the Appellant's claim for *mesne* profits on the basis that the facts show that the Respondents did not come to occupy the land through a right to occupy bestowed on them by the Appellant that had since expired. It further declined to award the Appellant damages for trespass and encroachment as well as compensation for trauma as there was no evidence to support the claims.

Aggrieved with the said decision, the Appellant now seeks to overturn the decision of the Tribunal on the following grounds:

1. **That the Court below erred and misdirected itself by holding that the Appellant compensate the Respondents for their structures in the absence of evidence demonstrating that the Appellant transacted and dealt with the Respondents in relation to the portions of the property in dispute that the 2nd to the 5th Respondents purported to have purchased from the 1st Respondent;**
2. **That the Court below erred and misdirected itself by holding that the Appellant compensate the Respondents for their structures in the absence of evidence demonstrating that the Appellant intends to utilize the 2nd to 5th Respondents' structures;**

3. That the Court below erred and misdirected itself by holding that the Appellant was aware of the existence of the Respondents on the property in dispute;

4. That the Court below erred and misdirected itself in dismissing the Appellant's claim for *mesne* profits on the ground that there was no tenancy agreement between the parties herein when there is evidence demonstrating that the Respondents have kept out the Appellant from using or benefiting from the portions the 2nd to 5th Respondents are occupying;

5. The Court below erred and misdirected itself in dismissing the Appellant's claim for an order to compel the Respondents to repair any damages caused to her property in the presence of evidence demonstrating the illegal structures on the property in dispute that were put up by the 2nd to 5th Respondents;

6. That the Court below erred and misdirected itself by holding that the contracts of sale of the portions of land in dispute to the Respondents were void for common mistake because the Respondents were of the reasonably held yet mistaken belief that the disputed land was subjected to customary tenure;

7. That the Court below misdirected itself in dismissing the Appellant's claim for damages for trespass and encroachment in the presence of evidence demonstrating that the Appellant never permitted the Respondents to enter and to encroach on her property; and

8. That the Court below misdirected itself by denying the Appellant costs in the absence of evidence demonstrating that she was guilty of improper conduct on the prosecuting of her claims.

Counsel for both parties filed heads of argument which have been taken into consideration.

With respect to ground one, it was submitted on behalf of the Appellant that there is no evidence on record to the effect that the Appellant sold portions of her land to the 2nd to the 5th Respondents. The argument was that the letter of sale exhibited before the Tribunal shows that the sale was between the 1st Respondent and the rest of the Respondents. The 1st Respondent was not an agent for the Appellant at any time, neither did the Appellant benefit from the proceeds of sale in any way.

To fortify this argument, the Appellant relied on the cases of **UNDI PHIRI v BANK OF ZAMBIA[6]; EDITH NAWAKWI v LUSAKA CITY COUNCIL & ANOR[7]** and **RAJAN PATEL v THE ATTORNEY GENERAL[8]**, whose import is that the law cannot be used as an instrument of fraud and that a plaintiff can still pursue the seller to recover his loss through a refund.

The unreported High Court decision of **OSSIE MANGANI ZULU v LUSAKA CITY COUNCIL & ORS[9]**, was called in aid to show that the Respondents, being squatters, have no rights, and damage to squatters' structures, though regrettable, is not recoverable.

With respect to ground two, the argument was that there is no evidence on record demonstrating that the Appellant intended to utilize the Respondents' structures built on the subject land as her claim was for their

demolition. She further wanted the Respondents compelled to restore the land to its original status. Therefore, it is contended that the case of **TREVOR LIMPIC v RACHEL MAWERE & ORS** was misapplied by the Tribunal.

The gist of ground three is that the land in issue is under state tenure and had beacons on it which were removed by the Respondents as disclosed by the Appellant's affidavit in support of the complaint. Therefore, by removing the beacons, the Respondents were aware of the existence of the Appellant on the land and thus cannot claim to be innocent purchasers for value without notice of any adverse claim.

The cases of **NAWAKWI v LUSAKA CITY COUNCIL & ANOR** and **MWENYA & ANOR v KAPINGA**[10] were called in aid where the Supreme Court held that:

> **"The occupation of land by a tenant affects a purchaser of land with constructive notice."**

The case of **NORA MWAANGA KAYOBA & ANOR v EUNICE KUMWENDA NGULUBE & ANOR**[11] was cited where the Supreme Court observed that:

> **"In purchasing real properties parties are expected to approach such transaction with much more serious inquiries to establish whether or not the property in question has encumbrances."**

With regard to ground four, Counsel for the Appellant submitted that it is a fact the Appellant has been kept out of her property through the

occupation of the Respondents. Therefore, by being kept out of the property, the Appellant was entitled to a grant of *mesne* profits.

The Appellant relied on the case of **VALENTINE KAYOPE v ATTORNEY GENERAL**[12] where it was held that:

> **"The Appellant kept the Respondent out of the house without lawful justification. In the circumstances, the law governing *mesne* profits stipulates that he must pay the *mesne* profits to the Respondent for his continued occupation of the house after the expiry of his legal right to occupy it."**

The gist of ground five is that there was clear evidence on record in the Respondents' affidavit of structures built on the land by the Respondents. The said structures were alleged to be clear evidence of damage to the Appellant's land, which if not repaired, would result in the Appellant failing to utilize her land. Therefore, it is contended that the Tribunal erred in holding that there was no evidence of damage caused to the property.

In support of ground six, Counsel submitted that land under customary tenure is also subject to law in that one has to obtain consent from the Chief and the President before occupying the same. Therefore, the Tribunal erred and misdirected itself in holding that the contracts of sale of the portions of the land in dispute to the Respondents, were void for common mistake as ignorance, in law, is not a defence.

Reliance was placed on the case of **DATSON SIULAPWA v FALESS NAMUSIKA**[13] where it was held that:

"In so far as s.13 (of the Land (Conversion of Titles) Act, 1975) provided no exception, all types of dealings in land, including the sale of village houses had to comply with it."

In arguing ground seven, Counsel for the Appellant submitted that the Tribunal ought to have awarded the Appellant damages for trespass and encroachment. The thrust of the argument was that there was no evidence on record showing that the Appellant allowed the Respondents to trespass and encroach on the property. Further that, it is not in dispute that the Respondents did trespass and encroach on the Appellant's property.

The Appellant relied on the **HALSBURY'S LAWS OF ENGLAND, 4th Edition, Volume 27, paragraph 255** which was referred to in the **KAYOPE** case by the Supreme Court on the issue of *mesne* profits. The said paragraph states that:

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

Lastly, in ground eight, Counsel contended that the main claim brought by the Appellant having succeeded in that she was declared to be the rightful owner of Lot 2659/M Lusaka, she is entitled to costs. It was submitted that there is no evidence on record revealing that the Appellant is guilty of improper conduct in the prosecution of her claim. In this regard, she is entitled to costs.

Reliance was placed on the case of **GEORGE CHISHIMBA v ZAMBIA CONSOLIDATED COPPER MINES[14]**, where the Supreme Court held that:

> **"A successful litigant is always entitled to his costs unless it is shown that he is guilty of improper conduct in the prosecution of his claim."**

The Appellant filed further heads of argument on 31st August, 2015 and supplementary heads of argument on 7th October, 2015. This was in addition to the heads of argument earlier filed on 22nd June, 2015. A perusal of the record shows that no leave of court was obtained to file these further and supplementary heads of argument. In addition, a perusal of the said arguments show that they simply repeat and emphasise what was earlier argued. Therefore, I do not intend to make reference to them.

Counsel for the 1st, 2nd, 3rd and 4th Respondents filed heads of argument in response and cross-appealed.

With regard to the main appeal, Counsel for the Respondents argued grounds one and two together which challenge the order to compensate the Respondents. Counsel submitted that the order by the Tribunal was based on the fact that at the time the Appellant was acquiring her title, the developments on the property were already existing on the land. Thus the Appellant obtained the land together with the Respondents' houses and that there was evidence on record to that effect. It was submitted that the said houses were built on the land prior to the Appellant obtaining title in 2013.

Counsel argued that the Appellant has misunderstood the import of the case of **TREVOR LIMPIC v RACHEL MAWERE & ORS**. It was submitted that in that case, the Supreme Court reversed itself having made a finding of fraud as it was wrong for them to have exercised their equitable jurisdiction and order compensation. It was further submitted that the second reason was that the question of compensation was never raised in the Court below.

Counsel therefore argued that in this case, there is neither an allegation nor a finding of fraud against the Respondents. Therefore, the finding and order of compensation by the Tribunal remains on firm ground.

With regard to ground three, Counsel for the Respondents submitted that the 1st Respondent came into possession of the land under customary law, which unlike a site plan, is legal tenure recognised under section 7 of the Lands Act, Chapter 184. He submitted that the 1st Respondent led evidence showing that her deceased father did apply to convert the same

land into statutory tenure in 1992. The 1st Respondent lives on the said Lot 8593/M and that there is a complete paper trail leading to the conversion of the land to statutory tenure.

Consequently, the 2nd, 3rd and 4th Respondents bought land from the 1st Respondent who claims part of the land in dispute under statute, and the other portion under customary tenure. Therefore, the Respondents' claim of ownership goes beyond a site plan.

The Respondents attacked ground four by arguing that it is baseless as the Appellant not only failed to adduce evidence of any loss, but failed to provide the legal basis for the claim for *mesne* profits. It was submitted that the Tribunal found as a fact that the Respondents were already leaving in the houses on the land when the Appellant acquired title. Thus, the Appellant applied for title knowing that the Respondents had developed the land and built houses on it. It was further submitted that the occupation of the land by the Respondents was not illegal as the Tribunal found that the land was converted from customary tenure to statutory tenure without the consent of the Respondents and the traditional ruler.

Counsel further contends that *mesne* profits being claimed by the Appellant can only be awarded if the Appellant shows that she was actually deprived of income as a result of being put out of possession of her land. Thus, to the Respondents, the Appellant has failed to demonstrate her loss.

With regard to ground five, it was argued that the Respondents' houses were built before the Appellant acquired the land, and that she was aware of their existence prior to that time. Therefore, the Appellant cannot

be compensated for houses that were built before she got title as she was aware of their existence.

On ground six, the Respondents argued that the Tribunal was on firm ground in finding that there was common mistake in the making of the contracts of sale. The basis for this is due to the fact that the 1st Respondent was genuinely under the impression that the land was still hers in view of the resolutions of the meeting of the Chingwele Village Development Committee held on 17th August, 1991. It is also contended that in any case, the conversion of the land to statutory tenure was done without the knowledge of the Respondents.

The Respondents are of the view that this ground has no real bearing to the outcome of the appeal as it is a case of encroachment and not legality of contracts of sale.

With regard to ground seven, Counsel for the Respondents argued that they have a legal claim of right under customary tenure and that they are not squatters because the Appellant found them already in occupation of the land.

With respect to ground eight, Counsel for the Respondents argued that for each of the Appellant's claims that failed, the Respondent was a successful party. Therefore, the Tribunal was on firm ground to deny the Appellant costs after several of her claims failed.

The 1st, 2nd, 3rd and 4th Respondents cross-appealed raising the following grounds of appeal:

1. **That the Tribunal misdirected itself both in law and fact when it rejected the evidence of the headman to the historical ownership of the land;**
2. **That the Tribunal misdirected itself both in law and fact when it rejected the evidence of Chief Mungule as to the lack of the Chief's consent at the time of converting the land from customary to statutory tenure; and**
3. **That the Tribunal misdirected itself in law and fact when it refused to cancel the Appellant's certificate of title.**

Grounds one and two were argued together. Ground one attacks the Tribunal's rejection of Headman Mapili's evidence on the basis that no further evidence was led to show how he acquired the background knowledge of the transaction leading to the conversion of the property. The evidence by the current Chief Mungule was rejected on the basis that it was his predecessor, and not him, that was a party to the transaction and thus had no personal knowledge of it.

The Tribunal's rejection of this evidence was attacked on the basis that admission of evidence is law and not assumption. It is contended that by virtue of being a headman or a chief, one comes to have knowledge of such transactions as chieftainship is an institution with continuity. It was submitted that information on customary tenure is passed on orally as there is no written customary law lands register. Consequently, that the letters by the Chief and Headman are both relevant and admissible.

With regard to ground three, it was submitted that the Tribunal having made a finding of fact, that there was no evidence of consent being

obtained, it followed that the whole process of converting the land in issue was illegal and the certificate of title ought to have been set aside.

It is contended that the Tribunal was wrong to find that the Respondents had no interest in the land prior to 1991 when it was converted to statutory tenure. The basis for the contention being that the 1st Respondent, as a Malasha, had sufficient interest in the land that belonged to her family even before she was allocated a specific portion in 1991, the land being family property. In any case, it is contended that the conversion of the land was illegally done.

Lastly, Counsel for the Respondents submitted that the matter was decided based on affidavit evidence before the Tribunal. However, as it has turned out to be contentious, there was need to call witnesses to verify the various contentious issues raised, especially from the Ministry of Lands.

Counsel for the Respondents placed reliance on the case of **KAMBARAGE KAUNDA v THE PEOPLE**[15] where the Supreme Court cited the case of **NKUMBULA & ANOR v THE ATTORNEY GENERAL**[16] and held that:

> **"It is inappropriate for evidence to be taken on affidavit in a controversial matter."**

Counsel for the Respondents prayed that in the alternative the matter be sent back to the Tribunal for a full trial so that the right parties are added and the evidence can be tested.

In response to the cross-appeal, the Appellant filed heads of argument.

With respect to ground one of the cross-appeal, Counsel submitted that the Respondents failed to prove at the time the property in dispute was converted into statutory leasehold tenure, the current village Headmen were the Headmen, and that they witnessed the transaction between Chief Mungule at that time and the late Abuite Tembo. Consequently, it is contended that whatever evidence was adduced by the current Headman was hearsay and inadmissible.

The cases of **MUVUNA KAMBANJA SITUNA v THE PEOPLE**[17] and **J.W. BILLINGSLEY v J. A. MUNDI**[18] were called in aid.

It was further contended that all land in Zambia is held by the President on behalf of the people of Zambia and that the law only recognises Chiefs as custodians of customary land, and not Village Headmen. Consequently, all documents on record that were authored by Village Headmen are null and void as the authors are without authority or jurisdiction to give customary land.

In ground two of the cross-appeal regarding the rejection of Chief Mungule's evidence, Counsel for the Appellant submitted that at the time the land in dispute was converted to statutory tenure, the late Manford Mungule was Chief Mungule. Between Manford Mungule and the current Chief Mungule were two chiefs by the names of Kennedy Mulisa and Desi Mulisa. Consequently, it was submitted that the letter by the current Chieftainess Mungule exhibited before the Tribunal contains hearsay evidence.

Coming to ground three of the cross-appeal regarding the alleged failure to follow procedure when obtaining title, Counsel submitted that in terms of Circular No. 1 of 1985, it was open to the Appellant to either apply to the Commissioner of Lands or the local authority. The local authorities, as agents, are only empowered to recommend to the Commissioner of Lands and not allocate land. Thus the Appellant opted to go by the route of directly applying to the Commissioner of Lands for the land which, at that time, was unencumbered. Thus, the Appellant duly followed the laid down procedure.

I have considered the grounds of appeal, arguments, evidence on record and the judgment of the Lands Tribunal appealed against.

In addressing the issues that arose, grounds one, two and three shall be dealt with simultaneously as they relate to the order of the Tribunal that the Appellant compensate the Respondents for the structures they built on the disputed land. In ground three it is contended that the Appellant was not aware of the existence of the Respondents on the property.

The Appellant is challenging the order of compensation on two fronts: firstly, that she never transacted with the Respondents, and secondly, that she does not intend to utilize the structures built by the Respondents on her land. However, in arguing the appeal, Dr. Banda submitted that the Respondents are squatters who occupied and built upon the land illegally, and are thus, not entitled to any compensation.

It is not disputed that the Appellant applied for and obtained a certificate of title to the land on 1st December, 2012. The record will show that it was not in dispute that at that time, the Respondents were already occupying the subject land and had built the structures in issue. Some of these structures were built in 2006 and others in 2011 as averred in the affidavit in reply to the affidavit in opposition sworn by the Appellant on record. In fact, the sale of the disputed land between the 1st and 2nd Respondent took place in 2000. Thus, the 2nd Respondent was in occupation long before the Appellant occupied the land.

Before a person decides whether or not to purchase any land, a duty is placed on that person to ensure that the land s/he intends to buy is free of encumbrances. In the case of customary land, and indeed, any other land, the purchaser must satisfy himself or herself that the land is not being occupied by any other person, including a tenant. The Supreme Court, in the case of **MWENYA & ANOR v KAPINGA**[19], guided that:

> **"The occupation of land by a tenant affects a purchaser of land with constructive notice."**

Thus, the presence of any other person, including a tenant, must place the buyer on notice and lead to further enquiries. Therefore, as rightly found by the Tribunal, the Appellant had constructive notice of the Respondents' occupation of the land because a physical search would have revealed their presence on the land and the developments they had erected. The failure to make inquiries of third persons in possession of the

land, affects the purchaser with notice of all the equitable interests held by such persons.

In this regard, the Respondents cannot be regarded as illegal squatters who have no rights and to whom the Appellant owes no duty of care. Having known that the Respondents were already occupying, and had built structures on part of the land she was seeking to obtain title for, the Appellant is obliged to compensate the Respondents for the properties they erected thereon.

It is inacceptable for the Appellant to say that she has no intentions of utilizing the structures or that she did not transact with the Respondents for her to be compelled to compensate them. Consequently, grounds one, two and three are without merit.

Grounds five and seven shall be dealt with together as they challenge the Tribunal's refusal to order the Respondents to repair the land and to award the Appellant damages for trespass and encroachment.

It is not in dispute that the Respondents erected houses and other structures on the land prior to the Appellant obtaining title to it. As noted above, the 1st and 2nd Respondents executed a sale in 2000. It is also accepted that the Appellant did not permit the Respondents to enter upon the land. However, the evidence on record shows that the Respondents entered upon the land and erected the structures prior to the Appellant obtaining title to the land.

Having entered upon the land prior to the Appellant obtaining title to it, the Respondents cannot be said to have encroached or trespassed upon the land. Furthermore, for the same reason, the Respondents cannot be compelled to repair any damage that may have been caused to the land by reason of their prior occupation of the land. If it were so, ordinary villagers and squatters on land yet to be alienated would be required to compensate whoever will be granted title in future. This would be wrong and unjust.

For these reasons, grounds five and seven must fail and are dismissed.

In ground four the argument is that the Tribunal ought to have awarded the Appellant *mesne* profits on the basis of the Appellant being denied the use of the land by virtue of the Respondents' occupying it. This approach is untenable at law as *mesne* profits are only awarded where there was initially a legal occupancy followed by an illegal occupation by the same person.

This is the law as stated by the Supreme Court when they referred to **HALSBURY'S LAWS OF ENGLAND, 4th Edition, Volume 27, paragraph 255** in the case of **VALENTINE KAYOPE v ATTORNEY GENERAL** cited earlier by Appellant's Counsel.

Therefore, as there was no legal relationship between the Appellant and the Respondents at any time, it follows that the Appellant cannot claim damages for trespass and encroachment from the Respondents. This reasoning also applies to ground seven which I have already dismissed.

Consequently, ground four lacks merit and is dismissed.

Ground six attacks the finding that the contracts of sale to the Respondents were void *ab initio* for a common mistaken assumption of fact. In its judgment, the Tribunal relied on the case of **GREAT PEACE SHIPPING LIMITED v TSAVLIRIS SALVAGE (INTERNATIONAL) LIMITED**[20] which outlines five elements that must be present if common mistake is to void a contract. The Tribunal found that these elements were satisfied and consequently nullified the contracts for being void *ab initio*.

A perusal of the Appellant's heads of argument shows that they simply attack the finding by the Tribunal without giving any sound legal basis. In his arguments, Dr. Banda does not state why the Tribunal erred in finding the contracts of sale to be void *ab initio* but goes on to argue on the need for those wishing to transact in land to obtain State Consent. He added that the Respondents cannot plead ignorance as it is not a defence at law. However, the finding by the Tribunal was not premised on whether or not there was consent to assign.

In his arguments in response, Mr. Mukande, State Counsel for the Respondents endeavoured to explain that the Tribunal arrived at the said decision on the fact that the 1st Respondent was genuinely under the impression that the land was still hers in view of the resolutions of the meeting of the Chingwele Village Development Committee held on 17th August, 1991. He further argued that in any case, the conversion of the land to statutory tenure was done without the knowledge of the Respondents.

Having considered the arguments, I find no fault in the manner the Tribunal approached the contracts. The issue of the Appellant being ignorant does not arise. This is so, for the Appellant did not abide by the procedure required to be followed by one wishing to convert customary land into statutory leasehold. Had she done so, she would have discovered that the Respondents had been occupying the land as far back as the year 2000. Therefore, ground six is bereft of merit.

Ground eight seeks to overturn the decision of the Tribunal to deny the Appellant costs when she was not guilty of improper conduct. While it is true that a party who is guilty of improper conduct may be condemned in costs, the record shows that the Tribunal did not award any party with costs. Instead, in its discretion, the Tribunal ordered each party to bear their own costs of and incidental to the proceedings.

As noted by Counsel for the Respondent in their arguments, five sets of skeleton arguments or heads of argument, were filed on behalf of the Appellant. A perusal of these arguments shows that they are a repetition of what was submitted earlier and thus unnecessary. With the greatest respect to senior Counsel, Dr. Banda, I must say that he was escalating the costs of litigation unnecessarily.

Therefore, I find no reason to interfere with the order of the Tribunal that each party must bear its own costs. The order for costs is upheld. Consequently, ground eight fails and is dismissed.

All eight grounds having failed, the main appeal is accordingly dismissed.

I turn to the cross-appeal by the Respondents.

The first and second grounds of appeal attack the decision of the Tribunal to dismiss the evidence of the village headmen on grounds of hearsay. The Tribunal took the view that the evidence was inadmissible as no further evidence was led to show how the traditional rulers came to possess knowledge of the transactions, and whether their evidence would have been admissible at trial as evidence of fact. It was concluded that Headman Mapili's letter did not satisfy the exceptions to the rule of hearsay under section 3 of the Evidence Act.

The issue to be resolved revolves around the admission of Headman Chingwele and Headman Mapili's letters marked **"HM13"** and **"HM14"** appearing in the record of appeal. The letters, both dated 10th April, 2014, are addressed to Her Royal Highness Chieftainess Mungule. In HM13, Headman Chingwele states that the land in dispute was given to one Kapito Ngulube in the 1950s by the Chingwele family to build a small shop. The letter marked **"HM 14"** by Headman Mapili supports this assertion.

The basis for the rejection of the two letters by the Tribunal is **Section 3(1)(a)(i) of the Evidence Act Chapter 43** which states that:

> **"3. (1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say:**
>
> **(a) if the maker of the statement either –**

(i) had personal knowledge of the matters dealt with by the statement; or"

Flawing from the above, for the two letters to be admissible as an exception to the rule against hearsay, the authors must have personal knowledge of the matters dealt with therein. However, it is not clear whether the two headmen were present when the said Kapito Ngulube was given the land to build the shop. In any case, the letters simply make an assertion of what transpired over 70 years ago without stating what role the two headmen played. Therefore, on a balance of probability, it can safely be concluded that the two headmen were not present when Kapito Ngulube was given the land, and thus have no personal knowledge of the matters dealt with by the statement as there is no evidence of them being parties to the transaction to have personal knowledge.

For these reasons, grounds one and two of the cross-appeal must fail and are dismissed.

Ground three of the cross-appeal opposes the refusal by the Tribunal to cancel the Appellant's certificate of title. The basis for this argument stems from the finding that the Respondents were in occupation of the land prior to the Appellant. It was also argued that the traditional ruler was not consulted together with those whose interests may be affected in terms of section 8 of the Lands Act.

As rightly observed by the Tribunal, the Lands Act was enacted in 1995. Following its enactment, section 8 of the Act required persons seeking to convert customary land into leasehold tenure to obtain the

approval of the chief and the local authority in whose area the land to be converted was situated. This provision would have applied to the Appellant had she been the first person to seek the conversion of the disputed land.

However, the record shows that the first such person to convert the land from customary tenure to leasehold tenure was the late Abiute Tembo. The late Tembo was required to comply with the provisions of the **Lands (Customary Tenure) (Conversion) Regulations** and the **Land Circular No. 1 of 1985.** Whether or not he complied with these regulations at the time is not clear. However, the fact that a fourteen year lease was issued in his favour, raises the presumption that Abuite Tembo complied with the procedure. Further, in terms of section 54 of the Lands and Deeds Registry Act, a certificate of title is conclusive evidence of proprietorship of the property to which the certificate relates. Thus, there is a strong presumption that Abuite Tembo's proprietorship of the land as evidenced by the certificate of title is conclusive. In any case, there was no challenge to Abuite Tembo's converting the land.

Therefore, as rightly noted by the Tribunal, the converters of the lease, being the original State lessor and lessee, being the President and the late Abuite Tembo, were duty bound to comply with the procedure of converting the land as enshrined in the **Lands (Customary Tenure) (Conversion) Regulations** and the **Land Circular No. 1 of 1985.** The current lessee, that is, the Appellant is under no such duty as she is only required to establish that she complied with the law in obtaining her 99 year lease once the disputed property reverted to the State; and that she

had no notice of any alleged fraud that may have occurred in converting the property to leasehold.

Therefore, I find that at the time the Appellant obtained the land from Abuite Tembo, and subsequently applied for a 99 year lease, section 58 of the Lands and Deeds Registry Act could not be applied against her in that there is no evidence of fraud on the part of Abuite Tembo. In fact, there has been no challenge against the proprietorship of Abuite Tembo to date.

Therefore, I find that there was no basis upon which the Tribunal could have ordered cancellation of the certificate of title in the absence of evidence of fraud or impropriety. Consequently, ground three of the cross-appeal is bereft of merit and I accordingly dismiss it.

Counsel for the Respondent argued in the alternative that this matter was decided by the Tribunal on affidavit evidence, but that, from hind sight, this was not suitable. There was need to call witnesses to testify on the several contentious issues. Reliance was placed on the case of **KAMBARAGE MPUNDU KAUNDA v THE PEOPLE** which is to the effect that it is inappropriate for evidence to be taken on affidavit in a controversial matter.

However, the parties themselves through their respective Counsel moved the Tribunal to proceed by way of written submissions and affidavits with documents exhibited. The Tribunal painstakingly considered the affidavit evidence and submissions on record and dealt with each issue that was raised in earnest.

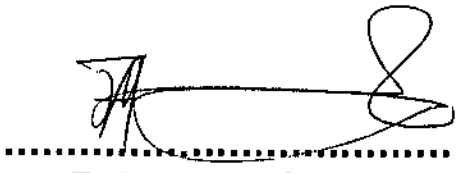
I am of the view that the outcome of the matter would still have been the same with or without a trial as there was sufficient, well documented material before the Tribunal to consider. Therefore, the alternative argument for the matter to be sent back for a trial is without merit, ill-conceived and designed to have a second bite at the cherry. The alternative ground is thus dismissed.

For the reasons stated, I find that the cross-appeal lacks merit and is dismissed.

For the avoidance of doubt, both the main appeal and the cross-appeal are unsuccessful and are hereby dismissed. Consequently, the orders granted by the Tribunal are upheld. As both the main and cross-appeal are unsuccessful, each party to bear own costs in this Court.

Leave to appeal to the Court of Appeal within the specified period is granted.

DATED this ...15th..... day of May, 2020 at Lusaka.



F. M. Lengalenga
JUDGE