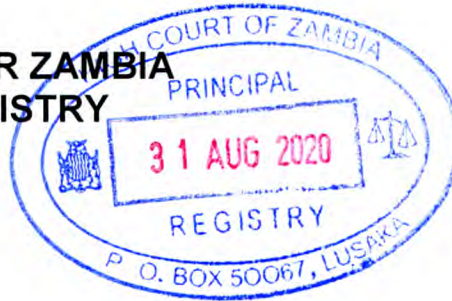


**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)



2017/HP/0768

BETWEEN:

MAJUMO KHUNGA (*suing as personal representative
of the late NZIWEME KHUNGA previously known as
ROBINSON NKHANG'ANTE KHUNGA*)

PLAINTIFF**And**

UNKNOWN ILLEGAL OCCUPIERS
OF STAND NO. 2038 KABWE

1st DEFENDANT

THE ATTORNEY GENERAL

2nd DEFENDANT

KABWE MUNICIPAL COUNCIL

3rd DEFENDANT

**Before Honourable Mrs. Justice M. Mapani-Kawimbe on the 31st day of August
2020.**

<i>For the Plaintiff:</i>	<i>Mr. M. Chitundu, Messrs Barnaby, Chitundu and Khunga Advocates</i>
<i>For the 1st Defendant:</i>	<i>Mr. T. Ngulube, Messrs Tutwa Ngulube Advocates</i>
<i>For the 2nd Defendant:</i>	<i>No appearance</i>
<i>For the 3rd Defendant:</i>	<i>No appearance</i>

J U D G M E N T

Cases Referred To:

1. *Justin Chansa v Lusaka City Council S.C.Z Judgment No. 29 of 2007*
2. *Alex Dingiswayo Jere (suing as Administrator of the Estate of Courtson Jere) v Edward Kangwa Mumbi SCZ Appeal No. 172 of 2015*
3. *Sablehand (Z) Ltd v Zambia Revenue Authority (2005) Z.R 109*
4. *David Nzooma Lumanyenda and Another v Chief Chamuka, Kabwe Rural District Council & Zambia Consolidated Copper Mines Limited (1988-1989) Z.R 194 (S.C)*

Legislation Referred To:

1. *Lands Act, Chapter 184*
2. *Lands and Deeds Registry Act, Chapter 185*
3. *Urban and Regional Planning Act No. 3 of 2015*

Other Works Referred To:

1. *Land Law in Zambia Cases and Materials by Fredrick Mudenda UNZA Press 2007*

1. **Introduction**

- 1.1 At the centre of this suit is farm no. 2083, Kabwe, which Mr. Nziweme Khunga leased from the State on 1st June 1981 for a period of 99 years vide certificate of title no. 54999 dated 23rd January 1984. Mr. Khunga partly developed the suit land and later died intestate on 17th November 2013. In the intervening period, the 1st defendants encroached his property without his consent and he failed to evict them before his death. The plaintiff was eventually appointed as the deceased's personal representative on 28th August 2014 and obtained probate from the Court on 29th August 2014. He registered the letters of probate with the Ministry of Lands and later commenced this suit contending that the 1st defendants are illegally on the suit farm.

2. **Pleadings**

2.1 The plaintiff filed a writ of summons and statement of claim into Court on 11th May 2017 seeking the following orders against the defendants:

- (i) An order that the late Nziweme Khunga is the legal and registered owner of the property known as stand no. 2083 Kabwe in extent of 1.3006 hectares;*
- (ii) An order that the defendants are illegal occupiers of and trespassers on stand no. 2083 Kabwe in extent of 1.3006 hectares;*
- (iii) Possession of stand no. 2083 Kabwe;*
- (iv) Damages for trespass to stand no. 2083 Kabwe;*
- (v) Interest;*
- (vi) Further or other relief the court may deem fit;*
- (vii) Costs of and incidental to this action."*

2.2 The plaintiff's case has by and large been underpinned in the introductory part of the judgment. Suffice to state that the deceased complained about the 1st defendants' intrusion to Kabwe Municipal council (KCM) and it called the parties to several meetings. The council eventually rendered that the deceased was the rightful owner of the suit land, but the 1st defendants refused to vacate the land.

2.3 The 1st defendants entered appearance and filed a defence into Court on 30th May 2019. They denied that the deceased owned the suit

property averring that they settled on it before him in the 1970s. They based their interest in the land on the principle of adverse possession and accused the deceased of fraudulently obtaining title on an unplanned settlement. They dismissed the plaintiff's claims of damage, loss and inconvenience and urged the Court to dismiss the plaintiff's case.

2.4 The plaintiff filed a reply into Court on 20th June 2019, where he contended that the 1st defendants' claim of adverse possession was unrealistic. Further, that they failed to properly plead the allegation of fraud nor to provide particulars. The plaintiff insisted that the deceased's certificate of title was indefeasible as he was the rightful owner of the farm.

2.5 The 2nd defendant did not enter appearance nor file a defence.

2.6 The 3rd defendant entered appearance and filed a defence into Court on 2nd December 2019. He averred that the Kabwe Urban District Council recommended the deceased for land allocation of the suit property in 1981. The Commissioner of Lands accepted the recommendation and the deceased was issued certificate of title no. 54999 on 23rd January 1984. According to the last entry on the Lands Register, the plaintiff registered letters of administration on 14th August 2015.

3. **Trial course**

- 3.1 The matter came up for trial on 11th and 19th March and 27th May 2020. The plaintiff (**PW**) largely restated his contentions in the pleadings. The departure was that the deceased Mr. Nziweme Khunga was formerly known as Robinson Joseph Mkhang'ante Khunga and that the suit property was 1.3 hectares in size. Further, that it was located at Mwapoleni and Nalikwanda avenues in Kabwe.
- 3.2 PW further testified that he found letters in the deceased's property, which described the 1st defendants as squatters. In addition, the KCM called meetings to resolve the dispute and it recognized the deceased as the rightful owner of the farm. PW was however surprised that in 2005, the council issued the 1st defendants land records and occupancy licences. In concluding, PW prayed to Court to order that the deceased was the rightful owner of the farm and to evict the 1st defendants from it.
- 3.3 In **cross-examination by the 1st defendants**, PW testified that the deceased's dispute with the 1st defendants was more than 30 years old. He was not aware of the number of people who squatted on the farm but they occupied a significant portion. He denied that his claim covered Katondo compound.

- 3.4 When **re-examined**, PW replied that the dimension of the suit land was stated in the certificate of title.
- 3.5 That marked the close of the plaintiff's case.
- 3.6 In response, the 1st defendant called two witnesses. The first was **Emmanuel Ngandu (DW1)** whose evidence was that his father Edson Ngandu bought a parcel on the suit land. They had lived on it since 1974 and he only met the deceased when he begun to build his store (Dengema). In the process, he told the residents that he owned the farm. The news perplexed DW1 because his father settled on the land before the deceased. Further, the fact that the council issued him an occupancy licence proved his superior interest in his land.
- 3.7 When **cross-examined**, DW1 testified that his father bought his land from the chairman of Katondo compound. He was aware that a councilor has no power in land alienation and added that the council issued the first occupancy licences in 2005. He conceded that the deceased's certificate of title was issued before the occupancy licences and did not obtain planning permission when he built his structure.
- 3.8 In **re-examination**, DW1 replied that after the council issued the occupancy licences, it told the 1st defendants to build decent houses.

- 3.9 The next witness was **Rodrck Kasongo (DW2)** whose evidence was that the chairman of Katondo compound sold him a parcel on the suit land in 1979 at K30. He thereafter built a house and store, and had lived on the property with his family for about 41 years. DW1 further stated that the council issued him an occupancy licence on 27th October 2006. Additionally, that the plaintiff's claim affected 1000 households including land that was outside the deceased's boundary in Chiparamba.
- 3.10 In **cross-examination**, DW2 testified that he bought vacant land from the chairman of Katondo compound. He was neither aware how the chairman acquired the land nor if he had power to alienate it. DW2 added that he did not obtain planning permission when he built his structures.
- 3.11 When **re-examined**, DW2 responded that he was not aware of the requirement of planning permission.
- 3.12 That marked the close of the 1st defendants' case.
- 3.13 The 2nd and 3rd defendants were joined to these proceedings at the instance of the 1st defendant on 15th August 2019. When the matter came up for trial, the 3rd defendant did not attend Court, while a purported representative of the 2nd defendant appeared on 11th March

2020, seeking an adjournment, which was declined. After the plaintiff and 1st defendants closed their cases, the Court decided to summon the 2nd and 3rd defendants. Thus, the Acting Commissioner of Lands and Acting Town Clerk of Kabwe Municipal Council appeared in Court on 27th May 2020. The 1st defendants who were well aware of the trial date did not attend Court nor tender any reason for their absence.

3.14 The Acting Commissioner of Lands, **George Sindila (SW1)** testified that plot no. 2083 Kabwe was first registered on 23rd January 1984 in Mr. Khunga Robinson Joseph Mukang'ate's name and certificate of title no. 54999 issued in that respect. Further that on 14th August 2015, the plaintiff registered letters of administration on the Lands Register. SW1 then went on to enlighten the Court that a certificate of title is conclusive proof of ownership of land and that details of a land owner are placed in the Lands Register. According to SW1, once the Ministry of Lands issued a certificate of title it would remain valid unless there was a counterclaim.

3.15 The witness was not **cross-examined** by the plaintiff.

3.16 The next witness, **Joel Shawa**, the Acting Town Clerk, Kabwe (**SW2**) who testified that council only developed a land record system in 2012. Before then, councilors were free to identify land in their wards

and recommend applicants for allocation without the council's verification. Afterwards, applicants would obtain occupancy licences. From 2012, all land applicants in Kabwe were expected to apply for land from the council. It would thereafter, verify if the land applied for was available for allocation and equally survey it. Subsequently, the council would issue successful applicants occupancy licences.

3.17 In reference to the suit farm, SW2 testified that the council did not know how it was allocated to the 1st defendants because it did not have any land records or duplicate occupancy licences. He then disowned the 1st defendant's land records and occupancy licences produced in Court asserting that they were not authentic.

3.18 In **cross-examination** by the plaintiff, SW2 testified that the council had no power to issue occupancy licences on land that was subject to a certificate of title. He emphasized that any other property document was subordinate to a certificate of title.

4. **Submissions**

4.1 Learned counsel for the plaintiff, Mr. Chitundu filed written submissions into Court on 9th June 2020, for which I am indebted. He begun his submissions by reprising the law on land alienation in the country from the Lands Act, Lands and Deeds Registry Act and

Urban and Regional Planning Act. He then went on to cite Statutory Instrument No. 4 of 1989 in which the Republican President delegated the administration of land to the Commissioner of Lands.

- 4.2 Counsel then adverted to the case of **Justin Chansa v Lusaka City Council**¹, where the Supreme Court reaffirmed the role of the Commissioner of Lands in land alienation. In reference to section 33 of the Lands and Deeds Act, counsel submitted that a certificate of title serves as conclusive proof of ownership of land and fortified his position by calling in aid the case of **Alex Dingiswayo Jere (suing as administrator of the estate of Courtson Jere) v Edward Kangwa Mumbi**², where the Supreme Court stated that:

“the 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...”

- 4.3 Counsel asserted that on the basis of the certificate of title, the deceased was the rightful owner of the suit land and his position was strengthened by the evidence of SW1 and SW2, who respectively stated that a certificate of title is conclusive proof of ownership of land. Further, SW2 on behalf of the council disowned the 1st defendants' lands records and occupancy licences.

4.4 On the allegation of fraud, counsel submitted that the defendants neither pleaded fraud and its particulars nor led any evidence according to the standard set out in the case of **Sablehand (Z) Ltd v Zambia Revenue Authority**³, where the Supreme Court elucidated that:

“Where fraud is to be a ground in the proceedings, then a defendant or respondent wishing to rely on it must ensure that it is clearly and distinctly proved. The clear message from the two cited cases is that allegations of fraud must, once pleaded, be proved on a higher standard of proof than on a mere balance of probabilities because they are criminal in nature.”

4.5 Counsel then argued that the 1st defendants’ claim that they adversely possessed the suit farm had no basis because the action was proscribed by section 35 of the Lands and Deeds Registry Act as follows:

“After land has become the subject of certificate of title, no title thereto, or to any right privilege, or easement in, upon or over the same, shall be acquired by possession or user adversely to or in derogation of the title of the Registered Proprietor.”

4.6 Counsel fortified his assertion by citing the case of **David Nzooma Lumanyenda and Another v Chief Chamuka, Kabwe Rural District Council & Zambia Consolidated Copper Mines Limited**⁴, where the Supreme Court held that land which is the subject of a certificate of title cannot be acquired by adverse possession. In any case, the Court had previously pronounced itself on the 1st

defendants' preliminary issue regarding the claim of adverse possession when in its ruling dated 20th April 2018, it held that:

“...it is clear that after land has become a subject of a certificate of title, no other person can acquire rights by virtue of being in possession adversely to the rights of the holder. The certificate of title is prima facie evidence of ownership of land.”

- 4.7 In concluding, counsel prayed to Court to grant the plaintiff the orders sought against the 1st defendants.
- 4.8 Learned counsel for the 1st defendants, Mr. T. Ngulube filed written submissions into Court on 17th June 2020 without leave. The submissions were not in the form that they ought to be because they introduced new elements of evidence, which were neither stated in the pleadings nor adduced in the 1st defendant's evidence. In short, the submissions sought to change the complexion of the 1st defendants' case and on that basis were ignored by the Court.

5. Determination

- 5.1 Having considered the pleadings, evidence adduced, submissions filed herein and authorities cited therein, it is indisputable that Mr. Nziweme Khunga leased farm no. 2083, Kabwe from the State on 1st June 1981 for a term of 99 years vide certificate of title no. 54999 dated 23rd January 1984. He died intestate on 17th November 2013 and before then, partly developed his farm which was invaded by the

1st defendants. He did not accept their occupation but failed to evict them. He escalated the dispute to KCM and it settled that Mr. Khunga rightfully owned the suit property.

5.2 After the deceased's death, the plaintiff was appointed as his personal representative on 28th August 2014 and obtained probate from the Court on 29th August 2014. He registered the letters of probate at the Ministry of Lands on 14th August 2015 and subsequently filed this suit into Court. Arising from the facts, the Court distills the following issues for determination:

- (i) **Whether the 1st defendants have any right to the suit property and if the plaintiff is entitled to an order of possession?**
- (ii) **Whether the plaintiff is entitled to an order of damages for trespass and interest?**

5.3 I shall now deal with the issues raised in turn.

- (i) Whether the 1st defendants have any right to the suit property and if the plaintiff is entitled to an order of possession?

5.4 The plaintiff contended that the deceased was the rightful owner of the suit land and the 1st defendants invaded it without his consent.

He had a valid certificate of title while the 1st defendants were merely squatters without a claim of right.

5.5 In response, the 1st defendants argued that they arrived on the suit land in the 1970s way before the deceased and thereby established their interest through adverse possession. They produced land records and occupancy licences with dates from 2005 issued by Kabwe Municipal Council which they averred asserted their interest in the suit land.

5.6 After considering the contested positions, the learned author **Fredrick Mudenda on Land Law in Zambia Cases and Materials, 2007**, at pages 800-804 eloquently elucidates the law on land alienation as follows: It starts with the process of land identification in a district which is undertaken by a local authority under Circular No. 1 of 1985. Once an area is planned, a local authority will 'forward the approved layout plans to the Commissioner of Lands for scrutiny as to the availability of the land.'

5.7 The learned author Fredrick Mudenda further states that after considering the recommendation(s) of a local authority, the Commissioner of Lands will offer suitable applicants. He may also reject the applications that have been received on the planned areas. *'Local authorities may not permit or authorize any intending developer*

to enter upon or occupy any stand unless and until such developer has firstly received a letter of offer, paid lease fees, development charges and obtained planning permission from the relevant planning authority.'

5.8 It follows therefore, that the Commissioner of Lands is the principal officer in all matters of land allocation in the country as SW1 correctly testified and his evidence to this effect was unchallenged. Councils/local authorities are agents of the Commissioner of Lands and are empowered to identify land for development. They are also required to submit layout plans to the Surveyor General for approval. While local authorities are also empowered to recommend prospective applicants for land allocation to the Commissioner of Lands, he is not bound by their recommendation(s).

5.9 The position of the law was reaffirmed in the case of **Justin Chansa v Lusaka City Council**¹, when the Supreme Court held that:

- (1) The authority to consider applications for land allocation from members of the public is vested in the President of Zambia who has delegated this authority to the Commissioner of Lands.
- (2) An applicant for land has in terms of Circular Number 1 of 1985, an option either to apply directly to the Commissioner of Lands, or to apply through a Local Authority which has been delegated powers to receive applications for land from members of the public.
- (3) Where a member of public opts for the second route, a Local Authority is mandated to advertise any land available, receive applications from members of the public and make recommendation to the Commissioner of Lands.
- (4) The powers to allocate land and make offers to successful applicants is reposed in the Commissioner of Lands."

5.10 Moving on, it is worth stating that legal ownership of land in Zambia is conferred by section 33 of the Lands and Deeds Registry Act which states:

"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 pof 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 from all other encumbrances, liens, estates or interest whatsoever."

5.11 Flowing therefrom, a certificate of title serves as conclusive proof of land ownership and the implication is that it extinguishes all other claims against a registered proprietor. It may however, be cancelled on the grounds of impropriety or fraud under section 34 of the Lands and Deeds Registry Act, which reads:

"34. (1) No action for possession, or other action for the recovery of any land, shall lie or be sustained against the Registered Proprietor holding a certificate of title for the estate or interest in respect to which he is registered, except in any of the following cases, that is to say:

- (a) the case of a mortgage as against a mortgagor in default;**
- (b) case of the President as against the holder of a State Lease in default;**
- (c) the case of a person deprived of any land by fraud, as against the person registered as proprietor of such land through fraud, or against a person deriving otherwise than as a transferee bona fide for value from or through a person so registered through fraud."**

5.12 The significance of section 34 of the Act was reaffirmed by the Supreme Court in the case of **Anti-Corruption Commission v Barnett Development Corporation Limited**⁴, when it was held that:

"Under section 33 of the Lands and Deeds Registry Act, a certificate of title is conclusive evidence of ownership of land by a holder of a certificate of title. However, under section 34 of the same Act, a certificate of title can be challenged and cancelled for fraud or reason of impropriety in its acquisition."

5.13 In other words, a certificate of title can only be cancelled in the following circumstances:

- (i) Where a mortgagor (borrower) has defaulted on a loan.
- (ii) Where a lessee has defaulted on the lease covenant.
- (iii) Where fraud or procedural impropriety in the allocation of land has been established.

5.14 What emerges from the facts of this case as a finding; is that Mr. Nziweme Khunga was the registered proprietor of the suit farm and up to the point of his death, there was no adverse entry made on the Lands register challenging the validity of the certificate of title. This fact was confirmed by SW1's evidence which was not challenged and also averred that the only other entry made on the Lands register after the deceased's death was the plaintiff's registration of letters of administration on 14th August 2015.

5.15 I also find that the land record and occupancy licences produced by the 1st defendants in their bundles of documents were issued after the deceased obtained his certificate of title dated 23rd January 1984 as opposed to theirs issued from 2005. According to the evidence of both SW1 and SW2 which was not challenged, a certificate of title is conclusive proof of ownership of land and cannot be defeated by a subordinate property document. SW2 on behalf of the 3rd defendant disowned the property documents that were produced by the 1st defendants and the consequence is that they are of no value to the 1st defendants' claims. In other words, I find and hold that the land records and occupancy licences do not clothe the 1st defendants with any right of interest in the suit farm and are therefore illegally occupying it as squatters. Their claim of adverse possession is not supported by the law and the Court pronounced itself in its ruling dated 20th April 2018.

5.16 I will not make any analysis of the 1st defendants' claim of fraud against the plaintiff because it was not pleaded with particularity or set out with sufficient detail. Moreover, none of the 1st defendants' witnesses adduced evidence on the threshold of fraud to show that the deceased and/or in collusion with others fraudulently procured his title deed.

5.17 **What then is the plight of the 1st defendants?** I have already determined that the 1st defendants are squatters and illegally on the plaintiff's farm. They have no authority to be found on it and I am fortified by the case of **Raphael Ackim Namung'andu**, where Hon. Matthew Ngulube, then High Court Commissioner stated that:

“(i) Squatters build on their own risk and if the owners of the land withdraw their permission or licence or if they decide to demolish a structure built in the absence of any permission or other lawful relationship, the squatters’ losses though very much regrettable are not recoverable in a Court of law.”

5.18 The case of the 1st defendants' is no different and as they illegally squatted on the suit land at their own risk. I further hold that they are liable to ejection and have no right to compensation for their losses. Accordingly, an order of immediate possession of stand no. 2083 is hereby granted to the plaintiff and it shall be executed without further recourse to Court.

(ii) Whether the plaintiff is entitled to an order of damages for trespass and interest?

5.19 The plaintiff pleaded damages for trespass of the suit farm and interest. The law is that damages have to be proved and the evidence adduced by the plaintiff did not show how the trespass affected him so as to be awarded reparation. Accordingly, the claim fails and is dismissed.

6. **Final orders**

- 1) It is hereby ordered that the Nziweme Khunga is the legal owner of stand no. 2083, Kabwe.
- 2) It is further ordered that the 1st defendants are squatters illegally occupying the suit farm. An order of immediate possession of stand no. 2083 is hereby granted to the plaintiff and it shall be executed without further recourse to Court.
- 3) The plaintiffs claim for damages and interest lacks merit and is dismissed.
- 5) Costs are awarded to the plaintiff to be taxed in default of agreement.

Dated this 31st day of August 2020.


M. Mapani-Kawimbe
HIGH COURT JUDGE