

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

(Civil Jurisdiction)

2018/HP/2023



BETWEEN:

IRFAN SULEMAN NARBHANDH

PLAINTIFF

AND

CHUNGU MUSONDA

DEFENDANT

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 28th DAY OF
JANUARY, 2020**

For the Plaintiff : Mr C. Sianondo, Malambo & Company

*For the Defendant : Mr C. Besa, M.B Christopher Legal Practitioners and
Friday Besa, Friday Besa & Associates*

J U D G M E N T

CASES REFERRED TO:

1. ***Yengwe Farms Limited and Masstock Zambia Limited, the Commissioner of Lands and the Attorney General SCZ No 11 of 1999***
2. ***Cetina Transport v Commissioner of Lands SCZ No 79 of 1999 (unreported)***
3. ***Galaunia Farms Limited v National Milling Company Limited and National Milling Corporation Limited 2004 ZR 1***
4. ***Justin Chansa v Lusaka City Council SCZ No 29 Of 2007***
5. ***Anti Corruption Commission v Barnnet Development Corporation Limited 2008 ZR 69 Vol 1***
6. ***Zambia Railways Limited v Pauline S Mundia, Brian Sialumba 2008 ZR 287 Vol 1***
7. ***Tobacco Association of Zambia v Kayanje Farming Limited and other Appeal No 17/2010***
8. ***Energovest Limited and another v Bank of Zambia and the Attorney General Appeal No (67/2008) 2012***

9. ***Hildah Ngosi (suing as administrator of the estate of the late Washington Ngosi) v the Attorney General, Lutheran Mission (Zambia) Registered Trustees SCZ No 18/2015***
10. ***Gift Luyako Chilombo v Biton Manje Hamakale 2016/CC/A004, Appeal No 2 of 2016***
11. ***Saidi Chibwana and Lynn Baines v Marian Mutinta Chitauka (suing as administrator of the estate of the late Hachaabwa Chitauka SCZ No 49 of 2017***
12. ***Silas Ngowani, Chilufya Lawrence, Chitalu Joyce, Teweshe Matelo, Mutinta Dominic, Longwani Davy and Machona Moses v Flamingo Farms Limited SCZ No 5 of 2019***

LEGISLATION REFERRED TO:

1. ***The Urban and Regional Planning Act No 3 of 2015***
2. ***The Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia***
3. ***The Land Survey Act, Chapter 188 of the Laws of Zambia***

OTHER WORKS REFERRED TO:

1. ***Phipson on Evidence, 1990 14th edition, Sweet & Maxwell***

The plaintiff commenced this action by writ of summons accompanied with a statement of claim on 22nd November, 2018, claiming the following reliefs;

- i. *Damages for anxiety and mental anguish.*
- ii. *An order that the said occupation and activities of the said land by the defendant is not in compliance with the planning stipulations.*
- iii. *An order and declaration that the acts of the defendant are illegal ab initio.*
- iv. *An order of interlocutory injunction restraining the defendant by himself, his agents, servants or whomsoever from conducting any activity on the said piece of land that he occupies.*

Kaputo, and a cashier at Buseko market called Elias Chipata. He then went and reported the matter to the Matero police, and he identified the document at page 21 of the plaintiff's bundle of documents as the OB number that he was given on 16th November, 2016 when he reported the matter.

However, despite having reported the matter to the police, the men continued going to the property, and when PW2 went back to the police to complain, he was referred to the Council. He decided to seek audience with the Minister of Lands, and he was referred to the Commissioner of Lands. However, he did not meet the Commissioner of Lands who was said to be in a meeting. Thereafter nothing happened between 2014-2015.

PW2 in cross examination testified that he reported the Market Manager, Kaputo, and Chipanta, the cashier, to Matero Police. He could not recall having reported the defendant to the police, and when cross examined further, he stated that he could not recall as it had been long, and he may have forgotten, as he has sugar and high blood pressure. He stated that when he sold the property to the plaintiff, it had no wall fence, and that no one was building a wall fence, although his neighbours had built wall fences.

When referred to the contract of sale at page 13 of the plaintiff's bundle of documents, PW2 agreed that the dimensions of the land that was sold is not stated. He however stated that the demarcation is Lumumba Road as the contract of sale refers to Lumumba road. He also agreed that there are no beacons on the land. His evidence was that the land is on a joint title with forty four (44) other properties, and he agreed that the houses have not been surveyed by Zambia Railways.

The last witness was the plaintiff. In his testimony, he told the court that he first bought House No 33 Lumumba Road from Mr Munyoro, and thereafter House No 34 from Mr Sisii. The documents at pages 1-4 and 6-8 of the plaintiff's bundle of documents were identified as the said contracts that were executed for the sale. He testified that the land starts from Lumumba Road in front, and that there is an inner road at the back.

The plaintiff with reference to the contracts of sale at pages 13 and 17 of his bundle of documents testified that the properties initially belonged to Zambia Railways who sold them to its employees.

When cross examined, the plaintiff testified that apart from houses 33 and 34, he owns another property on Lumumba road, being No 29. He agreed that property number 29 is not title, but that he had a site plan created for it, after he bought the property. His evidence was that No 29 is not located on the same line as No 33 and 34, which are on Lumumba road.

The plaintiff further in cross examination testified that No 29 is behind on the inner road, and he agreed that No's 33 and 34 had no wall fences when he bought them. His testimony was that the defendant was building the wall fence when he sued him, but he had not completed it. He also stated that the defendant was also putting up a structure which could be a house or a shop on the property. However, there were no building materials on site when he sued him. The plaintiff agreed that the contracts of sale do not state the sizes of the properties 33 and 34, and he stated that PW2 showed him the beacons, although the properties are not surveyed.

When referred to the proposed regularization of the plot for the defendant at page 13 of the defendant's bundle of documents, the plaintiff agreed that it has a stamp for the Lusaka City Council. He further agreed that just behind the shaded area on the diagram are sub divisions 11 and 12, his properties. That according to that site plan, his properties do not extend to Lumumba road. He agreed that he had no document indicating that his properties extend to Lumumba road. That marked the close of the case for the plaintiff.

The first witness called by the defence was the defendant. He told the court that he is trader at Buseko Market, having started trading there in 2002. He testified that the land opposite Buseko Market was a dumping site for Emmasdale residents and traders at Buseko market. He also testified that the Council would collect the garbage, and at times, the marketeers would hire a grader to remove the garbage. That this went on for many years until 2016 when there was cholera.

The defendant told the court that the traders were stopped from trading at Buseko market, and were ordered to clean the market and the dumping site. The Council then put a poster, which he identified as that at page 1 of the defendant's bundle of documents, prohibiting the throwing of garbage, and that the same was an offence which attracted a fine of K100.00.

He continued testifying, stating that they complained to the Market Master, Mr Kapulo that they were paying to remove the garbage, and that is how the Market Master said that he would ask the residents in the area to take up the responsibility, as the land was not for the Council, but in their residence. The defendant testified that he went with the Market Master who confronted two (2) residents over the garbage, but

they responded stating that they were just tenants, and the owners of the properties should be called.

He told the court that after some days, he followed the Market Master who was summoned by Mr Sisii over the dirt on the land, which was a buffer zone. The defendant stated that thereafter, he asked the Market Master if he could clear the land, and the Market Master verbally agreed. That is how the defendant cleared the land, and the Councillor was very happy. The defendant testified that he started trading there, and Mr Sisii begged him in the presence of the Market Master to put up a wall fence, and that is how he started erecting the wall fence.

From there, the Market Master advised him to secure the land by applying to the Council. The defendant's evidence was that this is how in 2018, he applied to the Council for regularization of the property as seen at page 2 of his bundle of documents. Later he saw officers from the City Council Valuation Department go to the land and they had measuring tools, and they took photographs. They also took notes. It was the defendant's testimony that sometime later he was informed by a Secretary at the Council that a full Council meeting had been held.

He was given a letter and minutes dated February, which approved the regularization of the property, as seen at page 3 of his bundle of documents. The defendant told the court that there was a subsequent meeting, and at page 8 of his bundle of documents was a letter from the Town Clerk to the Commissioner of Lands asking for approval to number the property.

Still in his testimony, and with reference to the receipt at page 14 of his bundle of documents, the defendant testified that he was charged K15,

000.00 to legalise the plot. He took the receipt to the Ministry of Lands where he paid K166.80 as the lodgment fee, which was at page 15 of his bundle of documents. Then in November, 2018 as he was at the property after he had received a phone call, asking if he owned the plot opposite Buseko Market, an Indian man with Counsel for the plaintiff had asked him if he was building the wall fence, and he agreed.

The next day he went to the Council and reported the dispute verbally and both parties were called. Thereafter the defendant wrote the letter at page 12 of his bundle of documents to the Council asking if the land was in contention. He only received the response at page 16 of his bundle of documents after this action had commenced, to the effect that the property had been recommended to him. He asked the court to award him the land, as it was given to him legally, after it was surveyed.

The defendant when cross examined testified that when Mr Kapulo told him to clean the land, he was not a Councillor at the time. When referred to the affidavit in opposition to the summons for an order of injunction at pages 39-40 of the plaintiff's bundle of pleadings, which he had deposed, the defendant agreed that the averment in paragraph 8 of that affidavit is that the area Councillor told him to clear the land and use it for business. He stated that Mr Kapulo did not say that the land did not belong to the Council.

The defendant agreed that before the Council allocates land, it is advertised, and that there was no advertisement in this matter. He further agreed that the Council recommends applicants of land to the Ministry of Lands. The defendant also agreed that the letter at page 8 of his bundle of documents is dated 10th October, 2018, and that in that letter, the Town Clerk wrote to the Commissioner of Lands proposing the

legalization of the plot in Emmasdale. He agreed that the letter does not have his name, and that it was recommending the numbering of the plot.

When referred to the affidavit in opposition to the summons for an order of injunction, the defendant agreed that paragraph 23 at page 41 of the plaintiff's bundle of pleadings, states that he deposed that the Lusaka City Council made a recommendation to the Ministry of Lands that he be offered the land in question. However, he had not exhibited the recommendation letter.

When referred to the demand notice at page 52 of the plaintiff's bundle of pleadings, the defendant testified that the document does not have his name, and that the land use indicated on the document is commercial. When cross examined further, the defendant stated that the land use on the document is residential, medium cost.

He agreed that PW2 had testified that he had reported the activities on the land to Matero Police, as seen on the OB number at page 21 of the plaintiff's bundle of documents on 16th November, 2016. When referred to the letter that the defendant wrote to the Council to legalise the plot which is at page 2 of his bundle of documents, the defendant stated that it is dated 7th December, 2017. He agreed that he wrote this letter after PW2 had reported the matter to the police.

The defendant further agreed that by applying to legalise the plot, he was illegally on the property. He stated that he had measured the plot when he wrote the letter to the Council. The defendant when referred to the inspection report from the Council over the property, which is at page 9 of the defendant's bundle of documents, agreed that it states that the

plot was being created in front of some plots. He could however not say whether the persons on those plots were consulted.

The defendant also agreed that the report does not state that he was recommended for the plot, and that only one letter was written to the Commissioner of Lands by the Town Clerk, requesting that the plot be numbered. He further agreed that page 16 of his bundle of documents was the stop notice that the Acting Director of Planning Muchimba M. Maambo signed on 22nd November, 2018.

The defendant when referred to the memorandum at page 11 of his bundle of documents, dated 10th October, 2018, and authored by the Acting Director of City Planning Mchimba Maambo, agreed that the signature on that document was different from the one at page 16 of the same bundle of documents. He could not say if someone was generating documents on behalf of the Council, but he denied having generated the proposed legalization of the plot at page 13 of his bundle of documents, stating that he got it from the Council, and that it was generated on 11th October, 2018.

The defendant agreed that the shaded area on the plot will be on Lumumba road. The defendant also agreed that the poster for the Lusaka City Council at page 1 of his bundle of documents does not state that it is on Lumumba road.

Richard Kapulo was DW2. His testimony was that he was in charge of market administration at Buseko Market. He told the court that he had known the plaintiff from 2002 as a timber trader at Buseko market. His evidence was also that the plot in dispute had been a dumping site from 2002 by residents of Emmasdale, traders at Buseko market and passers'

by. DW2 testified that the Lusaka City Council had been spending money to dispose of the waste that was being dumped at the site, and that it was an eye sore. He added that when the Council had no money to dispose of the waste, the traders at Buseko Market were engaged to contribute towards the same.

DW2 still in his testimony told the court that the Lusaka City Council, the Environmental Management Agency and health inspectors held meetings over the dumping site, and DW2 as the person responsible for the area was questioned. The meetings resolved that a person who would be responsible for the area should be found, and clean it up, so that spending money on removal of the garbage could be avoided.

He testified that a letter was written to the Town Clerk requesting the stakeholders to clean up the area, and that activities be put up there to stop the indiscriminate disposal of waste. The defendant then requested DW2's office if he could use the property, and DW2 had no objection. It was DW2's evidence that he advised the defendant to apply to the Council so that he could occupy the property.

That when the defendant applied, DW2 engaged the residents near the area, and when there was a cholera outbreak which affected the market, the defence personnel cleaned up the area. He concluded his testimony by stating that the City Planning Department and the Ministry of Lands went to the site to determine the extent of the buffer zone.

DW2 in cross examination denied that he was area Councillor as deposed to by the defendant in the affidavit in opposition to the summons for an order of injunction. He agreed that the Council advertises land before it is offered to members of the public, and that in

this case, there was no such advert. He further agreed that the Council recommends applicants to the Ministry of Lands. DW2 also agreed that the Ministry of Lands numbers properties. While testifying that he was not aware that the Council issued a stop order against the defendant, DW2 stated that if the Council offered the place, it could not issue a stop order.

The last witness called by the defence was Robson Banda, a Town Planner with the Lusaka City Council. DW3 testified that amongst his duties, is to issue enforcement notices for illegal developments, create lay out and development plans for the Council, to facilitate the numbering of produced lay out plans, and perform development control. He told the court that he joined the Lusaka City Council after he was transferred from Chongwe Municipal Council in December, 2018.

On how plots are given out, DW3 testified that the City Planning Department facilitates the creation of plots and advertises the plots to the general public, after the plots are created and numbered. He told the court that a Committee called the Planning Management and Information Systems (PMIS) looks at planning related issues, and it rejects and approves applications for plots. That the Committee takes those items to the full Council meeting which ratifies the Committees' resolutions.

With regard to this matter, DW3's evidence was that the defendant applied for the regularization of a plot that is opposite Buseko Market along Lumumba road to the Council. Upon receipt of the application which is at page 2 of the defendant's bundle of documents, officers were assigned to go and inspect the land and generate a report. Thereafter a recommendation was made to the PMIS to regularize the plot, and the PMIS approved the regularization after the plot was toured.

He stated that PMIS made a recommendation for the regularization of the plot to the full Council meeting, which ratified the regularization. He stated that page 3 of the defendant's bundle of documents was an extract of the minutes of PMIS, and at page 4 was the recommendation on the second item. DW3's testimony was that after the full Council meeting ratified the regularization, the matter went to the Planning Department which was instructed to inform the defendant, as the applicant, of the Council's decision.

DW3 told the court that the land was not advertised, and he explained that in giving out land, there are new creations and in fills. He testified that for new creations, the plots are advertised, while for in fills, they are not advertised as they come about as there is already a development plan for a particular area. He added that where a vacant plot is identified, applications are made to the Council, and the City Planning Department will inspect the land, and depending on the outcome of the inspection, a report is made to the Planning Committee.

It was further DW3's evidence that with regard to applications for regularization, such as the one that the defendant had made, it entails that a person occupied the land without the Council's permission. They thus seek permission from the Council, and that when such an application is received, the Council inspects the property, and generates a report. That in this case, after the defendant made the application for regularization, an inspection of the property was done, and a report was generated to the Planning Committee.

DW3 identified page 13 of the defendant's bundle of documents as the lay out plan, showing the plots along Lumumba road, and that it was stamped by the Lusaka City Council. He testified that this document

along with other supporting documents is sent to the Ministry of Lands. His evidence was further that on the diagram, the defendant's plot is shaded, and it is not encroaching on any plot. DW3 stated that it is a proposed plot, as it was not there on the lay out plan.

DW3 in cross examination agreed that for one to seek regularization of a plot, they are illegally on a property. That to his knowledge, there was no enforcement notice that was issued against the defendant. He agreed that the defendant as seen in the letter at page 2 of his bundle of documents, had measured the plot, but DW3 did not know where the defendant got the measurements from.

He agreed that the purpose of an advertisement is invite applications, as well as to enable those who have complaints to table them. DW3 told the court that he was aware of the 1985 guidelines on land allocation, and his evidence was that the Council follows them, but not exclusively. He however agreed that the 1985 guidelines do not distinguish between new creations and in fills.

It was also his evidence that the land in question was previously owned by Zambia Railways. While agreeing that the contracts of sale at pages 11 and 15 of the plaintiff's bundle of documents relate to house numbers 33 and 34, DW3 when referred to the proposed plan at page 13 of the defendant's bundle of documents testified that he could not see house numbers 33 and 34 on them. He added that what were on the proposed plan, were stand numbers. DW3 agreed that the shaded area, and not the other plots will be on Lumumba road.

DW3 also agreed that the letter at page 8 of the defendant's bundle of documents does not state that the defendant was being recommended to

be allocated the property. He further agreed that at page 10 of the defendant's bundle of documents was the inspection report for the property, which states that a storeroom had been constructed and shops were under construction when the enforcement notice was issued on 22nd November, 2018.

He agreed that an enforcement notice is issued to stop illegal development. DW3 also agreed that his department produced the report that was presented to the PMIS, and that the minutes of the meeting of the PMIS at page 3 of the defendant's bundle of documents are dated 13th February, 2018. He agreed that at page 9 of the said bundle of documents, the report states that the inspection was done on 22nd November, 2018. That according to the documents, the meeting of the PMIS took place earlier than the inspection.

Still in cross examination, DW3 agreed that the report does not state whether the neighbours were engaged when the inspection was done. DW3 was not aware that the owner of House No 34 had complained to the police over the encroachment, and that the report was silent on that issue.

He agreed that the contract of sale at page 16 of the plaintiff's bundle of documents states that the property was sold subject to a survey of the premises being done. That to DW3's knowledge, the Council did not engage Zambia Railways when the inspection of the property was done.

I have considered the evidence and the submissions that were filed by the parties. It is not in dispute that the plaintiff bought the properties known as House No 33 and 34 Lumumba Road in Lusaka, which are houses that were formerly owned by Zambia Railways. It is also not in

contention that the defendant occupied, and later applied for the regularization of the land which is in front of House numbers 33 and 34 Lumumba road. The question is whether the plaintiff is entitled to the reliefs sought?

The first claim is for damages for anxiety and mental anguish. The defendant in his submissions, with regard to the burden of proof in civil matters, cited the case of ***Galaunia Farms Limited v National Milling Company Limited and National Milling Corporation Limited*** ⁽³⁾ which held that;

“A plaintiff must prove his case and if he fails to do so, the mere failure of the opponents defence does not entitle him to judgment”.

Further reliance was placed on the case of ***Zambia Railways Limited v Pauline S Mundia, Brian Sialumba*** ⁽⁶⁾ where it was stated that;

“In the appeal before us, we are dealing with a civil case and not a criminal case. The standard of proof in a civil case is not as rigorous as the one obtaining in a criminal case. Simply stated, the proof required is on a balance of probability “as opposed to beyond all reasonable doubt in a criminal case”. The old adage is true that he who assents a claim in a civil trial must prove on a balance of probability that the other party is liable”.

Also relied on, in this regard, was the case of ***Energovest Limited and another v Bank of Zambia and the Attorney General*** ⁽⁸⁾ and paragraph 4-01 at page 50 of ***Phipson on Evidence, 1990 14th edition, Sweet & Maxwell***. The defendant submitted that the plaintiff had not

adduced any evidence to show that he is entitled to damages for mental anguish and anxiety due to the defendant's occupation and activities on the land.

That the defendant produced a lay out plan from the Lusaka City Council which shows that the land that the defendant is in occupation of has no encumbrances. The defendant also referred to the regulations under the **Urban and Regional Planning Act, No 3 of 2015** which empowers planning authorities to control all levels of urban and regional planning and ensure uniformity in the law, with Section 71 being cited as providing a penalty for failure to comply with the Act.

It was also the defendant's submission that Sections 64-70 of the **Urban and Regional Planning Act** provide for the procedure to be followed where there is breach of the planning regulations, which power is vested in the planning authority, and not individuals. Therefore, the plaintiff has no locus standi in this matter.

The plaintiff on the other hand argued that he has proprietary rights as the two properties that he bought were to be surveyed, so that individual title deeds could be issued for the properties. However, no title had yet been issued, but the properties were properly described. Reliance was placed on the case of **Hildah Ngosi (suing as administrator of the estate of the late Washington Ngosi) v the Attorney General, Lutheran Mission (Zambia) Registered Trustees** ⁽⁹⁾ where the late Washington Ngosi was given the land by South End Properties in appreciation of his services.

He died without having registered his interest in the land, and it was held that the plaintiff had an inchoate interest in the land, which is

defined in *Black's Law Dictionary, 9th Edition* as ***a property interest that has not yet vested***", as the late Washington Ngosi had a property interest that was yet to vest, but had not done so, for want of registration.

At the trial, the plaintiff did not lead any evidence to establish the basis of this claim, and neither was this claim addressed in the submissions that were filed. While the defendant argued that it is only the planning authority that has powers pursuant to the ***Urban and Regional Planning Act No 3 of 2015*** to ensure compliance with the planning regulations under the Act, and not an individual, the plaintiff bought the properties known as House No 33 and 34 Lumumba, and he alleges that the defendant is in occupation of part of that land.

He therefore has interest in the two properties, and while he has no power to enforce the regulations under the ***Urban and Regional Planning Act***, he has a right to ensure that there is compliance with the provisions under the Act, so that his properties are not affected. To that extent, he has locus standi. However, as already seen, the plaintiff did not adduce any evidence to establish the claim for damages for mental anguish and anxiety, and that claim will fail.

The next claim is for an order that the occupation and activities on the land by the defendant is not in compliance with planning stipulations and they should therefore be declared void ab initio. The evidence on record is that the two properties, number 33 and 34 Lumumba Road belonged to Zambia Railways who sold them to its employees.

The plaintiff submitted that it is common ground that the defendant occupied the land illegally, and he later applied to have his occupation of

the land regularized. That is why an enforcement notice which is at page 10 of his bundle of documents was issued. The plaintiff also contends that there was no advertisement of the land by the Council, as required by the Land Circular No 1 of 1985. Further, there was no recommendation by the Council to the Commissioner of Lands, nor a letter of offer of the land to the defendant from the Commissioner of Lands.

It was also submitted that the letter at page 9 of the defendant's bundle of documents shows that the letter that the Town Clerk wrote to Commissioner of Lands at page 8 of the said bundle of documents was a request to number the plot. Further, that the defendant had testified in the affidavit in opposition to the application for an order of injunction that the Councillor allowed him to occupy the land, but in his evidence in Court, he testified that it was the Market Master who approached him to occupy the land.

The plaintiff contended that this evidence was contradictory, and the weight to be attached to this evidence is reduced. As authority for this proposition, the case of ***Tobacco Association of Zambia v Kayanje Farming Limited and other*** ⁽⁷⁾ was relied on where it was held;

“That once a witness is shown to be untruthful in very material respect, their evidence can carry very little weight”.

That as to how the defendant occupied the land is material, and he was untruthful on the same, and his evidence should carry very little weight. While the plaintiff in the submissions agreed that he has no certificate of title to the two properties, he relied on the case of Hilda Ngosi to argue that the previous owners of the properties had contracts of sale, and

their rights to the land had crystallised. Therefore, the fact that no certificates of title have been issued for the two properties does not affect his claim to the land, and he therefore has a right to sue over the land.

With regard to the allocation of land, the case of ***Cetina Transport v Commissioner of Lands*** ⁽²⁾ was relied on, where the Supreme Court stated that the provisions of the Lands Circular No 1 of 1985 must be strictly adhered to. That as the Council in this case did not make any recommendation to the Commissioner of Lands for the offer of the property to the defendant, the plaintiff could not see how the defendant was allocated the land.

Therefore, the plaintiff's position was that there is no distinction when it comes to advertising, and thus all pieces of land must be advertised by the Council. That the defendant applied for the land through the Council when it had never been advertised. Reliance was placed on the case of ***Justin Chansa v Lusaka City Council*** ⁽⁴⁾ where it was stated that;

'It is beyond dispute that 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. As per Circular Number 1 of 1985, an applicant in Lusaka has an option either to apply directly to the Commissioner of Lands or to apply through the respondent who has been delegated powers to receive applications for land allocation from members of the public. It is also clear from the evidence that, where a member of public opts for the second route, the respondent is only mandated, firstly, to advertise any land available; secondly, to receive applications from members of the public;

and thirdly, to make recommendations to the Commissioner of Lands. The powers to allocate land and make an offer to successful applicants still remains in the Commissioner of Lands. The respondent only makes recommendation to the Commissioner of Lands. The Commissioner of Lands after receiving these recommendations from the respondents has the discretion to either accept or reject the recommendations made by the respondent”.

That the holding in that case was adopted in the case of ***Saidi Chibwana and Lynn Baines v Marian Mutinta Chitauka (suing as administrator of the estate of the late Hachaabwa Chitauka*** ⁽¹¹⁾. The plaintiff submitted that the law does not differentiate the procedure for particular land, but that Circular No 1 of 1985 must be complied with by the Council. It was also the plaintiff's submission that even if the court were to agree that the Council made a recommendation to the Commissioner of Lands that the defendant be allocated the land, the defendant's claim could only have been bona fide if the Commissioner of Lands had offered him the land. However, there is no such evidence on record.

Thus, the defendant does not have a vested interest in the property upon which he can challenge the plaintiff. It was also submitted that compliance with the procedure to allocate land is important, as in the case of ***Silas Ngowani, Chilufya Lawrence, Chitalu Joyce, Teweshe Matelo, Mutinta Dominic, Longwani Davy and Machona Moses v Flamingo Farms Limited*** ⁽¹²⁾, the court stated that;

“Other transgressions of the law such as circumvention of the procedure prescribed in the law, which would render null and void the allocation of land, would be just as fatal”.

That the court in that matter stated that the appellant did not have to plead and prove fraud to succeed on an action premised to on failure to follow procedure, as failure to follow procedure, renders the whole land acquisition process null and void.

The defendant in the submissions stated that pursuant to Section 33 of the ***Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia***, a certificate of title is conclusive evidence of ownership of property, and this position was reaffirmed in the case of ***Anti Corruption Commission v Barnnet Development Corporation Limited*** ⁽⁵⁾.

The defendant submitted that every certificate of title has a diagram annexed to it, which describes the property, and he also relied on Section 2 of the Land Survey Act, Chapter 188 of the Laws of Zambia which defines a diagram as;

“diagram” means a document containing geometrical, numerical and verbal representations of one or more parcels of land, the boundaries of which have been surveyed by a land surveyor, and which document has been signed by such surveyor or which has been certified by a Government surveyor as having been compiled from approved records of a survey or surveys carried out by one or more land surveyors, and includes any such document which, at any time prior to the commencement of this Act, has been accepted as a

diagram in the Registry or in the office of the Surveyor-General or his predecessors;

That as the plaintiff has not produced any diagrams or certificate of title, sketch plan or lay out plan to show that the land that the defendant occupies forms part of his land, he has not proved his case. It was also submitted that the plaintiff did not call any witnesses from Zambia Railways to give accurate evidence as to the boundaries of the properties, but the defendant had by the lay out plan that was submitted, shown the actual boundaries of the properties, which show that he is not in occupation of the plaintiff's land.

Further, the defendant had applied to the Council to regularize his occupation of the property, and the Council approved the same. The defendant also submitted that the Lusaka City Council has authority to administer and allocate land for and on behalf of the Commissioner of Lands in line with the Administrative Circular No 1 of 1985. That under paragraph 4 of that Circular, it states that the planning of stands shall be the responsibility of the appropriate planning authority of the area concerned, and that planning authority shall submit the approved play out plans to the Commissioner of Lands for scrutiny as to the availability of the land.

It was the defendant's submission that the evidence on record shows that after the defendant applied for the regularization of the land, the City Planning Department toured the land and recommended to the Commissioner of Lands that the property be numbered, as seen in the letter at page 8 of the defendant's bundle of documents, which attached seven copies of the approved plan for numbering.

that the property was sold subject to survey of the premises and subdivision.

Therefore, PW2's evidence that the houses in issue are housed on a mother title for Zambia Railways carries weight. That being the case, there must be a lay out plan for the area housing the properties. The defendant relied on the proposed lay out plan at page 13 of the defendant's bundle of documents to show that it reflects the plots in the area, and that this document shows that the land that the plaintiff occupies is free of any encumbrances.

A perusal of this proposed site plan shows that indeed it has a date stamp from the Council, entailing that it has the blessings of the Council. However, the document has short comings in that it refers to Stand numbers as opposed to the house numbers that are indicated on the contracts of sale that Zambia Railways executed with its employees. Further there is no indication of what land use the land sought to be regularized to the plaintiff was, that is whether it is buffer zone as alleged or anything such as a road reserve.

It is therefore not clear whether the land which the defendant occupies forms part of the plaintiff's land, which is yet to be surveyed, or what its use is, and whether there was need for the Council to replan it before it was offered to anyone. It is clear from the evidence that while DW3 testified that procedure was followed to offer the defendant the property, this is not true.

I say so because when one goes to page report that was presented to PMIS, which is at pages 3-7 of the defendant's bundle of documents, they will note that page 3 shows that the meeting was held on Wednesday 13th

February, 2018, but the report at page 9 shows that the inspection of the property was done on 22nd November, 2018.

What this reveals is that the inspection of the property was done after the Committee had recommended regularization of the property, which flew in the teeth of the evidence given by DW3, that before any recommendation for regularization of any property is made, the City Planning Department inspects the property to determine the suitability of the land.

Further irregularities are seen at page 8 of the defendant's bundle of documents which is letter that the Town Clerk wrote to the Commissioner of Lands dated 10th October, 2018 advising that the PMIS on 13th February, 2018 approved the regularization of the property, which was ratified by the full Council meeting, and the approved plan was being submitted for numbering.

Then there is the argument by the plaintiff that all land offered by the Council must be advertised as stipulated in Circular no 1 of 1985. The said Circular provides as follows in paragraph 4 B (ii) (iii) and (iv);

“4. Accordingly, the following procedures have been laid down and it will be appreciated if you shall ensure that the provisions of this circular are strictly adhered to.

B. ALLOCATION OF STANDS

(ii) Before stands are recommended, the District Council concerned may advertise them in the national press inviting prospective developers to make applications to the District Council in the form appended hereto and numbered as Annexure A.

(iii) On receipt of the application, the District Council concerned shall proceed to select the most suitable applicants for the stands and make its recommendations in writing to the Commissioner of Lands giving reasons in support of the recommendations in any case where there may have been more than one applicant for many particular stands, or where an applicant is recommended for more than one stand.

(iv) On receipt of the recommendation(s) from the District Council(s), the Commissioner of Lands shall consider such recommendation(s) and may make an offer to the successful applicant(s), sending copies of such offer(s) to the District Council(s) concerned.

In the case of *Yengwe Farms Limited and Masstock Zambia Limited, the Commissioner of Lands and the Attorney General* ⁽¹⁾, the Supreme Court stated that;

“This circular is intended to lay down general guidelines on the procedure which all the District Councils are expected to follow in the administration and allocation of land.”

The case of *Silas Ngowani, Chilufya Lawrence, Chitalu Joyce, Teweshe Matelo, Mutinta Dominic, Longwani Davy and Machona Moses v Flamingo Farms Limited* ⁽¹²⁾ dealt with the issue of failure to consult persons claiming rights to land held under customary tenure before alienating it, and obtaining the consent of the Chief before land held under customary tenure is converted into statutory tenure. It did not deal with the advertisement of land by a local authority before it is given out to members of the public.

It can be seen from Circular No 1 of 1985 that advertisement of land by the Council is discretionary as the Circular uses the word "may", but the recommendation for offer of land to the Commissioner of Lands by the Council is mandatory, as the word "shall" is used. In this matter, the letter at page 8 of the defendant's bundle of documents is a recommendation to the Commissioner of Lands to number the property, and it is not a letter of offer.

There is no evidence on record to show whether the Commissioner of Lands has in fact approved the numbering of the property. What is clear, is that the defendant has not been offered the property. He therefore has no interest in the property, and he cannot claim ownership of it. As this piece of land has not been offered to the defendant his occupation of the land is illegal, as well as the activities that he is carrying thereon.

The plaintiff succeeds on that claim, and the defendant is accordingly directed to forthwith vacate the said land. It is also important to state that in order for the plaintiff to secure his rights to the property, he should ensure that the properties are surveyed, and certificates of title obtained, as a certificate of title is proof of ownership. The plaintiff having succeeded, he is awarded costs of the action, to be taxed in default of agreement. Leave to appeal is granted.

DATED AT LUSAKA THIS 28th DAY OF JANUARY, 2020

kaunda

S. KAUNDA NEWA
HIGH COURT JUDGE