

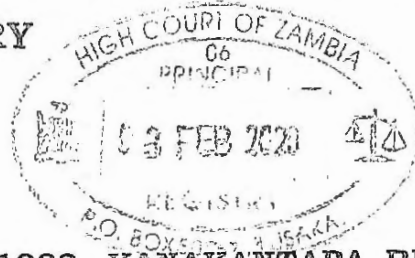
IN THE HIGH COURT FOR ZAMBIA

2015/HP/628

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)



IN THE MATTER OF: PLOT 1083, KANAKANTAPA RESSETTLEMENT SCHEME

BETWEEN:

<b>KELVIN CHOOMA</b>	<b>PLAINTIFF</b>
<b>AND</b>	
<b>TAMALA TONGA</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>BERNARD MWANSA</b>	<b>2<sup>ND</sup> DEFENDANT</b>
<b>ATTORNEY GENERAL</b>	<b>3<sup>RD</sup> DEFENDANT</b>

**BEFORE THE HONOURABLE LADY JUSTICE P. K. YANGAILO, IN OPEN COURT, ON 3<sup>RD</sup> FEBRUARY, 2020.**

*For the Plaintiff:* Mr. C. Siatwinda - Messrs. Legal Aid Board

*For the 1<sup>st</sup> Defendant:* Mr. P. Songolo & Ms. M. Masabo - Messrs. Philsong & Partners.

*For the 2<sup>nd</sup> Defendant:* Ms. G. C. Chilekwa - Messrs. AB & David

*For the 3<sup>rd</sup> Defendant:* N/A

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## JUDGMENT

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**CASE AUTHORITIES REFERRED TO:**

1. *Sableland Zambia Limited vs. Zambia Revenue Authority (2005) ZR 109;*

2. *Christine Malosa Banda vs. Copperbelt Energy Corporation and 2 Others (2013) Appeal Number 187;*
3. *Sithole vs. The State Lotteries Board (1975) ZR 106;*
4. *Galaunia Farms Ltd vs. National Milling Company Limited and National Milling Corporation Ltd [2004] ZR 1;*
5. *Anti-Corruption Commission vs. Barnnet Development Corporation Limited (2008) Vol.1 Z.R. 69;*
6. *Collum Coal Mining Industries Limited vs. Frontline Financial Services Limited and Others - CAZ Appeal No. 55 of 2019;*
7. *Base Chemicals Zambia Limited, Mazzonites Limited vs. Zambia Air Force, The Attorney General - S.C.Z. Judgment No. 9 of 2011; and*
8. *Wesley Mulungushi vs. Catherine Bwale Mizi Chomba (2004) Z.R. 96 (S.C.).*

**LEGISLATION AND OTHER WORKS:**

1. *The Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia; and*
2. *Bryan. A. Garner, Black's Law Dictionary, 10<sup>th</sup> Edition, Thomson and Reuters 2009.*

The Plaintiff initially commenced this action by way of Originating Summons dated 29<sup>th</sup> April, 2015. By order of Court, the matter was deemed as though it was began by way of Writ of Summons and Statement of Claim and proceeded as such. The Plaintiff claimed the following reliefs against the Defendants namely: -

- i. *A declaration that the Plaintiff is the lawful and rightful owner of Lot 1083 Kanakantapa Resettlement Scheme;*
- ii. *A finding and an order that the 1<sup>st</sup> Defendant was fraudulently issued the certificate of Title for Lot 1083 Kanakantapa Resettlement Scheme;*

- iii. *An order cancelling the certificate of title issued to the 1<sup>st</sup> Defendant in respect of Lot Kanakantapa Resettlement Scheme;*
- iv. *An order that any purported sale of Lot 1083 Kanakantapa Resettlement Scheme by the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant is null and void;*
- v. *An Order directing the 3<sup>rd</sup> Defendant not to issue a Certificate of Title to the 2<sup>nd</sup> Defendant;*
- vi. *An Order that the caveat placed on Lot 1083 Kanakantapa Resettlement Scheme by the 2<sup>nd</sup> Defendant be removed;*
- vii. *An Order directing the 3<sup>rd</sup> Defendant to issue a Certificate of Title in respect of Lot 1083 to the Plaintiff;*
- viii. *An Order for possession and demolition of the illegal structures and/or developments put by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants on the said piece of land;*
- ix. *An injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants from effecting further developments on the said piece of land;*
- x. *Any other relief the Court may deem fit and just; and*
- xi. *Costs of and incidental to this action.*

The Plaintiff's case as set out in the Affidavit in Support of Originating Summons was that sometime in 2002, the Plaintiff applied to the Land Resettlement Committee (hereinafter referred to as 'the Committee') under the Kanakantapa Resettlement Scheme (hereinafter referred to as 'the Scheme') to be allocated Lot 1083 situated in Chongwe District of the Lusaka Province of the Republic of Zambia.

On 18<sup>th</sup> July 2002, the Director of Resettlement wrote to the Plaintiff informing him that the Committee had approved his application in relation to the land in question. Following the approval, the Plaintiff applied to the committee to allow him acquire a Certificate of Title in relation to Lot 1083 in Kanakantapa Resettlement Scheme. The application was approved on 8<sup>th</sup> August 2003.

On 1<sup>st</sup> September 2003, the Scheme Manager wrote to the Commissioner of Lands recommending that the Plaintiff be issued a Certificate of Title. According to the Plaintiff, it came to his knowledge that the 1<sup>st</sup> Defendant was claiming ownership of the said Lot and that she had acquired title to that effect.

The Plaintiff stated that he became suspicious over the manner in which the 1<sup>st</sup> Defendant had acquired the said Certificate of Title and reported the matter to the Anti-Corruption Commission (ACC).

Investigations were carried out by ACC regarding the manner in which the 1<sup>st</sup> Defendant obtained title. The investigations revealed that the 1<sup>st</sup> Defendant was offered the said Lot earlier by the then Scheme Manager, Mr. R.K Yona, without the authority of the Committee. Further, that ACC also established that the Directorate of Resettlement denied having regularly offered the said Lot to the 1<sup>st</sup> Defendant. In addition, that it was the finding of ACC that as per the Department of Resettlement's guidelines, the Committee undertook settler selection based on applications submitted to the

Scheme and that there was no Committee approval offering the said Lot to the 1<sup>st</sup> Defendant.

It was stated that according to the said guidelines, the targets for land allocation in the area in question was the unemployed, retired, retrenched, workers on contracts, classified Daily Employees, displaced persons, vulnerable or disabled persons and public workers who are 51 years old or are within 4 years before retirement.

The Plaintiff averred that ACC established that at the time the 1<sup>st</sup> Defendant was purportedly offered the said Lot, she was a member of staff at the University of Zambia and therefore did not qualify to acquire land in the said Resettlement Scheme.

The Plaintiff alleged that the 1<sup>st</sup> Defendant has since sold the said Lot to the 2<sup>nd</sup> Defendant, although he is yet to obtain title in his name.

The 1<sup>st</sup> Defendant refuted the allegations by the Plaintiff and averred that sometime in the year 2000, one of her former students Mr. John Lungu introduced her to the Kanakantapa Resettlement Scheme Administration where she met the then Scheme Manager, Mr. R. K. Yona.

In the same year, the 1<sup>st</sup> Defendant expressed interest in a farm on virgin Land that was yet to be allocated to anyone. She was advised to apply for the said land by Mr. Yona. The 1<sup>st</sup> Defendant proceeded to clear the land and began agricultural activities by planting maize

and beans in the first season and followed this with bananas after which she dug a well. She proceeded to carry out these activities prior to making an official application for the land.

In January 2002, following information that the Scheme was now receiving applications for land in the area from interested members of the public, she proceeded to make the application by filling out Form DR1. She applied for the land she was already occupying. She submitted her application to the Scheme Management for consideration.

On 3<sup>rd</sup> January, 2003, under reference No. DR/KANA/3/28/1, the Scheme wrote to the Commissioner of Lands informing him that the small holding Numbered Lot 1083 Kanakantapa was in the 1<sup>st</sup> Defendant's possession who had already developed it and that the Scheme was recommending that she be issued title in relation to the said property. Consequently, the 1<sup>st</sup> Defendant was issued Certificate of Title No. 20671 in August, 2003.

It was alleged that at the time the Scheme is said to have recommended the Plaintiff's acquisition of title by letter dated 1<sup>st</sup> September, 2003, with reference number DR/KANA3/2/2, the 1<sup>st</sup> Defendant had already obtained her recommendation letter and title. According to the 1<sup>st</sup> Defendant, she legitimately and lawfully acquired Lot 1083 Kanakantapa.

The 1<sup>st</sup> Defendant maintained that she was in occupation of the land in question in the year 2000. Further, that had the Plaintiff

conducted any due diligence before submitting his application for Lot 1083 Kanakantapa, he would have discovered the 1<sup>st</sup> Defendant's interest in the property especially that she had been cultivating on the land and had built a well.

The 1<sup>st</sup> Defendant alleged that the letter dated 18<sup>th</sup> July, 2002, that purportedly offered Lot 1083 Kanakantapa to the Plaintiff makes no reference to Lot 1083 Kanakantapa and refers to another piece of land that the Plaintiff owns in Kanakantapa area. Further, that the Plaintiff has, for some time, been trying to extend his own farm which farm bordered hers so that it could include the 1<sup>st</sup> Defendant's Lot 1083 Kanakantapa. She eventually sold the land to the 2<sup>nd</sup> Defendant.

According to the 1<sup>st</sup> Defendant the reference number for the letter dated 18<sup>th</sup> July, 2002, namely DR/101/7/15/5 is different from the reference number appearing on the Plaintiff's own recommendation letter relating to Lot 1083 Kanakantapa.

The 1<sup>st</sup> Defendant averred that as an outsider, she was not aware of any guidelines or criteria that the Kanakantapa Resettlement Scheme had put in place for consideration of applicants and that all she was told by the Scheme Management was to apply for the land by filling in form DR 1 which she did. Further, that although the Plaintiff has alleged fraud he has not availed any specific particulars of the same. She went on to state that although she was interviewed by ACC concerning Lot 1083 Kanakantapa she never heard anything from the Commission regarding the outcome

of their investigations or indeed that any officer was prosecuted for fraud. She has only learnt of the allegations of fraud after this action was commenced.

The 1<sup>st</sup> Defendant averred that she was first to be recommended for acquisition of title in January 2003, while the Plaintiff's recommendation to the commissioner of Lands was made later in September 2003; after the 1<sup>st</sup> Defendant had already obtained title on 28<sup>th</sup> August, 2003.

The 1<sup>st</sup> Defendant urged the Court to dismiss the Plaintiff's claims and maintained that she was the legal owner of Lot No. 1083 Kanakantapa, which she later sold to the 2<sup>nd</sup> Defendant.

The 2<sup>nd</sup> Defendant averred that sometime in 2007, he discussed the possibility of buying the 1<sup>st</sup> Defendant's farm with her. She availed the documentation in relation to Lot 1083 including the Certificate of Title. According to the 2<sup>nd</sup> Defendant, he verified the authenticity of the Certificate of Title with the Ministry of Lands and upon being satisfied that the 1<sup>st</sup> Defendant was the legal owner he agreed to purchase the land and a contract of sale was executed. It was agreed that the property would be sold at ZMW13,000.00.

The 2<sup>nd</sup> Defendant stated that he took possession of the land in mid-2008 and entrusted the property to a caretaker. He added that at the time of purchase of the property, the 1<sup>st</sup> Defendant had initiated some developments on the land. Further, that in early 2009, the Plaintiff began to harass the 2<sup>nd</sup> Defendant and his



employees on the said property by claiming that the farm belonged to him. In order to protect his interest in the said property, he placed a Caveat on Lot No. 1083 Kanakantapa, Chongwe in his capacity as a *bona fide* purchaser for value on 22<sup>nd</sup> September, 2009.

According to the 2<sup>nd</sup> Defendant, the Plaintiff thereafter instigated the Anti-Corruption Commission to interrogate him regarding the property in question. He added that the Plaintiff's unwarranted actions have deprived the 2<sup>nd</sup> Defendant of quiet possession of the land.

The 3<sup>rd</sup> Defendant settled a defence dated 17<sup>th</sup> February, 2016, wherein it was averred that the registered owner of the property in question is the 1<sup>st</sup> Defendant as per land register. Further, that the Commissioner of Lands could not have offered the Plaintiff the property in question in light of an already existing interest on the property. In addition, that the Commissioner of Lands cannot be compelled to offer the Plaintiff land neither could the Commissioner issue title in the Plaintiff's name.

In support of his case the Plaintiff called two witnesses. The Plaintiff, Kelvin Chooma, was PW1. He testified that following his retirement on medical grounds his father advised that he purchases land on which to settle and was advised to go to the Department of Land Resettlement. When the Director at the Land Resettlement area indicated that there was land in Kanakantapa which was about to be demarcated, PW1 informed him that in fact his father

was settled there after which the Director indicated that he would be offered land that was close to his parents as he was wheel chair bound following an accident that led to his retirement.

It was PW1's testimony that he applied for land and was informed in June 2002, that the committee had allocated him Lot 1083, Kanakantapa J - Extension. In August 2002, he received an offer letter. When he went to check on the land that was allocated, he discovered that it was occupied by someone claiming to be the owner. He added that attempts to meet the person who had occupied the land proved futile prompting him to write a letter of complaint to the Scheme Management at Kanakantapa after which he was informed that the matter would be resolved. Later in 2003, he was called by the Scheme Manager who had written a letter recommending that he obtains title in relation to the land in question. When he pursued the matter with the Ministry of Lands he discovered that the land had already been on title in the name of the 1<sup>st</sup> Defendant.

PW1 told the Court that when he went back to the scheme he was informed that the 1<sup>st</sup> Defendant was not part of the list of persons whom the Scheme had allocated land. As a result of this continuing dispute regarding ownership of the property, PW1 reported the matter to the Anti-Corruption Commission. Investigations were concluded in 2009. He reported this development to the Director of the Resettlement Scheme who informed him that he had received correspondence from ACC

regarding the land in question together with their recommendations.

It was PW1's evidence that he eventually obtained the 2<sup>nd</sup> Defendant's number from the caretaker at the property and they agreed to meet. When the 2<sup>nd</sup> Defendant was shown the letter from ACC, he indicated that he had bought the property in question from the 1<sup>st</sup> Defendant. They agreed to meet the Director at the Resettlement on the same day. The Director indicated that the 1<sup>st</sup> Defendant was not known to the institution.

It was PW1's testimony that the ACC had recommended that the title obtained by the 1<sup>st</sup> Defendant be cancelled and title be issued in the name of the Plaintiff. Further, that when he followed up on the recommendation by ACC, he was informed that title could only be changed if the caveat placed by the 2<sup>nd</sup> Defendant was removed by way of a Court Order. He informed the Court that between 2009 and 2015, he could not commence Court action as he had no money to engage Counsel. He was advised to go to the Legal Aid Board in 2015.

PW1 urged the Court to order the cancellation of the 1<sup>st</sup> Defendant's title and a further order for the removal of the caveat placed by the 2<sup>nd</sup> Defendant. PW1, in addition, urged the Court to grant him all the reliefs that he sought.

Under cross examination, PW1 informed the Court that the offer letter to the 1<sup>st</sup> Defendant was issued earlier than his. He added

that while his offer letter was signed off by the Director of the Scheme, that of the 1<sup>st</sup> Defendant was authored by a Mr. Yona, the Scheme Manager. PW1 conceded that the Certificate of Title issued to the 1<sup>st</sup> Defendant was issued before the Scheme recommended that he be given land.

PW1 conceded that the title in question is in relation to Lot 1083, Kanakantapa while his offer letter makes reference to a property known as 3J Extension. He told the Court that ACC did not prosecute anyone for fraud regarding the land in question. Further, that he had written a letter to the Scheme Manager regarding the property although the same is not before Court. He conceded that the 1<sup>st</sup> Defendant had been occupying the land at the time he obtained his offer letter. Further, that he did not comply with the tenure agreement rules appearing at page 5 of the 1<sup>st</sup> Defendant's Bundle of Documents whilst the 1<sup>st</sup> Defendant did.

It was PW1's testimony that he did not want the land in question only because his father's land was next to it. He stated that he did not know whether or not the scheme had made a mistake in offering the land to him. He maintained that the title was obtained fraudulently because the procedure was not followed. Further, that his recommendation to obtain title was not fraudulent.

In re-examination, PW1 stated that he was not in a position to explain why the offer letter had the number '3J Extension' but that PW2 would be in a better position to explain. He added that there was no way he would have complied with the occupancy rules as

the property was occupied by someone else, otherwise he had complied with all the procedures with regard to obtaining an offer letter in relation to the property in question. Further, that he had lodged a complaint with the Scheme Manager and that when he received an offer letter in relation to the property he thought that the queries had been resolved. He denied having obtained the recommendation letter fraudulently as the Scheme's committee sat and recommended that he be offered the land in question.

PW2 was Mwenda Misael, a Scheme Manager at Kanakantapa Resettlement Scheme. He told the Court that he had been with the Scheme for 15 years. He explained to the Court that the Resettlement Scheme Program emphasised that the scheme is meant to assist the vulnerable citizens who cannot compete for land on the open market. He added that those in active employment are not considered for land allocation under the scheme as they are able to acquire land through other land agencies.

PW2 informed the Court that a person applying for land under the scheme ought to apply for land by filling out a Form (Form DR1). If the applicant qualifies, they are called to appear before the Kanakantapa Lands Allocation Committee which comprises several members including the Director who chairs the committee. If a person qualifies, the Scheme Manager who is the Secretary of the Committee, is instructed to prepare an offer letter which contains conditions which ought to be met by an applicant. Once an offer is made the offeree is expected to take occupation of the land and

adhere to the conditions of the occupation. When the conditions are met, there is a recommendation by the Director to the Ministry of Lands to obtain title. On the basis of the recommendation, the Ministry of Lands issues another offer letter and later a Certificate of Title.

PW2 told the Court that all the Scheme does is to ensure that the occupant occupies the land in line with objectives of the government policy. He went on to state that should the occupant wish to dispose off the land, they are at liberty to do so in compliance with procedures at the Ministry of Lands. Further, that the land can be sold to anyone outside the categories of persons mentioned earlier.

It was PW2's testimony that Lot 1083 is one of the properties in Kanakantapa managed by the Resettlement Scheme. Further, that the records show that Plot 1083 is an extension of 'J' Section which was initially referred to as 3J extension before the layout plan was submitted to the Ministry of Lands for numbering. It was then renumbered '1083' as no offer can be issued on an identification number.

It was PW2's testimony that when this matter came to his attention he checked through the files and discovered that the property in question was offered to the Plaintiff in 2002, although it referred to a property known as '3J Extension' at the time. Further, that he also found an invoice as proof of purchase of the application Form DR by the Plaintiff. In addition, that the form has a section filled

out by an official of the Scheme which indicates that the form had passed through the proper channels. He noted that the Plaintiff's form was properly filled out on this section.

It was PW2's evidence that at the office, he found all the documentation pertaining to the Plaintiff's application for land including the application form, recommendation letter and two complaint letters to the Scheme Manager with regard to the 1<sup>st</sup> Defendant's interference with the property in question. In a nutshell, PW2 maintained that the Plaintiff followed the proper channel when making his application for the land in dispute.

PW2 informed the Court that when he followed up on the land wrangles with regard to the land in question, he was informed by the then Director at the scheme, Mr. Manford Mulonga, that the matter had been reported to ACC. Further, that Mr. Mulonga told him that ACC had found that the 1<sup>st</sup> Defendant was illegally given title of the land in question. He added that he did not bring before Court the documentation with regard to Lot 1083 as he needed clearance to have them before Court.

It was PW2's testimony that upon inspection of the property in question he found a two roomed structure and a well. He added that he could not tell who the owner of the property was save for the fact that the records at his office indicated that the land belonged to the Plaintiff. He went on to state that inquiries from the neighbouring properties revealed that the people in the area had seen the 1<sup>st</sup> Defendant carry out developments on the property.

PW2 informed the Court that before one is offered land by the Committee he had to be shown the property and must commence developments within 18 months of the offer being given. Further, that there could be no assignment or subdivision without prior permission of the Director. He added that an offer will be null and void if it was not certified by the Director as per the conditions of the offer. He noted that the Plaintiff's offer letter was certified by the Director.

Under cross examination, PW2 maintained that he did not come with any documentation to support his claims as he did not have the requisite clearance and did not know that the documents would be required by the Court. He added that '3J Extension' refers to Lot 1083, although he could not prove his assertion in the absence of documents. He went on to state that the offer letter appearing at pages 4 to 6 of the 1<sup>st</sup> Defendant's Bundle of Documents is a genuine copy of the offer and only experts would be able to determine whether or not it was a forgery.

PW2 denied seeing the letter written by ACC to the commissioner of Lands. He maintained that there was no documentation at his office indicating that land was offered to the 1<sup>st</sup> Defendant. PW2 conceded that the 1<sup>st</sup> Defendant indeed applied for land as per Document DR1 appearing in her Bundle of Documents. Further, that the bottom of the application form was indorsed by Mr. Yona, the then Scheme Manager who was mandated to communicate with



all applicants. He conceded that Mr. Yona had indeed written an offer to the 1<sup>st</sup> Defendant.

PW2 informed the Court that the 1<sup>st</sup> Defendant could have been innocently offered the land in question if she followed the procedure he had earlier explained. He added that he was not present when the committee approved the 1<sup>st</sup> Defendant's offer. He expressed shock as to how one piece of land could be offered to more than one person. He added that the description of the properties on the offer letters seems different but a person familiar with the numbering system would know that they refer to the same property. He went on to state that it is possible for the allocating committee to have made an error.

It was PW2's evidence that he was informed about this dispute concerning the land sometime in 2008. He conceded that a search at Ministry of Lands revealed that the owner of the property was the 1<sup>st</sup> Defendant. He added that the letter from ACC does not show that the 1<sup>st</sup> Defendant had been prosecuted for fraud.

PW2 told the Court that applicants were normally called for interviews although he was not aware that the Plaintiff had been interviewed. He added that he made the visit to the land in question in 2008 and the neighbours informed him that the land belonged to the 1<sup>st</sup> Defendant.

It was PW2's evidence that the number '3J Extension' was on the layout plan for purposes of identification before the land is

numbered by the Surveyor General. He went on to state that the Resettlement Scheme can still make an offer on the basis of the identification number. He added that once a person was given a Certificate of Title they were at liberty to offer the land to anyone else. He maintained that the rules of the resettlement were such that only the vulnerable persons were offered land although he indicated that he did not have the said rules before Court. He however added that the said rules are strictly followed when offering land to individuals.

PW2 told the Court that he had been offered land in Kanakantapa owing to the fact that he was an officer facilitating the resettlement program and that the said land was not part of the resettlement area. He conceded that he did not have any documentation to support these assertions. He also conceded that there was no Form DR 1 filled out by the Plaintiff on record and the only Form DR 1 before the Court related to the 1<sup>st</sup> Defendant. Further, that the 1<sup>st</sup> Defendant was offered the land earlier than the Plaintiff and she has a Certificate of Title to that effect. He went on to state that with the title in place the 1<sup>st</sup> Defendant was at liberty to sell the land.

It was PW2's testimony that the Plaintiff did not develop the land in dispute.

In re-examination, PW2 stated that the Plaintiff did not develop the property as the 1<sup>st</sup> Defendant was in occupation of the land. He maintained that before the land is numbered it is given an identification number by the scheme hence '3J Extension' was later

renumbered as Lot 1083. He went on to state that the 1<sup>st</sup> Defendant's offer letter did not bear the Director's signature while the Plaintiff was allocated the land in question after verifying that the said land was not previously offered to anyone else.

It was PW2's testimony that the offer to the 1<sup>st</sup> Defendant was not sanctioned by the allocating committee thereby making the offer irregular. According to PW2, the Director is required to sign on all offer letters. PW2 stated that there is evidence that the Plaintiff applied through Form DR 1 but the same as well as the receipt are not before Court.

That marked the close of the Plaintiff's case.

The Defendants called 2 witnesses. DW1 was Tamala Tonga, the 1<sup>st</sup> Defendant herein. She told the Court that she is a Senior Lecturer at the University of Zambia and that it was her student who had introduced her to Mr. Yona sometime in the year 2000, after she had inquired if there was any farmland in Chongwe. She went on to state that the said Mr. Yona took her to the land in question which was bare land at the time and had not been allocated to anyone.

It was DW1's testimony that after showing interest in the land, she was asked to start farming activities as this was a condition that the Scheme followed before recommending that a person be offered the land on title. She went on to state that she started her farming activities and planted crops on the land. Later she built a well.

DW1 informed the Court that when the Scheme started receiving applications she made one by filling out Form DR 1, which application she made on 2<sup>nd</sup> January, 2002. She added that when she retrieved the form after the matter commenced through the 2<sup>nd</sup> Defendant she noticed that the date had been changed to '2003' by unknown persons. She added that sometime in 2003 she was informed by the then Scheme Manager that a recommendation letter was written to the Ministry of Lands so that she could be offered title.

It was the DW1's evidence that she had three neighbours, one of which was the Plaintiff's father who troubled her from time. She added that she obtained her title in August, 2003. Further, that she was therefore surprised when she realized that the same land was being recommended for issuance of title in September, 2003. She added that she noted that the said letter did not refer to Lot 1083.

It was DW1's testimony that she decided to sell the land in 2007 to the 2<sup>nd</sup> Defendant. In 2009, ACC invited her to their offices for an interview where she was asked how she acquired the land in question and why she sold it. She did not hear from ACC after the interview. Further, that she only saw the letter from ACC to the Ministry of Lands in the Plaintiff's Bundle of Documents. She maintained that the land could not have been referred to as '3J extension' at the time it was offered to the Plaintiff as it was already numbered Lot 1083 when she obtained her Certificate of Title.

Further, that the two letters of offer refer to two different files thus referring to different properties.

DW1 informed the Court that her application was regular and the correct procedure was followed. She denied having fraudulently obtained title in relation to the property in question. She urged the Court dismiss the Plaintiff's claims with costs.

Under cross examination, DW1 informed the Court that she was a youth and in formal employment when she occupied the land in 2000. Although at the time of her application in 2002 she was no longer a youth. She denied having fallen in the category of vulnerable persons at the time of her application.

It was DW1's testimony that she could not recall whether or not she had bought the application form as she did not have a receipt. She conceded that she did not go for any interviews following her application. She went on to state that she obtained documentation to support her case from the 2<sup>nd</sup> Defendant owing to the fact that she had sold the property to him and had submitted all documentation relating to the property to him.

DW1's evidence was that she did not follow up with ACC following the interview as it was incumbent on the institution to follow up with her. She added that she did not follow up on any of the findings made by the ACC as she only learnt of them after the matter was commenced. She maintained that she was never

charged for fraud. Further, that she followed all procedures required before obtaining title of the property in question.

It was DW1's evidence that she filled out the application form in 2002 but the date was altered to 2003. She maintained that at the time she first occupied the land it had already been numbered as Lot 1083. When asked why her recommendation letter had no file at the land Resettlement Scheme, DW1 stated that she was not privy to the internal affairs of the Scheme and only relied on communication from the Scheme Manager.

DW1 informed the Court that she did not report the interference made by the Plaintiff's father as she thought that the Plaintiff's father would stop with the interference.

This witness was not re-examined.

DW2 was the 2<sup>nd</sup> Defendant, Bernard Mwansa. He stated that he bought the property in question in 2007. He made the payment in two instalments, the last being in 2008. After purchasing the farm, he asked his brother to farm there before he could relocate. Shortly after purchasing the property he received a call from the Plaintiff who informed him that he was the owner of the property and the two arranged a meeting.

It was DW2's testimony that when he asked the Plaintiff what documentation he had in relation to the property he produced a piece of paper but did not have title. Following the meeting with the Plaintiff he went to verify the title at the Ministry of Lands and

found that the title belonged to the 1<sup>st</sup> Defendant. He added that following the meeting with the Plaintiff he decided to place a caveat on the property. He went on to state that he was summoned at ACC for an interview where he gave a statement.

Under cross examination he stated that he took steps to verify ownership of the land at Ministry of Lands. He added that after placing a caveat on the property he followed up the issue with the Scheme. At the Scheme, he had no access to the file as he was told that there was a dispute regarding the property.

DW2 told the Court that at the time he had made follow ups with the Scheme, the sale transaction with the 1<sup>st</sup> Defendant had already been concluded. DW2 conceded that before title is obtained certain procedures ought to be verified. He denied the fact that because he did not follow up with the Scheme before concluding the transaction he was not a *bona fide* purchaser.

In re-examination, he stated that if someone has title, the assumption is that all necessary procedures must have been followed.

The 3<sup>rd</sup> Defendant was not in attendance, despite being notified of the date of hearing and no reason was advanced for its absence. That marked the close of the defence by the Defendants. All the parties were given a time frame within which to file their written submissions.

Only the 1<sup>st</sup> Defendant filed into Court submissions, wherein it was argued that it is trite law that a Certificate of Title is conclusive evidence of ownership of land. To buttress this argument, I was referred to **Sections 33 and 54 of The Lands and Deeds Registry Act**<sup>1</sup>. **Section 33** specifically provides that: -

*"A Certificate of Title shall be conclusive as from the date of its issue and upon and after the issue thereof, notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the President or otherwise, which but for Parts III to VII might be held to be paramount or to have priority; the Registered Proprietor of the land comprised in such Certificate shall, except in case of fraud, hold the same subject only to such encumbrances, liens, estates or interests as may be shown by such Certificate of Title and any encumbrances, liens, estates or interests created after the issue of such Certificate as may be notified on the folium of the Register relating to such land but absolutely free from all other encumbrances, liens, estates or interests whatsoever."*

The 1<sup>st</sup> Defendant submitted that the Certificate of Title on record is conclusive evidence of ownership of the said land by the 1<sup>st</sup> Defendant. Further, that being the lawful owner of Lot No. 1083 Kanakantapa, the 1<sup>st</sup> Defendant lawfully sold the same to the 2<sup>nd</sup> Defendant on the 2<sup>nd</sup> of December 2007.

It was contended that despite the Plaintiff alleging that the title was fraudulently obtained, he did not lead evidence proving fraud and neither did he call any witnesses to prove the allegation to the requisite standard. The 1<sup>st</sup> Defendant contended that the record



does not show any evidence challenging the manner in which the Scheme or the Commissioner of Lands and his officers went about in issuing the said title deed to the 1<sup>st</sup> Defendant.

It was the 1<sup>st</sup> Defendant's submission that the Plaintiff did not, in the pleadings, set out the particulars of fraud to aid his case and put the 1<sup>st</sup> Defendant on alert as to the Plaintiff's case. I was referred to the definition of fraud as per *Black's Law Dictionary*<sup>2</sup>, as well as the Case of *Sableland Zambia Limited vs. Zambia Revenue Authority*<sup>1</sup>, where the Court discusses what constitutes fraud.

The 1<sup>st</sup> Defendant argued that there was no evidence led at trial by the Plaintiff regarding fraud and that general statements bordering on alleged unfairness do not constitute fraud at law.

It was contended that the 1<sup>st</sup> Defendant disclosed to the Committee through her application that she was a full-time member of staff of the University of Zambia who wanted to practice her profession on the land. Further, that it was the duty of the Scheme to assess whether or not the 1<sup>st</sup> Defendant qualified to be offered land in the area. The burden was never on the 1<sup>st</sup> Defendant to prove that she qualified. The land was subsequently offered to the 1<sup>st</sup> Defendant who later lawfully sold it to the 2<sup>nd</sup> Defendant after she had obtained her title. In addition, that the facts before the Court do not reveal fraud to warrant the Court's cancellation of her title.

The 1<sup>st</sup> Defendant argued that there was no evidence that was led that proved that the 1<sup>st</sup> Defendant was offered the land in question without involvement of the Land Resettlement Committee nor that the 1<sup>st</sup> Defendant was irregularly offered the said land. Further, that it is trite law that he who alleges must prove and secondly, that where fraud is alleged, a party wishing to rely on it must ensure that it is clearly and distinctly set out and that at the trial of the cause, the party alleging fraud must equally lead evidence to prove it. To support this argument, I was referred to the case of **Christine Malosa Banda vs. Copperbelt Energy Corporation and 2 Others**<sup>2</sup>. According to the 1<sup>st</sup> Defendant, the Plaintiff failed to prove fraud.

The 1<sup>st</sup> Defendant was of the view that the Court cannot infer fraud from the letter issued by the Anti Corruption Commission (ACC) dated 16<sup>th</sup> March 2009. Further, that the ACC did not make a finding of fraud in said letter. Secondly, the Plaintiff never bothered to call the author of the letter from the ACC or indeed any other officer from there to come before Court to present their report so that they too would be cross examined by the 1<sup>st</sup> Defendant. Further, that notwithstanding the letter from the ACC, the Commissioner of Lands still refused to cancel the 1<sup>st</sup> Defendants Certificate of Title. I was referred to the case of **Sithole vs. The State Lotteries Board**<sup>3</sup> where the Court discusses the standard of proof where fraud is alleged. The Court noted that to prove fraud, a party will require a higher degree of probability than that required in civil cases.

It was the 1<sup>st</sup> Defendant's contention that the Plaintiff failed to prove his case even on a mere balance of probabilities. Further, that Plaintiff did not even lead evidence to prove the alleged fraud at trial. I was referred to the case of *Galaunia Farms Ltd vs. National Milling Company Limited and National Milling Corporation Ltd*<sup>4</sup>, where the Court held that the burden to prove any allegation is on the one who alleges.

It was the 1<sup>st</sup> Defendant's contention that in the absence of the Plaintiff's application form supported by minutes of the Land Resettlement Committee sitting that allegedly decided in favour of the Plaintiff, it cannot be said on behalf of the Plaintiff that he followed the normal procedure for acquiring the land in the resettlement scheme. Further, contrary to the facts before Court, the Plaintiff's letter of recommendation addressed to the Commissioner of Lands and appearing on page 4 of the Plaintiffs Bundle of Documents states that the Plaintiff settled and "*developed the plot fulfilling the Resettlement requirements*" when the Plaintiff has never settled and developed the said land at all. This fact was admitted at trial.

It was submitted that the reference numbers on the letters that the Plaintiff produced at pages 1 - 4 of his Bundle of Documents do not correspond with each other and certainly do not relate to the file number that relates to the 1<sup>st</sup> Defendant's land. The 1<sup>st</sup> Defendant's reference number appears on page 3 of the 1<sup>st</sup> Defendant's Bundle of Documents. Further, that even assuming that the Plaintiff was

offered land in the area, the said land is different from the land issued to the 1<sup>st</sup> Defendant. The file and reference numbers for the Plaintiff's land are different from the file and reference numbers appearing on the 1<sup>st</sup> Defendant's letters.

The Court was urged to dismiss the Plaintiff's claims as he had failed to prove his case to the required standard.

I have considered the pleadings, adduced evidence, written submissions and list of authorities cited by the 1<sup>st</sup> Defendant's Learned Counsel, for which I am grateful.

It is not disputed that the 1<sup>st</sup> Defendant occupied the land in question sometime in the year 2000. No one was in occupation of the land at the time. She cultivated on the piece of land for a few years before she was advised by the then Scheme Manager, Mr. Yona, that the Committee was accepting applications for land in the resettlement area. The 1<sup>st</sup> Defendant duly applied and was offered the land she had occupied by letter authored by Mr. Yona. The 1<sup>st</sup> Defendant's offer letter referred to Lot 1083 Kanakantapa Resettlement Scheme. The 1<sup>st</sup> Defendant eventually obtained title in August, 2003, before the Plaintiff received his offer letter.

It is further not disputed that the Plaintiff was also offered a piece of land by letter. According to him, the land he was offered was the one occupied by the 1<sup>st</sup> Defendant. The Plaintiff's letter made reference to a property known as 3J Extension.

It is also not disputed that the property in question was sold by the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant. The 2<sup>nd</sup> Defendant has since placed a caveat on the property and is yet to obtain title in his name.

The Plaintiff alleges that the 1<sup>st</sup> Defendant obtained the title in question fraudulently, as she did not follow the correct procedures in obtaining title.

It is settled law that a Certificate of Title is conclusive evidence of ownership of the land it relates to. In the Supreme Court case of ***Anti-Corruption Commission vs. Barnnet Development Corporation Limited***<sup>5</sup>, the Supreme Court stated 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 reasons for impropriety in its acquisition." (Court's emphasis)

It is therefore evident that title can only be challenged and cancelled for fraud or reasons for impropriety in its acquisition. It is trite that contentions of fraud must be properly raised and proved. In the case of ***Collum Coal Mining Industries Limited vs. Frontline Financial Services Limited and Others***<sup>6</sup>, the Court of Appeal noted that allegations of fraud are serious allegations which ought to be specifically pleaded and strictly proved on a standard that is slightly higher than the proof on a balance of probabilities.

In the cited case of *Sablehand Zambia Limited vs. Zambia Revenue Authority*<sup>1</sup>, the Supreme Court held that: -

*"Where fraud is an issue in the proceedings, then a party wishing to rely on it must ensure that it is clearly and distinctly alleged. Further, at the trial of the cause, the party alleging fraud must equally lead evidence, so that the allegation is clearly and distinctly proved."*

The Supreme Court went on to hold 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."*

To buttress this point the Supreme Court in the case of *Base Chemicals Zambia Limited, Mazzonites Limited vs. Zambia Air Force, The Attorney General*<sup>7</sup> reiterated that: -

*"If a party alleges fraud, the extent of the onus on the party alleging is greater than a simple balance of probabilities."*

A perusal of the evidence on record shows that the 1<sup>st</sup> Defendant had initially occupied the land in 2000 and later applied for the acquisition of the said land. The Scheme offered and recommended that she obtains title from Ministry of Lands which title she was issued sometime in August, 2003.

The Plaintiff has merely claimed that the 1<sup>st</sup> Defendant did not follow the proper procedure when she applied for the land and that she did not qualify to apply as she did not fall within the category set out in the rules on allocations by the Committee. Further, that

the letter recommending that she obtains title was not signed off by the Director.

The record will show that there is uncontroverted evidence that the 1<sup>st</sup> Defendant made an application for the land in January, 2002. The application form is on record and shows that it was properly filled out with official comments from the Committee. The question as to whether she was eligible was one to be established by the Committee. The fact that the committee chose to recommend that she be issued title through a letter authored by the Scheme Manager shows that she was considered eligible. In any event, the Plaintiff failed to produce the guideline/rules on eligibility.

The record will further show that the Plaintiff failed to produce before Court a form indicating that he too had made an application for the land in question. The only document he has exhibited is a recommendation to the Ministry of Lands. Furthermore, I note that the letters recommending issuance of title make reference to different properties. The 1<sup>st</sup> Defendant's makes reference to Lot 1083 while that of the Plaintiff refers to 3J Extension. PW2 told the Court that the numbers made reference to the same property only that 3J Extension was the identification number issued to Lot 1083 before numbering.

PW2's evidence flies in the teeth of the evidence before the Court. It must be noted that the Plaintiff's letter was issued well after the 1<sup>st</sup> Defendant had obtained her letter and title. The title makes reference to Lot 1083. Therefore, it is strange that the Plaintiff's

letter makes reference to an identification number when the land in question was already numbered at the time as evidenced in the 1<sup>st</sup> Defendant's letter and as described in the Certificate of Title. In any event, PW2, the current Scheme Manager indicated in his evidence that the Committee does not offer land that is yet to be numbered (or land that only had an identification number).

In the case of *Wesley Mulungushi vs. Catherine Bwale Mizi Chomba*<sup>8</sup>, the Supreme Court observed as follows: -

*"We hasten to add that even though a title deed is conclusive evidence of ownership of land there are other factors that may be taken into account; these are factors that precede the issuance of title."*

Being guided by the above cited authority, I am of the view that even the circumstances leading up to the 1<sup>st</sup> Defendant occupying the land, applying for allocation and obtaining of title; there is no evidence of fraud, at least not going by the evidence adduced by the Plaintiff. I am of the further view that the sum total of the evidence before the Court does not in any way prove that the 1<sup>st</sup> Defendant fraudulently obtained title. As guided by the Supreme Court in the cases cited above, the standard of proof where there are allegations of fraud is higher than a mere balance of probabilities. The 1<sup>st</sup> Defendant's title, in the circumstances cannot be cancelled in line with **Section 34** of *The Lands and Deeds Registry Act*<sup>1</sup>.

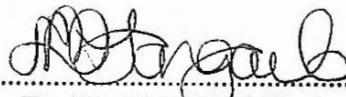


In light of the view I hold, namely that the 1<sup>st</sup> Defendant properly, acquired the land in question; the transaction between the 1<sup>st</sup> and 2<sup>nd</sup> Defendant cannot be faulted.

For the reasons recorded in my Judgment above, I find that the Plaintiff's case fails as he has failed to prove his case to the required standard and it is hereby dismissed with costs to the Defendants, to be taxed in default of agreement.

Leave to Appeal is granted.

**Delivered at Lusaka, this 3<sup>rd</sup> day of February, 2020.**



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**P. K. YANGAILO**  
**HIGH COURT JUDGE**