

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

2013/HP/0808

B E T W E E N:

JOHN TEMBO

MRS. WANG

AND

ELIZABETH TEMBO

**ALL ILLEGAL SQUATTERS ON THE REMAINING
EXTENT OF LOT NO. 2660/M, LUSAKA**

POINT AND LINE TECHNOLOGY LIMITED

DONZAM PACKAGING INDUSTRIES

GOLDEN KEYCAR BEAUTY



1ST PLAINTIFF

2ND PLAINTIFF

1ST DEFENDANT

2ND DEFENDANT

3RD DEFENDANT

4TH DEFENDANT

5TH DEFENDANT

Before the Hon. Mrs. Justice F. M. Chisanga on the 3rd day of February 2020

For the Plaintiff:

Dr. O. M. M. Banda, Messrs O. M. M. Banda & Company

For the Defendant:

Mr. K. Kaunda, Ellis & Company

For the 4th Defendant:

Mr. Hamachila, Messrs Iven Mulenga & Company

J U D G M E N T

Cases referred to:

- 1. *Monica Siakondo vs Frederick Ngenda (2005) ZR 22***
- 2. *Lumanyando and Another vs Kabwe Rural District Council and Another 1988 - 1989 ZLR 194,***
- 3. *Kabwe & Another vs Daka & Another 2006 ZLR 12,***
- 4. *Zambia Telecommunications Limited vs Valson Phama Zambia Limited 2010 ZR 142,***
- 5. *Anti-Corruption Commission vs Barnnet Development Corporation Limited 2008 (1) ZR 69***
- 6. *Chilufya vs Kanzunda (1999) ZLR P. 166***

- 7. *Ngowani and Others vs Flamingo Farms Limited Appeal No. 5 of 2019,***
- 8. *Tresford Chali and Bwalya Emmanuel Kanyanta Ng'andu, Appeal No. 84 of 2014.***
- 9. *Still Waters Limited vs Mpongwe District Council and Others, Appeal No. 90 of 2001 SC***
- 10. *Re Gornett, Gandy vs Macavlay (1885) 31ch. D 1***

By way of Writ of Summons, the plaintiff claims the following reliefs:

- i. An order that he is the legal, lawful and registered owner of Lot No. 2660/M, Lusaka.
- ii. An order the 2nd defendants are illegal squatters on his property and that the 1st defendant is not the owner of any part of the land in dispute.
- iii. An order that the Village Committee lacked jurisdiction to deal with this property thereby rendering their decision null and void.
- iv. Payment of K20,000.00 paid to the 1st defendant by him as compensation for purported encroachment.
- v. An order evicting the 2nd defendant from his property and demolition of all the structures erected by the 2nd defendant on his property.
- vi. Damages for loss of use of his property against the 2nd defendants.
- vii. Order of interim injunction restraining the defendants from claiming ownership of the property in dispute and from developing, building and gardening on his property.
- viii. An order that any sale or mortgage of any portion of his land was at the parties own risk, null and void.

- ix. Payment of travelling expenses to and from Tanzania, food, drinks etc.
- x. Interest, costs and any other relief the court may deem fit.

In the statement of claim, it is averred that the remaining extent of Lot No. 2660/M, Lusaka was previously owned by the plaintiff's late father on a 14 year lease. When the lease expired, the plaintiff applied for the said property and a Certificate of Title, No. 160549 issued to him on 14th May, 2012.

It is averred that the 2nd defendants have illegally and unlawfully occupied the plaintiff's property and are gardening and building on it. The 1st defendant is claiming to be the owner of part of the property in dispute. In June, 2012, the 1st defendant reported the dispute to the village committee under headman Mpilipili whereupon the plaintiff was ordered and forced to compensate the 1st defendant K20,000.00 for the purported encroachment. It is claimed that the village committee had no jurisdiction to deal with the land in dispute as it was land on title.

The plaintiff has not been able to utilise this property due to the defendant's illegal occupation thereby suffering losses and incurring costs in terms of transport to and from Tanzania.

In their defence and counterclaim, the defendants deny being squatters on the said Lot and claim that the plaintiff did not follow procedure in the alienation of land and subsequent issue of title.

The defendants aver that they are lawfully occupying their respective portions of land and that their activities on the said land are legal, the extent of the plaintiff's land being 6.3 hectares. That the Village Committee had jurisdiction to deal with the encroachment because at that time the 1st defendant's land had not been surveyed nor titled. On that premise, the plaintiff and his brother had agreed to pay the sum of K20,000.00 for encroaching on the 1st defendant's land. This payment was made on behalf of the plaintiff by Mrs. Wang who is currently developing the land.

It is averred in the counter-claim that the plaintiff, his agents, or employees have harassed the defendants on numerous occasions since April 2011. This has caused the defendants to live in constant fear. This intimidation and harassment has been reported to Chief Mungule and his subordinates. The defendants therefore counter claim for damages for harassment and intimidation suffered, damages for ensuing shock, damages for disturbing the defendants' quiet enjoyment of their land, punitive damages, interest, costs and any other relief the court may deem fit.

At the hearing, the plaintiff testified that he was appointed administrator of the estate of his late father Abuite Tembo. He searched for a title deed to one of the properties, Plot 2660/M Kabangwe. He found approved survey diagrams which he took to Ministry of Lands and engaged a lawyer to obtain title. He obtained a certificate of expiration as the land was held on a 14 year lease by his late father. With approval from his siblings, he applied for title and

obtained a 99 year lease in his name. He then found that there were squatters on that piece of land whom he did not know. He prayed that they be ejected so that he and his siblings could divide the land amongst themselves.

In cross examination, the plaintiff testified that he knew the 1st defendant as his relative. His late father was keeping her and other relatives on the land. His father's title expired in 1995 and he obtained title in 2013. He had a letter of appointment as administrator which he gave to the Ministry of Lands. He confirmed that the land in question was 2660/M. His father's title related to two properties. One was 2.25 hectares and the other 9.55 hectares. The one he was claiming was the second one according to his certificate of title.

When referred to page 26 of the plaintiff's bundle of documents, he testified regarding that document headed "*land dispute between John Tembo and Elizabeth Tembo*" that he was to pay the 1st defendant for encroachment. He stated that he sold the subject piece of land to one Mrs. Wang and she agreed to pay the 1st defendant. He testified that he was forced into signing that document.

He stated that the subject piece of land is in Shifwankula village in Chibombo. He did not obtain Chief Mungule's consent as regards 0.8056 hectares. The survey diagrams were dated 2001. Surveys SR No 266/1995 and D615.2001, according to the Surveyor General, are defective. He testified that a 14 year lease only has a sketch plan and the land had to be re-surveyed before it could

be put on a 99 year lease. After the land had been re-surveyed, the size increased from the original size that was owned by his father.

In re-examination, the plaintiff testified that diagram number 6853/2001 in relation to 2660/M, was approved on 29th October, 2001 and further that the Surveyor General did not cancel the diagram nor the certificate of title relating to his property.

PW2 was Jessy Tembo of Lusaka, sister to the plaintiff. She testified that when her father died in 2003, they appointed the plaintiff as administrator. The administrator found diagrams in relation to one of the properties of the estate and obtained title with the family's consent. The plaintiff later informed the family that about 19 people had encroached the said property.

In cross examination, PW2 testified that she is related to the 1st defendant. She confirmed that the plaintiff was chosen as administrator of her late father's estate. She stated that the plaintiff only sold part of 2660/M in extent 2.25 hectares. This was after the family agreed to the sale.

DW1 was Paulina Mboloma of Shifwankula village. She testified that she has lived on the disputed piece of land her whole life. She testified that the headman Shifwankula was her grandfather. He gave Capital Ngulube a piece of land to cultivate. Mr. Ngulube complained that the land he had been given was too small and so he was given another piece of land across the road. When her grandfather died, they continued living with Capital Ngulube until he died. He left his nephew Abuite Tembo who later left and went to live in Kapiri but his

children, including the plaintiff remained on that piece of land. She testified that Alice Phiri and Elizabeth Tembo were given land by her grandfather while the others acquired land through her elder sister, headwoman Shifwankula. She testified that when she was served with summons by the plaintiff, she and the others went to the headwoman and then to Chief Mungule. The chief resolved that he would call the plaintiff.

In cross examination, DW1 testified that there are a lot of people in Shifwankula village. Her neighbour, Alice Phiri had title to the piece of land she is occupying. She testified that she was old enough when Capital Ngulube was given the land. The headman allocates land and the chief had power over land under title.

DW2 was Elizabeth Tembo, the 1st defendant, a peasant farmer and resident of six miles, Shifwankula village. She testified that she settled on the land in dispute in 1975. She is not a squatter because she was given the land by Mr. Capital Ngulube. She explained that Capital Ngulube gave the disputed piece of land to her father and his young brother, Abuite Tembo. When her father died, his young brother, Abuite Tembo, divided the land and she began cultivating.

She testified further that in 2012, two Chinese nationals went to view the land and informed her that it was the plaintiff's land. Arguments ensued and the plaintiff called the police who explained to them the proper procedure. A meeting was then called in the presence of the headmen. As the plaintiff had encroached onto her property, it was agreed that he was to pay her

K20,000.00. This sum was paid to her by the Chinese national in the presence of the plaintiff.

She testified that the plaintiff is her young brother. She did not beat him or threaten to kill him.

In cross-examination, DW2 testified that she was not aware that the plaintiff held title to the disputed piece of land.

DW3 was Tempson Simbeye also a Shifwankula village resident. He testified that he was not a squatter because he followed proper procedure when obtaining the piece of land he occupies. He bought it from one Saidi Phiri in 2007. After making a part payment, he was taken to the village headwoman where Saidi Phiri surrendered the property to him. He obtained a letter from the chief and a sketch plan was done by the Department of Agriculture of Central Province. In 2013 when the dispute began, they approached the headwoman who advised them to see the chief. The chief advised them to proceed with court.

He testified that he was chosen to head the defence and so he asked the occupants to bring any relevant information. He stated that one Alice Phiri had a 14 years lease which had expired and she was in the process of renewing. Maureen Lungu was his neighbour on the eastern side. She is also in the process of obtaining title to her property. He stated that the plaintiff's title is not genuine because the 14 year lease expired in 1995 and the diagrams he

claims to have used were defective. DW3 testified that the plaintiff sold the land in extent of 2.6 hectares to Point and Line Technologies Limited. DW3 denied having threatened the plaintiff.

In cross examination, DW3 testified that the documents pertaining to the purchase of his land are not before court. He admitted that the letter on page 7 of the defendant's bundle of documents has no effect on land which is on title.

After reserving the matter for judgment, and upon considering the evidence, it became apparent that one Mrs. Wang would be affected by the decision of the Court. On 16th December, 2016, I rendered a ruling adding the said Mrs. Wang as the 2nd plaintiff to the proceedings. An application was later made by the defendants to add Point and Line Technology Limited, Donzam Packaging Industries and Golden Key Car Beauty as interested parties which application I granted.

The 4th Defendant filed its defence on 28th June, 2017. It averred that the 1st Plaintiff sold subdivision C of Lot 2660/M to the 3rd Defendant who later sold to it to the 4th Defendant by a contract dated 1st August, 2008. The 3rd Plaintiff paid K20 000.00 through its Directors for the land including the 8 metres which the 1st Defendant was compensated for. Despite the compensation, the 4th Defendant has allowed the 3rd defendant to continue occupying the said piece of land.

Following the joinder of parties and filing of further process, witnesses were recalled for cross examination by the 4th Defendant.

PW1 testified that he was forced to sign the document at page 26 of the plaintiff's bundle of documents which evidenced the resolution that he and Moses Tembo would pay K20 000 to the 1st Defendant as compensation for encroaching into her land by 8 metres. He testified that the 1st defendant's land is within his piece of land. He conceded that the 8 metres was part of the land that was sold. He stated that he paid the money to the 1st defendant through the 3rd defendant who deducted from his account. He was advised that even after paying the amount, the portion would still belong to the 1st defendant. He confirmed that that is the area where the 1st defendant has built her toilets.

He testified that the diagram labelled C at page 17 is the area he sold to point and line, in 2012. Elizabeth Tembo's areas was within this titled land. When referred to page 18 of the 4th defendant's bundle of documents, he said the document looked familiar. The area marked A B C D corresponded with the shaded area, which he had sold. The 8 metres were running along the whole length of C and D. He stated that, the squatters were in the portion indicated to be 0.5 hectares, but the other area was not showing. When referred to page 17 of the plaintiff's bundle of documents, he stated that the squatters were near A and B on the survey diagram. They had occupied the other area in white.

DW2 testified in cross examination that she does not know the extent of her land in terms of measurements. She stated that she had constructed a set of toilets. The Chinese encroached into her land by 8 metres. She was paid K20,000.00 which amount resolved the issue.

When recalled to the stand, DW3 testified that the diagram at page 6 of the defendant's bundle of documents relates to what transpired when the plaintiff's family distributed the land among themselves in the presence of the village headman. He believed that the issue with the 2nd Plaintiff was resolved.

DW1 testified in cross examination that she did not know the extent of the 1st plaintiff's land.

The 4th defendant called one witness, Dong Mezhong, a Director in the 4th defendant company. He testified that the 4th defendant bought a piece of land from the 3rd defendant in 2013. In 2014, after merging with Donzam Investments, the 4th defendant set up a shop on the land and also built a wall fence to demarcate the property. There was a toilet belonging to the DW2 on the boundary of the property. The witness explained that the land was bought by the 2nd plaintiff from the 1st plaintiff and later sold to the 4th defendant. He stated that the 4th defendant does not wish to claim the 8 metres.

In cross examination, DW4 testified concerning the document at page 14 of the 4th defendant's bundle of documents that the 1st plaintiff and Moses Tembo were allocated 1.3 hectares of land each. He testified that the 4th defendant bought land in extent of 2.5778 hectares. He was not aware who owned the other property.

In re-examination, DW4 was referred to page 17 of the 4th defendant's bundle of documents, and testified in relation to that document that the 1st plaintiff and the 2nd defendant authorized the sale.

SUBMISSIONS MADE ON BEHALF OF THE PLAINTIFF ARE AS FOLLOWS:

- The plaintiff's property was on a 14 year lease in the name of Abuite Tembo, his father, with effect from 1st July 1981. A Certificate of Expiration of Lease dated 7th November 2011 was issued by the Commissioner of Lands. The period of 14 years expired on 31st August 1995.
- Plaintiff had not adduced evidence that the late Abuite Tembo had applied for renewal of the lease, and his application granted. The property was as a result not Abuite Tembo's and did not form part of his estate. ***Siakondo vs Ndenga***¹ referred to. Therefore, plaintiff was under a misconception.
- Consequently, any eligible person could apply for the land to the Commissioner of Lands, including the defendants. The plaintiff applied, and a letter of offer given to him by the Commissioner of Lands.
- The survey diagram 6853/2001 and the lease dated 14th May 2012 reveal that the extent of Lot 2260/M is 10.3556 hectares.
- The plaintiff sold 2.5778 hectares and remained with 7.7778 hectares. Certificate of Title No 162925 shows that the extent of Lot 2260/m is 7.7778.
- The 1st defendant did not lead evidence to show that the land in dispute was co-owned by her father and the plaintiff's father.
- Although the 1st defendant occupied the land in 1975, she must have occupied it as a squatter, as the daughter of Joseph Tembo.

- The plaintiff's Certificate of title is conclusive evidence of ownership and no evidence has been led that the plaintiff obtained title by any other illegal means or fraud, which she did not plead. She cannot acquire the land by adverse possession.
- The Traditional court lacked jurisdiction to preside over the dispute between the plaintiff and the 1st defendant as the property was already on statutory tenure.
- The plaintiff signed the document on page 6 of the bundle of documents by force or duress because the parties had a dispute over it.
- The survey diagram was prepared on instructions from the late Abuite Tembo and the plaintiff cannot be liable or responsible if the deceased did not follow the procedure to subject 0.8056 hectares to leasehold tenure.
- Tempson Simbeye Musolela and Lungu Kanyanta Maureen acquired the portion of land on Lot 2660/M Lusaka on 13th October 2010, long after Lot 2660/M Lusaka had been surveyed, as revealed by the documentation.
- The 2nd defendants acquired portion of Lot 2660/M Lusaka when its extent was 10.3556 hectares in total, and the portions they acquired were already within the boundaries of Lot 2660/M Lusaka, or part of Lot 2660/M Lusaka.
- The documents on page 5 and 6 of the bundle of documents are not legal documents, and of no effect on the Certificate of Title to the land in question.

- The 14 year lease held by Alice Phiri expired and the Commissioner of Lands was entitled to dispose of it.
- Although Alice is appearing in the defendant's bundle of documents as 6th defendant, her alleged ownership of Lot 10934/m was not pleaded in the 2nd defendant's Defence of the counter claim. Patel vs Merwe SCZ Appeal No 60/2004 referred to.
- Chiefs and village headmen lack power to offer land vested in the President of the Republic of Zambia. Therefore, documents on pages 1, 2, 22 and 25 of the plaintiff's bundle of documents are not legal documents.
- The letter dated 10th July 2014 was written and signed by palace Secretary Titus Meleti, and not Chieftainess Mungule. No evidence was led that the Secretary had the mandate to write such a letter.
- With reference to the letter dated 21st July 2014, addressed to Maureen Kanyanta Lungu, and stating that the Council had no official records showing that John Tembo's application for acquisition of title deeds was considered by the Council, and subsequently recommended for issuance of title deed by the Council, it was submitted that the plaintiff opted to apply directly to the Commissioner of Lands for the land in dispute. That the documents on pages 2 to 7 of the plaintiff further supplementary bundle of documents filed on 27th July 2015 reveal that Chibombo district council had the record pertaining to the plaintiff's acquisition of the land in Chieftainess Mungule's area.

- The defendants cannot claim the land by adverse possession. ***Lumanyando and Another vs Kabwe Rural District Council and Another,***² ***Kabwe & Another vs Daka & Another,***³ ***Zambia Telecommunications Limited vs Valson Phama Zambia Limited***⁴ and ***Anti-Corruption Commission vs Barnnet Development Corporation Limited***⁵ were referred to among others.
- The defendant should have investigated the title of the land they proposed to acquire.
- The defendants have failed to prove fraud. They are squatters, liable to the plaintiff for damages. Their counterclaims cannot succeed and their claim should be dismissed with costs.
- The document on page 2 of the 1st and 2nd defendant's bundle of documents is not proof that the 8 hectares belong to the 1st defendant. There are two handwritings on the same documents, implying that the name Elizabeth and the words at the bottom were added after its preparation by an unknown person on pages 3, 10 and 27 of the 1st and 2nd defendant's bundle of documents.
- The 1st defendant's names do not appear on page 6 and 14 of the 1st, 2nd and 4th defendants' bundle of documents. Therefore, the document on pages 5, 10 and 27 of the 1st and 2nd defendants' bundle of documents are questionable, the plaintiff being only aware of the documents on page 18 of the 4th defendant's bundle of documents. The 1st defendant's documents

are contrary to those on pages 17 and 22 of the plaintiff's bundle of documents.

THE DEFENDANTS' SUBMISSIONS IN OPPOSITION TO THE PLAINTIFF'S ARE AS FOLLOWS:

- The relief claimed by the plaintiff can only be sought by a person with an interest in the land. The plaintiff went behind his siblings and secured the 99 year title to the land they shared and proceeded to illegally dispose of the titled land.
- The plaintiff could only dispose of his land, and not land belonging to the defendants. Reference made to page 3, 4, 6 and 27 of the defendant's bundle of documents, confirming the 6.3 hectares of land how it was shared by the plaintiffs: DW2 and the plaintiff's siblings, Moses, Jessy, Eunice and Chimwemwe.
- The plaintiff sold land that includes the defendants' land which is still held on customary tenure, and is in the process of being converted to state leasehold.
- When the plaintiff's encroachment was reported to the Traditional authorities, the plaintiff admitted the same, and had Mrs. Wang pay K20,000.00 on his behalf for the encroachment. This is irrefutable evidence of encroachment regardless of whether or not the plaintiff's alleged land is on title. He signed to signify acceptance. He did not report the matter to the police.

- Therefore, the inclusion in the 99 year Title of Land beyond the 6.3 hectares held on the 14 year title by the plaintiff and DW2's father was fraught with procedural impropriety and also fraud. Reference to section 8 (2) of the Lands Act CAP 184 of the Laws of Zambia.
- The evidence of DW1 and DW2 is that the plaintiff was summoned by headwoman Shifwankula to explain how the defendant's portions of customary land were converted to state leasehold by way of incorporating them in the plaintiff's 99 year title without consent of the Chief and the defendants. There is evidence that the local authority was not aware of these conversions, as confirmed by the letter signed by the council Secretary for Chibombo district.
- The defendants have been on the land in issue for at least 12 years before the plaintiff secured the 99 year lease. The plaintiff's claim would fail on account of adverse possession. When the Title expired, there was no title holder. The land reverted to the State.
- Therefore, priority would have to be given to the defendants as earlier occupiers when the 99 year title was secured. Reference made to sections 43 and 47 of the Lands and Deeds Registry Act. Reliance placed on Lumanyendo and Another vs Chief Chamuka and Others (1988-1989), Sections 33 & 35 of CAP 85.
- If inclusion of defendant's land in plaintiff's title is not due to fraud, then it is a result of misdescription of the boundaries.

- The contradictory sizes stated in the Certificate of Title and the Lease, as well as the Lands Register Printout connotes fraud, and supports the defendants' contention.
- Surveyor General's Office aware of the encroachment, as confirmed by letter dated 18th November 2010. The plaintiff's Certificate of Title should not have been issued in light of the said letter, as the Survey Record of 2001 is defective.
- The 1st defendant and the 4th defendant's witnesses have confirmed that the 8 metre piece of land the plaintiff is claiming was part of the land that Mrs. Wang paid for. The 4th defendant told the court that they do not need the 8 metres of land, even though they paid for it.
- Documents at page 14 of the 4th Defendant's bundle of documents, not objected to, revealed that the total extent of land is in fact 8.5 hectares. It was impropriety on the plaintiff's part to put the land on Certificate of Title, when his share was only 0.8 hectares.
- It is the plaintiff who should compensate the 1st and 2nd defendants for putting their land on his title when the same did not belong to him.
- Since the defendants' land is still under customary law, there should have been consultations with the defendants, as dictated 3 (4) of the Lands ACT CAP 184 of the Laws of Zambia. There having been no consultations, the plaintiff's Certificate of Title was erroneous.

I have considered the evidence led in support of and in defence to the plaintiff's claim. The following facts are revealed by the evidence.

Lot Nos. 2660/M, and 2659 were owned by Abuite Tembo, who sired the plaintiff and his siblings. According to the Land Record appearing at page 23 of the plaintiff's bundle of documents, Lot L/2660/M was owned by one Rosemary Kapembwa. The property changed hands, Abuite Tembo acquiring it subsequently. The certificate of title issued to him was for 2659/M and 2660/M. According to the description of the property on title deed at page 1 of the plaintiff's bundle of documents, Lot No. 2659/M was in extent of 2.2500 hectares while 2660/M was in extent of 9.5500 hectares. The lease between THE PRESIDENT OF ZAMBIA and ABUITE TEMBO was for a term of 14 years, commencing from the 1st day of July 1981.

When Abuite Tembo expired in 2003, the plaintiff, his first born son, searched for the title deed for the property but was unable to find it. He found an approved survey diagram instead. He engaged a lawyer, who duly obtained a duplicate of title deed for the land in issue. Subsequently an application was lodged for a 99 year lease. Instead of acceding to the application however, the plaintiff was served with a certificate of expiration, which, according to him meant that his father had no land, as the lease had expired in 1995. He was advised that anyone could apply for the land, and he did so.

I pause here to state that the effect of expiry of a state lease was explained by the Supreme Court in ***Chilufya vs Kanzunda***.⁶ That apex court held inter alia, that a state lease which confers ownership and which obliges a lessee to develop the land does not simply expire by effluxion of time. Further, that the

lease did not and could not terminate automatically. The appellant was entitled to obtain a 99 year lease as of right unless there was a major default.

In the present case, the administrator of the estate of Abuite Tembo should have obtained a renewal as administrator of the estate of Abuite Tembo. It was thus an error to grant a 99 year lease to John Tembo in his own right, when the deceased had duly observed the covenants imposed upon him by the lease. There is a notification of approval of planning permission at page 1 of the plaintiff's further supplementary bundle of documents. Abuite Tembo was being advised that the existing dwelling house was being legalized. In fact, clause 3(2) of the 14 year lease, entitled the lessee, Abuite Tembo, to obtain a lease of land for 99 years with effect from the commencement of the 14 year lease upon a completion of the survey of the land. The submissions made by both sides, that when the lease expired, any one could apply for it is clearly unsustainable. No such thing could occur. This disposes of the argument on this issue by either side.

The plaintiff states that he successfully applied for the land in issue and received an offer for the same as a result, as evidenced by the letter of offer for property No. L/2660/M produced in the plaintiff's supplementary bundle of documents. He subsequently obtained a certificate of title, which has been produced at pages 15 to 21 of the plaintiff's bundle of documents.

Thus far the facts are common cause. When cross-examined, the plaintiff said his father kept the 1st defendant, Elizabeth Tembo on the land, as a relative.

The plaintiff confirmed that other relatives also lived on the land in question. He confirmed that by the year 2013, the individuals he was referring to as squatters were already on the land. On these facts, I reach the conclusion that the alleged squatters were already on the land at the time the plaintiff obtained a 99 year lease of Lot 2660/M in his own right.

I accept that the 2nd defendant lodged a complaint with the Headman Mpilipili of Shifwankula village over the land in question as evidenced by the document at page 26 of the plaintiff's bundle of documents, and as confirmed by the plaintiff in cross-examination. The plaintiff was ordered to pay K20,000.00 for encroaching into the 2nd defendant's land by 8 meters. I accept the testimony that a Mrs. Wang paid the said fine. The plaintiff testified that Mrs. Wang had purchased part of the land from the plaintiff.

It is undisputed that Tempson Simbeye DW3 bought a piece of land measuring 34 x 74 metres. This is premised on the letter appearing at page 1 of the defendant's bundle of documents, dated 31st October 2007. In that letter, Headwoman Shifwankula notified Chieftainess Mungule that Tempson Simbeye was owner of a plot of those dimensions. I thus accept that Tempson Simbeye bought that plot and was taken to the village headwoman, and the plot surrendered to him in 2007.

Subsequently, the Palace Secretary for Chieftainess Mungule wrote to the Principal Agricultural Officer, requesting for an officer to conduct a survey of Tempson Simbeye's land with a view to preparing sketch maps to enable

Tempson Simbeye obtain a title deed. This conclusion is premised on page 7 of the defendant's bundle of documents. The sketch plan was accordingly drawn, as proved by the Location Map produced at page 9 of the defendant's bundle of documents. The said map indicates that it depicts a proposed small-holding for Mr. Tempson L. Simbeye in Chieftainess Mungule's area, in Chibombo district. The Location Map bears a date in the year 2010. The size of his area was depicted as being 0.8 HA (Approx).

I equally accept that the Acting Chief Examiner wrote to Mr. A. D. Mtonga on the 18th November 2010. It is pertinent to reproduce the said letter. It read:

**REPUBLIC OF ZAMBIA
MINISTRY OF LANDS**

**SD/104/13/10
18th November 2010**

**Mr. A.D. Mtonga
P.O. Box 39306
Lusaka
0977-842722**

**Office of the Surveyor General
P.O. Box 50397
Lusaka**

Dear Sir,

**RE: SEEKING FOR ADVICE ON THE COMMON BOUNDARY OF LOTS
2660/M AND 10943/M**

***I refer to the above mentioned matter.
Records (handwritten)***

See diagram in Title Survey

The Surveyor-General has instructed me to work with you to correct the situation on the ground. The two defective surveys S.E. No 2660/1995 and D615/2001 which were carried out by the Lusaka Regional Office will be cancelled and replaced by the new corrected survey after a re-survey is carried out by you. The approved old diagrams will be superseded by the new correct survey diagram.

Please reply to this request as soon as possible so that we resolve the encroachment.

Yours faithfully

***(signed)
Andrew Nyirenda
Acting Chief Survey Examiner
For/SURVEYOR-GENERARL***

Copy - Owner of Lot 2660/M
Copy - Owner of Lot 10943/M
Copy - Masha and Company, Legal Practitioners, Plot 3515/4, Great East Road, Rhodes Park.

It will be observed that two surveys, S.R. 2660/1995 and D615/2001 were stated to be defective, and that the defects were realised before the plaintiff obtained his title deed, in May 2012. The approved old diagrams were to be superseded by new correct survey diagrams as the old ones were defective and to be cancelled. Thus, diagram number D615/2000 in the plaintiff's certificate of title was a defective diagram, and I so find.

It is undisputed that a site plan was drawn for Maureen Lungu's land. The site plan, which appears at page 13 of the defendant's bundle of documents indicates that Maureen K. Lungu's land was in extent of approximately 0.13 hectares. I accept that she is Tempson Simbeye's neighbour. Chibombo District Council recommended to the Commissioner of Lands that Maureen Kanyanta Lungu acquires a certificate of title. Thus far, the evidence led by the parties has not been controverted by either.

At page 26 of the defendant's bundle of documents is a list of 19 defendants, collectively referred to as the second defendants. Of all the 19, only Tempson L M Simbeye, Elizabeth Tembo and Paulina Mboloma testified. Documentary evidence touching on Maureen Lungu's land and Alice Phiri's interest was referred to by Tempson Simbeye. He also said his neighbours were Keith Lungu, Malipenga and Royda Malungu. He said they were about 19. The

document at page 26 bears a date stamp of office of headman Lumuni of Shifwankula village.

On the evidence and the pleadings, the issues arising for determination are: The extent of the plaintiff's property, that is, the Remaining Extent of Lot 2660/M, whether or not the defendants are squatting on the plaintiff's property, and whether or not the village committee had jurisdiction to deal with the plaintiff's property.

The plaintiff stated in cross-examination that Lot 2660/M is in Shifwankula village. That admission leads to the inference that the land in question fell under customary tenure before it was converted into State land.

I should state here that recommendation by a Council to the Commissioner of Lands that a Certificate of Title be issued to an applicant whose land is in a customary area is inconsequential if the law relating to conversion of customary land tenure into leasehold tenure has not been adhered to. When the Commissioner of Lands issues a letter of offer for such land, the offer is a nullity at law. This position was restated in **Ngowani and Others vs Flamingo Farms Limited**,⁷ where the Supreme Court held that fraud, specified in Section 33 of the Lands and Deeds Registry Act, does not provide the only pathway by which a Certificate of Title may be cancelled. Other transgressions of the law such as circumvention of the procedure prescribed in the law would render *null* and *void* the allocation of land and would be just as fatal.

I will refer to this case in detail later.

Customary tenure is recognized and protected by law. Section 7 of the Lands Act, CAP 184 enacts the following:

7. (1) Notwithstanding subsection 2 of Section thirty-two but subject to Section nine, every piece of land in a customary area which immediately before the commencement of this Act was vested in or held by any person under customary tenure shall continue to be so held and recognized and any provision of this Act or any other law shall not be so construed as to infringe any customary right enjoyed by that person before the commencement of this Act.

(2) Notwithstanding Section thirty-two, the rights and privileges of any person to hold land under customary tenure shall be recognized and any such holding under the customary law applicable to the area in which a person has settled or intends to settle shall not be construed as an infringement of any provision of this Act or any other law except for a right or obligation which may arise under any other law.

Section 8 of the said Act deals with conversion of customary tenure into leasehold tenure and provides to that effect as follows:

8.(1) Notwithstanding Section seven, after the commencement of this Act, any person who holds land under customary tenure may convert it into a leasehold tenure not exceeding ninety-nine years on application, and the manner prescribed by way of –

- (a) *a grant of Leasehold by the President*
- (b) *any other title that the President may grant*
- (c) *any other law*

(2) *The Conversion of rights from a customary tenure to a leasehold tenure shall have effect only after the approval of the chief and the local authorities in whose area the land to be converted is situated, and in the case of a Game Management Area, and the Director of National Parks and Wildlife Service, the land to be converted shall have been identified by a plan showing the exact extent of the land to be converted.*

(3) *Except for a right which may arise under any other law in Zambia, no title, other than a right to the use and occupation of any land under customary tenure claimed by a person shall be valid unless it has been confirmed by the Chief and a lease granted by the President.*

The procedure for conversion of customary land to leasehold tenure is prescribed, pursuant to Section 31 (2) (c) of the Lands Act. It is outlined in Statutory Instrument Number 89 of 1996. In summary, a person who has a right to the use and occupation of land under customary tenure, or one using and occupying the land with the intention of settling there for a period of not less than five years can apply to the chief of the area in the prescribed form.

The chief may give, or refuse to give consent. Where he refuses to give consent, he is required to communicate to the applicant as well as the Commissioner of

Lands stating his reasons for such refusal in the prescribed form. Where he consents to the application he is required to confirm, in the prescribed form, that the applicant has a right to the use and occupation of that land. He must state the period the applicant has been holding that land under customary tenure, and that the applicant is not infringing on any other person's right. The chief is further required to refer the said form to the Council in whose area the land that is to be converted is situated.

Upon receiving the form and before making a recommendation to the Commissioner of Lands, the Council has to consider whether or not there is a conflict between the customary law of that area and the Act. If satisfied that no conflict exists, the Council would then make recommendation to the Commissioner of Lands. The Commissioner of Lands would accept or reject the recommendation,

These provisions clearly indicate that interests conferred by customary land tenure on a customary land holder are to be preserved and safe-guarded, as provided by the law. The role of the chief in the conversion of customary land tenure to leasehold tenure is cardinal. It cannot be over-looked. To that effect, subsection 8(3) of the Lands Act *supra* states that a title shall not be valid unless it has been confirmed by the chief, and a lease granted by the President.

The grant of a lease by the President is clearly dependent on confirmation by the chief that the land in question is unencumbered.

I should at this point refer the judgment of the Supreme Court in **Tresford Chali v. Bwalya Emmanuel Kanyanta Ng'andu**.⁸ In that case, both the appellant and respondent claimed the same land. The appellant had bought the customary land from one Lloyd Chikoloma on 7th February 2006, while the respondent had been given the land directly by Chief Mungule in the chief's area. He later applied to convert this land from customary to leasehold title and both the chief and the local authority consented to his application. The land was surveyed by a registered surveyor and a survey diagram produced, which was approved by a Government Surveyor. He was issued with a Certificate of Title on 19th March 2001. The appellant lost the case at first instance and on appeal.

The Court had this to say among other things:

"In our view, unless the consent of the traditional ruler and local authority can be impugned, the alienation of land held under customary law by the President cannot be faulted. And, once one has obtained a Certificate of Title, section 33 of the Lands and Deeds Registry Act comes into play.....It is clear from Section 33 that once a Certificate of Title is issued, it becomes conclusive evidence of the ownership of land to which it relates. This implies that once a person is issued with a Certificate of Title, the Title raises a presumption that the person followed the requisite procedures for obtaining title to land. This presumption is rebuttable and can be dislodged under the circumstances provided by section 33 itself, notably in the case of fraud.....The fact that the Respondent was issued with a Certificate of Title raises a presumption that he followed all the procedural requirements for converting the land in dispute. This presumption has not been rebutted. The appellant has not adduced any credible evidence that would cast doubt on the conclusiveness of the Respondent's Certificate of title." [underlined for emphasis]

Ngowani & Others vs Flamingo Farms⁷ *supra* is also instructive. In that case the respondent acquired land in Chief Lesa's chieftdom in Lamba land of the Copperbelt Province. The appellants had earlier been allocated land for farming and residency on the same land. The chief had allocated the land to a Mr. Kabwe, who sold it to a Mr. Sinyangwe. The latter engaged a land surveyor to mark and demarcate the land he had bought. However, the marking and demarcation exercise was done in the absence of the appellants and the local traditional leadership known as '*ba Chilolo*'. Mr. Sinyangwe sold the land to the respondent. The appellants challenged the respondent's Certificate of Title, which encompassed their land.

They failed in the High Court, but succeeded on appeal. The Supreme Court considered sections 33 and 34 of the Lands and Deeds Registry Act CAP 185 of the Laws of Zambia, as well as section 3(4) of the Lands Act, which restricts the President's authority to alienate any land held under customary tenure. In a nutshell, section 3(4) of the Lands Act forbids the President from alienating land without taking into consideration the local customary law in land tenure which is not in conflict with the Act. It also forbids him from doing so without consulting the chief and the local authority in the area in which the land to be alienated is situated. It equally prevents him from doing so if the applicant for a leasehold title has not obtained the approval of the Chief and the local authority within whose area the land is situated.

The Supreme Court referred to ***Still Waters Limited vs Mpongwe District Council and Others***,⁹ where it held that Section 3(4) of the Lands Act made it mandatory that consultations were made before land was allocated to the appellant company, and that failure to do so resulted in the purported allocation being null and void.

Following this holding, the Supreme Court held that failure to follow the prescribed procedure rendered the whole land acquisition process null and void.

I have noted above that Kapembwa Rosemary appears on the Lands Register as Lessor, while Abuite Tembo was the lessee. It appears that however described, Rosemary Kapembwa had something to do with the land as no evidence to dispute this fact has been adduced by the defendant who presumably inspected the lands register produced before court pursuant to Order 27 Rules of the Supreme Court. It will be observed that the sketch plan showing the dimensions in the 14 year lease and Certificate of Title depicted 2660/M and 2659 respectively. The bigger area was described as being 9.5500 while the smaller area was shown to be 2.2500. The sketch plan was indicated to be No. 7040, dated 09th September 1981, attached to the lease between Abuite Tembo and the President.

When a person makes a claim against a deceased person, he must prove his case, and his evidence will be looked at with suspicion by the court. As

support for this proposition, I will refer to **Re Gornett, Gandy vs Macavlay**,¹⁰ where Sir BALIOL BRETT, M. R said the following:

“Another point was taken. It was said that this release cannot be questioned because the person to whom it was given is dead, and also that it cannot be questioned unless those who object and state certain facts are corroborated, and it is said that, that was a doctrine of the Court of Chancery. I do not assent to this argument. There is no such law. Are we to be told that a person whom everybody on earth would believe, who is produced as a witness before the judge who gives his evidence in such a way that anybody would be perfectly senseless who did not believe him, whose evidence the judge, in fact believes to be absolutely true, is according to a doctrine of the courts of equity not to be believed by the judge because he is not corroborated? The proposition seems unreasonable the moment it is stated.

The law is that when an attempt is made to charge a dead person in a matter, in which if he were alive he might have answered the charge, the evidence ought to be looked at with great care; the evidence ought to be thoroughly sifted and the mind of any judge who hears it ought to be, first of all, in a state of suspicion; but if in the end the truthfulness of the witness is made perfectly clear and apparent, and the tribunal which has to act on their evidence believes them, the suggested doctrine becomes absurd.

As earlier noted, Abuite Tembo was entitled to apply for a 99 year lease upon completion of the survey. It follows therefore that the survey was to be based on the site plan in the title deed issued to Abuite Tembo for a period of 14 years. It is not disputed that the survey diagram annexed to the Certificate of Title issued to John Tembo was drawn at Abuite Tembo’s instance. The plaintiff said he found an approved survey diagram. The diagram annexed to the Certificate of Title was drawn in 2001, before Abuite Tembo’s demise. Therefore, Abuite Tembo engaged the surveyor to do the work. The survey was

done by a Mr. R. M. Moyo. Notably, it was done after a sketch plan annexed to the 14 year certificate of title had been drawn, in 1981.

The Land Survey Act CAP 188 of the Laws of Zambia prescribes the limits of error when a surveyor is conducting a survey of land. The Land Survey Regulations stipulate, in regulation 25, the allowable misclosures in categories of surveys. The import of that allowance is that a survey may not be as precise as the indication in the site plan.

According to diagram number 6853/2001, the surveyed land increased to 10.3556 hectares, from 9.5500 hectares. The increase is substantial, being only one fifth short of a hectare. The implication of the discrepancy falls to be viewed in light of the land tenure applicable to the land in question.

According to the plaintiff's advocate, the land in question is State land, as headmen and chiefs have no jurisdiction over the land in question. I agree that a certificate of title is conclusive from the date of its issue upon and after the issue thereof, except in instances where a proprietor claims under a current prior certificate of title, or in the case of an omission, or misdescription of land.

See Section 33 of the Lands Act CAP 184 to that effect.

Clearly, a certificate of title may be assailed in the stated instances. It should be kept in view that upon conversion of customary land into State land, the rights of other occupiers of customary land should not be infringed. The safeguards provided by the law cannot be circumvented. Section 8 of the Lands

Act supra clearly states that no title is to be valid unless it has been confirmed by the chief.

In the present case, no evidence has been led to the effect that Abuite Tembo acquired additional land other than the land whose dimensions were stated in the site plan pertaining to the 14 year lease. In addition to this the survey done was said to be erroneous by the Surveyor General's office. The intention to cancel the defective survey diagrams was expressed way before the plaintiff had obtained his Certificate of Title. On no basis whatsoever, can the defective survey diagram be validated. In that connection, I note section 18 of the Land Survey Act CAP 188 which states as follows:

18(1) Whenever it is established to the satisfaction of the Surveyor General that the diagram of any registered parcel of land or attached to any registered document (in this section referred to as the existing diagram) does not correctly represent the boundaries of such parcel of land –

(a) The owner thereof may apply to the Surveyor General for the cancellation of the existing diagram and the approval in lieu thereof of a new diagram of such land for registration;

(b) The Surveyor-General may in writing call upon the owner thereof to arrange within a specified period for a new approved diagram to be registered which shall supersede the existing diagram.

It was indicated in the letter to Mr. A.D. Mtonga from the Surveyor-General that the Lusaka Regional Office had made an error in the survey, and the diagrams fell to be corrected. The plaintiff, having assumed ownership of the survey diagram by applying for a certificate of title based on the said survey, cannot distance himself from its effect. He cannot point to Abuite Tembo as originator of the defective survey, and avoid its implications. Therefore, his certificate of title is premised on a defective survey.

According to Tempson Simbeye, property number 10943 belonging to Alice Phiri, and 2660/M for Abuite Tembo had overlapped. This is borne out by the letter reproduced above. This evidence cannot be ignored.

Tempson Simbeye drew my attention to page 7 of the plaintiff's further supplementary bundle of documents, stating that the proposed subdivision numbered L/2660/M/C belonged to John and Moses Tembo, yet John Tembo was claiming the whole area. I do not comprehend the drift of his observation, as the whole of Lot M/2660 was registered in John Tembo's name initially, even though a smaller portion was subdivided from the bigger portion, and put in John and Moses Tembos' names. I note that consent to assign was obtained for the same Lot No. 2660/M/C. It was subdivided for sale.

I echo the words of the Supreme Court in **Tresford Chali vs Bwalya Emmanuel Kanyanta Ngandu**⁸, *Supra*, Mambilima CJ, delivering the judgement of the court had this to say:

“In case of Wilson Masongo Zulu vs Avondale Housing Project Limited, we said the following:

‘... It is accepted that where a plaintiff alleges that he has been wrongfully or unfairly dismissed, as indeed in any other case where he makes any allegation it is generally for him to prove those allegations. A plaintiff who also has failed to prove his case cannot be entitled to judgement, whatever may be said of the opponent’s case’.

We, therefore, hold that the respondent has no burden to establish that in obtaining his Certificate of Title, he followed all the requisite procedural requirements for converting from customary tenure. The fact that the respondent was issued with a Certificate of Title raises a presumption that he followed all the procedural requirements for converting the land in dispute. [Underlined for emphasis]

With the above guidance in mind, the question that now arises in the instant case is whether the defendants have adduced credible evidence proving that they are not squatters on the plaintiff’s land, or rather, that the plaintiff is not entitled to the land as depicted on the Certificate of title issued to Abuite Tembo for the 14 year lease. The first thing to note is that it is the chief who is required to consent to an application for conversion of customary tenure after making the necessary enquiries, and confirming in writing that an applicant has not encroached on the rights of others in applying to convert his land into leasehold tenure.

The letter at page 25 of the defendant’s bundles of documents was written by the head person of Shifwankula Village, ‘*To Whom It May Concern.*’ Nothing whatsoever was said about Abuite Tembo’s land and its extent, no indication whatever, was made that Abuite Tembo, or for that matter Rosemary

Kapembwa from whom he appears on a balance of probabilities to have obtained the land did not follow procedure when applying to convert the land to leasehold tenure. It is surprising that the Chief, who presumably gave consent required by Section 7 of the Lands Act, never uttered a word concerning the same. No explanation has been offered regarding the dimensions of the land indicated on the 14 year lease. The presumption that the procedure was followed has not been displaced. This presumption is coupled with the requirement to consider evidence against a deceased person with suspicion, and upholding it only when the trier of fact is convinced the witness is telling the truth.

The defendants would have done well to show in what way the chief, who presumably gave consent upon following the requisite procedure went wrong. The local authority also presumably gave its consent. The premise on which this consent was given has not been assailed. I have difficulty with this state of affairs. It seems to me that there is a gap in the evidence led by the defendants. How can a lesser functionary, a head person of the village, nullify what a Chief did presumably in compliance with Section 8 of the Lands Act without any explanation whatsoever?

Tempson Simbeye indicated that the Chief would testify on their behalf, but he never did. The failure to call the Chief leaves unresolved questions. This is more so considering that the sketch plan on Abuite Tembo's 14 year lease title deed was done in 1981, 32 years before the letter at page 25 of the defendant's

bundles of documents was written, stating that the defendants were villagers of Shifwankula Village. It will also be noted that 12 of the defendants took occupancy of the land after 2003, when Abuite Tembo had died. Cassie Phiri Machelenga is stated to have settled in the village in 2003. Since he did not testify, I will take it that he did so after the death of Abuite Tembo. As for Cecilia Mwansa and Mrs. Mweene, the year of settlement is not indicated. This must react against them, and leads to the inference that they were not on the land before Abuite Tembo's demise.

Indication of Rosemary Kapembwa on the Lands Register raises questions as to the involvement of Capital Ngulube in the allocation of the land to Abuite Tembo. If capital Ngulube gave the land to Abuite Tembo and Elizabeth Tembo's father, how did Rosemary Kapembwa feature on the Land's Register? The documents at page 6 of the defendant's bundle of documents have handwritten names and what is being referred to as GPS information equally in handwriting. No explanation has been made regarding the diagram at page 27. The question as to who drew the diagram arises.

The evidence of Jessy Tembo was that the plaintiff found diagrams and obtained title with the family's consent. And when cross examined, she stated that the plaintiff only sold part of 2660/M in extent of 2.25 hectares, after the family had agreed to the sale. At page 14 of the 4th defendant's bundle of documents is a note purportedly written and signed by the plaintiff's sisters, stating that they shared the father's land equally in extent of 1.3, 1.3, 0.8, 1.2,

and 1.3 hectares, which comes to 5.9 hectares. When one looks at the diagram at page 6 of the defendant's bundle of documents, one notices that there is a portion of 0.5 hectares which is unaccounted for.

The difficulty with this document is that it contradicts what Jessy Tembo said in her testimony, and she was not recalled to be cross-examined on the contents, when leave to recall all the witnesses for cross examination had been granted. Why was she not recalled to be cross examined on such an important document?

DW3 said the diagram at page 6 related to what transpired when the plaintiff's family distributed the land among themselves in the presence of the village headman. DW3 did not say that he attended the meeting where the land was shared. The village headman was not called to testify, and I wonder why. The question as to how the land reduced from 9.5 hectares to about 6 hectares has not been addressed. Curiously, the document at page 4 of the defendant's bundle of documents depicts an area purportedly belonging to Sara C. Tembo, measuring approximately 6.3 hectares. The diagram was drawn in 2008. No explanation has been made, regarding this document or relating to the named Sara C. Tembo. There is no property number on the same. The document clearly relates to unsurveyed land, and appears to be an initial proposal for a small holding, when the land in dispute had already been surveyed, howbeit inaccurately. The defendants have made and relied on unsubstantiated assertions, when they needed to show, on a balance of probabilities that

Rosemary Kapembwa and subsequently Abuite Tembo's acquisition of the land in 1982 was fraught with irregularities, on tangible evidence.

On the state of the evidence, and as conceded by the plaintiff however, I conclude that Abuite Tembo's relatives were on the land for a long time, and were there even at the time of his death. He had not asked them to vacate the land but had allowed them to continue staying there for a long time. Presumably, they built houses on the said land, as they were not staying in Abuite Tembo's house. The plaintiff himself did not say that his father did not want his relatives there. It would be inequitable to displace individuals who had been allowed to live on the land for a long time, with the consent of the deceased. Equity estops him, and his successors from displacing them. The doctrine of proprietary estoppel thus avails the deceased's relatives. I derive the power to make this Order from Section 13 of the High Court Act CAP 27 of the Laws of Zambia, which stipulates as follows:

"In every civil cause or matter which shall come in dependence in the Court, law and equity shall be administered concurrently, and the Court, in the exercise of the jurisdiction vested in it, shall have the power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as shall seem just, all such remedies or reliefs whatsoever, interlocutory or final, to which any of the parties thereto may appear to be entitled in respect of any and every legal or equitable claim or defence properly brought forward by them respectively or which shall appear in such cause or matter, so that, as far as possible, all matters in controversy between the said parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided; and in all matters in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail." (Underlined for emphasis)

On this account, I hold that Abuite Tembo's relatives are entitled to remain on the land in question. These include Elizabeth Tembo and Pauline Mboloma, and other unnamed relatives who are part of this action, who occupied the land before Abuite Tembo's demise.

As for the rest of the defendants, I am unable to see how they can succeed, in the absence of evidence tracing how they acquired their respective portions of land, and from whom; whether they acquired their portions of land from individuals who had occupied it before Abuite Tembo got his land from Rosemary Kapembwa. I note, in relation to Maureen Kanyanta Lungu, that she wrote a letter to the Chibombo District Council Secretary indicating that she had been dragged to court by John Tembo of Lot 2660/M for encroachment. She sought clarification as Council could not give the same land to two people in 2011 and 2012. The response she got was that the official records held by Chibombo District Council did not show Mr. John Tembo's application for acquisition of title deeds for a piece of land in Chieftainess Mungule's area.

This response is not surprising, as the person who must have applied for acquisition of title deed for the land in question was not John Tembo but Rosemary Kapembwa, as she appears as the person who passed on her interest to Abuite Tembo on the Lands Register.

On 16th May 2011, Lot number 2660/M was inspected by Chibombo District Council, and a letter written following Inspection report to the Commissioner of Lands for the Chibombo Council Secretary. The letter indicated that the

property was on a 14 year lease offer to Abuite Tembo and was approximately 9.5500 hectares and was located 1.2 km from Kabangwe Sub-center of Chibombo District. There were no registered caveats, encumbrances, court orders and injunctions. The Acting Council Secretary stated in conclusion and recommendation as follows:

“The offer (sic) has developed the small holding since allocation and therefore following the site verification inspection findings I have no objection to recommend for the approval of the subdivision.”

The proposed subdivision was approved, in the extent of approximately 2.6 hectares. It was this subdivision which was later sold to Point and Line Technologies Limited which later sold the same to Dozam Investment Limited.

The remaining extent of the land after the subdivision reduced more or less by 2.6 hectares, going by the sketch plan annexed to the Certificate of Title issued to Abuite Tembo for the 14 year lease. The Certificate of Title produced at page 14 of the plaintiff's bundle of documents purported to show that 7.7778 hectares was the remaining extent. That cannot be accurate in light of the fact that the subdivision of about 2.6 hectares was effected on a defective survey diagram that represented that the land was 10.3556 hectares in extent.

I now turn to address the rest of the arguments by the parties. As revealed by the *Siwale* case *supra*, Alice Phiri's interest did not expire. She was entitled to a renewal of her lease. The evidence led relates to Alice's land, which had been encroached upon. I cannot ignore the evidence, as it was let in unobjected to.

She is entitled to a re survey of her land, as well as the plaintiff's as they overlap. The argument relating to Alice Phiri is dismissed as a result.

I agree that chiefs and village headmen lack power to offer land vested in the President to others. However, the validity of a Certificate of title issued by the President depends on consent from a chief and the concerned local authority. If this had not been obtained, the President had no power to deal with the land as though it were state land. The land in excess of 9.5 hectares has not been shown to have been subjected to applicable procedure before being allocated to Abuite Tembo. Therefore inclusion of the excess in the Certificate of Title is an illegality. The land falls to be resurveyed in line with the sketch plan annexed to the 14 year lease.

The evidence before me is that Abuite Tembo allowed his relatives on the land. As stated above, Capital Ngulube's involvement in allocation of the land appears doubtful, as Rosemary Kapembwa appears to be the person from whom Abuite Tembo got the land in question. I agree that the traditional court has no jurisdiction to deal with land that is subject of a Certificate of Title, where procedure to convert the land was presumably followed. However, the plaintiff agreed to pay the K20,000.00 damages for trespass, when he could have easily refused. On account that I have held that Abuite Tembo's relatives will remain on the land an account of proprietary estoppel, I will not order a refund of the K20,000.00, as doing so would contradict the finding of the

2. Elizabeth Mboloma, Elizabeth Tembo and Abuite Tembo's relative's will remain on the portions they occupy on grounds of proprietary estoppel.
3. The rest of the defendants' claims have not been proved. However, should the re-survey disclose that they occupy the area erroneously included in the title deed, they will remain on the portions they occupy, as it will ultimately not belong to the plaintiff.
4. Should the re-survey reveal that some of the defendants are on the plaintiff's land, then those defendants will pay damages to the plaintiff for loss of use, to be assessed by the Registrar, and the usual processes of execution will be resorted to, but only after the re-survey.
5. Should some defendants be found to be on the plaintiff's land after the re-survey, they will bear the plaintiffs' costs to be agreed and in default taxed.

Before I leave this judgment, I wish to express my regret at the length of time it has taken to deliver it. This is attributable to pressure of work. I also wish to state that a reminder to deliver a judgment cannot affect the court's impartiality which attends this court's decisions as indicated to the parties at an earlier occasion following certain remarks on the law pertaining to injunctive relief.

Dated the 3rd day of February 2020



F. M. CHISANGA
HIGH COURT JUDGE