IN THE HIGH COURT FOR ZAMBIA **2013/HP/1654**

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)

B E T W E E N:

COSMAS MWEEMBA AND 34 OTHERS **PLAINTIFFS**

AND

CHIKANKATA DISTRICT COUNCIL **1ST DEFENDANT**

THE ATTORNEY GENERAL **2ND DEFENDANT**

Before the Honourable Mrs. Justice S. M Wanjelani this 21st day of May, 2020.

For the Plaintiffs : *Mr. C. Sianondo, Messrs Malambo & Company*

For the 1st Defendant: *Mrs. N. Simachela with Ms. N Chibuye- Messrs. Nchito & Nchito Advocates*

For the 2nd Defendant: *Ms. C. Adalafya-Attorney General's Chambers*

JUDGMENT

Cases Referred to:

1. *Justin Chansa v. Lusaka City Council, 2007 ZR 185 (SC).*
2. *Godfrey Miyanda v. Attorney General, No. 1 (1985) ZR 185 (SC)*
3. *Communications Authority v Vodacom Zambia Limited Judgment No. 21 of 2009*
4. *Phillip Mhango v Dorothy Ngulube and Others (1983) ZR 61*
5. *Zambia Railways Limited V Pauline S. Mundia, Brian Sialumba*
6. *Anderson Mazoka and Others v Mwanawasa and Others (2005) ZR 138 (SC)*
7. *Attorney General v Law Association of Zambia (2008) ZR 21 Vol, (SC)*

8. *Godfrey Miyanda v Attorney General (No.1) (1985) ZR 185 SC.*
9. *Lusaka City Council V Adrian S. Mumba (1977) Z.R. 313 (S.C.)*
10. *Godfrey Miyanda v The Attorney-General (No.1) (1985) Z.R.185 (S.C.)*
11. *Paton v Attorney General (1968) ZR 185*
12. *Attorney General v Thixton (1967) ZR 10,*
13. *Anti-Corruption Commission v. Barnet Development Corporation Limited (2008 Vol 1 ZR 69*

Legislation and other materials cited:

1. *The Constitution of Zambia, Act No. 1 of the Laws of Zambia*
2. *The Lands Act, Cap 184, of the Laws of Zambia*
3. *The Agricultural Lands Act, Chapter 187 of the Laws of Zambia*
4. *The Interpretation and General provisions Act Chapter 2 of the Laws of Zambia*
5. *The Protection of Fundamental Rights Rules, 1969*

The Thirty-four (34) Plaintiffs commenced these proceedings against the Defendants by way of Writ of Summons and Statement of Claim on 14th November 2013, which were amended with Leave of Court on 13th November 2015. The endorsement on the Amended Statement of Claim is for the following reliefs:

I. *A declaration that the Plaintiffs were at all material times and still the lawful and legal occupants of Mugoto Settlement consisting Farm lands and Communal Grazing Land forming part of Farm 106 Chikankata District legally subdivided, surveyed and offered to them;*

II. *A declaration that the Defendants action of displacing the Plaintiffs from the said land is unwarranted and unlawful because the said land was lawfully and legally*

allocated to the Plaintiffs for farming and settlement purposes;

III. *A declaration that the Defendant's actions on the said land are unwarranted and unlawful in that the land was previously surveyed and demarcated for the Plaintiffs use and that the Plaintiffs were in the process of being issued with Title Deeds.*

IV. *A declaration that the Plaintiffs have acquired rights in the said land as Farmers and the Defendants' actions of demolishing the Plaintiffs property by the construction of the purported District Offices is unlawful.*

V. *An Order that the land be given to the Plaintiffs for the intended use of farming and settlement or in the alternative, an order to have the Plaintiffs relocated to a suitable area in the district and adequate compensation;*

VI. *An Order for damages for anguish, undue inconvenience, harassment, damaged properties and loss of use of the land resulting from the illegal and unwarranted actions of the Defendants;*

VII. *An Order of Interlocutory Injunction restraining the 1st Defendant and the 2nd Defendant or their servants or agents from interfering, intermeddling, fencing off, harassing, evicting, demolishing, displacing, developing or taking possession of the property being the Farm 106 Chikankata District, Southern Province and or forming part of or known as "Mugoto Settlement" or in any way*

dealing with the property until the final determination of the matter.

VIII. *Costs of and incidental to the proceedings*

IX. *Any other relief that the court may deem fit*

According to the Amended Statement of Claim, the Plaintiffs are among the successful 229 applicants and beneficiaries of the 'Mugoto Settlement' forming part of Farm No 106, a Government possessed Farm which consisted of farm lands and communal grazing lands and each Plaintiff inhabited 10 hectares of legally subdivided, surveyed and numbered land offered to them. It was vied that during a meeting held by the Mazabuka Municipal Council on 28th March 2002, it was resolved that the Plaintiffs were to be offered title deeds to their respective pieces of land and that their applications would be sent to the Commissioner of Lands on recommendation from the Mazabuka Municipal Council.

The Plaintiffs added that however, sometime in 2013, the 1st Defendant sent surveyors to the area to survey the said land for purposes of constructing a District consisting of a Civic Centre and District Council Offices, and that on 14th September 2013, without notice, the Plaintiffs watched helplessly as large commercial mobile machines moved onto their settlement and began uprooting, grading, levelling and other activities whilst surveyors pegged and re-demarcated plots and carried out other construction works on the communal grazing land where the Plaintiffs' cattle, goats, sheep and pigs grazed.

The Plaintiffs averred that the 1st Defendant did not make any consultations with them in relation to their intention to build the District Council Offices on their settlement area as the Plaintiffs had acquired rights and claims on the land space both individually and collectively.

Consequently, on 2nd October 2013, the Plaintiffs wrote a letter to the 1st and 2nd Defendants demanding that they desist from the illegal actions and stop the construction on the land and threatened them with legal proceedings in default thereof, but the demand letter was ignored and the illegal and unlawful construction works continued, resulting in the destruction of property and grazing lands for the animals to the detriment of the Plaintiffs whose livelihood depends on their animals. They aver that there are no indications to relocate or compensate them hence the claims herein.

The 1st Defendant filed its defence on 19th January 2016, in which it denied the Plaintiff's allegations. The gist of the 1st Defendant's defence was that the "Mugoto Settlement Area" was part of Mazabuka District and that no one including the Plaintiffs, holds title to the said land.

The 1st Defendant averred that in December 2012, at a Stakeholders meeting held at Mazabuka Civic Centre, the Mazabuka Council surrendered the Nega Nega Junction to the newly created 1st Defendant to construct Council Offices and attendant infrastructure.

The 1st Defendant thus denied the assertions that the Plaintiffs hold title to the said land and further averred that no single occupant of

the land in question had been displaced as all the inhabitants had been integrated into the new township.

The 1st Defendant averred that it held numerous consultative meetings which were attended by the Residents' representatives and traditional leaders who all endorsed the Site Plan. The 1st Defendant denied that the construction works being carried out at the settlement were illegal.

In his defence filed on 6th May 2016, the 2nd Defendant also denied the Plaintiffs' claims stating that according to the records, the land in contention has always been State Land as it used to be Farm 106a which was cancelled and subdivided into settlements and therefore that the issue of communal grazing land does not arise.

It was vied that the Mazabuka Municipal Council recommended the acquisition of title deeds for 219 Mugoto settlement settlers on 3rd August 2004, but that most of the subdivided plots had not been issued with offers except for the three namely: L/Mugoto/5, L/Mugoto/41 and L/Mugoto/71.

According to the 2nd Defendant, the Commissioner of Lands had not issued any offer on the land in question and it followed therefore that there was no cause of action against the Commissioner of Lands and any loss and damage suffered by the Plaintiffs in respect of the land has not been occasioned by the 2nd Defendant.

The Plaintiff's first witness was **Musolini Yebo Buumba (PW1)** who testified that sometime in 1977, after Farm No. 106 belonging to a

Mr. Walker was repossessed by the Government of the Republic of Zambia, the then Minister of Lands, Mr. Alexander Chikwanda convened a Meeting at which he announced to all the indigenous people that had been displaced to the hills by the white settlers, that the Government had repossessed idle land belonging to an absentee landlord for the purpose of resettling the displaced people back to the arable land.

PW1 stated that after the Meeting, the Ministry of Lands and Agriculture under the Mazabuka District Council and Planning Department moved on site at Farm 106a and demarcated plots of 10 hectares each. He said the indigenous people who were interested were told to apply and after which 229 were selected and they were given the newly demarcated settlement plots.

According to PW1, the selected settlers were each given 10 hectares for crop production. In addition to this, each of the settlers was allocated a portion for residential houses and a vast communal portion of land for grazing of their animals. He said in 1978, the settlers moved on site and began clearing the land, sinking wells and boreholes and building houses and cultivating.

PW1 averred, that in 2013, the Plaintiffs woke up to a rude shock when they saw a group of surveyors who came to the settlement and started demarcating the land in the grazing and residential areas and upon inquiring from the surveyors what they were doing, the surveyors responded that they wanted to take development to the

area. PW1 described how the surveyors proceeded with their mission and started mounting beacons, mostly in the Plaintiffs' communal grazing area and the residential houses. He testified that no consent was obtained from the Plaintiffs.

In giving a background to how the Plaintiffs were on the land, PW1 testified that the Government of the Republic of Zambia set up a Commission of Inquiry (hereinafter referred to as the "Commission") into the land situation in Southern Province which was headed by the former Chief Justice Ernest Sakala (Retired). He said in 1982, a detailed Report("the Report") as reflected on Page 272 of the Plaintiff's Bundle of Pleadings, was generated which dealt with the Mugoto Settlement and other land matters in Chief Naluama area, as well as recommending that some of the arable land be repossessed from the absentee landlords.

When asked to comment on the differences between the Farm numbers in the Report at Page 285 of the Plaintiff's Bundle of Pleadings, PW1 told the Court that the Report was referencing original numbers which were re-numbered after Government repossessed Farm 106a and creating the Mungoto/Naluama Settlement and allocating them the subdivided plots. PW1 explained that in 2004, Mugoto settlement fell under Mazabuka Municipal Council and referred to the letter from that Council to the Commissioner of Lands for acquisition of title deeds for the Mugoto Settlers. PW1 explained that the Mazabuka Municipal Council advised them to apply for title deeds because their land was not secure without title deeds.

In conclusion, PW1 contended that the Plaintiffs were in a state of desperation due to the fact that their land including the maize fields and residential areas had been taken over by the Government and they did not know where to go and what to do. He stated that they had been told that they would be integrated into townships but wondered how considering that the Plaintiffs reared goats and cattle. PW1 added that no form of compensation had been offered to the Plaintiffs for the land and that the District Council only informed the Plaintiffs that the Government was undertaking developmental works in the area. He insisted that the Plaintiffs had been displaced.

In cross-examination, PW1 stated that he was one of the Plaintiffs and his name appeared on the List of Plaintiffs as "*Vincent Chembo*" He testified that the indigenous people lived on the land before they were displaced by the white settlers. However, he said that the Government repossessed the land after which the property became State land but the Government gave the Plaintiffs permission to live there.

PW1 confirmed that their traditional leader was Chief Naluama and the Headman was Hachiwa and further that the land was in Sichete Ward which had a Ward Councillor. He further confirmed that the Offices were placed in the grazing area and that each Plaintiff had 10 hectares of landas well as having access to the communal grazing area. He stated that he was able to ascertain his property based on the beacons that had been placed by the Government Planning Department in 1978.

PW1 said that he was told that the Chief and the Councilor were consulted but that he was not aware that they had no objection. He conceded that he had not been moved from where he has been living but that there was a beacon outside his house whose purpose he did not know.

In further cross examination by the 2nd Defendant's Counsel, PW1 stated that the extract of Minutes from the Council showed a recommendation for issuance of title deeds but that he was not aware that the Commissioner of Lands could accept or decline the recommendation. PW1, in changing his response on what was allocated to him stated that according to the Plan, the offer of land included the grazing land.

PW1 stated that they had not applied for planning permission as there was no need and insisted that he had been displaced as his animals were now grazing where the Government had built.

In re-examination, PW1 emphasized that the disturbance was that Government beacons were placed in the Plaintiffs' settlement and Farms.

The second Plaintiffs' witness was **Cosmas Mweemba,** (PW2) who testified that on 19th February 2013, the Plaintiffs saw people come onto their settlement and told them that they wanted to put up a district. He stated that when he inquired on whom they had consulted, they responded that they were Government officials.

PW2 testified that in September 2013, before the Plaintiffs could find out about the issue of establishing a district in their area , they saw big machinery being brought onto the disputed land and that the people who brought the machines started grading the area, making roads, damaging graves and even uprooting trees. He testified that the officials were accompanied by Police Officers during these activities and that they told the Plaintiffs that they were Government officers and therefore that there was nothing that the Plaintiffs could do about what was being done.

PW2 stated that that following the above events, the Plaintiffs wrote a letter to the Attorney General, as reflected at Page 307 of the Plaintiffs' Bundle of Pleadings, in which they explained how many people were in the settlement, with their animals, and asked what form of assistance the Plaintiffs would get from the Government. He referred to a response from the Attorney General at Page 308 of the Plaintiffs' Bundle of Pleadings, which according to him, was to the effect that the land in dispute was given to the people of Naluama and that if there was a problem, they should be given what could be given to them.

His narration on how the Plaintiffs acquired the land was the same as that of PW1, save to add that the land was divided into three portions for residential, agriculture and grazing.

PW2 testified that after the demarcation of the land, each of the successful applicants was shown the parcel of land for residential purposes, cultivating and the grazing area in 1978. He added that

the Mugoto Settlers, including all the Plaintiffs, have stayed on the disputed land for over 30 year without any issues until later when they saw the machinery and the Government officials move onto the site without consulting the Plaintiffs. PW2 testified that when the people who purported to be Government officials moved on the land, they demarcated the disputed land in portions both for sale as well as for construction of their offices.

PW2 narrated how the Plaintiffs tried to obtain title deeds from the Ministry of Lands and submitted all the documentation for them to be issued with the Certificate of Title. He said that however, just at the time when the Plaintiffs started to receive offer letters, the current problem over the disputed land started and only three people collected Certificates of Title.

When referred to documents appearing at Pages 331,332,334,336,338,340,342,344,346,348,350 and 353 of the Plaintiffs Bundle of Pleadings, PW2 told the Court that they were offer letters for the people who all resided in the Mugoto Settlement.

In adding to the historical aspect of acquisition, PW2 testified that that the Member of Parliament, then Joshua Lumina and the late Chief Naluama requested that the Government helps the Plaintiffs with arable land as they were staying in the hills. He said the late Chief Naluama invited the Minister of Lands and Agriculture who held a meeting where he announced that Government had given the land to the Naluama people and that he had given it to the people so that it could be shared under customary land. PW2 stated that this

pronouncement was in writing He said the document at Page 177 of the Plaintiff's Bundle of Pleadings dated 13th April 1977, stated that the Minister surrendered the land to the people and that the Plaintiffs are the same people that the Minister was addressing.

In cross-examination by Counsel for the 1st Defendant, PW2 confirmed that he is a resident of Mugoto and had been since 1978. PW2 said that the Plaintiffs applied to the Mazabuka Municipal Council but that they did not know whether or not the land belonged to the Mazabuka Municipal Council and that he had applied for 10 hectares of land. When further probed as to how much land he currently has, PW2 responded that the Plaintiffs were given 10 hectares of land for farming and residential area and that the grazing areas were not measured and that the Plaintiffs were only shown were to stay and graze their animals. PW2 explained to the Court that none of the Plaintiffs owns the grazing land individually because it was for the entire community.

When asked by the 1st Defendant's Counsel who showed the Plaintiffs' the land, PW2 responded that it was the surveyors who came from the Council. He said that when the surveyors came onto the Settlement, they found that a portion of the disputed Land had water and showed the Plaintiffs were to stay. PW2 confirmed that the Plaintiffs were each given 10hectares of land for Farming and residential area which they still occupied to date.

PW2 further stated that he was not aware that the Plaintiffs' Traditional leader, Chief Naluama was consulted when coming up

with the site for Chikankata District Township. However, PW2 stated that based on the documents at Page 1 of the 1st Defendant's Bundle of Documents, which are the Minutes of the Third Stakeholders Meeting over the siting of the Chikankata District Township held at the Mazabuka Council on 14th December 2012, and having read the first name and second names as those of Chief Naluama and Chieftainess Mwenda, respectively, confirmed that they were present during the Meeting. He further confirmed that at Page 4 of the 1st Defendant's Bundle of Documents titled *'Closing Remarks'*, the Chiefs gave directions in the said Meeting. PW2 further confirmed that the Plaintiffs' Councilor then Mr. Phizwell Mainza also attended the Meeting as per the Minutes at Page 1 of the 1st Defendant's Bundle of Documents.

PW2 told the Court that he wrote to the Attorney General but that the Chikankata District Council was not copied in, in the said letter and therefore that there was no way that Chikankata District Council would have known the contents of the letter to the Attorney General for it to respond. He said the size of the Mugoto settlement, was approximately 7000 plus hectares.

PW2 was referred to a Map of the Mugoto Settlement Scheme at Page 1 of the 1st Defendant's Bundle of Documents and he identified Farm No. 204 as his residence and that the other Plaintiffs lived in the other portions of the residential area, while indicating that none of the Plaintiffs lived in the blank area as it was a grazing area. PW2

also told the Court that the other side of the Mugoto Settlement, across the road was in Mazabuka District.

PW2 confirmed that he was aware that five people were given offer letters adding that one was situated in Chikankata District, while the rest were in Mazabuka District. He however, told the Court that he did not have an offer letter.

When he was referred to a Newspaper article appearing at Page 177 of the Plaintiffs' Bundle of Pleadings dated 13th April 1977, PW2 said that the date was put by the Mail Reporter and again that it was one of the officials that accompanied the Minister of Lands. PW2 told the Court that he obtained the newspaper cutting from the National Archive and that he did not know when the article was published.

In further cross-examination, PW2 maintained that he was personally present when the Minister of Land and Agriculture made the pronouncement giving the disputed Land to Chief Naluama for onward transmission to the people of Naluama. PW2 confirmed that he was given 10hacteres of land to Farm, to reside on and to graze his animals, which land he still occupies.

In response to the cross -examination by the 2nd Defendant's Counsel, PW2 said that the Plaintiffs were given the land in 1978 by the Mazabuka Municipal Council after which they surrendered all documentation relating to the disputed land to their lawyers. PW2 added that although he did not have any legal documentation to show his interest in the land, the Plaintiffs' had submitted applications to

the Commissioner of Lands for them to be issued with Certificates of Titles. PW2 told the court that he was aware that an application for title to land can either be accepted or rejected.

PW2 stated that he had written the letter to the Attorney General at Page 308 of the Plaintiffs Bundle of Pleadings indicating that the land was held under customary law. He, however, stated that he knew that the first owner of the Farm was a Mr. Smith and that it had been held by the Government before it was given to the Plaintiffs.

With regard to the document titled "Chikankanta District Council, plots for offer" on Page 313 of the Plaintiff's Bundle of Pleadings, PW2 stated that he did not know if that was an offer or sale and that he did not know the cost of the application or the land. He stated that they settled on the land before getting letters of offer.

In re-examination, PW2 said that the land was handed over to the Chief but that the Council went to subdivide and that the Plaintiffs had to apply to the Council because they wanted a specific number of people for the land.

When referred to the advert from Chikankata appearing at Page 313 of the Plaintiffs' Bundle of Pleadings, PW2 said that the third Column referred to the cost of the application.

The 1st Defendant's first witness was **Johnson Sakanya Changwe** (DW1) the current Council Secretary for Luangwa Council, who stated that he did not know Mr. Cosmas Mweemba, the 1st Plaintiff herein.

DW1 informed the Court that in 2012, he moved to Chikankata District Council, as Council Secretary. He explained that initially Chikankata District Council was being hosted by the Mazabuka District Council having had no accommodation of its own at the time it was established in 2012. Consequently, Chikankata and Mazabuka District Councils shared staff and property including Motor vehicles. DW1 explained that later, Chikankata District Council started operating own its own from a temporary structure that was initially a Guest House at Turn Park at the junction of Chirundu and Mazabuka.

DW1 testified that the initial mandate of the newly created Chikankata District Council, through instructions from the Ministry of Local Government was to find space in form of land for the establishment of the Chikankata District Administrative Centre. Consequently, that a Stakeholders Meeting was held sometime in December 2012 for purposes of consulting where the District's Administration Centre could be set up.

DW1 stated that the meeting was attended by members drawn from all over the Districts, churches, Heads of Government Departments, Members of Parliament for both Mazabuka and Chikankata Districts, Commercial Farmers, representatives from the Ministries of Lands and Local Government and Housing, their Royal Highnesses Chief Naluama and Chieftainess Mwenda as well as individual members of the public.

DW1 explained that the stakeholders meeting achieved the purpose for which it was called as it was unanimously agreed that the Administrative Centre be set up at a place called Nega-Nega turn -off which was the most favourable among all the places suggested. DW1 averred that he prepared the Minutes for the Meeting which appear Pages 1 to 4 of the 1st Defendant's Bundle of Documents.

DW1 stated that after the Meeting, a Report was generated and submitted to the Ministry of Local Government, showing that the Stakeholders had agreed to the site for Civic Centre. He testified that the Civic Centre was established after approval by the Ministry of Local Government and that a contractor from the Ministry was taken to the Site to put up infrastructure being 10 houses, a civic centre and District Administration offices Phase one.

DW1 stated that however, as the Contractor began constructing, the 1st Defendant was served with Summons from Messrs Mushipe and Company, claiming that the 1st Defendant was encroaching on the land that did not belong to the Council. DW1 said that they were surprised to receive summons from individuals that were not known by the Chikankata District Council.

In his continued testimony, DW1 said that when they went on site, they found huts, permanent and semi -permanent structures and individuals that were residing there. He added that there were no structures at the site were the 1st Defendant had begun construction. DW1 further testified that there was an understanding that any structures found on the land would not be disturbed and continue

standing as before. He concluded his testimony by stating that he did not know the current status of the structures found on the land

During cross-examination by Counsel for the 2nd Defendant, DW1 testified that the disputed land has always been state land. He further told the Court that there was no interest declared during the Stakeholders Meeting of 14th December 2012. He added that he could not tell whether or not the Plaintiffs attended the Stakeholders Meeting, which was open to the public and those that could not make it were represented by the Councilors.

DW1 added that to his knowledge, no one had been displaced because the people continue to be where they were and the Site for construction was on wide open land.

He said he was aware of the recommendation letters that were generated by the Mazabuka Municipal Council for an area of land called the Mugoto Settlement, which crosses the boundaries of the Mazabuka and Chikankata Districts. DW1 further vied that the Council cannot offer land to individuals directly without involvement of the Commissioner of Lands.

In cross-examination by Counsel for the Plaintiffs, **DW1** stated that he had worked for the Chikankata District Council from August/September 2012 to March 2014 and confirmed that the reason why the Civic Centre was not set at Kasamu was because the owners of the land did not release the land. He stated that he was aware that resettlements are a creation of the Ministry of Agriculture

and that the land in issue was subject to a Commission of Inquiry, and that it was established in 1979, and designated to have residential and grazing area.

The Witness was taken through various provisions of the Report. He stated that according to the Table on Page 3, the ownership of land was under customary tenure.

DW1 stated that there was no evidence that the Council engaged the headman as suggested by the Chiefs in the Meeting. He stated that with reference to the Map on page 5 as produced by the Council, they sought the Chiefs signature as according to the Minutes, the land was under customary tenure. He further stated that according to the Commission Report; the Attorney General's letter and the Minutes, the land was under customary tenure and that the Attorney General had stated that the Plaintiffs should be given compensation, failing which they should continue enjoying.

DW1 stated that he head about the Albidon Mining Settlement on page 292 of the Plaintiffs Bundle of Pleadings for the affected people to be compensated but no one was compensated during his stay at the 1st Defendant Council. He said there were no people to be re-located, hence the concern raised by the Councilors on compensation and settlement was not addressed.

The witness stated that the letters of recommendation to the Commissioner of Lands were sent in 2004, before the 1st Defendant was established and that some letters of Offer had been issued.

In re-examination, DW1, informed the Court that there was no claim for compensation from anyone alleging that they had been displaced or evicted from where they were settled, and that the Councilors upheld the decision to establish the Centre at Nega Ngea as earlier resolved by the larger group in Mazabuka.

DW2 was **Nelson Mhango**, a Planning Assistant at the Provincial Planning Office in Southern Province, who stated that he had been at that Office since 2012. The gist of his evidence was similar to that of DW1 as regards the formation of the 1st Defendant, the Stakeholder Meetings that included the traditional chiefs and the identification of the Nega Nega junction as the site, for the Administrative Centre for the 1st Defendant Council.

He stated that after the area was identified, they moved on site to pick the coordinates for the extent of the earmarked District and also looked at the developments to take stock of how the households would be impacted. He stated that they were taken around and he noted that there was a dam that was being used by the cattle while there were open spaces that had cattle grazing.

The witness stated that they had meetings with the local settlers and assured them that *no one* would be left behind in development and that they would be intergrated in the new township. DW2 stated that in their initial stages of the work, the area was perceived to be traditional but it emerged that the property was sitting on state land, and would entail people having letters of offer or titles from the Commissioner of Lands. He said that they were availed a Map by

Under cross-examination by the Plaintiff's Counsel, DW4 stated that she had been in the Civil Service for 24 years and with the Ministry of Lands for 10 years. She stated that land exceeding 250 hectares is approved by the Minister. She stated that for purpose of title deeds, even those under settlement have to go to the Ministry of Lands, and that the Commissioner of Lands must approve and thereafter the Applicants' names are placed in the System.

DW4 conceded that she had not investigated much on the background of the area before Court, and that she was not aware of the contents of the Affidavit sworn by the Legal Officer, Paul Kachimba. She said the investigations were not extended to the Ministry of Agriculture but that according to the Report, the Settlements are established by the Department of Agriculture. She said that paragraph 6 on page 207 of the Plaintiff's Bundle of Pleadings confirms that 10 hectares was allocated to each plaintiff.

DW4 stated that the Commission Report indicated that there was communal grazing land, and residential area organized on a settlement basis and that a village is on customary land. She averred that according to the letter from the Attorney General, the Plaintiffs appear to be enjoying customary tenure.

In re-examination, she stated that based on the documents before her, the land was held under customary tenure. She stated that the Ministry of Agriculture needed to consult the Ministry of Lands for approval after recommendation by the Council.

in the course of their service thereby leaving the Plaintiffs unprotected.

According to the Plaintiffs, the Court has to make a determination whether under Zambian law, the Plaintiffs' acquired and accrued enforceable customary, legal and equitable land rights by 2013, when a decision was made by the District Council to take over their land and whether under Zambian and International Law, the Chikankata District Council violated the law when it compulsorily took over the Plaintiffs' land and interfered with their usage of the land without consultation and providing compensation.

It was alleged that the land was repossessed and surrendered to Chief Naluama for the benefit of his subjects and shared through the Ministry of Agriculture which divided it into 10 hectares each of arable land, grazing area and residential, and for the 299 settlers who were registered in the Register of Settlers under Mugoto Settlers Scheme. It was contended that the issuance of a Certificate of Title was merely the last in the process of registering already acquired and accrued rights and interests in land.

The Plaintiffs further submitted that some of the Applicants had been given letters of offer for the land by the Commissioner of Lands and singling out and leaving at the Plaintiffs would amount to discrimination contrary to the provisions of **Article 23(2) of the Constitution of Zambia.** The principles of equity and public policy were all invoked in relation to the Plaintiffs having acquired the land through the President's authorized agents. Again, the Constitution

was cited to the effect that there can be no compulsory acquisition without compensation in line with **Article 16 (1)** of the **Constitution**.

It was also argued that the Defendants violated the Plaintiffs right to be consulted in decisions affecting their rights and cited various provisions of the **Constitution** to buttress this allegation. In addition, it was alleged that the Defendants activities violated not only statutory provisions but also constitutional provisions and International Human Rights Standards.

Reference was made violations to the right to self worth and dignity of the person contrary to **Articles 8 and 12** of the **Constitution**, and being humiliated and debased contrary to **Article 15** of the **Constitution**, as well as protection to privacy of home and other property in line with **Article 17 of the Constitution**, freedom of movement and residence contrary to **Article 22 of the Constitution**.

In summation, the Plaintiffs contend that they are entitled to the land even though they do not have title deeds, and the fact that the Commissioner of Lands has already issued letters of offer to others would amount to discrimination. In addition, it was agreed that the 1st Defendant has no authority to compulsorily acquire the Plaintiffs' land without giving them notice and compensation, which amounts to forced eviction and a gross violation of the Plaintiff's guaranteed rights under both the International Law and the Constitution.

According to the 1st Defendant's submissions, the land in issue is state land as confirmed by the Sakala Commission Report. It was

submitted that the Plaintiffs' witnesses stated that each settler was allocated 10 hectare and here has been no disturbance in their way of life because they live in the same residential areas and hold on to the 10 hectares.

Thus, the Plaintiffs had only acquired the right to use but the State had the power to determine the use/ and or allocation of a portion for the construction of the 1st Defendant's Administrative Center. The alternative prayer was that is the Court found that it was customary land, the traditional rulers were consulted in accordance with the provision of **Section 3(4) of the Lands Act** and thus the Defendant's followed the provisions of the law. Consquently the Plaintiffs have no claim of right over the land that does not vest in them.

The 1st Defendant contended that the Plaintiffs had failed to prove their case against the Defendants to entitle them to the discretionary remedies as stated in the case of **Communications Authority v Vodacom Zambia Limited**[3]

It was submitted that the Plaintiffs had alleged that they had applied for Certificates of Title but none of them had produced one, thus showing that they merely have a right to occupy and use the land at the pleasure of the State in the Agriculture Settlement Scheme. The Defendants submitted that the Plaintiff's witnesses also confirmed that the 10 hectares that each settler was allocated for Farming and the residential area are separate from the grazing area as indicated on the Map. It was added that if this Court holds that the land was

customary, the two traditional leaders were consulted and did approve of the site as shown by Minutes produced in the Plaintiff's Bundle of Pleadings.

It was further submitted that the Plaintiffs had failed to prove that they had been displaced from the land, and no evidence was led on how they had been displaced, how many animals they had and the number that had nowhere to graze nor was any evidence led on the alleged demolition of property.

The 1st Defendant contended that the Plaintiffs could not rely on the Albidon Settlement Agreement entered into with other settlers as the cases are distinguishable in that, in that case, the settlers could not live in the mining area, due to the hazardous nature of mining, which cannot be compared to the building of Administrative Offices and houses which were meant to develop and improve the surrounding community.

The 1st Defendant further argued that the Plaintiffs had not led any evidence to show sufficient particulars on what loss they had suffered in line with principles in the **Phillip Mhango v Dorothy Ngulube and Others**[4] case.

A general comment was made regarding the extraneous matters contained in the Plaintiffs submissions including the disparaging remarks on the Defendants' witnesses as well as speculations on what the Attorney General had looked at prior to writing the letter.

The 1st Defendant urged the Court to ignore the extraneous arguments.

I have considered the pleadings, the oral testimonies and the submissions on record. It is trite that the burden of proof in civil proceedings lies with the Plaintiff. In the case of **Zambia Railways Limited V Pauline S. Mundia, Brian Sialumba**[5] the Supreme Court stated *inter alia*, that:

> ***"The old adage is true that he who asserts a claim in a civil trial must prove on a balance of probability that the other party is liable."***

From the record, that the following issues are common cause:

- Around the year 1978, the Government repossessed Farm 106(a) in Mazabuka District belonging to an absentee land lord, and set up Agricultural Settlement Schemes.
- The Plaintiffs are settlers in the Mugoto Settlement of Chief Naluama area who were beneficiaries of the repossessed land.
- The Mazabuka District Council made a recommendation to the Commissioner of Lands to issue Title Deeds to the Mugoto settlers who had applied to the Council in 2004.
- A meeting of Stakeholders held on 26th December 2012 in Mazabuka resolved and selected the Nega Nega turn off as the most suitable site to set up the newly created Chikankata District Center as well as the setting up of a new township.

The issues for determination in my view are:

I. Whether the land in issue is state land or customary land?

II. Whether the Plaintiff have any acquired or accrued or interest rights to the land in dispute?

I note from the submissions that the Plaintiffs have made detailed claims on the alleged violations of their constitutionally guaranteed rights and yet this was not alluded to in their Pleadings. The purpose of pleadings has repeatedly been alluded to in various authorities including in the case of **Anderson Mazaoka and Others v Mwanawasa**[6] which is not to take the other Party by surprise and to enable the other Party know what case he is to meet.

Further it has been held that any allegation of violation of constitutional rights ought to be commenced by way of Petition by virtue of **Rule 2 of the Protection of Fundamental Rights Rules,** as stated in the case of **Attorney General v Law Association of Zambia**[7] that. Thus, the alleged infringement of constitutionally guaranteed rights cannot be sneaked into this matter commenced by way of Writ of Summons and Statement of Claim and through submissions. I find that these claims are improperly before me and I shall not delve into them.

I also note that in these, submissions, the Plaintiffs have cast aspersions on the Defendants' witnesses' competence, honesty and judgment as well as their age. These witnesses were not trial and no yardstick was placed before the Court to measure their competence

or otherwise. This is rather unfortunate, I urge Counsel to submit in accordance with the established rules and accord proper decorum and courtesy to opposing Counsel and the witnesses.

From the evidence given, the Plaintiffs allege that they were recipients of the land in dispute after it was repossessed from an absentee landlord in 1978. PW1 stated that they are asked to apply for allocation as there was a specific number of people required and they did so to Mazabuka Council. After the land was surveyed by officials from the Department of Agriculture, it was divided into 10 hectares of farming, and residential areas and communal grazing land. To this effect the Plaintiff have produced a newspaper excerpt with the date hand written, wherein it was reported that the Minister of Lands and Agriculture, Mr. Alexander Chikwanda had released more land for the farmers in Chief Naluama area.

In addition, there is also produced a Report of the Commission of Inquiry into land matters in the Southern Province dated 25th June 1982 which has been referred to as the Sakala Commission. The said Report on Page 287 of the Plaintiff's Bundle of Documents recognizes three Schemes established by the Department of Agriculture, that is, the Nangwezi, Mwanachingwala and Naluama Settlement Schemes.

The Plaintiffs further contended that the land was given to Chief Naluama and it became customary land. They further submit that this was recognized by the Attorney General as reflected in his letter dated 4th January 2015, and the Mazabuka District Council Stakeholders Meeting Minutes of 14th December, 2012 that refereed

to the ownership of land as customary on Page 3 of the 1st Defendant's Bundle of Documents, as well as that the Site Plan being signed by Chief Naluama and the fact that the Sakala Report indicated that the disputed land was on a village settlement basis.

The Defendants on the other hand, contend that the land was repossessed and reverted to the State and therefore is state land. DW4 had also informed the Court that once land is repossessed, it cannot revert to being under customary tenure again.

There is no dispute that the land in issue was held on title by the absentee landlord before it was repossessed by the Government. PW1 had testified that they had to apply to Mazabuka Council prior to them being given the land and that the land was subsequently surveyed and divided into the 10 hectares, residential and grazing land, by surveyors from the Council and the Department of Agricultural.

A perusal of the **Agricultural Lands Act,** and in particular the functions of the Board shows that it deals with state land and section 10 states that the Minister may by Statutory Instrument declare any state land to be subject to the provisions of the Act.

The Plaintiffs have stated that the land was repossessed and it was alienated and allocated under the Ministry of Agriculture as settlement scheme while also contending that the land is under customary tenure. However, **Section 10** of the **Agricultural Lands**

Act states that it is only state land that is subject to the provisions of that Act.

I have also perused the provisions of the **Lands Act** and note that there is recognition of holding land on customary tenure and the option of converting from customary tenure to leasehold tenure upon fulfilling prescribed conditions. However, I have not seen any corresponding provision that state land can be re-converted to customary tenure.

In addition, the provisions in **Section 4 of the Lands Act** state that persons who wish to convert from customary tenure to leasehold tenure shall not pay any consideration for such conversion. The Offer Letters produced on pages 331 to 353 of the Plaintiff Bundle of Pleadings show that the offerees, who are members of the Mugoto Settlement Scheme according to PW2, have to pay consideration fees to the Ministry of Lands.

A further perusal of the evidence of PW1 shows that upon repossession of the land by the State, the people were asked to apply to Mazabuka Council for allocation and; the Department of Agriculture did the surveying and put beacons.

I am not privy to what information the Attorney General looked at for him to state that the "*settlers appear to be legitimately enjoying customary land rights*", nor know the extent of the Site Map whether it was just the just repossessed farm or more land that necessitated the Chief to sign off.

Further the Plaintiffs did not dispute the evidence by DW4 that there were no Conversion Forms attached to their applications nor did they state that they followed the procedure for conversion of land from customary to leasehold as provided in the **Lands Act**.

All these factors and procedures point to the fact the land in question this is state land. In my view, the labeling in a document that land is under "customary tenure" as can be seen in the Minutes of the Stakeholders Meeting does not make the holding customary tenure, in the same way labelling a "donkey" as a "horse", does not make the "donkey" a "horse".

Based on the foregoing, I find that the disputed land is state land and it is not held under customary tenure.

The next issue is whether the Plaintiffs have accrued any rights over the subject land. The Plaintiffs in their submissions have argued that that they have acquired and accrued rights and interests over the land they were lawfully allocated in 1978 by the President through his lawful agent, the Minister of Lands and Agriculture and cannot be changed or abolished through changes in the law and they cited the case of **Godfrey Miyanda v Attorney General**[8].

According to **section 14(3) (c) and (e) of the Interpretation and General Provisions Act**:

> ***"14 (3) Where a written law repeals in whole or in part any other written law, the repeal shall not:***

(c) Affect any right, privilege, obligation or liability acquired, accrued or incurred under any written law so repealed; or..."

The Supreme Court in interpreting the section above in the case of **Lusaka City Council V Adrian S. Mumba**[9] stated as follows:

"Section 14 (3) (c) of the Interpretation and General Provisions Act does not preserve rights of the public at large; only the specific rights of individuals who have, before the repeal, satisfied any conditions necessary for their acquisition can survive."

In addition, in the case of **Godfrey Miyanda v The Attorney-General**[10] cited by the Plaintiffs, it was stated that:

"Generally speaking, the law preserving rights acquired or accrued does not preserve abstract rights conferred by the repealed statute but only applies to specific rights given on the happening of events specified in the statute."

A perusal of much earlier cases of **Paton v Attorney General**[11] and **Attorney General v Thixton**[12], decided by the Court of Appeal, the forerunner to the Supreme Court, all suggest that accrued rights are vested by a statute and a repeal of that statute does not take away those rights.

In the case before me, the Plaintiffs have not referred to repealed law by which they accrued rights to the land in issue so that those rights would be protected even with the introduction of a new law, which

new law again, they have also not cited. This Court can only make a determination based on the evidence presented before it, and not speculate.

However, it is not in dispute that the Plaintiffs have been on the land in issue from sometime in 1978/1979 and have been living, farming and grazing their animals there and that they have no Certificates of Title. In the case of **Anti-Corruption Commission v. Barnet Development Corporation Limited**[13] 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."***

No certificate of title has been produced in these proceedings to prove ownership as required by the provisions of **section 33 of the Lands and Deeds Registry Act.**

It is also not in dispute that the Plaintiffs had made applications to Mazabuka District Council for certificates of title and a recommendation was made to the Ministry of Lands so that they are offered the land and that a number of offers have since been issued to that effect. This evidence was not disputed and in fact, confirmed by DW4. The Plaintiffs themselves indicated that they had applied

for 10 hectares to be on title. I therefore find that the Plaintiff were lawfully on the land and are entitled to the 10 hectares of land and to be issued the certificates of tile to those portions.

In relation to the residential and grazing lands, PW1 had informed the Court that they were merely shown where to have their residential and communal grazing lands places and no measurements of the extent were done.

The 1st Defendant submitted that the subject land is administered by way of settlements schemes under the **Agricultural Lands Act** and thus the State had the powers to determine the use and/or allocate a portion of it for the construction of the 1st Defendant's District Centre.

I have read the said **Agricultural Act** and I note that under the part of a alienation of Lands, specifically **section 10** reads as follows:

> ***"10. (1) The Minister may, by statutory notice, declare any State land and, with the consent of the registered owner thereof, any freehold land to be subject to the provisions of this Part and may at any time, by like notice, declare that any such land that has not been alienated under the provisions of this Part shall cease to be subject thereto."***

In addition, **section 13** of the same Act which provides for Preparation of Schemes reads as follows:

> ***"13. (1) Whenever any land is, in the opinion of the Minister after consultation with the Board, suitable for***

alienation under the provisions of this Part, the Minister may direct the Board to prepare proposals for the alienation of the land in economic agricultural units and for matters connected therewith or incidental thereto."

There was no evidence before me to show that the Minister had issued Statutory Instrument to show that the subject land was subject to the provisions of the **Agricultural Lands Act**. However, the Commission Report on page 283 of the Plaintiffs Bundle of Pleadings indicates that it was established by the Department of Agriculture.

A further perusal of the **Agriculture Lands Act** shows that the leases granted in pursuance to its provisions under **Section 19** is for a period of 30 years and subject to payment of annual rent.

Thus, even under this Statute the Plaintiffs have not produced evidence of a lease or payment of annual rent to show that they have acquired or have accrued rights under this Act, to the residential and communal grazing lands.

It is my considered opinion that the Plaintiffs have an equitable interest to use the land but the State, as a legal owner has the overriding legal interests. In essence, the state has the right to change the use of the land from communal grazing to another activity, particularly as the Plaintiffs have not shown to the Court the extent of the communal grazing land that they use, how much of it has been used by the Council, how many animals they actually have

and what damage they have suffered as a result of the change in the land use of part of the land taking into account the fact that PW2 had stated that the extent of the land repossessed was over 7000 hectares. The Plaintiffs have not demonstrated to the Court, that the building by the Defendant has deprived them of all the grazing land.

I thus find that the Defendants did not compulsorily acquire the land from the Plaintiffs. Further there is no evidence that anyone has been displaced, and thus, there is no basis for ordering compensation.

As further alluded to by the 1st Defendant, the circumstances that led to the compensation agreement with Albidon Mining and the settlers are different in that I take Judicial Notice that mining is a hazardous activity while in this case, this is building of an Administrative District Center that would incorporate the existing structures into the Township, including the Plaintiff's residential areas.

No evidence was led to show what property was demolished by the Defendants, or what anguish, inconvenience harassment or loss of use of the land was suffered by the Plaintiffs arising from the Defendant's actions to requires payment of damage. This claim cannot be sustained.

In the sum total, I find that the Plaintiff's claim only succeeds to the extent that they are entitled to be issued Certificates of Title with respect to the 10 hectares that they applied for and was approved by

the Commissioner of Lands, as their witnesses confirmed that they have not been displaced by the Defendants.

The Plaintiffs' case is therefore dismissed save for the right to be given title deeds to the 10 hectares of land. Each party shall bear its own costs.

Leave to appeal is granted.

Delivered at Lusaka this 21st day of May, 2020.

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S.M.WANJELANI
JUDGE