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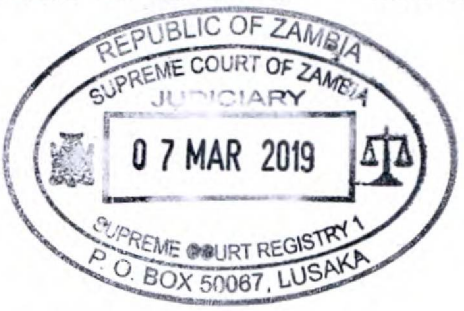
IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 72/2016**

HOLDEN AT NDOLA

(Civil Jurisdiction)



BETWEEN:

STEPHEN CHALWE (Administrator)
of the Estate of late Chalwe Nkaba) **1ST APPELLANT**

JOSEPH TUUSI **2ND APPELLANT**

AND

BRIDGET CHOOKA (Administrator of the
Estate of late Robinson Nkaba Chooka) **1ST RESPONDENT**

MARIA MILOSI CHOOKA **2ND RESPONDENT**

JEREMIAH NKABA **3RD RESPONDENT**

JONATHAN CHALWE **4TH RESPONDENT**

Coram: Wood, Musonda and Mutuna, JJS
on 5th and 7th March, 2019

For the Appellants: Mrs. M.K. Soko of Messrs Malambo & Company

For the Appellants: Mr. F M H Hamakando of Messrs Batoka Chambers

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JUDGMENT

MUSONDA, JS, delivered the Judgment of the Court

Cases referred to:

1. **Zambia Consolidated Copper Mines Limited v. Matale [1995-97] Z.R. 144**
2. **Wilson Zulu v. Avondale Housing Project Limited: (1982) Z.R. 172**

Legislation referred to:

1. **Intestate Succession Act, Chapter 259 of the Laws of Zambia**

1.0 INTRODUCTION

1.1 This appeal contests a judgment by which the court below determined and declared that an untitled or unregistered piece of traditional land measuring 30.8 hectares and situate in Chieftainess Mungule in the Chibombo District of Central Province (which we propose to continue referring to in this judgment as "the land in dispute") was the property of and constituted part of the estate of Robinson Nkaba Chooka and that, consequently, the same had devolved upon the beneficiaries of the said Robinson Nkaba Chooka's estate who, for the avoidance of doubt, included the respondents to this appeal.

1.2 Arising from the determination and declaration in the preceding paragraph, the lower court dismissed, as unmeritorious, the appellants' search for a rival declaration seeking to have the land in dispute declared as the property

of late Chalwe Nkaba and, consequently, had devolved upon the beneficiaries of the estate of the said Chalwe Nkaba.

1.3 We must hasten to flag up, even at this very early stage, that the trial court's judgment, to the effect we momentarily intimated, was, without doubt, a culmination of the manner in which that court resolved the findings of fact which it had ascertained during the course of the trial.

2.0 HISTORY AND BACKGROUND

2.1 The history and background facts and circumstances which had precipitated the court action whose outcome has become the subject of the present contest were aptly captured in the contestants' respective pleadings and the judgment of the court below.

3.0 THE COURT ACTION – PLEADINGS

3.1 According to the writ of summons and statement of claim which the respondents – then plaintiffs – had taken out in the court below, the primary relief which the respondents had set out to secure in that court was a declaratory order that they were *"... the rightful owners and beneficiaries [of] the estate of late Robinson Nkaba Chooka."*

3.2 The respondents also sought to recover possession of the portions of the land in dispute which had been occupied by the defendants at the time (who continue to be represented in this appeal by the appellant).

3.3 We pause here to comment that although the respondents did not, in their pleadings, package the real relief which they were seeking in the court below in the best of terms, the trial court helpfully understood the task which it had been called upon to undertake as that of determining whether or not late Robinson Nkaba Chooka had been the owner of the land in dispute we earlier identified and, by necessary extension, whether, following his demise, the land in dispute formed part of his estate.

3.4 The respondents' action was countered by the appellants who went so far as to assert that the respondent had trespassed upon the land in question. For his part, the 1st appellant even launched a counter-claim by which he sought to have the court below declare that the land in dispute was the property of the late Chalwe Nkaba and formed part of his estate to which the beneficiaries of his estate, who included the 1st appellant himself, were lawfully entitled. The 1st appellant also sought to recover

possession of the land in dispute on behalf of the beneficiaries of late Chalwe Nkaba's estate.

4.0 THE TRIAL: EVIDENCE AND CONTENTIONS BY THE PARTIES

4.1 At the trial, four witnesses testified on behalf of the respondents while three witnesses testified on the appellants' behalf.

4.2 Bridget Chooka, one of Robinson Nkaba Chooka's children who had also been appointed as the administratrix of his estate was the first witness to testify on the respondents' behalf and was designated as "PW1".

4.3 PW1 opened her testimony by telling the lower court that her father died on 6th February, 2009 and that, one of the properties which he owned at the time of his death was the land in dispute upon which he had built a 15-roomed house and other minor structures.

4.4 According to PW1, her late father owned the land in dispute and that, at the time of his death, he was in the process of securing title deeds for the same. The witness further testified that the process of securing title deeds had the full blessing of Chieftainess Mungule who had

authorised surveyors to proceed with the preparation of relevant diagrams and a sketch map which she had accessed at the Department of Agriculture in Kabwe.

4.5 PW1 further testified that, following her father's death, her aunt by the name of Lauder Nkaba (one of late Chalwe Nkaba's daughters) and her uncle by the name of Fraser Chalwe, started harassing her, her mother (Robinson Nkaba Chooka's widow) and her siblings over the land in dispute and even asking them to move away from it.

4.6 PW1 also testified that she did not know why she, her mother and her siblings were being chased from the land in dispute because, as far as she was concerned, this land was left for them by her late father. The witness further told the trial court that her grandfather (the 3rd plaintiff) by the name of Jeremiah Nkaba ("PW3") as well as the 4th plaintiff and her mother were better placed to know how her father acquired the land in dispute.

4.7 According to PW1's further evidence, a judgment of Chieftainess Mungule's traditional court of 2007 also attested to the fact that the land in dispute belonged to her late father.

4.8 In closing her evidence-in-chief, PW1 told the trial court that as a result of disputes over the land and the harassment which she, her mother and her siblings were being subjected to over the same as earlier noted, she and her mother decided to approach Chieftainess Mungule's traditional court, for the purpose of securing this traditional institution's intervention and protection. However, the witness complained that Chieftainess Mungule's court exhibited hostility towards them and did not want to hear them out, let alone to look at their papers. According to PW1, it was for this reason that she and the other persons she was representing decided to approach the court below.

4.9 When PW1 was cross-examined, she told the trial court that, prior to his retirement in 2000, her father had been serving as Commissioner of Police and that while he was serving in the Police Service his father's uncle, Jeremiah Nkaba (PW3) who lived close to the disputed land had been taking care of the disputed land on behalf of her father.

4.10 PW1 further testified that her father started building the 15-roomed structure earlier mentioned in 2002.

4.11 In closing her cross-examination evidence, PW1 told the court below that she could not rush to institute court proceedings against her aunt and her uncle because she wanted to give Chieftainess Mungule an opportunity to resolve the dispute. She further confirmed that unlike her late father, she had not been registered as a member of the Nkaba Village for which her aunt, Lauder Nkaba, had assumed the position of village headwoman. She denied any knowledge about a judgment of 2012 in respect of the land in dispute and added that she was unaware about any court process leading to that judgment.

4.12 The respondent's second witness ("PW2") was Jeremiah Lumamba Nkaba who was the 3rd plaintiff in the action below.

4.13 PW2 opened his testimony by telling the trial court that he was late Chalwe Nkaba's younger brother and that he joined his brother, who had since passed on, in 1955 following his father's death.

4.14 According to PW2, the land in dispute was previously owned by Rice Mulonda and used to be known as Mulonda farm.

4.15 PW2 went on to tell the trial court that, according to what late Chalwe Nkaba told him, he, Chalwe Nkaba, bought the land in dispute from Rice Mulonda using three herds of what was described to him by Chalwe Nkaba as family cattle.

4.16 This witness further testified that the late Chalwe Nkaba told him that because he had bought the land in dispute using family cattle, only his family members were to inherit it in the event that he died. According to PW2, the family members that Nkaba specifically identified were his two sisters, being Harrison Mweemba's mother and Rodia Nkaba and his brother by the name of Jonathan Nkaba. The witness further explained that late Robinson Nkaba Chooka was Rodia Nkaba's son.

4.17 According to PW2's further evidence, late Robinson Nkaba Chooka inherited the disputed land because his mother was one of late Chalwe Nkaba's family members whose herds of cattle he had used to buy the same. PW2 also explained that late Chalwe Nkaba had distributed other pieces of land that he owned among all his children, including Fraser and Lauder Chalwe.

4.18 PW2 also confirmed that late Robinson Chooka had built a house, servants' quarters and a shop on the land in dispute and that, in his (PW2) view, these properties belonged to Robinson Chooka's children who included PW1 (Bridget Chooka).

4.19 In closing his evidence-in-chief, PW2 testified that a week after Robinson Chooka's death, Lauder Chalwe proceeded to erect a structure in the middle of the land in dispute.

4.20 Under cross-examination, PW2 told the court below that it was late Chalwe Nkaba's wish to have his siblings live near him. The witness also confirmed that prior to Robinson Chooka's death, a judgment was rendered by Chieftainess Mungule's traditional court by which Robinson Chooka's ownership of the land in dispute was confirmed. PW2 denied any knowledge of another judgment from the traditional court after the one of 2007.

4.21 The respondent's third witness ("PW3") during the trial below was Johnson Chalwe who was late Chalwe Nkaba's first born son and the 1st appellant's step brother.

4.22 According to PW3, the land in dispute was purchased by his father (late Chalwe Nkaba) using three herd of cattle

which were contributed by his two aunties, namely, the mothers to Harrison Mweemba and Robinson Chooka while his father had contributed a little money.

4.23 This witness further testified that the land in dispute was given to Robinson Chooka by himself and Jeremiah Nkaba ("PW2") sometime in 2002.

4.24 The witness also told the judge below that, sometime after year 2002, his step sister, Lauder Chalwe, took the matter of the land in dispute to Chieftainess Mungule's traditional court which was chaired by headman Kanyemba. He further testified that, in 2004, the Kanyemba-chaired traditional court rendered a judgment which declared to the effect that late Chalwe Nkaba's children were the owners of the land in dispute.

4.25 PW3 further testified that he did not agree with the 2004 judgment and, consequently, he supported Robinson Chooka's appeal against the same which culminated in the 2007 judgment which declared Robinson Chooka as the owner of the land in dispute. The witness also testified that no one did anything about the 2007 judgment until after Robinson Chooka died.

4.26 PW3 went on to tell the trial court that when Robinson Chooka died, Lauder Chalwe proceeded to build a structure on the land in dispute and wanted to sell the same.

4.27 According to PW3's further evidence, Lauder Chalwe was subsequently appointed as village headwoman of Nkaba village. When this happened, Lauder Chalwe started selling fields including the one which PW3 owned. At this point, this witness confirmed that while he and Lauder Chalwe share the same father (late Chalwe Nkaba) they were born of different mothers.

4.28 In his closing evidence-in-chief, PW3 told the trial court that he had never seen or known anything about the 2012 judgment in respect of the land in dispute until it was shown to him during the trial. The witness also suggested to the trial court that the 2012 judgment had arisen under circumstances which suggested strict privacy. The witness even questioned the authenticity of that judgment.

4.29 Upon being cross examined, PW3 testified that it was himself (PW3) that had informed his late father (Chalwe Nkaba) about the land in dispute having been put up for

sale and that, subsequently, he and his father went to inspect it.

4.30 PW3 further confirmed before the trial court that his late father had informed him after inspecting the land in dispute that he did not have money to buy it at the time but asked him (PW3) to inform his aunties and an uncle about the opportunity to buy the land.

4.31 According to this witness, when he informed his aunties and uncle about the availability of the land in dispute the trio offered to avail three herd of cattle from Southern Province which, together with a little money which his father had, were applied towards acquiring the subject land. PW3 also reiterated in cross-examination that while he knew about the authenticity of the 2007 judgment concerning the land in dispute, he knew nothing about the 2012 judgment adding that the latter was procured 'privately'.

4.32 The respondents' last witness ("PW4") was Marriot Chikwenda who opened his testimony by telling the trial court that he had served as chairman of Chieftainess Mungule's traditional court from 2003 to 2012.

4.33 In his role as chairman of Chieftainess Mungule's traditional court PW4 received various complaints or disputes which arose within the chiefdom. Some of these disputes or complaints related to land ownership.

4.34 PW4 went on to tell the lower court that, sometime in 2007 a dispute had arisen between village headwoman Lauder Chalwe, her siblings and the 2nd appellant of the one hand and Robinson Chooka of the other in connection with the disputed land.

4.35 According to PW4, the parties we have identified in 2.34 above, together with headman Chalwe Nkaba (the son to the late Chalwe Nkaba who had been the first headman Nkaba) were heard and that the Chieftainess' Advisory Committee visited the land in dispute.

4.36 PW4 further testified that, during his Committee's visit to the land in dispute, the committee's members were informed by headman Nkaba that he had allocated the land in dispute to his nephew, Robinson Chooka.

4.37 PW4 went on to testify that, following deliberations, the Chieftainess' court proceeded to hand down its (2007) judgment which was read out by himself in the presence

of all the parties who included Lauder Chalwe. This judgment, according to PW4, was in favour of Robinson Chooka.

4.38 The witness further testified that after the judgment of 2007 was delivered the parties were given 14 days within which to appeal, in the event of either side to the dispute being dissatisfied or unhappy with it. According to PW4, no one appealed against this 2007 judgment.

4.39 Upon being shown the judgment of 2012, PW4 expressed ignorance about the same.

4.40 Following the closure of the respondents' case, the appellants opened their case by calling the first out of their three witnesses.

4.41 Stephen Chalwe ("DW1") opened his testimony by telling the trial court that before his father (late Chalwe Nkaba) died he had occasion to learn from him (his late father) as to how the land in dispute was acquired by his father.

4.42 According to DW1, his father told him that the land in dispute was purchased by himself using cattle which he had earlier bought from the money he received as his terminal benefits when he retired.

4.43 DW1 further testified that when his father died on 19th April, 1987, he left behind 28 children and three wives.

4.44 According to DW1, after his father's burial, a meeting took place which he and all the late Chalwe Nkaba's children attended. Others who attended that meeting were Chooka's children, headmen Chikumbi, Manenekela, Mukwanka and Lumina.

4.45 DW1 further testified that, at the meeting referred to in 2.44, a decision was reached to the effect that his late father's children were going to inherit the land in dispute and continue undertaking farming activities in the same way that their father had been doing. At the same meeting, DW1's father's nephew by the name of David Chooka was chosen as the administrator of his estate while his young brother, a Mangomba, was chosen as the new headman Nkaba.

4.46 The witness also further testified that, following disputes which erupted among some family members in relation to the land in dispute, he, his siblings and the 2nd appellant took the matter to Chieftainess Mungule's traditional court which resulted in that traditional court's first judgment

relating to the land in dispute in 2004. In terms of this judgment, the children of the late Chalwe Nkaba were declared as the only legitimate owners of the land in dispute.

4.47 The witness further testified that in 2007 another judgment emerged from the traditional court which declared Robinson Chooka as the owner of the land in dispute.

4.48 DW1 also told the court below that following the judgment of 2007, the children of Chalwe Nkaba appealed in 2012. This appeal culminated in a judgment of the traditional court of that year which declared the land in dispute as being the property of late Chalwe Nkaba's children who were the beneficiaries of his estate.

4.49 The appellants' second witness ("DW2") was Alexander Mwachilwana who told the court below that the late Chalwe Nkaba went to the area where the land in dispute is situated in 1939 and that in 1960 Nkaba bought the land in dispute using his herd of cattle.

4.50 The appellants' last witness ("DW3") was Joseph Tuusi who is also the 2nd appellant to this appeal.

4.51 DW3 told the trial court that he came to know late village headman Chalwe Nkaba sometime in 1983 and that in 1986 Nkaba allowed him to utilise 150 yards of the land in dispute for the purpose of growing cotton and sunflower.

4.52 DW3 further testified that at the time when late Chalwe Nkaba allowed him to use part of the land in dispute as stated above he (Nkaba) made it clear to him that the land in dispute had been bought by him for his children.

4.53 This witness also testified that, following late Chalwe Nkaba's death in 1987, he visited Chieftainess Mungule to inform her about his decision to vacate the piece of the land in dispute which he had been allowed to use by late Nkaba and the fact that he had surrendered the land to late Nkaba's children.

4.54 According to DW3, Chieftainess Mungule acknowledged what DW3 had done and noted that the land in dispute belonged to late Nkaba's children.

5.0 CONSIDERATION OF THE MATTER BY THE TRIAL COURT AND DECISION

5.1 Following the closure of the parties' respective cases, the trial court considered the evidence which had been laid

before it and proceeded to make a number of its findings of fact on the basis of that evidence. We propose to highlight the trial court's findings which we consider material to the present appeal.

5.2 The first fact which the trial court considered not to have been in dispute was that late Chalwe Nkaba purchased the land in dispute from Rice Mulonda sometime in 1960 using three herd of cattle.

5.3 The next issue which the trial court determined as having arisen during the course of the trial related to the four judgments of Chieftainess Mungule's traditional court being:

5.3.1 the judgment of 5th June, 2004 by which it was determined that the land in dispute belonged to the Chalwe family;

5.3.2 the judgment of 6th September, 2005 which declared that the land in dispute was the property of the 2nd appellant;

5.3.3 the judgment of 5th June, 2007 involving Lauder Chalwe and the 2nd appellant of the one hand and Robinson Chooka, of the other, in which it was

declared that the latter was the *bona fide* owner of the land in dispute; and

5.3.4 the judgment of 11th October, 2012 involving the 1st appellant, Lauder Chalwe and their siblings on the one hand and late Chalwe Nkaba's nephews, Robinson Chooka's widow and another, on the other, which declared the land in dispute as the property of late Chalwe Nkaba's children.

5.4 the trial court also noted that late Robinson Nkaba Chooka had constructed a house and other structures at the land in dispute which he had occupied for sometime prior to his death. The court further noted that Chooka had secured the authority of Chieftainess Mungule to have the subject land surveyed for the purpose of securing a certificate of title in respect of the same and that relevant survey diagrams had been prepared for that purpose.

5.5 According to the trial court, it was not in dispute that the traditional court judgment of 2007 by which Robinson Chooka was declared as the *bona fide* owner of the land in dispute was never appealed against within the time-frame

which had been given up to the time that Robinson Chooka died on 6th February, 2010.

5.6 After outlining its findings of fact, the court below went on to observe that, on the facts and the evidence before it, the main relief which the respondents were seeking before that court was a declaration that they were the rightful owners of the land in dispute in their capacity as the beneficiaries under the estate of late Robinson Nkaba Chooka.

5.7 Arising from the matter which we have identified in the preceding paragraph, the trial court went on to reason that the issue which fell for its determination was whether late Robinson Nkaba Chooka was the *bona fide* owner of the land in dispute and, consequentially, whether the said land formed part of his estate (for the purpose of having the respondents as the beneficiaries under that estate, benefitting therefrom).

5.8 The court below then went on to observe that the two sets of protagonists in this matter had each taken the position that they were the rightful owners of the land in dispute in their respective capacities as the beneficiaries under the

two sets of estates involved namely, the estate of Chalwe Nkaba and that of Robinson Nkaba Chooka.

5.9 The lower court then turned to the judgment of Chieftainess Mungule's traditional court of 2007 and noted that the same had served to reinforce the respondents' position. That judgment was expressed in the following terms:

> **"This is a matter, which the court heard over a dispute on the Mulonda field in Nkaba village, which this court has been charged to determine. The final verdict of the case mentioned above has finally been resolved that Robinson Chooka is a bonafide owner of the Mulonda field and further orders that there should be no interferences from the other party.**
>
> **The court also heard that Joseph Tuusii and Phiri encroached by making gardens into the fields, which end at the bans of the Mwembeshi stream, which fields have no provision for gardens. The court has arrived at this conclusion after critically examining the minutes during the sharing of the estates of the deceased.**
>
> **Also the testimony given by Mr. Jonathan Chalwe Nkaba the elder son of the late Trywell Chisuta Headman Nkaba and that of Jeremiah Nkaba young brother to the late who told the court that the field belongs to the nephew, which evidence the court accepted as a current version and current position that the field was given to the nephew as their property.**

Ruling

Since we have already stated the reasons as to how the Mulonda field came to be the property of the nephew, Rauder Chalwe, Joseph Tuusii and Phiri should vacate from the field and stop gardening immediately after harvesting their crops. This order should be observed by both parties."

5.10 The trial court noted that although the appellants challenged the 2007 judgment of the traditional court on the basis that it was (allegedly) fraudulently procured and that the appellants were never heard in respect of the same, this claim (on the part of the appellants) was discounted by the evidence of PW2, PW3 and PW4 which confirmed that both the 2nd appellant as well as Lauder Chalwe, the 1st appellant's sister, were present during the proceedings which had culminated in that judgment.

5.11 On the basis of the trial court's reasoning as set out in the preceding paragraph, it affirmed the genuineness and legitimacy of the 2007 judgment.

5.12 To support its conclusion, the trial court noted that the appellants neither disputed nor commented upon the evidence of PW2, PW3 and PW4 in regard to the fact that Lauder Chalwe was present when the 2007 judgment was handed down.

5.13 Quite aside from the factor of the 2007 judgment, the court below also noted that the evidence which had been laid on behalf of the respondents, particularly by PW2 and PW3, suggested that the deceased, Chalwe Nkaba, bought the land in dispute using three herd of cattle that had come from his two sisters and a brother in Southern Province.

5.14 The court further observed that, according to PW3, he was actually the one who informed the late Chalwe Nkaba about the land in dispute having been put up for sale and knew about the three herd of cattle that were used to purchase it and the fact that the deceased Chalwe Nkaba only contributed a bit of money towards the purchase. The court further observed that the deceased Chalwe Nkaba had told them that the land in dispute was for his siblings as family property because he wanted his relatives near him and had confirmed that the same did not belong to him or his children.

5.15 According to the trial court, PW2 and PW3 further stated that they had testified in the 2007 case and that even the minutes of the meeting which was convened after the death of the deceased Chalwe Nkaba reflected the fact that the land in dispute did not belong to him or his children

and that it was for that reason that Chalwe Nkaba had distributed the fields that he owned elsewhere among all his children including the 1st Defendant. The trial court also noted that the issue of the minutes we momentarily referred to was also attested to by PW4 and referred to in the 2007 judgment.

5.16 The trial court further observed that, according to the evidence, the then village headman Nkaba and Jeremiah Nkaba had apportioned the Mulonda field to the late Robinson Chooka and that this was how Chooka had settled on the land.

5.17 The trial court also noted that the mother to Robinson Chooka was among the siblings of the deceased Chalwe Nkaba whose cattle was used to purchase the subject field from Rice Mulonda.

5.18 After considering the two versions of the evidence which was deployed before her, the trial judge indicated that she was inclined to believe the eye witness accounts of PW3, PW2 and PW4 that the herd of cattle which was used to purchase the Mulonda field did not belong to the deceased Chalwe Nkaba but were availed by the deceased's siblings

who included the mother to the late Robinson Chooka. On the basis of this finding, the trial court concluded that the land in dispute did not form part of the estate of the deceased Chalwe Nkaba and, therefore, did not devolve on the 1st Defendant and his siblings as children of the deceased Chalwe Nkaba.

5.19 With regard to the 2012 judgment by the traditional court, the trial judge noted that the appellants had failed to negative or to counter the respondents' evidence which was to the effect that they were unaware about that judgment and the proceedings which had culminated in that judgment.

5.20 The lower court accordingly took the position that the 2012 judgment was obtained in the respondents' absence and that they were never heard when the proceedings that had culminated in that judgment were being conducted.

5.21 In concluding its judgment, the court below found it odd that the appellants never challenged the 2007 judgment until after five (5) years and well after the late Robinson Chooka had died in 2010 and that all this while the late

Robinson Chooka was in occupation and possession and later his family.

The court accordingly declared that the respondents were the rightful owners of the land in dispute in their capacity as beneficiaries of the estate of the late Robinson Nkaba Chooka. The court also dismissed the appellants' counter-claim and granted costs in favour of the respondents.

6.0 THE APPEAL AND THE GROUNDS THEREOF

6.1 The appellants were not satisfied with what their exertions in the court below yielded and have now appealed to this court on the basis of 7 grounds which have been expressed in the following terms:

6.1.1 The Court below erred in fact when it found that there was a given time frame within which the appeal against the 2007 judgment which declared Robinson Chooka as the beneficial owner, was to be made when there was insufficient evidence to that effect.

6.1.2 The Court below erred in fact and law in finding that the allegation that the 2007 Judgment was not fraudulently obtained and that it was a valid Judgment on the basis of evidence of PW2, PW3 and PW4 to the effect that "the 2nd Defendant and the 1st Defendant's sister Lauder Chalwe were present as complainants during the 2007 proceedings and delivery of Judgment...and that the Judgment was read to them and the one signed by the chieftainess

given. That the other copies were stamped"; whilst ignoring PW4's evidence when he stated that that 2007 Judgment *"was not the judgment that we wrote, it was just translated"*; and further ignoring that fact that PW4 failed to positively identify the 2007 Judgment as being the authentic Judgment which he purports to have chaired, such that when he was shown the document his only answer in identifying it was to say, *"if it is for 2007 then it is the one"*, and in the face of dispute from the Defendants of not having been present at such hearings.

6.1.3The Court below erred in law and fact when it held that *"the said 2007 Judgment has been produced by the Defendants indicating that they were aware of it and its contents"*, in aid of proving the authenticity of the said Judgment; and whilst ignoring the fact that the Defendants in disputing its authenticity did appeal against said Judgment and obtained Judgment of 2012 dismissing the same.

6.1.4 The Court below erred in law and fact when it discarded and ignored the Judgment of 2012 after finding that all Judgments before court being 2004, 2005, 2007 and 2012 were not signed by the Parties; and whilst still finding that the 2012 Judgment even had the thumb print of the chief unlike the 2007 which only had a stamp. The Court further erred in law and fact in finding that the Plaintiffs were never aware of the proceedings of 2012 in light of the evidence before court.

6.1.5 The Court below erred in law and fact when holding that she was inclined to believe the evidence of PW2,

PW3 and PW4 that the cattle used to purchase the Mulonda field did not belong to the deceased Chalwe Nkaba but were the ones from the deceased's siblings who included the mother to the late Robinson Chooka; whilst ignoring the evidence of PW3 and PW4 that stated that the field was family property and that Chalwe Nkaba did add his own money to purchase the field whilst he was a teacher.

6.1.6 The Court below erred in law and fact when it held that Mulonda field belonged to the estate of Robinson Nkaba without clear proof of ownership and whilst ousting the children of Chalwe Nkaba from benefiting in the land to which their father bought contrary to the evidence before court.

6.1.7 The Court below erred in law and fact when it failed to take into account that it was called upon to consider all the facts, circumstances and evidence brought before court; the court ignored much of the Defendants evidence and documents filed and which evidence was not disputed such as to the process of how land is obtained/owned.

7.0 PARTIES' CONTENTIONS/ARGUMENTS ON APPEAL

7.1 We confirm that the two sets of contestants in this appeal filed their respective Heads of Argument to support their respective positions in the appeal.

7.2 Having regard to the position which we have taken in relation to the filed grounds of appeal, as shall become clear later in this judgment, we propose to defer the task

of reviewing the individual grounds and their relative arguments to a later stage.

8.0 CONSIDERATION OF MATTER AND DECISION

8.1 We confirm having examined the Arguments which counsel on either side of the appeal canvassed before us and express our gratitude to them for sharing their rival perspectives with us.

8.2 In the view that we have taken and having regard to the issue which the trial court ascertained as having fallen for its determination, we have been at a loss – with all due respect to counsel concerned – to appreciate the value which most of the grounds on which this appeal was founded bring to the material issues around which the court below pronounced itself and which, ultimately, defined the fate of the action in that court.

8.3 Quite aside from the grounds of appeal having revolved around findings of fact, the arguments which were constructed around them represented little else beyond hot air. To drive the more serious point we are trying to make home and, as we remarked in **Zambia Consolidated Copper Mines Limited v. Matale**[1], an appeal to this court

which is founded on a finding of fact can only be viable if the finding of fact involved becomes a question of law on the basis that *"... it is a finding which is not supported by the evidence or, at the very least, it was one which was made on a view of the facts which cannot reasonably be entertained"* (at p. 146).

8.4 It will be recalled that, before the trial judge reached the conclusion which she arrived at in her judgment, she identified what she deemed to have been the core and overarching issue which the dispute which she had been called upon to resolve had raised.

8.5 It will also be recalled that the issue which the trial judge identified as having fallen for its determination in the matter which was before her was whether late Robinson Nkaba Chooka was the *bona fide* owner of the land in dispute and, consequentially, whether the said land formed part of his estate (for the purpose of having the respondents, as the beneficiaries under that estate, benefitting therefrom).

8.6 We also call to mind that after the learned trial judge reviewed the evidence which had been deployed before her,

she came to the conclusion that the answer to the issue she had identified lay both or either in the judgment of the traditional court of 2007 and/or the evidence of PW2, PW3 and PW4.

8.7 In relation to the 2007 judgment, the trial judge reasoned that this judgment had declared Robinson Chooka as having been the *bona fide* owner of the land in dispute. The court further noted that not only did the appellants and everyone else who was working with them (appellants) fail to discredit the 2007 judgment but none of the affected parties took any steps to appeal against the same within the time-frame which that judgment had specified.

8.8 The trial court also noted that, contrary to the appellants' claims suggesting that they had been unaware about the 2007 judgment, the 1st appellant's uncle and step brother (PW2 and PW3 respectively) had confirmed during the trial that, Lauder Chalwe, the 1st appellant's sister and the 2nd appellant were present when that judgment was delivered.

8.9 The trial judge wondered why the 1st appellant did not call his sister (Lauder Chalwe) to testify and discount the evidence which had suggested that the latter had attended

the delivery of the 2007 judgment on her own behalf and on behalf of her siblings. The learned judge also confirmed that it did not surprise her that the appellants had produced the 2007 judgment during the course of the trial and that they were aware both about its existence as well as its contents.

8.10 Another factor which had served to persuade the trial judge to reach the conclusion which she had reached related to the pieces of evidence by PW2 and PW3's evidence which had spoken to the manner in which the land in dispute was acquired. In this regard, the judge noted that not only did Chalwe Nkaba purchase the land in dispute using his sisters' and uncle's herd of cattle, but he had clearly distanced both himself and his children from the ownership of that land. For the avoidance of doubt, the judge below noted that one of Chalwe Nkaba's sisters who had contributed a herd of cattle was Robinson Chooka's mother.

8.11 The uncontested evidence of PW2 and PW3 also confirmed the fact that Chalwe Nkaba had apportioned his other pieces of land to all his children away from the land in dispute.

8.12 With regard to the appellants' counter-claim, the trial judge's simple reaction (which reflected the evidence which had been marshalled on behalf of the respondents) was that, the foundation of that counter-claim, namely, the 2012 judgment had never been brought to the attention of the respondents. Not only did the appellants fail to demonstrate otherwise, but they also failed to negative the trial court's conclusion that the 2012 judgment had arisen in circumstances which suggested that the respondents were never heard.

8.13 In the light of what we have unravelled above, we would have expected the appellants' counsel to squarely deal with the matters upon which the trial court had anchored its decisions and conclusion and appropriately thwart or traverse those matters.

8.14 Instead of proceeding in the fashion we have suggested in 8.13 above and discrediting the basis on which the trial court founded its conclusions, the appellants, in their grounds of appeal, chose to treat us to a catalogue of complaints around what are really no more than peripheral issues.

8.15 Even assuming that we have been overly critical in the approach which we have taken above, the fact still remains that the grounds which the appellants constructed and put forward to support their appeal were distinctly porous as we shall demonstrate in the paragraphs which follow.

8.16 Under the first ground of appeal, the appellants criticised the lower court for having suggested that the judgment of 2007 specified a time-frame within which any person who was dissatisfied with that judgment could appeal.

8.17 As counsel for the respondents observed in their response to this ground, the criticism directed against the trial judge is without any basis whatsoever because PW4, who had chaired the proceedings of the traditional court which had handed down the 2007 judgment was very clear in his testimony when he said:

> *"The one who won the case was Robinson Chooka. The parties were given 14 days to appeal if not happy... There was no appeal over this judgment."*

Clearly, ground 1 is without any basis and we dismiss it.

8.18 Under ground 2, the gist of appellants' complaint in this ground was that

the 2007 judgment of the traditional court was fraudulent or fraudulently procured.

8.19 Contrary to the appellants' rather specious allegations and, as the trial court established, there was nothing fraudulent about the 2007 judgment. Indeed, the eye witness accounts of PW2, PW3 and PW4 clearly demonstrated that, contrary to the appellants' unsubstantiated assertions, the 2007 judgment arose under circumstances which were legitimate and transparent.

8.20 The appellants have contended in their Heads of Argument that:

> *"...there was no evidence brought before court other than the respondents' word of mouth that the appellants were present at the hearing and delivery of [the] judgment of 2007"*

8.21 We find it quite baffling indeed from the passage we have quoted above that anyone can criticise the trial judge for having referred to and relied upon evidence which had arisen by *'word of mouth'* and, was, therefore, of the nature of primary evidence. Indeed, in her judgment, the trial judge clearly acknowledged her preference for eye witness

account testimonies. How can the judge be faulted for having relied upon this uncontradicted and undiscredited 'word of mouth' evidence?

We really find nothing of value to this appeal in this second ground and accordingly, dismiss it.

8.22 Under the third ground, the appellants faulted the trial judge for having observed that,

> *"...the judgment of 2007 has also been produced by the [appellants] indicating that they were aware of it and its contents."*

8.23 According to the appellants' counsel, the sentence we have quoted above was employed by the trial judge for the purpose of demonstrating what counsel described as *"the authenticity of the said judgment"* which 'authenticity' the appellants were disputing.

8.24 With the greatest respect to learned counsel for the appellants, we have not understood the use of the sentence which was used by the trial judge and which we quoted in 8.22 above as suggesting what counsel has posited.

8.25 Speaking for ourselves, our understanding of the trial judge's use of the sentence we have quoted above by the

trial judge is that it was meant to convey the meaning that the appellants were in possession of the judgment in question and had read its contents.

8.26 In point of fact, and contrary to the 'authenticity' issue which counsel for the appellants suggested, the sentence which the trial judge used as quoted above was intended to demonstrate the fact of the appellants having been aware of the existence of the judgment.

8.27 With regard to the 4th and 5th grounds of appeal which relate to the dismissal of the appellants' counter-claim as founded on the traditional court judgment of 2012, we have found nothing in the arguments canvassed which discounts or negatives the trial court's conclusion that no evidence was placed before the lower court to discredit or counter the respondents' evidence to the effect that neither the proceedings which had culminated in the judgment of 2012 nor the judgment itself had been brought to the attention of the respondents. The two grounds cannot possibly succeed and, accordingly we dismiss them.

8.28 As to the 6th and 7th grounds, we consider that we have amply addressed the issues which the appellants have

canvassed around these grounds. For the avoidance of doubt, as late Chalwe Nkaba clearly acknowledged that the land in dispute was not owned by him, the issue of the inheritance scheme which the Intestate Succession Act, Chapter 259 of the Laws of Zambia prescribes cannot arise. In short, the preponderance of the evidence was against the law sought to be relied upon.

8.29 As we conclude, we wish to make or reiterate an observation which stems from a feature which was apparent from both the judgment of the lower court as well as the grounds of appeal and their relative Heads of Argument.

8.30 The observation which we wish to make or reiterate is that the judgment of the court below turned – almost exclusively – on findings of fact. Likewise, the grounds which were constructed by the appellant for the purpose of discrediting and impugning the judgment in question also revolved around findings of fact. Not surprisingly, hardly any legal principle was adverted to (in the arguments) to support the appeal or any of the six grounds of appeal.

8.31 Having regard to the observations we have made in 8.29 and 8.30 above, we would have expected the appellants' counsel to bring to the fore the legal principles which should be at play when it is sought to contest a judgment which is anchored on findings of fact. This is the point which we unequivocally made in **Wilson Zulu v. Avondale Housing Project Limited[2].**

8.32 This appeal was doomed to fail. And it does. The costs will abide the outcome we have just announced and are to be taxed in default of agreement.

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A.M. WOOD
SUPREME COURT JUDGE

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M. MUSONDA
SUPREME COURT JUDGE

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N. K. MUTUNA
SUPREME COURT JUDGE