YENGWE FARMS LIMITED AND MASSTOCK ZAMBIA LIMITED, THE COMMISIONER OF LANDS AND THE ATTORNEY GENERAL

BWEUPE, D.C.J., CHAILA, CHIRWA, JJ.S.
22ND FEBRUARY, 1998 AND 11TH MAY, 1999.
(S.C.Z. JUDGMENT NO. 11 OF 1999)

Flynote
Land Law - Restrictions on land allocations - Reserves and Trust Lands.

Headnote
The appellant was given a 99 years lease for Farm No. 4890 in 1986. Initially the appellant had applied for 10,000 hectares in the Lusaka rural area. The application was considered by the District Council after necessary consultations with the local chief and the people and was sent to the Commissioner of Lands. The Commissioner granted 2,000 hectares and Title Deeds to the appellant. Later the 1st respondent was also issued two farms of 2,500 hectares each. One of the farms encroached on the appellants farm and the matter of the encroachment was taken to the High Court.

The Commissioner of Lands directed the appellant to surrender the title deeds to his farm and informed him that he (the Commissioner of Lands) had made a mistake in allocating the appellant 2,000 hectares in Trust Land and the Committee had only approved an allocation of 18 hectares of land. The Commissioner of Lands relied on the contents of Circular No. 1 of 1985 w/c restricted allocations in reserves and trustlands.

The High Court found for the respondents. On appeal to the Supreme Court, it was

Held:
(1) The 1st respondent is restrained whether by itself, its servants or agents or howsoever from disturbing, interfering or in anyway preventing the appellant, its agents or servants from quiet enjoyment and occupation of part of the appellant's farm.
(2) That the appellant is a registered owner of the farm.
(3) That the cancellation and rectification records at hands a Deeds Registry are null and void and that the appellant should get back his Title Deeds.

Cases referred to:
1. Thixton v Attorney-General (1966) Z.R. at page 10.
2. Bridget Mutwale v Professional services Ltd. (1984) Z.R. 72.
3. Datson Siulapwa v Namasiku (1985) Z.R.21.
4. Mutwale v Professional Services Ltd. (1984) Z.R. Page 72.
5. Zandamela v Management Committee of the Local Authorities Superannuation Fund Z.R. Page 144.
6. Muyawa Liuwa v The Attorney General No. 43/96.
7. Re:139 Deptford High Street Ex Parte British Transport Commission (1951) ch. Division, P. 884.

For the Appellant: Messrs Shamwana, S.C. and C. Hakasenke.
For the 1st Respondent: Mr. R. Simeza of Simeza, Sangwa and Company.
For the 2nd & 3rd Respondents: Mr. D.K. Kasote, Principal State Advocate.

Judgment
CHAILA, J.S.: delivered the judgment of the court.

This is an appeal against the decision of the High Court
(Mrs. I. Mambilima, J.) refusing to grant the declaration sought in the motion brought by Yengwe Farms Ltd., hereinafter referred to as the appellant against Mastock Zambia Ltd., the Commissioner of Lands and the Attorney General, hereinafter referred to as the 1st Respondent, the 2nd Respondent and the 3rd Respondent, respectively. When the matter was

argued before us on 23rd February, 1998, no advocate appeared on behalf of the 2nd and 3rd respondents. The court had, however, before it heads of argument filed on behalf of the 2nd and 3rd respondents. On 26th May, 1998, the Attorney General's office on behalf of the 2nd and 3rd respondents submitted supplementary list of authorities. We will consider these submissions in our judgment.

The brief facts of the case were that the appellant was given a 99 years lease for Farm No. 4890 in 1986. Initially the appellant had applied for 10,000 hectares in the Lusaka rural area. The application was considered by the District Council after necessary consultations with the local chief and the people and was sent to the Commissioner of Lands. The application was then considered by the Commissioner of Lands and the appellant was given 2,000 hectares and Title Deeds were issued. Later after obtaining the Title Deeds, the President of the Republic of Zambia approved two farms for the 1st respondent. The President directed that the 1st respondent be given 20,000 hectares of land.

The Commissioner of Lands however reduced the allocation to 5,000 hectares of 2,500 hectares of each farm. One of the farms encroached on Farm No. 4890. The encroachment created took the parties to the High Court. The Commissioner of Lands directed the appellant to surrender title deeds to his farm and informed him that he (the Commissioner of Lands) had made a mistake in allocating the appellant 2,000 hectares in Trust Land and that the committee had only approved an allocation of 18 hectares of land.

The Commissioner of Lands relied on the contents of circular No. 1 of 1985 which restricted allocations in reserves and trust lands.

The learned trial judge found that the appellant had followed all the normal procedures in obtaining the land. She further found that the appellant had not used unorthodox means to obtain the land and title deeds. The learned trial judge on the facts before her found that the appellant applied for land properly which was given, unfortunately outside the legal competence of the Commissioner of Lands. The learned trial judge was of the view that the Commissioner of Lands should in all fairness grant what he should have validly granted at the time or by seeking the Minister's approval, grant him more acreage seeing that the local people had welcomed the appellant in the area. The learned trial judge went further to say that if that were not possible, then the appellant should be compensated for its investment on farm No. 4890 and any loss of business suffered to be assessed by the Deputy Registrar.

Messrs Shamwana and Hakasenke on behalf of the appellant have advanced three grounds of appeal. These are:

1. The learned trial judge erred in law and in fact in holding that the President can make valid dispositions of land notwithstanding circular No. 1 of 1985 and that if he steps on other people's toes, then the constitutional provisions on compensation came into play.
2. The learned trial judge erred in law and in fact, in not making any of the specific declarations and/or orders sought by the appellant and leaving it to the discretion of the Commissioner of Lands.
3. The learned trial judge erred in law and in fact in holding that the Commissioner of Lands did not have powers to allocate the mass of land he allocated to the appellant.

Mr. Shamwana on ground one submitted that the learned trial judge was wrong in saying that the President as a custodian of all land can make unrestricted dispossessions of land. He referred us to Section 4 of the Land (Conversion of Titles) Act which provides that the President holds the land not for his beneficial interest, but on behalf of the people of Zambia. To him the interest of the people of Zambia affected must be taken into account. He submitted further that in accordance with circular No. 1 of 1985, the power of the President is specifically limited. He drew our attention to Section (d) of the circular on reserves and trust lands. He concluded by saying that in making any grant, the State cannot ignore the requirement in Section (d) because the President does not hold the land for his own benefit but as trustee for the people of Zambia. Mr. Shamwana argued further that even if the President has such powers to dispose of land which, in his opinion, the President did not have, the President cannot exercise such power to deprive of any interest already being enjoyed. The State Counsel argued further that for the President to do so, he would first have to compulsorily acquire the land from the applicant. In this case he did not do so. Instead, Mr. Shamwana argued, the President went about business by trying to enter through the backdoor. He maintained that the President in approving Farm 5062 and another farm in 1988, he did not carryout any consultations with the local people. Whereas on the other hand, the appellant consulted everybody concerned and in fact complied with the requirements of circular No. 1 of 1985, even though at the time it had not been issued.

It can be seen from Mr. Shamwana's argument that his client was very unhappy when he was asked to surrender the title deeds to the farm after he had done all the necessary consultations with the people and the local chief. His client was further not pleased to be ordered to surrender part of his farm to someone who had not complied with the requirements for granting land in the reserves and trustlands.

The appellant's counsel complained bitterly about the conclusion of the learned trial judge when she said at page 11 of their judgment:

> **"Thus while it is desirable that all interests in the land be taken into account, the President can make valid disppositions of land notwithstanding land circular No. 1 of 1985. If in the process he steps on other people's toes, then the constitutional provisions on compensation come into play."**

Mr. Shamwana drew our attention to the provisions of Section 14 (c) of the Interpretation and General Provisions Act, Cap.2. He also drew our attention to the case of ***Thixton v Attorney General*** **(1966) Z.R. At page 10.** Mr. Shamwana argued that when the President gave two farms to the 1st respondent, he did not have in mind that the appellant was the owner of farm No. 4890. Mr. Shamwana maintained that for the President to dispose of the appellant's interest in his farm, he must first compulsorily acquire land from him and that evidence in the court below showed no such steps were taken. Instead the President ordered the Commissioner of Lands to give the 1st respondent 20,000 hectares of land but the Commissioner of Lands advised the President he could only grant 5,000 hectares of land divided into two farm of 2,500 hectares each.

Mr. Simeza, counsel for the 1st respondent relied on his detailed written submissions. His position was that the President under the Land (Conversion of Titles) Act, was the only owner of land which he held in position of a trustee for the people of Zambia. He was the only person with absolute power of disposition of land and according to Section 3 of the Land (Conversion of Titles) Act, the land referred to includes traditional land, reserves and trustland. He referred us to the case *of* ***Bridget Mutwale v Professional Services Ltd*****. (1984) Z.R. 72.** This case dealt with failure to obtain prior Presidential consent which rendered the whole transaction in land unenforceable. We have read with authority and we do not think it applies to the present case.

Mr. Simeza further referred us to ***Datson Siulapwa v Namasiku*** **(1985) Z.R. 21** in which it was held that the 1975 Land (Conversion of Titles) Act is applicable to land held under customary law. This is a High Court case. It was concerned with the President's consent. In this case the question of consent is not in issue. It is not the appellant's case that the Land (Conversion of Titles) Act does not apply to customary land, reserves and trustland. What is in issue in this case is whether the Commissioner of Lands was competent to allocate the land which he did to the appellant and whether it was done through a mistake or fraud to attract the cancellation of the title deeds. Mr. Simeza referred to circular No. 1 of 1985 and argued that it was intended to lay down general policy guidelines regarding the procedures all district councils were expected to follow in the adminstration and allocation of land. To him this circular was in no way meant to fetter the President's statutory powers and besides the circular itself, in its introduction, clearly spelt out to whom it was directed. He argued that the President had no obligation under the Land (Conversion of Titles) Act to consult the local people because the circular issued by the Minister of Lands was not directed at him.

Mr. Simeza in his heads of argument maintained that the Certificate of Title for Farm 4890 was issued to the appellant by error or mistake of fact. He argued that the Registrar was correct in cancelling the register since there was a mistake.

On ground one, counsel for the State argued that the learned trial judge was on firm ground when she held that all land vested absolutely in the President of the Republic of Zambia. The absolute vesting of all land in Zambia is contained in Section 13 of the land (Conversion of Titles) Act which has since been repealed and replaced. The learned counsel for the State referred us to the case of ***Mutwale v Professional Services Ltd*****. (1984) Z.R. page 72** where it was held that if prior Presidential consent is not obtained for a sub-lease, the whole of the contract including the provision for payment of rent is unenforceable. He further referred us to the case of ***Zandamela v Management Committee of the Local Authorities Superannuation Fund*** **(1978) Z.R. page 144.** The learned advocates for the 2nd and 3rd respondents discussed in detail President's powers and need to have State consents.

As we have already stated, the present case was not concerned with President's consent.

These authorities are not relevant to the present case. The learned counsel then discussed the effect of circular No. 1 of 1985, vis-à-vis the powers of the President. The learned counsel argued that it was in dispute that the circular was intended to lay down general policy guidelines regarding the procedure all the District Councils were expected to follow in the administration and allocation of land. The learned counsel argued that the circular was not put into law and hence it cannot have force of law. He referred us to the case of ***Muyawa Liuwa v The Attorney General*** **No. 43/96.** The learned counsel argued further that the power of the President remained unfettered and he could make valid dispositions of land notwithstanding circular No. 1 of 1985. We have seriously considered this circular to which we shall later refer in detail. The circular was not directed at the President and it dealt with recommendations by the District Councils to the Commissioner of Lands. The circular itself did not fetter the powers of the President. We would however, like to observe that tenure in Trustlands and Reserves was governed by the Northern Rhodesia (Native Trustlands) orders in Council, 1947 to 1963 as amended by the Zambia (Trustland) order, 1964 repealed and replaced by the Lands Act 1995. These orders provided restrictions in alienation of land held under customary tenure. These restrictions are now to be found in Section 3(4) (c) of the Lands Act which reads as follows:

> 3(4) Notwithstanding subsection (3), the President shall not alienate any land situated in a district or an area where land is held under customary tenure;
>
> (C) Without consulting any other person or body whose interest must be affected by the grant.

Restrictions are there even without circular No. 1 of 1985. Even in the present case, the appellant wanted 10,000 hectares of land, but the allocation was reduced to 2,000 hectares. The 1st respondent wanted 20,000 hectares but was given 2 farms of 2,500 hectares each. The appellant's interest should have been taken into account, but the State has argued that the appellant's farm was not 2,000 hectares, but 18 hectares and to them there was no interest to be affected since a mistake had been made. We will deal with the question of mistake later in our judgment.

As regards Section 11(1) of the Lands and Deeds Registry Act, Counsel for the State has referred us to the Certificate of Title in favour of the appellant. He argued that the Deeds Register procured by fraud or mistake may be rectified if the Registrar considered such allegations have been satisfactorily proved.

The Registrar may correct such error, ommision or entry. The learned counsel of the State submitted that the directive by the Commissioner of Lands to the Registrar of Lands and Deeds to cancel the registration and recalling in the appellant's Certificate of Title in respect of farm 4890 was lawful under the said section.

The learned counsel drew our attention to the case of ***Re 139 Deptford High Street Ex Parte British Transport Commission*** **(1951) ch. Division, P. 884.** The learned counsel gave a detailed account of the history of the application by the appellant and concluded that the Commissioner of Lands had made a mistake in issuing title for 2,000 hectares instead of 18 hectares which had been authorised. It is a fact that the State has not appealed against the finding of the learned trial judge on the alleged mistake by the Commissioner of Lands. The learned trial judge found that the appellant had done everything that was required of him and that the Commissioner of lands had not made any mistake. It cannot, therefore, be argued by the Commissioner of Lands or by the Attorney General's office that a mistake was made.

As regards ground two, the learned counsel for the appellant drew our attention to what the learned judge said after having found that the Commissioner of Lands did not have powers to allocate the mass land to the appellant. The court below observed that the Commissioner of Lands in all fairness, should grant a maximum of 250 hectares to the appellant or seek the Minister's approval for more. The learned trial judge further observed that if that were not possible, then the appellant should be compensated for the investment on the said farm.

We now turn to ground three. The appellant was not satisfied with the directives or advice the learned trial judge concluded that the appellant had found himself in unfortunate situation and that she could not do anything since according to circular No. 1 of 1985, it stopped the Commissioner of Lands from giving mass land to the appellant. She was, however, of the view that the Commissioner of Lands should have at least given 250 hectares to the appellant. The learned trial judge's position was quite clear. Her conclusion was that the Commissioner without the Minister's approval could not give more than 250 hectares.

The learned advocate for the State and Commissioner of Lands submitted that circular No. 1 of 1985 has no force of law because it was intended to lay down general policy guidelines regarding the procedure in the administration and allocation of land. He submitted further that the circular was an instruction to the Commissioner of Lands by the Minister responsible for land matters. He argued further that even though the Commissioner of Lands is empowered by the President to make grants or dispositions of land to any person, the Commissioner's powers are subject to the special or general directions of the Minister aforesaid. In this matter, the Minister issued circular No. 1 of 1985 which restricted the allocation of land by the Commissioner to the maximum of 250 hectares for farming purposes. The advocate for the State further submitted that the learned trial judge was on the firm ground when she held the Commissioner of Lands did not have powers to allocate mass land he allocated to the appellant.

Ground four deals with costs. The learned advocate for the State did not have strong arguments since the award of costs is discretionary.

As we have already observed the case centres on the powers of the Commissioner of Lands and the interpretation of circular No. 1 of 1985. It is common cause that in accordance with provisions of the repealed Land (Conversion of Titles) Act, all the land in Zambia is vested absolutely in the President of the Republic who holds the same on behalf and for the people of Zambia in perpetuity. The dispositions or grants of land to the subjects have been delegated to the Commissioner of Lands. The learned trial judge considered the provisions of the relevant section and concluded that the Commissioner of Lands could not, because of circular No. 1 of 1985, give 2,000 hectares to the appellant. She concluded that the Commissioner should have either given 250 hectares or in all fairness sought the Minister's approval to give more land. She took circular No. 1 of 1985 as a directive to the Commissioner of Lands.

Counsel for the appellant have urged this court to consider circular No.1 as not binding on the commisioner since it was directed to the District Councils.They have maintained that the circular was intended to give policy guidelines to the councils.The advocate of the respondents have contended that the circular was meant as a directive to the Commissioner of Lands and that the Commissioner was bound to follow the instruction. We have carefully looked at the circular, the introduction says: **"This circular is intended to lay down general guidelines on the procedure which all the District Councils are expected to follow in the administration and allocation of land."**

Paragraphs 2,3 and 4 read as follows:

"2. Your attention is drawn to the fact that all land in Zambia is vested absolutely in His Excellency the President who holds it in perpetuity for and on behalf of the people of Zambia. The powers of His Excellency the President to administer land are spelt out in the various legislations, some of which are: The Zambia (State Land and Reserves) Orders, 1928 to 1964; the Zambia (Trust Land) Orders, 1947 to 1964; the Zambia (Gwembe District) Orders, 1959 and 1964 and the Land (Conversion of Titles) Act No. 20 of 1975 as amended. His Excellency the President has delegated the day-to-day administration of land matters to the public officer for the time being holding the office or executing the duties of Commissioner of Lands. Under Statutory Instrument No. 7 of 1964 and Gazette Notice No. 1345 of 1975, the Commissioner of Lands is empowered by the President to make grants or disposition of land to any person subject to the special or general directions of the Minister responsible for land matters.

3. Pursuant to the policy of decentralisation and the principle of participatory democracy it was decided that District Councils should participate in the administration of land. To this effect, all District Councils will be responsible, for and on behalf of the Commissioner of Lands, in the processing of applications, selecting of suitable candidates and making recommendations as may be decided upon them. Such recommendations will be invariably accepted unless in cases where it becomes apparent that doing so would cause injustice to others or if a recommendation so made is contrary to national interest or public policy.

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

There is no doubt that this circular was directed to the District Councils and strict perusal of

the circular shows that the Minister of Lands gave guidelines to the District Councils on allocation of land and recommendations to make to the Commissioner of Lands.

As we have earlier stated in our judgment, this circular does not bind the President. The President is however, bound to follow the provisions of the relevant Act dealing with the former Trust Lands and Reserves. We have carefully and critically read the circular. We agree with the view taken by the advocates for the appellant that the circular being a policy one, was directed at the District Councils. This circular in our view was intended to give guidelines to the District Councils which in turn make recommendations to the Commissioner of Lands. The circular was not directed at the Commissioner of Lands. The Commissioner of Lands was legally entitled to award more then 250 hectares depending on the circumstances of each case. The learned trial judge was in error when she decided that the Commissioner of Lands was precluded by circular No. 1 of 1985 from giving more than 250 hectares.The appellant followed all normal procedures required. There was no mistake made by the Commissioner of Lands by granting 2,000 hectares and in issuing title deeds. We grant the following orders:

(a) The 1st respondent is restrained whether by themselves, their servants or agents or whosoever from disturbing, interfering or in any way preventing the appellant; its agents or servants from quiet enjoyment and occupation of farm known as No. 4890 Lusaka Rural in the extent of 2285. 6464 hectares;

(b) The appellant is a registered owner of the farm;

(c) That the cancellation and rectification records at Lands and Deeds Registry are null and void and that that the appellant should get back his title deeds;

(d) Any improvements made by the 1st respondent should be assessed.

The appeal is allowed with costs.

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