IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA

APPEAL NO. 150/2009
SCZ/8/30/2009

(Civil Jurisdiction)

BETWEEN:

TADEOUS SHIPE(Trustee for and on behalf of
THE SALVATION ARMY ZAMBIA TERRITORY) **1st APPELLANT**

MAJOR MUYOBA (Trustee for and on behalf of
THE SALVATION ARMY ZAMBIA TERRITORY) **2nd APPELLANT**

GEOFF BURTON (Trustee for and on behalf of
THE SALVATION ARMY ZAMBIA TERRITORY) **3rd APPELLANT**

AND

VICTOR NALISA MUNG'AMBATA AND

OTHERS (suing on his own behalf and on behalf
of the PARENTS COMMUNITY SCHOOL COMMITTEE) **RESPONDENTS**

Coram: Mwanamwambwa and Chibomba, JJS and Lengalenga Ag. JS.

On 7th February, 2013 and on 23rd February, 2015.

For the Appellants: Mr. M.H. Haimbe and Ms M. Kalyabantu both of Malambo and Company.

For the Respondents: Mr. E.C. Mwansa of Mwansa, Phiri and Partners.

J U D G M E N T

Chibomba, JS, delivered the Judgment of the Court.

Cases referred to:-

1. Anderson K. Mazoka and 2 Others vs Levy Mwanawasa and Another (2005) ZR 138
2. Sithole vs. The State Lotteries Board (1975) Z. R. 106
3. Rosemary Phiri Madaza vs Awadh Karen Coleen (2008) ZR 12.
4. Bradford Third Equitable Benefit Building Society vs Boarders (1941) 2 All ER 218

5. Mususu Kalenga Building Ltd and Another vs Richman's Money Lenders Enterprises (1999) ZR 27
6. Attorney General vs Marcus Kampumba Achiume (1983) ZR 1

Legislation Referred to:-

1. The Constitution of Zambia, Chapter 1 of the Laws of Zambia
2. The Lands Act, Chapter 184 of the Laws of Zambia
3. The Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia
4. The Lands Acquisition Act, Chapter 189 of the Laws of Zambia

Other materials referred to:-

1. D.R. Casson's Odgers on High Court Pleadings and Practice, 23rd Ed., London: Sweet and Maxwell (1991) at p. 127

2. Stuart Sime, A Practical Approach to Civil Procedure, London: Blackstone Press Limited (1994) at p. 89 – 90

The Appellants appeal against the Judgment of the High Court, at Lusaka, in which the learned Judge in the Court below held, *inter-alia*, that the Kanyama Salvation Army Community School (KSACS) remains a community school run by the elected Parents' Community School Committee (the PCSC or the PTA Committee) and ordered the Lusaka City Council (LCC) to sub-divide the land and issue a separate title deed in the name of the Community School to avoid future litigation.

The facts leading to this case as found by the learned trial Judge are that the Appellants were/are trustees of the Salvation Army Church, Zambia Territory (the Church). They were/are holders of a Certificate of Title over the piece of land known as Stand 12933, Kanyama, Lusaka, upon which the Community School in question was constructed and is being operated. The funds for the construction of the Community School came from the donors and the Government of the Republic of Zambia. The community provided stones and labour. After the construction was completed and the KSACS became operational, the Church applied to the Ministry of Education to turn the said School into a private school. The Provincial

Education Officer (PEO) declined the application. However, the Church begun and continued charging School fees to the parents. The Respondents, by Amended Writ of Summons, commenced an action in the Lusaka High Court, in which the following reliefs were sought:-

"i. **For an Order that the plaintiffs are the lawful owners of the School the defendants having failed to run it thereby surrendering the school property to the plaintiffs pursuant to a letter dated 16th February, 1999.**

ii. **An order that the school remain a Community school pursuant to a Memorandum of Agreement of Community School between the Ministry of Education and Zambia Community Schools Secretariat.**

iii. **An order that the school be re-registered under a different name thereby deleting the defendant's name which name was merely adopted for purposes of identification from the other community schools in the locality.**

iv. **For an Order that the community school does not belong or fall under the defendants but under the Zambia Community School Secretariat.**

v. **An order that the ownership of the school be deemed to be vested in the plaintiffs.**

vi. **An order that title deeds be issued in the name of the Trustees for the Parents Community School Committee.**

vii. **An injunction restraining the defendants, their servants, agents or whosoever from carrying out any works at the school, interfering, intermeddling, collecting fees, disposing, selling, subletting, leasing or in any way dealing with the school property, suspending, expelling and harassing the plaintiffs until the determination of this case.**

viii. **Any other relief the court may deem fit.**

ix. **Costs."**

The learned trial Judge received evidence from both parties which he considered and analysed. From that evidence, the learned Judge found the following facts proved:-

> **"i. The school in question was a community school;**
>
> **ii. The structures were partly funded by the donors and the Micro-Project of the Ministry of Education;**
>
> **iii. The structures were built for the benefit of the vulnerable children;**
>
> **iv. The school was not a commercial but a benevolent venture;**
>
> **v. The structures were constructed on the defendants land with their authority."**

Based on the above findings of fact, the learned Judge then went on to discuss the case before him and then came to the conclusion which he put as follows:-

> **"There was the desire by the commanding officer of the Salvation Army to turn the Community School into a private school, which endeavour was rejected by the provincial education officer in a letter dated 21st May, 2001 and I quote the relevant passage:**
>
> > ***I acknowledge receipt of your undated letter in relation to the above captioned subject and regret to advise that Kanyama Salvation Army Community School cannot be turned into a private school. This is so because Kanyama Community School's purpose is to avail total quality education to orphaned and vulnerable children..."***

On the basis of the above letter, the learned Judge came to the following conclusions:-

> **"It is patently clear that this was the church's admission that the school belonged to the community and the change of the church's fundamental beliefs and principles of serving the community especially orphans and vulnerable children cannot be entertained. It could not be noble and decent...**
>
> **The Salvation Army now wants to use the title to the property to eject the plaintiffs as if they were squatters who built at their own risk and whose loss though regrettable is not recoverable, Muwang'andu vs Lusaka City Council[1]. The doctrine of estoppels in this case which Black's Law Dictionary defines as:-**

Affirmative defence alleging good-faith reliance on a misleading representation and an injury or detrimental change in position resulting from that reliance...

The local community contributed money and labour and the Ministry of Education solicited for donor funds relying on the representation by the Salvation Army, that they were partners in providing education to orphans and vulnerable children. Structures were built on church land pursuant to that belief and agreement. The failure by the church representatives to give in to convictions of honour and commitment to help the poor children has left their integrity and credibility deeply wounded...

The plaintiffs have proved their case on the balance of probability. The school shall remain a community school run by the elected Parents Committee by the community. The Lusaka City Council is ordered to sub-divide the land and issue a separate title in the name of the community school to avoid future litigations. Costs will follow the event to be taxed in default of agreement."

The learned Counsel for the Appellants, Mr. Haimbe and Ms. Kalyabantu, relied on the Appellant's Heads of Argument filed. In arguing this Appeal, the Appellants begun by first arguing Grounds five, then two, one, four, three and lastly, Ground six. On the other hand, Counsel for the Respondents, Mr. Mwansa, also relied on the Respondents' Heads of Argument and the Respondents' Further Submissions filed. He responded in the same order that Counsel for the Appellants argued the grounds of appeal.

In support of Ground five which attacks the learned trial Judge's holding that the Appellants played no role in the funding and construction of structures on their land, it was contended that this finding of fact is not supported by evidence on record. It was pointed out that the Court below erroneously found that the structures were partly funded by the donors and the Micro Project of the Ministry of Education without mentioning the Appellant's funding and construction and the role it played in soliciting funds for the construction of several structures on its land. That instead, the Court below solely relied on the Respondents' evidence which was unsubstantiated and lacked logic and merit. To illustrate this point, Counsel

referred us to the evidence of PW1 on the history of the plot in question. PW1 testified that:-

"The community acquired the Plot with the help of Norad..."

It was argued that PW1 however, did not explain how this was done and why ownership is registered in the Salvation Army Church if the plot was acquired by and for the community. It was pointed out that at the time the School was set up in 1989-90, PW1 was merely a community member and not a Committee member and could therefore, not have known how the title deed to the land was obtained and by whom.

On PW2's evidence that he did not know the owner of the land, it was argued that PW2 also stated that he became the Chairman of the Parents' Committee in 1997 and that before then he was merely a member of the Kanyama Community. That PW2 also stated that there was a school running before he became Chairman and that the Salvation Army was handling the funds. Further, PW2 testified that he knew NORAD funded the construction because they were being sensitized that the project was for the community. That however, PW2 failed to explain how NORAD happened to come to Kanyama and provide the funding nor did he explain who solicited for the said funding. It was further contended that the rest of the Respondents' witnesses could not explain how that particular piece of land was identified to be used; who identified it and who obtained title to it as all that the witnesses told the Court below is that the land was bare before the NORAD funding. That however, they did not show any proof of this.

Counsel argued that although PW1 attempted to state in answer that the plot was acquired free of charge through a UNIP Councilor, Mr. Phiri, for community purpose, he failed to state which persons in the community

dealt with Mr. Phiri. Further, that PW1 did not give the extent of the purported land that was "gifted" as no documentation of gift or survey diagrams were ever exhibited in the Court below nor was any proof whatsoever to support such statement produced in Court. On PW5's evidence, it was submitted that she gave similar evidence to that of PW1 as she stated that the Church did make monetary contributions towards the Community School.

It was submitted that in contrast to the "shaky and unsure position" of the Respondents' witnesses on the ownership of the land and funding of the construction of the structures on the land, the Appellants' witnesses' testimonies were supported by documentary evidence on ownership of the land and the substantial role the Appellants played in soliciting funds and in providing its own funds for the construction of the bulk of the infrastructure on the land housing the services and programmes offered at the Centre. In this respect, Counsel pointed to the evidence of DW1 who told the Court below that the premises had a title deed in the name of the Church, and that the idea of a community school started in 1989 after the Church did a feasibility study focusing on vulnerable children and that it wished to extend services to the community having acquired the land to do so. Further, that the funding used to build the structures on the land came from Canada, the local community which mostly consisted of church members and the Church itself.

Further that DW2's evidence was that the School opened in 1995 and that the Church members including himself, had prior to this been involved in building the wall fence and part of the class room block. And that donor money from Australia and Norway was used to build the structures and that from these funds, a multi-purpose hall was also built. And that the community only participated in the second project by providing stones and

unskilled labour. Counsel submitted that to buttress these facts, the Appellant exhibited documentary evidence including a duly issued Certificate of Title in the name of the Church. It was submitted that the Appellants also exhibited the letter dated the 22nd January, 1995 in which the Appellants were applying for disbursement of the funds from Canada for the expansion of the Kanyama community project and that the Respondents did not challenge the authenticity of that document.

It was further contended that the evidence of the Appellants through the Affidavit in Opposition of the Application for injunction was that the Plaintiffs/Respondents' Committee only came into existence four years after the establishment of the Community School. And that it is undisputed and abundantly clear that the Appellants own the land on which the structures and programmes were begun for the benefit of the Community and that it was as a result of the efforts of the Appellants in acquiring funding and in providing its own funds that the structures were constructed. Therefore, that at this stage of the Appeal, there cannot be any submissions or challenge on the authenticity of the Appellants' Certificate of Title as the Respondents did not raise this issue in their Pleadings. As such, any attempt to raise the issue in this Appeal is grossly irregular, highly prejudicial to the Appellants and would require the calling of fresh evidence before the issue can be determined by this Court.

It was pointed out that our decisions in several cases and in particular the case of **Anderson K. Mazoka and 2 Others vs Levy Mwanawasa and Another**[1] fortifies the above argument. In that case we held that:-

> **"The function of pleadings is to give fair notice of the case which has to be met and to define the issues on which the Court will have to adjudicate in order to determine the matters in dispute between the parties. Once the pleadings have been closed, the parties are bound by their pleadings and the Court has to take them as such."**

It was submitted further that having been granted a lease in 1991 and having secured a feasibility study in 1989, the Appellants proceeded with their mission work of servicing the Community by building and operating a Community Pre-School and running the Family Health Education Programme. Counsel argued that from this, it is clear that there were pre-existing structures on the site before the Respondents Committee came into being.

It was further submitted that it was through the initiative of the Appellants and its Church members that the idea of a Community Centre to provide services to the community came about. And that the Appellants' evidence clearly shows that it was the efforts of the Appellants in putting in their own money from their rented property and through their application and solicitation of donor funding, which led to the disbursement of Canada funds that enabled the Appellants to set up the School, accommodating grades 4/5, a night school, furniture for the school, developing a curriculum and training of teachers in its use, provision of teaching aids, paying the teachers, etc. It was pointed out that the sketch plan exhibited by the Appellants in the Court below, shows several structures situated on the Land, and that the Respondents did not dispute the existence of a Pre-School; Nursery School; playground for the youth; 3 houses; carpentry; clinic, class rooms; etc. - all built from Canada funding, which the Appellants solicited through their good standing and letter of application in 1995.

It was submitted that contrary to this evidence, the Court below held that the Appellants played no role, as it was merely the work of the community in Kanyama which procured funding for the structures on the Appellants' land when in fact, not. We were, therefore, urged to take

judicial notice that the Church, like its sister Missions in several countries worldwide, is a non-profit making organisation, whose philanthropic work is mainly funded by donors. And that this was so because of the good standing and proven good work that the Salvation Army Church does worldwide which places it in very good standing to acquire donor funding from many donors globally.

In response to Ground five which attacks the learned Judge's finding that the Appellants played no role in the funding and construction of structures on their own land, it was submitted that the above holding is supported by the evidence on record. It was argued that the evidence does not show how the Salvation Army contributed either financially or materially to the construction of structures on the land. That DW1's evidence was that he was involved with the KSACS and that the Community School was built with Canadian funds and the local community mostly Church members and the Salvation Army put money in the construction of the building but he could not recall the exact amount. And that although the property was to be a Salvation Army Church property, under cross-examination, he confessed that he was not physically on site. It was submitted that DW1's evidence was hearsay as he told the Court below that he got this information from Lt. Hachitapika. Therefore, DW1 had nothing tangible to offer as all he told the court below is what he heard from Lt. Hachitapika.

It was submitted, that as "**a cross appeal**", the Respondents' submissions on the ownership of land upon which the KSACS was built is that if indeed the title deed is genuine, then it was fraudulently obtained. Further, that DW1 told the Court below under cross-examination, that title was obtained from Ministry of Lands and that Mr. Hachitapika collected the title deed. That, however, he was not certain as he said part of the original title deed was at Headquarters as what was filed is a copy. Counsel

therefore, urged us to take judicial notice of the fact that the diagrams for a 99 years lease do not contain a hand written diagram and that the diagrams are drawn by the Government surveyors and must have signatures as a legal requirement. Hence, the sketch map and the comments attached to it are invalid as they cannot be part of a genuine title deed which must have a cadastral diagramme and a lease attached to it . That in the absence of the original title deed to compare with what was produced, the authenticity of the title deed is therefore, in serious question.

Counsel then went on to repeat the submissions that the plot was given to the Respondents by a UNIP Ward Councillor. He argued that this evidence was not challenged. He further submitted that if the Appellants had a valid title deed, then the same was ceded to the Community School as this is what convinced the learned trial Judge to decide as he did. Counsel then submitted that there was no need for the learned Judge to order demarcation of the property as the whole certificate should have been cancelled as no portion of the land can be subdivided and given to the Appellants.

In support of Ground two which challenges the trial Judge's decision of granting the ownership of the Community School without assessing the evidence on the origins and purposes of the entire infrastructure on the land where the KSACS is located, it was submitted that DW1 explained the origins and purpose of the infrastructure. That DW2 stated that the Appellants did a feasibility study to start up a community school in Kanyama and solicited funds from Canada to start up the project. And that the Church was in charge and ran programmes at the Centre, namely, a pre-school, a clinic, a nutrition hall and church activities. That the community school was run by the Appellants as it is not uncommon to have faith based community schools that were run by the faith that owns the place.

It was submitted that the donors requested for local participation from the community. That the application letter for the Canada Fund, clearly states the origins and purpose of the structures built on the land. That the structures were intended to be a recreation and all inclusive multi-purpose service Community Centre that would not only provide primary school education to the local Kanyama residents but also provide various life skills training to both genders of various age groups; to empower them to set up and manage their own businesses; to empower them in health knowledge in order to encourage safer life style choices, avoid drugs and diseases, know the nutritional value of foods so as to provide their families with balanced diets for a healthier community and to curb the high levels of malnutrition that had devastated the area. There was also a clinic to serve the health requirements of the community.

It was contended that it was therefore misleading, to call the Community Centre at Kanyama simply "a Community School" when the truth of the matter is that the premises is properly called a Community Centre providing much needed and valuable services to the community by the Appellants who have vast knowledge and experience in the successful running of such centres and "local programming and technical assistance".

It was submitted that the claim of ownership of the entire Community School by the Respondents with all its structures is not only unsupported by evidence on record but would also be a grave injustice to the Appellants whose brain child the idea of a community centre it was and who spent its own money and also solicited funding at their own initiative in building such structures. And that such a claim would render the Appellants' useful and much needed philanthropic work that is benefiting the community at Kanyama to an end. Counsel went on to itemise the other services provided at the Centre by the Appellants. It was further argued that though

ownership is being claimed by the Respondents, no proof of ownership has been given nor have the Respondents itemised what services they have rendered to the community or how they would sustain such services.

In response to Ground two, it was submitted on behalf of the Respondents that contrary to the Appellants' arguments, the moment the Appellants allowed the construction of a Community School on its land, ownership of that property became vested into the community. That PW3's evidence was that as long as KSACS is registered under the Zambia Community Schools Secretariat, it is a community school. And that the reason the Parent Committee is mandated to administer or run the affairs of the community school on the guidelines given by the Secretariat is to ensure that the School operates independently from the initiator whether internal or external or any funder. And that even if an NGO or Church is part of PCSC, a community school is to be considered a separate entity.

Further, that PW3 also stated that there were a number of community schools set up in farming blocks where a farmer donates land to the community, sometimes it could be a church donating land and that members of Parliament have also donated land and material to Community Schools. And that once a piece of land is released, the community school belongs to the community. Therefore, the previous owner ought to consent to have given it. Further, that PW3's evidence was that the property is owned by the community and that according to the form the Appellants filed and under re-examination of PW3, it is clear that when an individual gives land to the community, it is like a farmer giving land for a grave yard. They cannot go back and say it is my land. That this evidence was not controverted under cross-examination or by evidence in rebuttal. And that PW3's letter dated 16th February, 1999 which states that the Community School in question now has a Parents Committee in place which will ensure

community participation and ownership of the school, meant that the future of the school including whether it is to succeed or fail lies mostly in the hands of the local community. The Salvation Army will continue to be a reliable partner. It was submitted that the ownership of the School is clearly in the hands of the community represented by the Parents' Committee.

In response to the Appellants' arguments on the origins of the School, Counsel submitted that PW5's evidence was that she and others heard that there were donors who wanted to build a community school and that they attended a meeting. That the community comprised of church members, businessmen and marketeers from which a committee was created. And that the donors supplied materials and the community then built the school. That the construction commenced with a wall fence and two blocks and that there are about four classes, a skills block, a tuck shop and an office to be used as a clinic. And that PW4's evidence was that "the whites" who built the school did so because there were a lot of pupils who were not going to school and teachers' houses were also built. That she knew the Salvation Army because they were congregating at 'the School'. And that before the school was built, the Church was congregating at its own premises in Old Kanyama. That there were no structures on the premises before the School was built and that the Appellants came and said they wanted to use the premises for prayers. Counsel submitted that the above evidence is confirmed by the evidence of PW1 who told the Court below that the plot was initially obtained by the community from the then Kanyama ward Councillor during the UNIP era. And that there were no structures at the place where the community school now sits before the NORAD funding was obtained.

It was submitted that this evidence was not rebutted at all nor did the Appellants produce a single document to support their assertion that they

also helped in funding the project or the sum(s) which they contributed towards the construction of the School. Therefore, that the only reasonable inference that can be drawn is that when the School was completed in 1994 and the Salvation Army sought permission to use the School as a worship centre, the Church then went behind the back of the community and fraudulently obtained a certificate of title that same year.

In support of Ground one which attacks the learned trial Judge's Order that the land be sub-divided, it was contended that the learned trial Judge erred by so ordering without first determining which structures can properly be said to belong to the Community School. That perusal of the Record of Appeal and the evidence adduced by the parties in the Court below, shows clearly how the word "Community School" was so loosely used. It was argued that the Respondents conveniently used this term and created the impression that Community School refers to all structures situated on the titled land registered in the Appellants' name. That however, the sketch map shows that there are other structures apart from what can be properly termed as the KSACS. These other structures are a clinic, playground for youth, Church, 3 houses, garage, carpentry, tailoring, etc. That, however, in terms of the word "school", there is a pre-school, nursery, skills training hall, classrooms A to E and Headmaster's office.

Counsel went on to recite the evidence produced by the Appellants which we have already referred to under Ground five. It was argued that it was not in dispute that funding from Canada was received. That however, in accordance with the intention and understanding of the Appellants, the Community School had no other connotation or legal meaning other than the understanding that it would be a school built using the Canadian funding which the Appellants solicited to serve the community at the Salvation Army Kanyama Corps Community Centre. Therefore, it can be seen that the real

intention of the Appellants was to develop this Community Centre and not to give it away or divest itself of the ownership and management thereof with its various programmes and activities.

It was submitted that the definition of a Community School as defined by the Zambia Community Schools Secretariat (ZCSS) which shifts ownership, management and organization to the Community to a Committee, is not a correct definition but the one given above.

It was further submitted that all the structures previously existing before the funding from Canada were funded by the Appellants and all the structures built using the said Canadian fund were clearly property of the Title holder (the Appellants). Hence, it was contended that those structures were built on the Appellant's land to service the Kanyama Community under the auspices and control of the Salvation Army. And that even the structures that were built using the EC Micro-Projects Programme, the funds were solicited for by the Appellants except that the funding requirements under that programme dictated that a Committee be set up for and on behalf of the community which would sign the agreement with the Ministry of Finance and Economic Development. Therefore, that it was this requirement that necessitated the ushering in of a committee in 1997, of which PW2 was Chairman, for the purpose of accessing the funds.

As regards the Report of the Taskforce of the Ministry of Education on Policy and Guidelines for the Development of Community Schools in Zambia, it was submitted that clause 2.7 provides that:-"...**where a community school <u>is a part of</u> a NGO system, the NGO becomes <u>a partner</u> in the agreement.**" It was argued that this provision does not and did not oust the involvement of the Appellants as the Appellants were made a partner in the management and control of the community school. Hence,

the Appellants in the current case, cannot be ousted from so acting. Therefore, that when the Committee signed the agreement with the ZCSS for the release of funds for the building of structures on the Appellants' land, the Appellants as an NGO, also became a partner in the running and management of the structures to be built as a community school and of the Community school itself.

In response to the arguments in support of Ground one, the Respondents' Counsel submitted that the order by the learned trial Judge is clear that all those structures that were built using donor funds (NORAD, the Canadian and Micro-projects Unit) belong to the Community School. Hence there is no structure which was built by the Church or for the Church which is confirmed by the evidence from the witnesses except that of Major Elisha Milambo Makomba who told the court below that the Church and its members exclusively built structures on the plot. That however, his evidence is hearsay as he conceded, under cross-examination that he was not physically there and that his evidence was based on the information from Lt. Hachitapika.

Further, that DW2's evidence was that there was no harmonious relationship between the Church and the PTA Committee. And that the evidence of DW2 was that the Board which initially ran the School was created and that its members comprised mainly of Church members. And that there is no documentary evidence to this effect and that it is difficult to understand why a Church appointed Committee could not have a harmonious relationship with the Church. That DW2 conceded under cross-examination, that he could not remember if a Committee was formed for the first structure and he also confirmed that money was donated by the Australians and Norwegians and that nothing could have been done without the participation of the non-church member community. It was contended

that DW2 conceded that the money used was from the community and that his committee executed the project and that there was a PTA Committee which was to run the KSACS. However, that for obvious reasons, this witness refused to confirm that the School was a Community School.

It was further submitted that DW3, Acting Director, ZCSS, told the Court below that the owner of the land upon which the School is built signed an agreement with the community through the Community Parents' Committee. That this evidence agrees with the evidence of the Respondents' witness, PW3. And that DW3 told the court below that the guidelines are that the role of the agent is supportive. And that if they intended to cease being a Community School, they have to re-register. Further, that once the piece of land is released, the school belongs to the community. And that the previous owner ought to consent to have given it. That under re-examination, DW3's evidence was that when an individual gives land to the community, it is like a farmer giving land for a grave, you cannot go back and say it is my land.

It was contended further that all the structures built on that plot belong to the Community School and that all the Respondents' witnesses' evidence was that there were no existing structures on the plot prior to the construction of the KSACS. Therefore, that when the court below ordered sub-division of the land, it was assuming that there was an area at the plot which was undeveloped and which could be given back to the Appellants so that the School could run without interference from the Church. Unfortunately, that the reality on the ground is that the whole premises is full of immovable structures belonging to the KSACS leaving the Appellants with nothing.

In support of Ground four, it was contended that the Court below erred in law when it ordered the Appellants to be dispossessed of its land which it was entitled to under a lawfully issued and valid Certificate of Title. That the learned Judge found and held as follows:-

> **"The Plaintiff have proved their case on a balance of probability. The School shall remain a Community School run by the elected Parents Committee by the Community. The Lusaka City Council is ordered to sub-divide the land and issue a separate title in the name of the Community School to avoid future litigations."**

It was submitted that a Certificate of Title is conclusive evidence of ownership as provided under Section 54 of **the Lands and Deeds (Registry) Act** (**the Act**) and that the only exception is where fraud or mistake is proved. That in the current case, fraud or mistake was neither pleaded nor proved by the Respondents and that during trial, the Respondents did not ascertain ownership of the land, nor claim to be registered owners of that land.

Therefore, that dispossessing land in the manner directed by the Court below will not only prejudice the Appellants, but also cause grave injustice as the same is not supported by any consideration and is not supported by law. And that the procedure upon which a proprietor of land holding a Certificate of Title may be dispossessed of the land is provided for under **the Act**, **the Lands Acquisition Act** and **the Constitution of Zambia**. Counsel then went to cite Section 13 (1) of **the Lands Act** which provides that:-

> **"where a lessee breaches a term or a condition of a covenant under this Act the President shall give the lessee three months' notice of his intention to cause a certificate of re-entry to be entered in the register in respect of the land held by the lessee and requesting him to make representations as to why a certificate of re-entry should not be entered in the register."**

It was submitted that the Appellants did not breach the above Section as it has continued to hold a valid title. Sections 61 (1) and 63 of **the Act** were cited which provide respectively, that:-

> **"61(1) when land in respect of which a provisional certificate or a certificate of Title has been issued or any estate or interest in such land, is intended to be transferred, or any right of way or other easement is intended to be created, the Registered proprietor may execute for the purpose of registration a deed of transfer..."**
>
> **63 Whenever any order is made by any court of competent Jurisdiction vesting any estate or interest in land in any person, the Registrar upon being served with an official copy of such order, shall enter a memorandum thereof in the Register and on the outstanding instrument of title."**

It was submitted that the facts of this case did not support the finding by the Court below that the Community School or indeed, the land on which it is situated should be vested in the Respondents' Committee. That as such, the learned trial Judge misdirected himself by ordering the subdivision of the Appellants' land as there cannot be any reliance or invocation of the above quoted Sections of **the Act**.

It was further submitted that the Order by the Court below for the subdivision of the land amounted to granting relief or benefits which the Respondents were not entitled to, nor claimed nor given evidence in support of. That PW1 and PW2 merely stated that the land was Community land without explaining how this came about and that there was no proof that what the purported Area Councillor Phiri gave them was the same land. Therefore, that the Respondents have no proper claim of right to this land as their witness, PW1, stated that he did not know who the land was for. A question was posed on how could he claim that the land belonged to the

Respondent, especially that there was a valid Certificate of title over that land?

It was argued that in this case there was no dispossession of the land by the President in accordance with Section 3 of **the Lands Acquisition Act.** As regards Article 16 of **the Constitution of Zambia** which protects rights to property and protection from being forcibly dispossessed/deprived of one's own property without consideration or compensation, it was argued that this provision was made to achieve fairness at all times. That however, in the current case, the learned Judge did not make any orders as to compensation. Therefore, that on the basis of Article 16 of **the Constitution** and Section 63 of **the Act**, the Order for sub-division of the land cannot be sustained. And that the sum total is that the order of the learned Judge should be set aside as it is not supported by law and facts and it should therefore, be quashed.

In response to Ground four, it was argued that the learned Judge in the Court below was on firm ground when he ordered the dispossession of the land from the Appellants. That DW1's evidence was that he was not physically there and that he got the information from Lt. Hachitapika who was not called despite being a crucial witness to the Appellant as he is the one who represented the Appellants on the Community School Committee and authored the letter dated 16th February, 1999. Therefore that the only reasonable inference to be drawn is that Hachitapika would have stated the truth which the Appellants did not want to accept; namely, that KSACS belonged to the Community in Kanyama and not to the Appellants.

Further, that PW1's evidence was that the School was built on the land given to the Community by the then UNIP Councillor who allocated the land in "squatter compounds" as they were then known. And that this

evidence was not controverted. Further, that PW2 and PW5 told the Court below that at the time of construction of structures on the plot, there was no single structure and that all the structures on the plot were built using donor funds. And that the Appellants were aware of those constructions and that they did not raise the issue of illegality on the property. Therefore, that if the land originally belonged to the Church, then the Appellants ceded ownership of the KSACS the moment it gave it to the Community for the purpose of constructing thereon, a community school.

In support of Ground three, it was contended that the learned trial Judge erred when he held that it was patently clear that the School belonged to the Community and that the change of the Church's fundamental beliefs and principles of serving the Community especially orphans and vulnerable children cannot be entertained as it could not be noble and decent. It was pointed out that this holding was based on the letter from the PEO dated 21st May, 2001. It was argued that the letter did not render any admission by the Appellants that the School belonged to the Community. And that the Appellants' witnesses vehemently denied having ceded ownership of the KSACS or any part of the Community Centre to the Respondents and the Community. That PW1's evidence was that the premises had a title deed in the name of Salvation Army Church and that the land had not been conveyed to anybody.

It was submitted that the Respondents' witnesses claimed ownership without any proof to support their ownership claim. And that their evidence was contradictory and the letter relied upon and referred to above, did not transfer ownership of the property to the Respondents. That all the Appellants stated in that letter is that there was a Parents Committee which would ensure community participation. That the context of the word "ownership" was not intended to mean divesture but was rather meant to

encourage the sense of responsibility and willingness from the Community to support the school that was serving the educational needs of the Community and was also meant to be an assurance that the School would remain for the benefit and use of the community.

It was further argued that had it been the intention of the Appellants to divest itself of the ownership, the same would have been clearly stated. Hence, the meaning of the last words: "**The Salvation Army will continue to be a reliable partner**", did not mean that the Appellants would from that date have nothing to do with the KSACS. It was therefore, contended that there can be no legal ceding of ownership of titled land in the manner suggested by PW3 because there was no documentation to support this claim and that the analogy of a farmer who donates land not being able to reclaim it was not relevant as that had no legal basis.

It was submitted that PW3's evidence that once a committee signs an agreement with the ZCSS, the school becomes a community school owned by the community, is merely a guideline of which there was no proof that such Guidelines have any force of law that would be binding on any other person that did not sign any agreement with the ZCSS. That a guideline, does not at all bind the Appellants and that a position of an automatic transfer of a School into a Community School by virtue of signing an agreement does not even appear anywhere in the letter approving funding from EC Micro-Projects nor in the 1999 Financing Agreement. Therefore, that there was no admission by the Appellants that the ownership of the School was vested in the Respondents. Hence, there was no evidence upon which the Court below would have based its finding that the Appellant had changed its fundamental beliefs and principles of serving the Community as there is no evidence that shows that the Appellants had

moved away from its calling of serving the Community. Therefore, that Ground three of this Appeal has merit and should be upheld.

In response to Ground three, it was argued that the learned trial Judge was on firm ground when he held that there was a change in the Appellant's fundamental beliefs and principles of serving the community. It was submitted that the evidence before the trial court showed that there was a change concerning serving the community in that Lt. Hachitapika and Captain B. Magoya's letter dated 16th February, 1999, shows that the Salvation Army called itself a 'reliable partner' while acknowledging that the Parents' Community School Committee was to ensure community participation and ownership. That however, Tadeous Shipe, the 1st Appellant, tried to create a totally new interpretation in the Court below by stating that he used the word 'ownership' in the same sense as it is currently used by government, NGOs and CBOs to mean "**have a sense of responsibility for and identity with and to look after and sustain the function and purpose of the beneficial community service or programme**". That however, the word in English is often used to emphasise identity rather than possession.

Further that Lt. Col. Geoff Blurton, wrote to the Chairman and members of the Kanyama Community School PTA Committee as follows:-

> **"...Salvation Army has therefore taken complete control of the Management of the school with effect from 20th February.... (and that)....Furthermore the Salvation Army is hereby suspending all activities of the PTA with immediate effect. When all legal implications of this case are settled the Salvation Army will decide whether or not the Committee is needed for the future."**

It was argued that this evidence tallies with the letter by Lt. Hachitapika and contradicts the letters by the 1st Appellant and Geoff

Burton which it was contended, clearly shows a fundamental shift in beliefs. That the letter from Mr. Geoff Blurton purports to suspend the PTA Committee despite knowing that the School belongs to the Community and not to the Church. Further, that the shift from the Appellants' fundamental beliefs and principles of serving the community is buttressed by the uncontroverted evidence of PW1 that victimisation of the Parents Community School Committee (PCSC) by Salvation Army began just after the completion of the construction of the final phase of the school with the assistance of Micro Projects Unit as the Salvation Army started collecting school fees instead of the committee; the Salvation Army also, privately applied to turn the school into a private one and kept the school fees collected for its own contrary to the community school regulations.

It was submitted that the title deed obtained by Salvation Army was dubiously obtained over the School property. That therefore, although the Court below used the words that the Appellants' fundamental beliefs and principles of serving the community had changed, the truth is that the Appellants from the beginning intended to defraud the poor Kanyama Community of its School and used the poor Kanyama Community to obtain money from un-suspecting donors such as NORAD and the Micro- Projects Unit to build the School and later convert it to a private school run by the Church.

In support of Ground six, it was submitted that the Court below erred in law and fact when it ignored the fact that the suit was brought not on behalf of the Kanyama Compound Community to which the Appellants are an integral or important part but on behalf of a Committee comprising a few individuals who aspire to take over ownership of the School.

It was submitted that the Appellants' evidence was that when the Community School began to operate in 1995 at the Community Centre established by the Appellants, there was existing an advisory Board which comprised various stakeholders including the beneficiaries to the services provided at the Centre and that the function of the Board was to advise the local Salvation Army Church which was in charge of implementing the programmes. That DW2 gave evidence on how the PTA Committee was formed and that this was in line with the Appellants' intention to encourage the parent-child participation.

We were accordingly urged to take judicial notice of the fact that most of the schools in Zambia, maintain PTA Committees for the purpose of sharing ideas, discussing affairs and running of the school, projects/activities and performance of the students. That however, this does not at all show ownership of the school by such a body. And that the Parents' Community School Committee in this matter came into existence in 1997 with PW2 as its first Chairman and that this was necessitated by the request of EC Micro Projects and Ministry of Finance for the signing of an Agreement for the disbursement of funds. Therefore, that the Respondents' claim that they were representing the PCSC is not backed by any documentary evidence on record nor were minutes produced to that effect. That to legitimise their status the Respondents in May, 2003, registered themselves as a Parents Committee but this was after this action was commenced in January, 2003 and that they amended their pleadings in April, 2003.

It was Counsel's further contention that the legitimacy of the Respondents Committee is questionable in view of the uncertainty of who the Respondents are and in view of their lack of *locus standi*. Hence, an order granting ownership of the KSACS to unknown persons is highly

irregular and would raise injustice to the unsuspecting members of the Community. Therefore, that the Respondents are not acting *bona fide*. As such, that the Judgment of the learned Judge in the Court below should be reversed and ownership of the Community Centre at Kanyama reverted to the Appellants and that the KSACS should continue to be run as a Community School under the prevailing legal guidelines of the law so that the Community can continue to benefit as has always been the intention of the Appellants.

In response to Ground six, Counsel for the Respondents submitted that the trial Judge was on firm ground as evidenced by the Financing Agreement signed between EC Micro Projects/Ministry of Finance and Economic Development on the one hand and Kanyama Salvation Army Community School PTA Committee on the other hand as it is categorical on the status of the PTA Committee, which has full legal value and status. It was submitted that the Appellants were not in the picture at all and that among the signatories to this Agreement on behalf of the Respondents are Victor Mungámbata and Wesley Ng'andu who is the only member of the Appellants' group. That the Appellants tried to mislead the Court by arguing that legally, the KSACS belonged to the Appellants contrary to the definition of the Community School Contract found in clause 2.7 of the of the Policy and Guidelines for Community Schools in Zambia which states that:-

> **"An agreement between a Parent Community School Committee and ZCSS will be entered into. This will be binding on both parties and will assist the community to develop a Community School to full accreditation. Where a community school is part of a NGO system, the NGO becomes a partner in the agreement."**

That however, the Appellants are not registered as a partner in the contract between the Community School and ZCSS but that partner with

ZCSS is the Parents Community School Committee itself. Hence, this shows that the Appellants are not the owners of the KSACS. We were accordingly urged to dismiss this Appeal with costs and to grant the entire property to the Community School.

In their Further Submissions, the Respondents, submitted *inter-alia*, that the Appellants in their submissions were creating evidence which is not on record. Counsel then proceeded to quote from the Appellants' arguments the paragraphs regarded not to have been supported by the evidence. It was further alleged that Counsel for the Appellants was also guilty of twisting the evidence by submitting that:-

> **"we submit that in view of the uncertainty of who the Respondents are and in view of the fact of their lack of locus standi having been raised in the pleadings (paragraph 20 of page 124 of the record) an order granting ownership of the Community School to unknown persons is highly irregular and would result in a grave miscarriage of justice to the detriment of the unsuspecting members of the community at Kanyama."**

The contention of the Respondents is that the relationship of the Community School is not in question as the current chairperson is the 1st Respondent who was the 1st Plaintiff in the court below.

It was further submitted that it is settled law that pleadings are mere statements upon which a litigant relies during trial. Counsel quoted **Odgers on High Court Pleadings and Practice** in which the learned author states that:-

> **"The whole object of pleadings, as we have seen, is to bring the parties to a clear issue and thus to secure that, they both know before the action comes for trial what is the real point to be discussed and decided."**

Counsel also quoted from "**A Practical Approach to Civil Procedure"** on the functions of pleadings in which the learned author has stated as follows:-

> **(a) to inform the other-side of the case they will have to meet to ensure they are not taken by surprise at trial.**
>
> **(b) To define the issues that need to be tried, so as to save costs at trial and to build the ambit of discovery and the evidence that needs to be prepared.**
>
> **(c) To provide a trial judge with the precise statement of the contentions advanced by the parties...**
>
> **The parties are restricted to pleading the facts which are material to the claim or defence advanced and must not plead the evidence by which those facts are to be proved."**

It was contended that one cannot depend on pleadings to prove the case. That in the current case, the Appellants' pleading is against the ownership of the School by the Respondents as it is stated as follows:-

> **"The Defendant denies paragraph 4 of the Statement of Claim and will aver that it was a condition by donors that in order for the KSACS to be assisted, KSACS should establish a Committee that would oversee and manage the project."**

Counsel then proceeded to pose the question as follows:-

> **"if the donor wanted to give money to the Church to construct a school why should the condition be that the community should create a Committee? After all don't Church members come from the community for the donor to require people outside of the Church to create a Committee? The only logical conclusion we submit, is that the donors were not funding a Church organisation project but a community project run by the community itself."**

On the pleadings of the Appellants that: "**the funds were not released to the community, but to the plaintiff on behalf of the Defendant to be used to benefit the school as a condition of the grant/donation aforestated**", Counsel posed the question as follows:-

> **"why did the donors release the money to the Plaintiff instead of the Church?"**

It was contended that the intention of the donors was to donate to the Community and not to the Church and that this position is supported by the evidence of PW1, PW2, PW3 and PW5. That all the witnesses testified that the School does not belong to the Church but to the Kanyama Community and hence, the evidence of DW1 should be dismissed as hearsay as he was not physically there but relied on the evidence of Lt. Hachitapika.

As for the rest of the arguments in the Respondents' Further Submissions, we are of the view that these are more or less repetitive of the arguments in the Respondents' Heads of Argument. We do not therefore, see the relevance of summarising the same as we would end up repeating ourselves. This however, does not mean that we did not read the Respondents' Further Submissions in full. We have done so and have taken them into account in this Judgment.

We have seriously considered this Appeal together with the Grounds of Appeal filed, the arguments in the respective Heads of Argument and the authorities cited. We have also considered the Judgment by the learned Judge in the Court below. The central question raised in this Appeal is whether the learned trial Judge was on firm ground when he ordered the sub-division of the land where the KSACS is situated and ordered the Lusaka City Council to issue a separate certificate of title in the name of the Community School in question. For convenience and to avoid repetitions, we shall deal with all the six Grounds of Appeal together as they all gyrate around the ownership of the land where the KSACS was built. It is also our considered view that there are other peripheral questions to be determined. These are:-

1) **Whether the Appellants played any role in the construction of the Community School;**

2) **Whether there was any change in the Appellants' fundamental beliefs and principles of serving the community;**

3) **Whether the Respondents had *locus standi* in this matter; and**

4) **Whether the order by the learned Judge to have the plot sub-divided and to have a separate title deed issued to the Respondents was viable in the circumstances of this case.**

To ably determine the central question posed above, we are compelled to address the question of ownership of the land on which the KSACS was built, because although not specifically raised as a ground of appeal, both parties have argued at length on this issue. On one hand, it has been canvassed by the learned Counsel for the Appellants that the Appellants are the legal owners to the land in question. The Appellants based their ownership claim to the land on a certificate of title issued to them by the Commissioner of Lands. On the other hand, the Respondents traced their ownership claim to some councillor, during the UNIP government era, a Mr. Phiri. The learned Judge in the Court below did consider the issue of ownership of the land in question. His conclusion was that the land upon which the KSACS was constructed is/was vested in the Appellants.

We regard the issue of ownership of the land in question to be the crux of this matter which requires us to delve into the evidence on record so as to ably determine the question whether or not the learned Judge was on firm ground when he held that ownership of the land in question was vested in the Appellants.

Perusal of the evidence on record has indeed confirmed that the learned Judge was on firm ground when he held that ownership of the land

in question was vested in the Appellants because the Appellants' claim of ownership is supported by a certificate of title in their name. On the other hand, the Respondents' claim of ownership is not supported by any documentary evidence. Further, the councillor, a Mr. Phiri, who, during the UNIP government era, purportedly, allotted the same piece of land to the Respondents was not called to testify. We further find the claim by the Respondents that the community was given the land in question long before the Appellants went behind their back and acquired title deeds after being allowed to congregate there, to be a mere assertion which is not supported by any tangible evidence. On the other hand, the Appellants' evidence showed clearly how the land and title deeds were acquired. The evidence also shows that this was long before the Respondents' committee was established.

Although the Respondents have spiritedly argued, at length, that the Appellants' certificate of title was acquired by fraud and that the copy that was produced in the Court below is defective, as other parts of the title deed were not included, it is our firm view that the law on fraud allegations is settled. This is that for fraud to succeed, the alleged fraud must not only be specifically pleaded but must also be strictly proved. Authorities in our jurisdiction on this abound. In the cases of **Sithole vs The State Lotteries Board**[2] and **Rosemary Phiri Madaza vs Adwah Karen Coleen**[3], we made it clear that a party who alleges fraud bears the onus of proof which is higher than a simple balance of probabilities and that fraud must clearly and distinctly be alleged and proved. The English case of **Bradford Third Equitable Benefit Building Society vs Boarders**[4], buttresses this point as the Court held in that case that fraud must be precisely alleged and strictly proved.

The question that follows is, did the Respondents plead fraud and if so, did they adduce sufficient evidence to prove the alleged fraud? We have perused the pleadings by the Respondents, as well as the evidence on record. We have come to the conclusion that the Respondents did not plead fraud over the manner the Appellants acquired the certificate of title nor did they substantiate the alleged fraud to the required standard, which is higher than a balance of probabilities. Therefore, the alleged fraud by the Respondents in the acquisition of the certificate of title in question by the Appellants cannot stand. Further, Section 33 of **the Act** fortifies the Appellants' position, as it provides that once a title deed is acquired, that is conclusive evidence of ownership of that piece of land by the title holder. The only exceptions to this which the law recognises is where fraud or mistake in the acquisition of the certificate of title is proved, as provided under Sections 58 and 59 of **the Act**.

To further show that the Respondents' argument on the alleged fraud is ill-fated, it is the position of the law that issues that were not raised in the court below cannot be raised before the appellate court. Since fraud was not pleaded or proved, the Respondents cannot raise this issue before us. Therefore, the Respondents' argument on the alleged fraud, in the manner the title deed was acquired, falls directly in the teeth of our decision in **Mususu Kalenga Building Limited and Another vs Richman's Money Lender's Enterprises**[5] where we pronounced that:-

"...We have said before and we wish to reiterate here that where an issue was not raised in the court below it is not competent for any party to raise it in this court."

Further, the Respondents have also not cross-appealed against the learned trial Judge's finding that ownership of the land in question was vested in the Appellants or that the title deed was fraudulently acquired.

Coming to the Respondents' alternative argument that should this Court find that the certificate of title issued to the Appellants was not fraudulently acquired and/or that ownership of the land is vested in the Appellants, then their position is that once the Appellants allowed the Community School to be constructed on their property, the Appellants ceded ownership of that land to the community. To illustrate that the Appellants ceded the land to the KSACS, the Respondents based their claim on the following:-

1) The evidence of PW3, a witness from the Zambia Community Schools Secretariat, who told the court below, *inter alia*, that:-

> **"There are a number of community schools set up in farming blocks where a farmer donates land to the community, sometimes it could be a Church donating land, members of parliament have donated land and material once the piece of land is released, then the school belongs to the community, therefore, the previous owner ought to consent to have given it."**

2) The letter by the Appellants which is addressed to Mr. E. Mwansa, Chairman of the KSACS and is dated 16th February, 1999. The letter, in paragraph 4, reads as follows:-

> "... **The Community School in question now has a Parent's Committee in place which will ensure community participation and ownership of the school. This means that the future of the school including whether it is to succeed or fail, lies mostly in the hands of the Local Community. The Salvation Army will continue to be a reliable partner...**"

3) That the construction of the KSACS was funded by the Government of the Republic of Zambia and other donors; and

(4) That the Appellants did not play any role in the funding and construction of the KSACS as funding came from donors and Government.

On the other hand, the Appellants' position on this issue is that it was them that conceptualized the idea of a community centre, where various services such as a clinic, nutrition centre, skills training, pre-school, community school, etc. could be provided. That they then solicited for funding from donors and Government for the various programmes to be established and run from the Centre. And that in fact, the Respondents' committee was established for the purpose of signing the agreement for the release of the funds for the construction of the KSACS. And that only one class-room block; 4 VIP pit latrines and furniture were constructed and procured using donor and Government funds which the Respondents signed for as a condition required by the donors for the disbursement of the funds as shown at pages 303-315 of the Record of Appeal.

We have considered the above arguments. The above arguments require determination of who constructed the KSACS. The learned Judge did consider the issue of who constructed the KSACS. He came to the conclusion that:-

"i. The school in question was a community school;

ii. The structures were partly funded by the donors and the Micro Project of the Ministry of Education;

iii. The structures were built for the benefit of the vulnerable children;

iv. The school was not a commercial but a benevolent venture;

v. The structures were constructed on the defendants land with their authority."

The question therefore, is whether the learned Judge was on firm ground when he found as he did. To determine this question, we have to look at the background to the establishment of the Community School in

question. From the evidence on record, it is abundantly clear that the Appellants are the ones that conceptualized the idea of a community centre, from which various services and/or programmes, including the community school, were to be operated, for the benefit of the community in Kanyama. It was also the Appellants who sourced for funds from the donors and Government, for the construction of the various structures at the Centre. The evidence also shows that some of the structures from which the KSACS operated from were constructed using donor funds and funds from GRZ's Micro-Projects Programme. From this evidence, it is clear that the findings of fact by the learned Judge in the Court below, itemized above, are correct as they are supported by the evidence on record.

Perusal of the Operational Guidelines for Community Schools also state clearly that a person or organization wishing to operate a Community School in Zambia must comply with the guidelines contained in that policy document. The guidelines provide for establishment, accreditation and registration of community schools in Zambia. It follows that in order for the KSACS to have been registered and accredited as a Community School, the Appellants must have complied with these guidelines.

Therefore, although the Respondents have argued, at length, that the Appellants ceded ownership of the School upon allowing the School to be built on their land and by allowing the School to be accredited and registered with the ZCSS, this argument is not supported either by the Operational Guidelines for Community Schools or by the evidence on record. Our understanding of paragraph 2.3.3 of the Guidelines, which provides, that a fully accredited Community School shall, among other things, own the land and buildings or at least have a 14 year lease over the land on which it is situate; is that this includes situations where an NGO or a Church owns the land. So this provision cannot be a basis upon which it

can be implied or construed that registration and accreditation amounted to an automatic conveyance of the land and buildings from which the KSACS was/is operated into the Respondents' Committee. The converse applies as it is the Appellants that are title holders of the land and are owners of the structures, from which the KSACS was/is being operated. So, it is correct to say that as a PTA of the KSACS, the Respondents are only responsible for the day to day operations and management of the Community School.

As regards PW3's evidence that once a land owner donates land for community use, he/she cannot reclaim that piece of land and the contention by the Respondents that PW3's evidence is supported by the letter dated 16th February, 1999 from the Appellants to the Respondents' Committee, our firm view is that properly considered and read, PW3's evidence and the document in question cannot be construed to amount to automatic transfer of ownership of the land and the structures constituting KSACS by the Appellants to the Respondents' Committee. Clearly, the intention of the Appellants was to construct a Community School and to operate it for the purpose of serving the vulnerable children in Kanyama Compound. Their vision of serving the entire community, including the vulnerable children in Kanyama, is confirmed by the other activities which the Appellants were, and continued, to operate from the Centre, as already alluded to above. It follows that the establishment of the Respondents' Committee, as a condition for registration and accreditation and for accessing the funds from the Government, cannot amount to an intention on the part of the Appellants to cede ownership of the KSACS or the land upon which the Community School was constructed and/or the structures on that land to the Respondents' Committee.

We also note that in the letter dated 5th October, 2001, which was in response to the letter dated 16th February, 1999, the Appellants made it

clear to the Respondents what the term "**the community owning the land**" used in the Guidelines for accreditation connotes. This letter reads as follows:-

> "... **Attention: Community School Parents Committee**
>
> **Dear Captain Milambo,**
>
> **Greetings in Jesus' name. With reference to the issue of "ownership" of the buildings at the Salvation Army Community Centre at Kanyama and a letter dated 16th February, 1999, written by the then Corps Officer, B. Hachitapika: the word "ownership" was used by him in the same sense as it is used currently by Government, NGOs and CBOs when it is used to mean "have a sense of responsibility for and identify with" and to "look after and sustain the function and purpose of the beneficial community service or programme." The word in English is often used to emphasize identity rather than possession. Such is the case here. In no way does anyone but the Salvation Army have legal possession of the community school or any of the other buildings at the Salvation Army Community Centre at Kanyama.**
>
> **While I write to you as Officer in Command of the Kanyama Corps and Community Centre, I intend this letter to be for the information of the Community School Parents' Committee. It should also be released to any that have a real stake in the affairs of the Community Centre and any others who may think that they have..."**

We cannot agree more with the interpretation given by the Appellants in the above quoted letter. Clearly, the tenor of this letter cannot be taken to be proof of the Appellants' intention to cede ownership of the land and the KSACS to the Respondents' Committee. The letter merely clarifies the position that legal ownership of the land is/was vested in the Appellants, while the management and operations of the KSACS was/is the responsibility of the elected PTA Committee, whose composition as can be seen from the Operational Policy and Guidelines for Community Schools in Zambia, varies from time to time.

The Respondents have also argued that since they signed the agreement for the disbursement of funds with the Government's Micro-Projects Programme for the extension of the Community School, the Appellants ceded ownership of the land to the community. In response to

the above argument, the Appellants argued that they did not cede ownership of land to the Respondents, as the Respondents signed the agreement, purely as a projects committee and for the purposes of meeting the donors' condition for disbursement of funds and not for change of ownership of the land and all structures on it. We have considered the above arguments. It is, however, our firm view that the approval letter and the Financing Agreement relied upon by the Respondents, as proof of their ownership claim, cannot be interpreted to amount to the Appellants ceding ownership of the land and the structures on it to the Respondents. These documents contain specific terms and conditions for release of the funds for the project. Hence, these documents cannot, by any sense of wide interpretation, be construed to be proof of ownership of land by the PTA Committee and/or as proof of the Appellants' intention to cede ownership of the land and structures on it to the Respondents. The fact that the Respondents signed the Financing Agreement with Government is no basis upon which an inference can be drawn that the Appellants intended to cede ownership of the land and the KSACS to the Respondents.

As regards the Respondents' lengthy submissions that the Appellants did not play any role in the provision of funding and labour for the construction of the Community School and other buildings on their land, as the construction was done through donor funding while the Community provided labour, we must say that we have failed to appreciate the value or benefit of this argument to the Respondents' case. The submission by the Respondents that since the funds for the construction of the School and other buildings came from donors and Government and therefore, the Appellants did not own and/or cannot continue to own the School and the land in question, cannot be more wrong and is misconceived. This argument is not only folly but also exhibits the Respondents' total ignorance

and/or disregard of the law and procedure on how a registered title holder of land may be dispossessed of ownership of his/her piece of land. We have in mind the provisions of Section 3 of **the Lands Acquisition Act** and Article 16 (1) of **the Constitution of Zambia** which state as follows:-

> "**Section 3.** **Subject to the provisions of this Act, the President may, whenever he is of the opinion that it is desirable or expedient in the interests of the Republic so to do, compulsorily acquire any property of any description."**

> "**Article 16 (1)** **Except as provided in this Article, property of any description shall not be compulsorily taken possession of, and interest in or right over property of any description shall not be compulsorily acquired, unless by or under the authority of an Act of Parliament which provides for payment of adequate compensation for the property or interest or right to be taken possession of or acquired."**

From the evidence on record, the role the Appellants played in the establishment of the KSACS is outstandingly clear. This role is significant as the Appellants did not only play a role in the acquisition of the land in question, but they also conceptualized and actualized the programmes operated and run from the Kanyama Community Centre. They also sourced the funds from the donors and Government to fund the construction of the structures at the Centre. The above is confirmed by the Canada Fund document dated 22nd January, 1995, which clearly outlines the role of the Appellants. We note that this document was written long before the Respondents' Committee was established. This document reads in part, as follows:-

> "... C. **Project Description:**
> **The overall aim of the project is to provide opportunities for residents of the Kanyama compound to increase their educational levels, with the view to increased livelihood in the future.**
>
> **We are proposing to have 4 types of educational programs established during 1996, these are:**

- Pre-School program for 130 children
- Family Health Education for 30 women every 6 months.
- Community School, concentrating on supplying literacy, numeracy and life skills for children in a compromising situations.
- Night School for adults.

For the last 6 months we have operated the pre-school with a role of 50 children. For 1996 year we have 130 children enrolled. The profit generated from this program will help sustain the Family Health Education Programme, from which 24 women graduated in December, 1995.

We are seeking funding to allow us to implement the other 2 programs during 1996:

-"*Community School*" This would concentrate on supplying an education level up to grade 4/5 for children in compromising situations. Children and young teens who have missed the chance of formal education, are now being found in very vulnerable situations. We feel the Community School would assist these children to gain some basic education that would otherwise be denied them. Included in the programme would be health education, art/craft, sports, Christian living and other topics that were highlighted as useful and affordable (as well as an educational curriculum covering maths, language, environmental studies).

D) Project Background

...

In 1989 a needs assessment survey was conducted for the Salvation Army. This survey highlighted the growing problems of the urban poor in many of Lusaka's compounds. One of the major problems associated with the rising poverty was malnutrition among young children...

The concept of beginning a community centre at Kanyama was originally initiated by the Salvation Army, Zambia Headquarters personnel. Over the last 18 months the initiative and implementation of the programmes has been handed over to the local church, who have a management team that plans and ensures the implementation of the programme.

In June of 1995, the first two programmes, "Pre-School" and "Family Health Education", started to operate following the official opening of the community centre..." (Underlining ours for emphasis).

Hence, the Respondents' contention that the Appellants did not play any role whatsoever in the construction of the KSACS has no basis.

As regards the arguments under Ground three of this Appeal which attack the learned trial Judge's holding that the Appellants changed their

fundamental beliefs and principles of serving the community, the Appellants have argued that this finding is not supported by the evidence on record. Although lengthy submissions on this issue were made by Appellants, mostly these were repetitions of the background on the acquisition of the land in question, the establishment of the Kanyama Community Centre and the programmes that were to be operated therefrom including the Community School. In response, the Respondents also submitted at length. The gist of the Respondents' submission is that the learned Judge was on firm ground by so holding as the holding is supported by the evidence on record. In this vein, the Respondents referred us to the Appellants' application to turn the KSACS into a private school as proof of the change of fundamental beliefs and principles by the Appellants.

We have considered the above arguments. To ably determine the issues raised under this ground of appeal, it is imperative to recast here what the learned trial Judge stated on this issue leading to the conclusion that he made. This is as follows:-

> **"There was the desire by the commanding officer of the Salvation Army to turn the community school into a private school, which endeavour was rejected by the provincial education officer in a letter dated 21st May, 2001 and I quote the relevant passage:**
>
> > "*I acknowledge receipt of your undated letter in relation to the above captioned subject and regret to advise that Kanyama Salvation Army Community School cannot be turned into a private school. This is so because Kanyama Community School's purpose is to avail total quality education to orphaned and vulnerable children.*"
>
> **It is patently clear that this was the church's admission that the school belonged to the community and the change of the church's fundamental beliefs and principles of serving the community especially orphans and vulnerable children cannot be entertained. It could not be noble and decent.**
>
> **The Salvation Army now wants to use the title to the property to eject the plaintiffs as if they were squatters who built at their own risk and whose loss though regrettable is not recoverable..."**

To say the least, there can be no doubt that in coming to the above conclusion, the learned trial Judge took a very narrow view of the evidence before him as he based his findings and conclusion on a single application to turn the Community School into a private School. Although the Appellants did apply to turn the KSACS into a private school, this cannot be a basis for drawing such a wide conclusion. Neither can this render any credence to the finding by the learned trial Judge that this was an admission by the Church that the School belonged to the Community. It is clear that the learned trial Judge totally ignored the glaring evidence on record which showed that the Appellants continued to run other charitable activities from the Centre for the benefit of the Community in Kanyama. The learned Judge also seems to have become oblivious to those other charitable activities and programmes that were being run from the Centre.

The evidence also showed that the Ministry of Education turned down the Appellants' application to turn the KSACS into a private school which meant that the status-quo was maintained. Therefore, had the learned Judge properly directed himself and addressed his mind to the evidence before him, he could not have come to the conclusion that the Appellants had changed their fundamental beliefs and principles of serving the poor and vulnerable people of Kanyama Compound. The learned Judge was also oblivious to the Canada Fund document dated 22nd January, 1995, which states as follows:-***"...The profit generated from this Program (the Community School) will help sustain the family Health Education Programme..."***. This clearly shows the Appellants' intention from the beginning to utilize the funds generated from the Community School to sustain the family Health Education Programmes. Further, the Appellants did not take issue over the Ministry of Education's refusal to allow them to turn the Community School into a private School. We are therefore,

satisfied that this is a proper case for us to reverse the finding of fact made by the trial Judge. In arriving at this decision, we are fortified by our decision in the **Achiume**[6] case as clearly, the learned Judge misapprehended the facts and the evidence on this issue.

Ground six of this Appeal attacks the learned Judge for not finding that the Respondents (who were the Plaintiffs in the Court below) did not have *locus standi* in bringing the action. All we can say is that this ground and all the arguments pertaining to it are misconceived. Firstly, the Appellants ought to have raised this issue as a preliminary issue in the court below and not before us as a ground of appeal. *Locus standi* goes to the root of the whole matter, which if resolved in favour of the defendant, will result into the whole case not proceeding any further. Secondly, perusal of the Judgment appealed against will show that although the Appellants raised the issue of the Respondents' lack of *locus standi* as *a* defence, the learned Judge did not rule on this. Further, by allowing the case to proceed in the court below up to Judgment stage, without raising this issue, the Appellants can be said to have sat on their rights and to have waived any objection and to also have acquiesced to the case proceeding with the Respondents as Plaintiffs. Hence, the Appellants are estopped from raising this issue at this appeal stage. We also note that the arguments under this ground are not that the trial Judge did not rule on this issue but that the trial Judge was wrong in not finding that the Respondents had no *locus standi*. For the reasons given above, we find no merit in Ground six of this Appeal.

Coming back to Ground one of this Appeal which raises the central question whether the learned trial Judge was on firm ground when he ordered the sub-division of the land in question and the issuance of a separate title deed in the name of the KSACS, both parties made lengthy

submissions. The Appellants raised three issues in their arguments as follows:-

(1) That the sketch plan at page 379 of the Record of Appeal shows that there are other structures on the land which were built by the Appellants for other purposes other than the KSACS and which belong to the Appellants as they funded and/or solicited for funds to build them. That except the structures built using the Micro-Projects fund, all the other structures belong to the Appellants;

(2) That the Appellants solicited for the funding from the Government's Micro-Projects Programme. And that the Respondents' Committee was created in 1997 with PW2 as its first Chairperson for the purpose of accessing the Micro-Projects funding; and

(3) The Appellants intention was to develop a community centre at that piece of land over which it has a title deed and not to cede the land and its services to the Respondents. That even when the KSACS was established, the Church was/is a partner and is not excluded from the School's activities.

In response, the Respondents' arguments were as follows:-

(1) That all the structures on that piece of land were built using donor and Government funds hence they are part and parcel of the KSACS;

(2) That the Church gave that land to the community and cannot claim ownership; and

(3) That since all the structures belong to the KSACS, the learned Judge ought not to have ordered the sub-division of the land as there is no bare land remaining for the Appellants to retain and that the Appellants should have been ordered to surrender the whole land and the purported title deed for cancellation.

We have considered the above arguments. We believe that most of the issues raised under this ground of appeal have been dealt with above. As conceded by the Respondents, it is obvious that the learned Judge ought not to have ordered the sub-division of the land in question and order the issuance of a separate title deed to the Community School. He should have first established whether the land in issue was capable of being sub-divided. It is also apparent from the sketch map of the Kanyama Salvation Army Community Centre produced in the Court below by the Appellants that there are numerous structures on the land which, as alluded to above, were/are not part of the Community School. From this sketch, it is clear that it is not possible to sub-divide the land in question in the manner envisaged by the learned trial Judge and/or for separate title deeds to be issued. The sketch clearly shows that the KSACS is surrounded by other structures that are not part of the Community School. So the learned trial Judge ought to have considered all this before making the order that he made. It is also trite that courts do not make orders that are not capable of being enforced. The order by the learned Judge to sub-divide the land and to issue separate title deeds is one such order that is incapable of enforcement.

It is also evident that the learned Judge did not properly address his mind to the undisputed fact that the land on which the KSACS is situated is covered by a certificate of title issued by the Commissioner of Lands. Had he done so, he would have come to the inescapable conclusion that the Lusaka City Council had no authority to sub-divide land covered by a certificate of title issued by the Commissioner of Lands. It is also apparent that the Order in question totally ignores the law and procedure for dispossessing land which is covered by a title deed which we have illustrated above.

For the reasons given above, we have come to our conclusion that the learned trial Judge misapprehended the facts and the law when he ordered the sub-division of the land in question and ordered the Lusaka City Council to issue separate title deeds to the Respondents. On the principle enunciated in the **Achiume**[6] case, we reverse the findings of fact by the learned Judge. We find merit in Ground one of this Appeal.

In summing up, we confirm our finding that the Appellants are not only the legal and proprietary owners of the land where the KSACS is situated, but also that they are the legal owners of the School in question. Except to the extent spelt out under Ground six, this Appeal has succeeded. The Appellants shall have their costs in this Court and in the Court below, to be taxed in default of agreement.

M.S. Mwanamwambwa
SUPREME COURT JUDGE

H. Chibomba
SUPREME COURT JUDGE

F.M. Lengalenga
ACTING SUPREME COURT JUDGE