

IN THE HIGH COURT FOR ZAMBIA

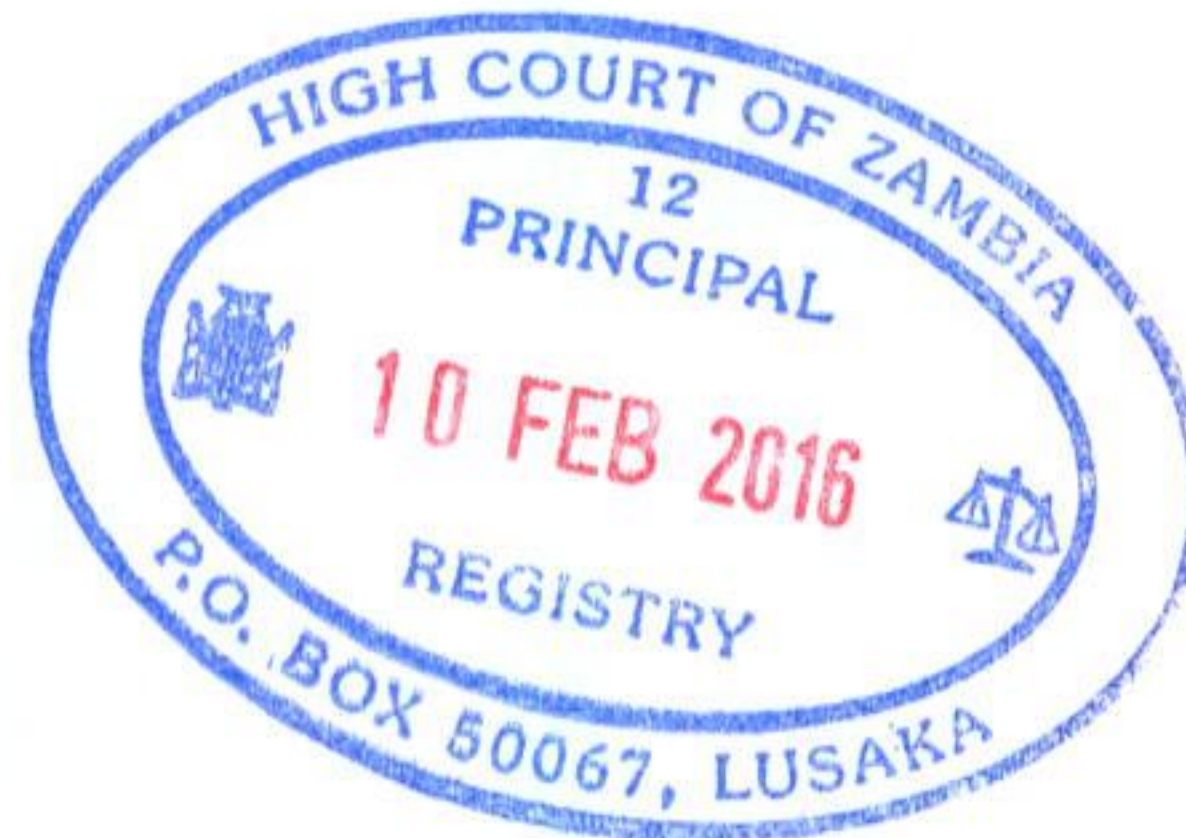
2011/HP/1283

AT THE PRINCIPAL REGISTRY

AT LUSAKA

(Civil Jurisdiction)

BETWEEN:



DANWELL LISHIMPI

PLAINTIFF

AND

STEADFAST CHOMBELA

1ST DEFENDANT

(Sued as Administrator of the Estate of the ROLNARD SHIRD CHOMBELA)

STEADFAST CHOMBELA

2ND DEFENDANT

GIVERS SHINJENDE

3RD DEFENDANT

TITUS MASAKA

4TH DEFENDANT

DONALD MUKOBEKO

5TH DEFENDANT

(Sued as Administrator of the Estate of the Late THOMAS MUKOBEKO)

RICHARD MPONDA

6TH DEFENDANT

Before the Honorable Mr. Justice C.F.R. Mchenga SC

For the Plaintiff: c. Siatwinda, Lega Aid Counsel, Legal Aid Board

For the Defendants: In person

J U D G M E N T

Cases referred to:

1. David Nzooma Luamanyenda and Goodwin Kafiko Mazumbwa v Chief Chamuka and Kabwe Rural District Council and Zambia Consolidated Copper Mines Limited [1988-89] Z.R. 194
2. Fabiano Humane v D.P. Chinkuli 1971/HP/407 (Unreported)
3. Raphael Ackim Namungandu v Lusaka City Council [1978] Z.R. 358
4. Zambia Telecommunications Company Limited v Valso Pherman Zambia Limited SCZ Judgment No. 3 of 2010

Legislation referred to:

1. The Lands Act, Chapter 184 of the Laws of Zambia
2. (Customary Tenure) (Conversion) Regulations Statutory Instrument No. 89 of 1996
3. The Lands and Deeds Registry Act, chapter 185 of the laws of Zambia

The plaintiff, by originating summons taken out pursuant to Order 113 Rule 3 of the Rules of the Supreme Court, seeks the following reliefs against the defendants:

1. *An order for vacant possession of the property known as Farm Number 10765 situated in Chibombo District of the Province of the Republic of Zambia.*

2. *An order that the illegal structures erected on his farm by the defendants be demolished.*
3. *Costs and any other relief the court may deem fit.*

The summons are supported by an affidavit deposed by the plaintiff who also gave oral evidence. His evidence was that when he moved to Mwalilanda Village, in 1952, he went to see Headman Mwalilanda who gave him farmland and a burial site. At the time, there were no villages or people on the said land.

In 1968, Shirt Chombela, the 1st defendant, visited his father and asked for a place where he could place a hammer mill. His father called him and his elder brother to discuss the request and when they were informed that the 1st defendant would only be there for short while, they allowed him. He only operated the hammer mill until 1969 and when they asked him to leave, he refused. His refusal to leave was reported to Headman Mwalilanda who advised them to leave him and wait and see what his intentions were.

In 1997, Headman Mwalilanda informed all the villagers under him that if anyone of them was interested in having a Certificate of Title for their land, he was ready to give them a letter to take to the chief. He got such a letter from the village committee, exhibit "DL2", which

he took to the chief. He also filled in forms exhibited as "DL9" and "DL10", which he took to Chibombo District Council after they had been endorsed by the chief.

The council deliberated on his application and he was sent to Kabwe Provincial Offices where a map depicting the size of the farm was prepared. He was then sent to the Ministry of Lands where his application was approved. He received Certificate of Title No. 111233, exhibit "DL3a", after paying K2,115,000. He decided to sue the defendants when they resisted advice to move out of the farm.

It was also his evidence that the 1st defendant has been living on land which is part of his farm with his son, the 2nd defendant, since 1968. He did not know when Titus Masaka, the 4th defendant and Richard Mponda, the 6th defendant, came on to his farm but they were not on it when he moved there. Givers Shinchende, the 3rd defendant, is the 1st defendant's grandson and he was not born when he moved on to the farm. Neither was Titus Masaka, the 4th defendant, living there. He did not know when the 5th defendant came on to the farm but he saw him in 1970. He stays on the portion of the farm where he used to stay until 1962 when he relocated on his brother's advice.

When he was cross-examined, the plaintiff said he knows that the 1st defendant was a headman. But he is headman in the area where his farm is, which is 5 miles from the land in dispute. Though the 1st defendant now stays in Mwalilanda ward, he is from Mashikali ward. He maintained that the 1st defendant went to ask for land from him to station a hammer mill and that his niece, Fales, was present. He confirmed that the 1st defendant has been staying on the farm since 1968.

The plaintiff also confirmed that the 2nd defendant was born in Mwalilanda Village. He said he was not given his field by the headman but he imposed himself on it and started cultivating it without the headman's consent. He does not stay where he cultivates but both the 2nd defendant's field and living quarters are within his farm. He admitted that the 6th defendant stays on the western side of where he stays in Chikoloma Village. He admitted that the 1st defendant has built a piggery where he stays but says it was built without his consent.

He said he did not stop the 2nd defendant from building his house in 1982 because he was scared of being beaten. The 2nd defendant is not registered in the Mwalilanda Village register but the Shinchende

Village register. His farm is in Mwalilanda Village and the letter from the village committee allowed him to get a Certificate of Title for his farm which is in Mwalilanda Village.

The plaintiff also admitted seeing the 3rd defendant build his house in 1990 but said he failed to stop him because he was part of a group of troublesome people and he was scared of being beaten. He is registered in Shinchende Village which is to the east of his farm. He did not know how long the 4th defendant has stayed on his farm but the field he cultivates is on his farm. He admitted that though he was in good standing with the 4th defendant, he did not talk to him before suing him. He said he did not ask him to leave because he is in the same group with the other defendants. He is aware that he built his house in 2007.

He also said the 6th defendant was registered in Chikoloma Village but could not recall when he started cultivating in his farm. He was given the land by headman Chikoloma but recalled warning him to stop cultivating.

When he was re-examined, the plaintiff said between Shinchende and Mwalilanda villages, there is a village called Muchapi. Chikoloma village and Mwalilanda Village are separated by Mumbwa Road. Even after obtaining title, he has allowed individuals who are related to him to remain on the farm.

Fides Mubita was the plaintiff's second witness (Pw2). Her evidence was that in 1968, when she was 14 years old, the 1st defendant went to ask for land to place a hammer mill from her grandfather. He told him that he did have such land and that in any case, it was the headman who gave out land. She was sent to call the plaintiff and after they discussed, he was allowed to bring the hammer mill.

In 1997, the plaintiff informed her about Chief Liteta's intimation that he was ready to write letters for those who wanted to get Certificates of Title for their land. She is aware that he obtained the certificate.

When she was cross examined, Pw2 maintained that the 1st defendant asked for and was given land by her grandfather. She didn't know how many hectares he was given or whether he was also given a field.

Though she saw the hammer mill he brought, she does not know its make. She did not know whether he was stopped from building his house or piggery. She did not know whether the 2nd defendant was born on the farm.

She said the 2nd defendant was called when the farm was being inspected prior to the title deed being issued. She did not know whether it is the 1st defendant who gave the 5th and 6th defendants land on the farm. She did not know where the 3rd defendant was born or where his house was. She did not know when the 4th defendant settled on the farm nor if he is registered in Mwalilanda Village. The Certificate of Title deed was issued before he moved on to the farm. She did not know where the 6th defendant stayed or if he was registered in Mwalilanda Village.

The third witness for the plaintiff was Sox Samutumwa (Pw3). He has been Headman Mwalilanda since 1990. His evidence was that the 1st defendant came from Shinchende Village to run a hammer mill in Mwalilanda Village in 1968. The 2nd defendant stays in his village. Both the 3rd and 4th defendants, stay on the plaintiff's farm.

The 5th defendant stays in Mwalilanda Village and went there a long time ago. He should not have been a defendant in the case because he was given land to cultivate by the plaintiff; he has built on the same land. The 6th defendant stays Chikoloma Village but cultivates on the plaintiff's farm land. All the defendants' names are not in the Mwalilanda Village register because they were they were just brought to the village.

Pw3 also testified that he was involved in the plaintiff's acquisition of the Certificate of Title. The village committee considered his desire to obtain it and he did not involve the defendants because they did not appear in the village register.

When he was cross examined, Pw3 admitted that the 1st defendant was a headman but he does not know who made him headman; his father and sister were buried in Mwachisompola. At the time the 1st defendant was clearing his field, his uncle was the headman. He refused to enter the 6th defendant in his village's register because he was registered in the 1st defendant's village.

He said a person can only be allowed to stay in a village for a few days without being registered but admitted that the 2nd defendant has been in Mwalilanda Village since 1968. The 2nd defendant was not born in his village. He did not know where he has built and so does not know the ward in which he is. He admitted that the 3rd defendant has been staying in the plaintiff's farm for many years and he was not there when the boundaries for Muchapi and Mwalilanda village were being demarcated. He did not know when the 4th defendant settled on the plaintiff's land. The plaintiff's farm was in both Mashikili and Kalola ward.

As regards the 5th defendant, he said the 1st defendant allowed him to settle on the farm. He did not know how much land remained in the village after the plaintiff was given title to his farm. In the case of the 6th defendant, he is not registered in Mwalilanda but Chikoloma Village.

When he was re-examined, Pw3 said the register the 1st defendant has is for his village, Shinchende Village and not Mwalilanda Village. He has not been entered in his register because he only went there to do business. His evidence closed the plaintiff's case.

Steadfast Chombela, the 2nd defendant, gave evidence on behalf of the 1st defendant and on his own behalf. He said his father used to be Headman Shinchende and he settled on the land in dispute in 1958. The plaintiff stays where his father stayed but is registered under Mwalilanda Village. His father never run a hammer mill and did not ask for land from the plaintiff. He was appointed headman by Chief Liteta. He was born on the land where he is staying in 1964. In 1976, his father built a brick house and the plaintiff who was staying where he still stays now did not stop him. Thereafter, he built a piggery which was not objected to by the plaintiff. In 1977, his father sunk a bore hole.

It was also his evidence that in 1980, Jeremiah Chali, who was staying west of the plaintiff, decided to leave for Zimbabwe. He decided to sell his father, among other things, an 80 hectare field he had bought from Pw3 and a 9 roomed house. The chief allowed his father to buy the house but not the land. He said Chali should not have been sold the land and since he was leaving, the land was going to revert to him. He then drew up a map demarcating Shinchende and Mwalilanda villages. The chief also said though the plaintiff was registered in Mwalilanda village but his house was in Shinchende village, he could still remain

on it. If he decided to leave, the land could revert to the 2nd defendant's father.

In 2007, the plaintiff started cultivating across the boundary and Headman Shinchende reported him to the chief. Two senior headmen were assigned to investigate and report on the matter. The issue appeared to have been resolved. In 2010, they saw a surveyor who was in the company of the plaintiff's family members taking measurements. They discovered that their houses and fields were in his farm. It was also learnt that land from six headmen, namely, Shinchende, Chikoloma, Luo, Mwachisompola, Mpengula and Sendwe made up the plaintiff's 241 hectare farm.

The plaintiff and the defendants were summoned to the chief's palace after a complaint was lodged. The chief told them that before he signed the letter for the plaintiff to obtain the Certificate of Title, Pw3 misled him into believing that all the land was in his village and that there was no one on it. Finally, he said his father did not give the 5th defendant land and the 5th defendant's land is in Chikoloma Village.

When he was cross-examined, the 2nd defendant said the land where they now stay was given to his father by Headman Shinchende who was his elder brother. His father never settled in Mwalilanda Village. The two villages are separated by the Mumbwa Road. Mwalilanda village is on the west in Kalola ward while Shinchende village is on the right in Mashikili ward. He disputed the claim that there is a Mwachipi Village in between the two villages. The plaintiff stays 200 meters from where they stay.

Though minutes were taken at the meeting where the dispute between the plaintiff and the defendants was discussed, he has not filed any papers because he did not know that he had to file them in advance. He denied fabricating his evidence. When he was referred to exhibit "DL10", the chief's approval of an application to convert land under customary tenure into leasehold tenure, he admitted that Chief Liteta signed the document. He was not aware that the plaintiff used it to obtain the title deed because it only allowed him to get land in Mwalilanda Village and not in Shinchende Village. Further, he was not allowed to get title to land that had people living on it. The land that the plaintiff was given came from other headmen because Headman Mwalilanda does not have more than 250 hectares.

He admitted that exhibit "DL1" was a letter from the plaintiff to the village committee; exhibit "DL2" was an approval from the village committee in Mwalilanda Village and not from Shinchende Village; exhibit "DL3" was a letter to the chief from the village committee approving the plaintiff's application for 250 hectares; and exhibit "DL4" was an application by the plaintiff to the lands department. His position was that the committee was dishonest because the land that was surveyed had people living on it.

When he was re examined, the 2nd defendant said it is not true that Mwalilanda Village shares a boundary with Muchapi Village because there is James Mphande Village in between. His name does not appear in the Mwalilanda Village register because he does not stay there.

The second witness for the defendants was Givers Shinchende, the 3rd defendant. His evidence was that he lives in Shinchende Village and that is where he was born. He was surprised to hear that he has settled in plaintiff's farm which is in Mwalilanda village. He was given the land he stays on by Headman Shinchende, his grandfather, 25 years ago. He has built houses on it and no one raised issue until

now. His village does not share boundaries with Mwalilanda Village and there is a road in between the two villages.

When he was cross examined, the 3rd defendant said he was familiar with the procedure for converting traditional land into leasehold land and he set out the procedure. He admitted seeing exhibit "DL10" where the chief recognized the rights associated with that land. When he was shown "DL22", he denied the suggestion that Shinchende Village does not exist but admitted not being able to point it out on that map. He denied being settled in Mwalilanda Village. He maintained that the plaintiff did not follow the correct procedure when obtaining the Certificate of Title. He rejected the suggestion that the defendants had no right to stay on the farm.

When he was re examined, the 3rd defendant said the plaintiff's farm includes land that is not in Headman Mwalilanda's Village.

Donald Mukobeko, Administrator of the estate of the late Thomas Mukobeko, was the defendant's third witness (Dw3). His evidence was that the land where his father settled, which is 18 acres in extent, is under Chikoloma Village. When he retired in 1976, he settled on the

land which his brother bought from Jonathan Chilonda in 1962. It was previously owned from Lawrence Chibu who settled on it in 1949. In 1976, his father built an 8 roomed brick house and no one claimed he was a squatter until 2011. It is not the 1st defendant or the plaintiff who gave his father the land but his brother.

When he was cross examined, Dw3 said it is not true that in 1970 his father was told to vacate in the land by the plaintiff. He admitted that exhibit "DL10" indicates that the chief approved the plaintiff's request to convert traditional land into leasehold property but said he was misled. His father and the other people who were settled on it were not talked to or asked questions by the people the chief sent. A meeting was supposed to be called but it wasn't. Further, his father told him that council officials who came to inspect the land came at night. He confirmed seeing exhibit "DL18", minutes showing the resolution of the council on the application.

When he was re examined, Dw3 said the minutes of the village committee meeting that approved the plaintiff's application do not indicate the names of the people who attended it.

Richard Mponda, the 6th defendant, was the defendants' fourth witness. His evidence was that he is a businessman and he stays in Chikoloma Village. He was born in that village which is on both sides of the road from Landless Corner to Mumbwa. The land he stays on was given to him by the headman in 2004 and no one was cultivating it at the time. It is only in 2011 that he was summoned to come to this court over that land. The plaintiff was given land in Mwalilanda and not Chikolola village.

When he was cross examined, the 6th defendant denied being asked to leave the land prior to being sued.

The defendant's fifth witness was Dishon Kalunga who is Senior Headman Chiwama (Dw5). He is secretary at Chief Liteta's palace. His evidence was that in 2007, Headman Mwalilanda (Pw3), took the plaintiff to the palace seeking approval to obtain a Certificate of Title deed. His request was granted. In 2010, the 2nd defendant and his late father went to the palace to complain that the plaintiff was about to evict them from their village claiming that it was his land.

The chief sent him and others to inspect the disputed land and they found that Mwalilanda Village was on the right while Shinchende was on the left of the road to Mumbwa. The plaintiff's farm encompassed fields from 6 villages and these were Mpengula, Sendwe, Luo, Mwachisompola, Chikoloma and Shinchende. The houses for the plaintiff are near those for Headman Shinchende. They learnt that Shinchende Village was demarcated in 1958.

A report was rendered to the chief who then called the plaintiff and Headman Mwalilanda. He asked them why they misled him when they were asking for his approval; they had included land outside Mwalilanda Village that was occupied. He asked them where he would take the people they wanted to evict. They were told to go back and correct the error in the Certificate of Title. The chief also wrote to the council asking them why they had not verified whether the land was occupied before issuing the said certificate.

When he was cross-examined, Dw5 said he has been headman since 1979. Between 2003 and 2004, he was a secretary to the palace. He then resumed in 2007 and has continued to date. According to him, the surveyors did not do a good job. He admitted that Shinchende Village

does not appear on "DL22". When one is going west on Mumbwa Road, Mwalilanda Village is on the left while Shinchende Village is on the right.

On the day the plaintiff and his headman were called to the palace, he was not secretary, he was just listening and he cannot recall if the proceedings were recorded. When inspections are being carried out, the chief does not physically go there, he has a committee of 10 people who do it on his behalf. It was his view that the inspection did not take place because the Certificate of Title indicates that the land is in Mwalilanda Village when it is in fact in Shinchende Village. The chief was not told the truth and that is why he wrote to the council.

Debson Kampangila, Headman Chikoloma, gave evidence as the defendant's sixth witness (Dw6). His evidence was that he gave land to the 6th defendant in Chikoloma Village in 2004. The 5th defendant is registered in his village having been given land in 1969. He summoned the plaintiff after he encroached on his land but he did not respond when he summoned him. He stopped the surveyors the plaintiff brought and reported him to the chief who told him to remove the beacons. Soon after he removed them, he was summoned to court.

When he was cross examined, Dw6 said the 5th defendant went to Chikolma Village in 1967. None of the defendants are settled in Mwalilanda village, the 5th and 6th defendants are settled in his village while the others are in Shinchende village. Headman Mwalilanda was present when he took the plaintiff to the chief. He denied the suggestion that his complaint to the chief was dismissed because the procedure for obtaining land was followed.

All the parties filed in written submissions.

On behalf of the plaintiff, Mr. Siatwinda referred to **Section 33 of the Lands and Deeds Registry Act** and submitted that following the issuance of the Certificate of Title, the plaintiff's ownership of the land also known as Farm 10765 is now conclusive. This is because he complied with **Section 8 of the Lands Act and Regulations 2 to 3 of the Land (Customary Tenure) (Conversion) Regulations** when converting the land from the customary tenure to into leasehold tenure. Further, there is no evidence of fraud in the process of conversion or an indication that there were any encumbrances on the land. He submitted that though the defendants have alleged irregularity, they have not

led any evidence that questions the veracity of the Certificate of Title.

Counsel also pointed out that Section 34 (1) and 35 of the Lands and Deeds Registry Act which set out the circumstances in which a registered title holder can be ejected from his land and submitted that none of the instances set out therein are applicable to this case. He referred to the case of David Nzoma Luamanyenda and Goodwin Kafuko Muzumbwa v Chief Chamuka and Kabwe Rural District Council and Zambia Consolidated Copper Mines Limited (1) and submitted that no rights by adverse possession can be acquired if land becomes the subject of a certificate of title. Mr. Siatwinda also referred to the case of Zambia Telecommunications Company Limited v Valson Pherman Zambia Limited (2) and submitted that the defendant's claims came after the issuance of the Certificate of Title and the traditional authorities did not know about them. The plaintiff cannot therefore be affected by the claims.

Counsel also referred to the cases of Raphael Ackim Namung'ande v Lusaka City Council (3) and Fabiano Humane v D. P. Chinkuli (4) and submitted that since the plaintiff is legal owner, he cannot be

sued for trespass by the defendants. He is entitled to the reliefs that he seeks.

In their joint submissions, the defendants referred to **The Lands (Customary Tenure) (Conversion) Regulations** and submitted that the plaintiff has relied on exhibits "DL1", "DL2" and "DL3" to prove compliance. The authenticity of these documents is doubtful because the authors are not known nor are the names of the committee members known. They also submitted that exhibit "DL22" indicates that the land to which the plaintiff was entitled to obtain a Certificate of Title was in Mwalilanda Village and the headman who recommended him was from the same village. This evidence raises doubt in his claim that there was compliance because the farm is actually in Shinchende Village and the plaintiff has not brought any evidence that he received approval from the committee in that village.

I am indebted to the parties for their submissions which have taken into account in arriving at my decision.

From the evidence before me, I find that it is not in dispute that the plaintiff is the holder of Certificate of Title No. 111233 for Farm No.10765 Chibombo. It is also not in dispute that prior to 22nd February 2011, when the Certificate of Title was issued, the said land was under customary tenure in Chief Liteta's chiefdom. It is not in dispute that the plaintiff approached the chief to have the land converted to a leasehold tenure and the chief gave his approval. Further, it is not in dispute that the application for the conversion was tabled before and approved by the Chibombo District Council. The council then made a recommended to the Commissioner of Lands that he is issued with the Certificate of Title and the recommendation was accepted.

Further, it is not in dispute that all the defendants were staying on the farm prior to the Certificate of Title being issued. The 1st defendant started living on it in either 1958 or 1968. In the case of the 2nd defendant, it was in 1964 and it was in 1989 for the 3rd defendant. The 5th defendant moved there in 1976 while the 6th defendant went there in 2004. The date when the 4th defendant settled on the land is unknown because he did not give evidence. Finally, the parties are

agreed and I find it not to be in dispute that the demarcation between Mwalilanda and Shinchende Villages is the Mumbwa Road.

What is in dispute is whether the plaintiff fully complied with the procedure for converting the land into a leasehold tenure. Also in dispute is whether the land on which the farm sits was all originally part of Mwalilanda Village.

According to the plaintiff the land on which the farm sits, was all part of Mwalilanda Village. His evidence is supported by Pw3 who is Headman Mwalilanda. On the other hand, the defendants' position is that the land is not in Mwalilanda Village. They say it covers 6 other villages including those of headmen Mpengula, Sendwe, Luo, Shinchende, Mwachisompola and Chikoloma.

In his affidavit in reply, the plaintiff exhibited a map, exhibit "DLA22", which shows the position of the farm and the villages around it. That map shows that the plaintiff's farm is across the road and not on the side of the road where Mwalilanda Village is. In addition, it shows that the farm is surrounded by "Chisompola" and "Mpenguala"

villages. I am satisfied that these are the villages the defendants referred to as Mwachisompola and Mpengula.

Going by the uncontested evidence that Shinchende and Mwalilanda Villages are separated by Mumbwa Road, I find that the plaintiff's farm is not in Mwalilanda Village but Shinchende Village. Though Shinchende Village does not appear on the map, I find this to be the case because there is agreement by all the parties that it exists and it is separated from Mwalilanda Village by the Mumbwa Road. I also accept the defendants', Dw5 and Dw6's evidence that all the defendants are residents of Shinchende Village with the exception of the 5th and 6th defendant who are from Chikoloma Village.

I have considered the evidence of the plaintiff and Pw3 that the defendants were illegally on the land that is now the plaintiff's farm. They claim that the 1st defendant only went there to run a hammer mill and when he stopped he was supposed to leave but he resisted. Thereafter, he illegally allocated land to nearly all the defendants without the consent of the plaintiff or Headman Mwalilanda. I don't believe their claim that the 1st defendant went to the area to operate a hammer mill and overstayed.

Even if I did, it was the plaintiff's own evidence that when he resisted leaving the headman at the time, allowed him to stay. It was also Pw3's evidence that a person can only be allowed to stay for only a few days without being registered. How is it possible that the 1st defendant, 2nd defendant and 5th defendant have all overstayed their stay for periods in excess of 30 years? I find it is inconceivable that they would have been allowed to stay that long and build permanent structures if they were illegally there.

I accept the 2nd defendant's evidence that the 1st defendant is resident in the plaintiff's farm by virtue of being Headman Shinchende. I also accept the 3rd defendant's evidence that he was allocated the land where he cultivates by the 1st defendant. It is my finding that the defendants were not illegally residing in Pw3's village prior to the Certificate of Title being issued.

Regulation 4 of the Land (Customary Tenure) (Conversion) Regulations, deal with the procedure for converting land under customary tenure into leasehold tenure. They provide as follows:

4. *(1) Where a council considers that it will be in the interests of the community to convert a particular parcel of land, held under customary tenure into a leasehold tenure, the council shall, in consultation with the Chief in whose*

area the land to be converted is situated, apply to the Commissioner of Lands for conversion.

(2) The council shall, before making the application referred to in sub-regulation (1),-

- (a) ascertain any family or communal interests or rights relating to the parcel of land to be converted; and*
- (b) specify any interests or rights subjects to which a grant of leasehold tenure will be made.*

Regulation 4 (1) requires the council to consider whether it will be in the interests of the community to convert a particular parcel of land, held under customary tenure into a leasehold tenure. This determination is made in consultation with the chief and was the basis for the plaintiff being required to file in the form exhibited as "DL10", also known as the chief's consent form.

I accept Dw4's evidence that when the application was presented to the chief, the plaintiff and Pw4 claimed that the land now comprising the farm was vacant and was all in Mwalilanda Village. There is also evidence from Pw3 that he never involved the defendants because as far as he was concerned, they were not legally resident in his village. The failure to disclose that the land was not under the jurisdiction of Pw3 and the failure to involve the headmen under whom it fell was highly irregular and fraudulent. As a result, the defendants' headmen, namely Shinchende and Chikoloma, were denied the opportunity

to bring the defendants' interest to the attention of the chief and the council. I have no doubt that had the chief and the council been informed about the defendants' residence on the land, they would not have approved the plaintiff's request.

Section 33 of the Lands and Deeds Registry Act provides as follows:

A Certificate of Title shall be conclusive as from the date of its issue and upon and after the issue thereof, notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the President or otherwise, which but for Parts III to VII might be held to be paramount or to have priority; the Registered Proprietor of the Land comprised in such Certificate shall, except in case of fraud, hold the same subject only to such encumbrances, Liens, estates or interests as may be shown by such Certificate of Title and any encumbrances, Liens, estates or interests created after the issue of such Certificate as may be notified on the folium of the Register relating to such land but absolutely free from all other encumbrances, Liens, estates or interests whatsoever:

- (a) Except the estate or interest of a proprietor claiming the same land under a current prior Certificate of Title issued under the provisions of Parts III to VII; and*
- (b) Except so far as regards the omission or misdescription of any right of way or other easement created in or existing upon any land; and*
- (c) Except so far as regards any portion of land that may be erroneously included in the Certificate of Title, evidencing the title of such Registered Proprietor by wrong description of parcels or of boundaries.*

The evidence before me establishes that when the plaintiff was applying to convert the land that is now Farm No. 10765, Chief Liteta was informed that it was all in Mwalilanda Village and vacant. It has now turned out that it encroaches on land falling under other

headmen and that it was actually occupied by the defendants. I am satisfied that the misrepresentation which was the basis of the grant of the Certificate of Title, was dishonest and fraudulent.

Contrary to Mr. Siatwinda's submissions that the defendant's have failed to show impropriety in the manner in which the Certificate of Title was obtained, the evidence before me shows that the plaintiff did not comply with the procedure for converting title. He was able to obtain the chief's consent and the council's approval after making a misrepresentation on the lands status. I find both the chief's consent and the council's approval to be *null and void ab initio* because of the misrepresentations. Since they are *null and void*, it is my finding that there was no compliance with procedure because the chiefs consent and the council's approval where not properly obtained.

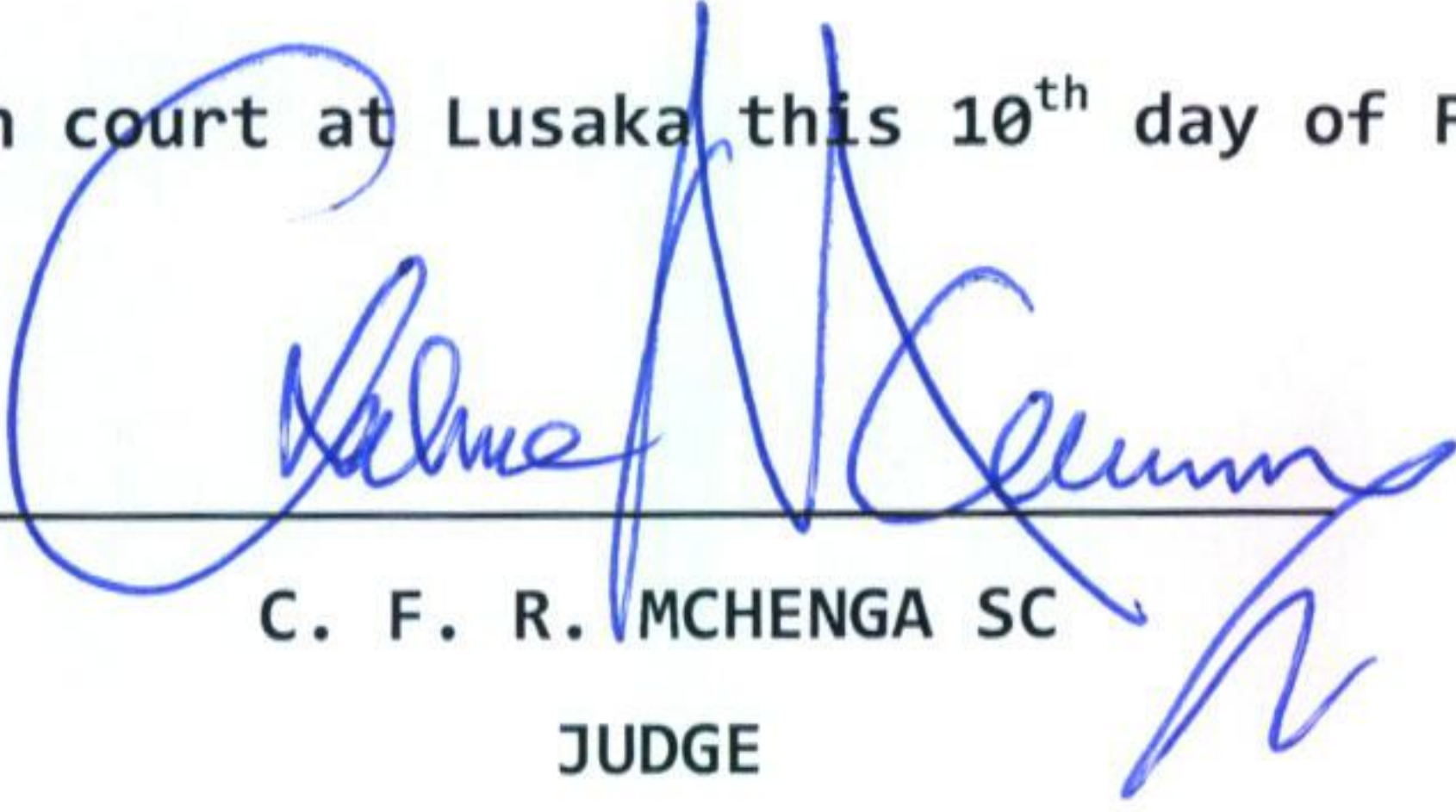
The cases of David Nzooma Luamanyenda and Goodwin Kafiko Mazumbwa v Chief Chamuka and Kabwe Rural District Council and Zambia Consolidated Copper Mines Limited (1), Fabiano Humane v D.P. Chinkuli (2) Raphal Ackim Namungandu v Lusaka City Council (3) and Zambia Telecommunications Company Limited v Valso Pherman Zombia Limited (4) that counsel referred to are not applicable to the facts of this case.

They could have been applicable had the plaintiff fully complied with the procedure set in the Land (Customary Tenure) (Conversion) Regulations for converting land under customary tenure into leasehold tenure.

Having found that Certificate of Title No. 111233 for Farm No. 10765 Chibombo, was obtained after fraudulent misrepresentation, I decline to grant the plaintiff's prayer for vacant possession of the land. I also decline to order that the structures erected on his farm by the defendants be demolished. Instead, I order that the said Certificate of Title be cancelled on account of it being obtained after a fraudulent misrepresentation.

Costs to the defendants, to be agreed and in default to be taxed.

Delivered in open court at Lusaka this 10th day of February, 2016



C. F. R. MCHENGA SC
JUDGE