

IN THE HIGH COURT FOR ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2012/HP/1019

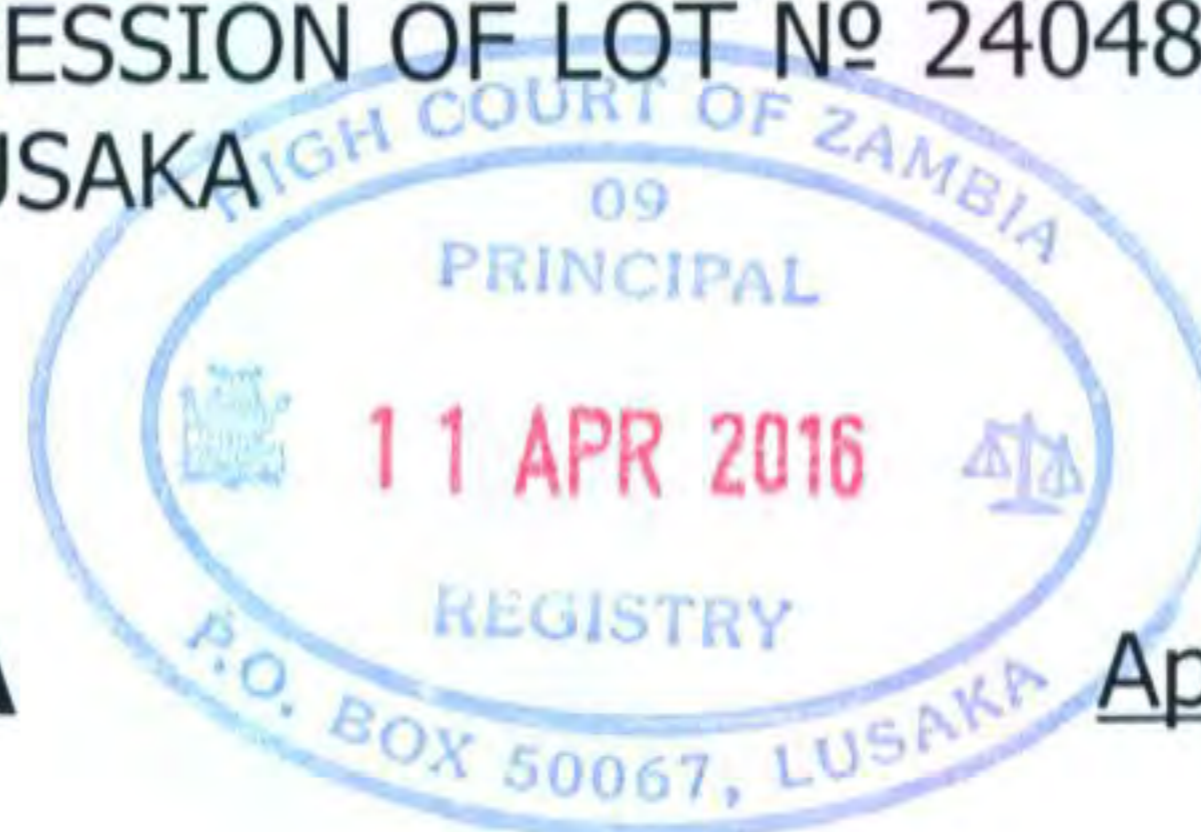
IN THE MATTER OF: ORDER 113 OF THE RULES OF THE SUPREME COURT, 1965

AND

IN THE MATTER OF: AN APPLICATION FOR SUMMARY POSSESSION OF LOT Nº 24048/M SITUATE IN LUSAKA

BETWEEN:

BATES NAMUYAMBA



Applicant

and

**LYDIA SIWAKE & OTHER PERSONS
UNKNOWN**

1st Respondent

COMMISSIONER OF LANDS

2nd Respondent

ATTORNEY GENERAL

3rd Respondent

Coram: Hon Lady Justice F. M. Lengalenga in chambers at Lusaka.

For the applicant: Mr. G. Lungu – Messrs Muleza Mwiimbu & Company

For the 1st respondent: In person

For the 2nd and 3rd respondents: Mrs. M. Chomba – Senior State Advocate

J U D G M E N T

Cases referred to:

1. **LIAMOND CHOKA v IVOR CHILUFYA (2002) (Unreported)**
2. **SIWALE v SIWALE (1999) ZR 84**
3. **CHILUFYA v KANGUNDA (1999) ZR 166**
4. **RAPHAEL NAMUNG'ANDU v LUSAKA CITY COUNCIL (1978) ZR 358**
5. **FABIANO HUMANE v D. P. CHINKULI – 1971/HP/407 (Unreported)**
6. **HUNT v LUCK (1902) 1 CH.D 428**
7. **MWENYA AND RANDEE v KAPINGA (1998) ZR 17**
8. **MANFRED KABANDA & KAGEN CONSTRUCTION v JOSEPH KASANGA (1990/1992) ZR 145 at p. 148**

This action comes by way of originating summons for possession of land pursuant to Order 113 of the Rules of the Supreme Court, 1965. It is brought by the applicant herein and directed at the 1st respondents herein and by the said originating summons, the applicant seeks an order from the Court for possession of the subject property namely, Lot Number 24048/M situate in Lusaka. The summons is supported by an affidavit sworn by Bates Namuyamba, the applicant herein. He deposed therein that he is the holder of certificate of title number 149887 relating to Lot Number 24048/M situate in Lusaka. He exhibited a copy of the said certificate of title as "**BN1.**" He deposed further that he bought the said piece of land from Mr. Simwinji Simwinji but that he has been unable to develop it on account of the 1st respondents' presence on the said piece of

land. He further deposed that he has not been able to build the house at the time that he wanted to start building as he found that the respondent had put up a building on the property. The applicant avers that the respondents have refused to move from the said property and or even to discuss the possibility of an *ex curia* settlement. He stated that as a consequence thereof, he wishes to take possession of the said property and to put it to his intended use. He stated that it is vital that he takes possession of the property as soon as possible so that the 1st respondents and all the other unknown persons occupying the said property without the applicant's licence or consent are removed forthwith. The applicant deposed that in the circumstances, he respectfully seeks an order for possession of the property to enable him to have the unlawful occupants removed from the property.

An affidavit in opposition to the originating summons for possession of land was filed into Court by the 1st respondent on 18th October, 2012 and it was sworn by Lydia Siwake. She deposed therein that the assertions contained in paragraph 2 of the applicant's affidavit are false and a deliberate attempt to mislead this court. She claims that the said certificate of title number 149887 relating to Lot Number 24048/M was invalidated and/or cancelled when the Commissioner of Lands re-subdivided the said Lot to pave way for the 1st respondent's interest and that of her family. She exhibited a copy of a letter dated 4th May, 2012 from the Commissioner of Lands as "**LS1**" and a copy of the site plan as "**LS2.**"

The said Lydia Siwake deposed further that paragraph 3 and 4 of the affidavit in support are misplaced because she only came on the scene when she and her family had been sitting tenants of the disputed land since 1999. She referred to copies of recommendation and confirmation letters of sitting tenancy issued by the District Council Secretary marked "**LS3**" and "**LS4**" respectively. She further deposed that after she made several efforts and applications to the Commissioner of Lands for a formal offer of the land that they occupied, on 30th December, 2011, the Ministry of Lands convened a stake holders meeting which was attended by herself, Mr. Simwinji Simwinji and others and which meeting later gave rise to the Commissioner of Lands decision to invalidate and cancel the certificate of title number 149887 relating to Lot Number 24048/M Lusaka. Lydia Siwake subsequently received offer letters from the Commissioner of Lands and she complied with the statutory requirements by paying service charges. She exhibited copies of the offer letter and the accompanying receipt and service charge receipts exhibited as "**LS5**" to "**LS7**" respectively. She averred that she proceeded to have the re-subdivided Lot Number 26204/M surveyed and she exhibited a copy of the survey diagram in respect of Lot Number 26204/M as exhibit "**LS8.**" The 1st respondent asserted that the applicant, therefore, has no claim or at all against her and that his application is misconceived, misplaced and lacks merit.

Lydia Siwake also filed into court on 14th November, 2014, a further affidavit in which she appraised the court on a few issues. She deposed that following several representations by herself and her family to the Commissioner of Lands, through the Acting Chief Lands Officer, he wrote to the Provincial Planner asking him to approve the proposed sub-division of Lot Numbers L/24044/M and L/24050/M for re-alignment to cater for the Siwake families and that was done. She exhibited copies of the said letters as "**LS1**" and "**LS2**" respectively. The 1st respondent deposed further that the Commissioner of Lands has since issued a certificate of title number 186525 of the original certificate of title marked and exhibited as "**LS3.**"

In the applicant's affidavit in reply filed into court on 2nd November, 2012, he denounced paragraph 5 of the affidavit in opposition as being false since he is in possession of the certificate of title relating to the land under dispute. He exhibited as "**BN1**" a copy of a computer print-out dated 22nd August, 2012 showing that he is the registered title holder of the property which is the subject of this action.

After the court granted the order for joinder of the Commissioner of Lands and Attorney-General as 2nd and 3rd respondents respectively, an affidavit in opposition was filed into court on 30th September, 2013 on behalf of the two respondents. It was sworn by one Sarah Mulwanda Chanda, then Principal Legal Officer in the Ministry of Lands who deposed that Lot Number 24048/M was re-surveyed and re-numbered following

complaints that a borehole and other developments had been placed in properties belonging to other people such as Mr. Simwinji who subsequently sold the property to the applicant herein. She deposed further that following the said complaints, the following properties, L/24044/M to L/24050/M inclusive of L/24048/M were cancelled and re-numbered as L/26202/M to L/26204/M and that the applicant was allocated L/26202/M as his new property. The Principal Legal Officer stated that the re-planning exercise took into account the developments that had been undertaken by the 1st respondent who was residing on the subject property.

The applicant, Bates Namuyamba filed into court on 14th October, 2013 an affidavit in reply to the 2nd respondent's affidavit in opposition. In response to Sarah Mulwanda Chanda's affidavit he stated as follows, that the said re-survey and re-numbering was not done with his consent and that, therefore, it is null and void. He stated further that Lot Number 24048/M has never been cancelled and re-numbered and that he has never been re-allocated Lot Number 26202/M as asserted by the said Sarah Mulwanda Chanda. He added that in any case, he is not ready to accept the re-allocated property. The applicant further stated that the 2nd respondent's action was an illegal undertaking.

Since the court was not clear on the applicant and 1st respondent's position in relation to the former Lot Numbers 24048/M, Lusaka and the re-numbered and re-allocated plots after the subject land was re-surveyed,

the Commissioner of Lands was summoned to Court to give oral evidence to clarify the position.

At the hearing, Mr. Barnaby Bwalya Mulenga, Commissioner of Lands in his testimony first gave a brief history of the case as he was conversant with the same as he had handled the matter.

According to the brief background he gave, Lot Number 10205/M situate in Lusaka West off Mumbwa Road, used to belong to a company known as Bramtree Limited. At one time the Commissioner of Lands attempted to repossess it for non-development but the owners challenged the repossession and it was cancelled. Later in 2010, a Mr. Simwinji Simwinji who was seeking to be allocated alternative land as a result of loss of Lot Number 10204/M, Lusaka West approached the Commissioner of Lands and he indicated that he had found possible alternative land on Lot Number 10205/M Lusaka West.

Upon hearing that, the Commissioner ordered an inspection of the said property and it revealed that there was a family living there, even though the initial two inspections indicated that there was no-one living there. On the file relating to the said property, he discovered an application by one Lydia Siwake with attachments from Kafue District Council indicating that she was a settler on the said land. She was, therefore, applying for a certificate of title.

Further upon noting that there was no evidence of postage of the last repossession, he ordered a fresh repossession for purposes of re-planning of the land into seven portions. To that effect, the Commissioner sent out a team of surveyors to carry out the re-planning exercise to accommodate the existing settlement. Upon their return, the team reported that they had found an Asian who was building a high cost house on one of the corners of the property and further that part of the property had been sold.

The Commissioner testified further to the effect that when he received that report, he went to the site to investigate and he interviewed the 1st respondent who told him that the expensive structure belonged to her daughter.

Due to her insistence that the new structure was built by their family, he decided to give the 1st respondent's family two portions out of the seven portions. He explained that Lot Number 10205/M, Lusaka was cancelled and new numbers were given to the new allotments from Lot Number 24044/M up to Lot Number 24050/M. He testified that Simwinji Simwinji was allocated Lot Number 24048/M comprising twenty (20) hectares in order to resolve the long outstanding case. The 1st respondent and her family were given Lot Numbers 24050/M and 24045/M where their dwelling and the high cost house were situated.

The Commissioner of Lands also pointed out that the 1st respondent was a squatter by law at the time she moved onto the titled property of

Bramtree Limited. He was of the view that the Kafue District Council was wrong to recommend an applicant for titled property but he nevertheless decided to help the 1st respondent and her family by giving her a portion of land on the replanned property. He testified that, however, his re-allocation of the said pieces of land was not well received by the 1st respondent who went on national television and accused him of grabbing her land. She later visited him at his office and alleged that the surveyors engaged by Simwinji Simwinji had encroached into her property. He testified further to the effect that as a result of the 1st respondent's complaint, the Minister of Lands directed that a verification be conducted in order to ascertain whether or not the survey was wrongly done.

To that effect, surveyors from the Surveyor-General's department were sent out into the field for the verification exercise. The survey report revealed that the survey conducted for Lot Number 24048/M, Lusaka West was wrongly done and against the approved lay-out plan which had isolated the 1st respondent's property.

The Siwake family thereafter made representations to the Minister of Lands that they preferred the front part that joins the main road on the cancelled property Lot Number 10205/M because of the foundations that had already been done by family members. As a result of the wrong survey done by Simwinji Simwinji's surveyors, the Commissioner advised the Minister that what was required to be done was a resurvey of the

property so as to replace the diagram in respect of Simwinji Simwinji's certificate of title.

With the Minister's approval, the old property, Lot Number 10205/M was replanned in such a way that the front part of twenty (20) hectares was given to the 1st respondent whilst the remaining twenty (20) hectares at the back was earmarked for Simwinji Simwinji who by then had a title for Lot Number 24048/M. According to the Commissioner of Lands that is when he became aware that Simwinji Simwinji had sold the property to the applicant, Bates Namuyamba. He further informed the court that with the replanning that was done, Lot Numbers 24044/M to 24050/M were cancelled. He testified further to the effect that a new lay out plan was done for Lot Numbers 26202/M, 26203/M and 26204/M and the 1st respondent's family were allocated Lot Numbers 26203/M and 26204/M which covered the old and modern structures. After cancellation of Lot Numbers 24044/M to 24050/M Simwinji Simwinji was verbally informed and a meeting was planned between himself, the applicant and the Minister but it did not materialise.

In cross-examination, the Commissioner of Lands conceded that the title for Lot Number 24048/M was not cancelled and that he was aware that he and his officers cannot re-plan titled property without consent of the title holder. He further conceded that under the laws of this country a person cannot build on a property that he does not own without the blessing of the owner and the planning authority. He stated that in the 1st

respondent's case, she and her family had neither when they built the structures on the disputed property. The Commissioner concluded by conceding that the 1st respondent is seeking to legalise her illegal occupation and erection of the structures on the property.

The gist of the applicant's skeleton arguments is that he is the holder of certificate of title no. 149887 for Lot Number 24048/M and that the 1st respondents have no claim of right to the property in issue as they entered thereon without his consent. He relied on the case of **LIAMOND CHOKA v IVOR CHILUFYA**¹ where it was established that summary procedure under Order 113 can only be suitable for squatters and others without any genuine claim of right or who have since transformed into squatters.

It was submitted on behalf of the applicant that even at the time of the 1st respondents' taking possession of Lot Number 10205/M they occupied the same as squatters since the said piece of land belonged to Bram tree Limited who held it on title and did not contest its wrong repossession by the 2nd respondent. It was later allocated to one Simwinji Simwinji as Lot Number 10204/M and it was re-allocated Lot Number 24048/M which he consequently sold to the applicant. It was submitted that the said Simwinji Simwinji was re-allocated twenty hectares of Subdivision of Lot Number 10205/M which totaled to forty hectares.

Learned Counsel for the applicant submitted that although the 1st respondents claim that certificate of title number 149887 relating to Lot

Number 24048/M was invalidated and/or cancelled when the 2nd respondent re-subdivided that Lot to pave way for her interest, the applicant denies that the said certificate has ever been cancelled as shown on exhibit "**BN1.**" It is contended on behalf of the applicant that the 1st respondent's claim that she had been in occupation of the disputed land since 1999 does not exonerate her from being a squatter since the land belonged to someone else even at that time. It was further contended that the claim that Lot Number 24048/M was re-surveyed and re-numbered following complaints, was done illegally as it was without the consent of the applicant as the title holder of the disputed piece of land. To support his argument, learned Counsel relied on section 3(4)(c) of the Lands Act, No. 29 of 1995 which provides that there is need for the Commissioner of Lands to consult any person or body whose interest might be affected by the grant or conversion of land as was held by the Supreme Court in the case of **SIWALE v SIWALE²**.

He submitted that the 2nd respondent's action is null and void for want of consultation with the applicant. He further referred to the cited case of **LIAMOND CHOKA** where Ngulube, CJ as he then was stated as follows:

"The circumstances in which the procedure can be used are restricted to cases where land is occupied by persons who have entered into or remain in possession of the land without the licence or consent of the person claiming

possession. It does not apply to persons holding over after the determination of a lease."

It was submitted that in the present case, the 1st respondents entered or have remained in possession of the applicant's land without licence or consent from the applicant. Learned Counsel submitted further that since there has never been a lease between the applicant or the original owner and the 1st respondents, this court should grant an order of eviction of all the 1st respondents and all others unknown from the said piece of land.

The applicant's reaction to the 1st respondent's assertions that the Commissioner of Lands had issued her with certificate of title number 186525 in respect of Lot Number 26204/M, was that the same is null and void since it was issued on 22nd October, 2012 whilst the current proceeding had already begun. It was submitted that this indicated that the 1st respondent being fully aware of these proceedings, with impunity and total disregard of the court, fraudulently and contemptuously obtained a certificate of title in respect of the illegally replanned piece of land. He relied on the case of **CHILUFYA v KANGUNDA**³ in which the Supreme Court held *inter alia* as follows:

"Section 54 of the Lands and Deeds Registry Act does not authorise fraud and this was a clear case of fraud. The law thus contemplates that fraud will vitiate a Certificate of Title."

Counsel for the applicant submitted that in the case, *in casu*, the 1st respondent's connivance with the 2nd respondent was highly irregular and a sign of disrespect to the courts.

It is the applicant's contention that the 1st respondents are squatters who can never suffer any injury if evicted and he relied on the decision in the case of **RAPHAEL NAMUNG'ANDU v LUSAKA CITY COUNCIL**⁴ where it was held *inter alia* as follows:

"Squatters build on their own risk and if the owners of the land withdraw their permission or licence or if they decide to demolish a structure built in the absence of any permission or other lawful relationship, the squatters' losses though very much regrettable are not recoverable in a Court of law."

The applicant further relied on the unreported case of **FABIANO HUMANE v D. P. CHINKULI**⁵ for the position that where any person is a squatter, that person is in mere adverse possession and the position in law appears to be that his want of title disentitles him to any remedy in a court of law to which only a person with legally recognised proprietary or possessory right is entitled.

It was submitted that based on the said authority the 1st respondents will not suffer any injury as they are squatters who attempted

to legalise their occupation by fraudulently engaging the 2nd respondents in processing legal documents through illegal sub-divisions and re-conversions without the applicant's consent.

The applicant concluded by praying that this court grants him an order for eviction of all squatters on his piece of land and for a declaratory order that the purported cancellation of certificate of title Number 149887 in relation to Lot Number 24048/M is null and void for want of procedure and to yield vacant possession thereof with costs to the applicant.

The 1st respondents filed their skeleton arguments on 20th November, 2013. The gist of their argument is that they are lawfully on the disputed piece of land as indicated in the documents from Kafue District Council attached to the 1st respondents' affidavit in opposition filed herein on 18th October, 2012 and exhibited as "**LS3**" and "**LS4.**" It is the 1st respondents' contention that it is not disputed that they have been sitting tenants of Lot Number 10205 since 1999, prior to the offer and issuance of title in respect of the said property. They submitted that therefore they have been in occupation of the said property long before the applicant allegedly purchased it from Mr. Simwinji Simwinji. They submitted further that the applicant ought to have inquired from the 1st respondents about their interest since they were living on the said property and they had established permanent structures thereon. They relied on the case of **HUNT v LUCK**⁶ where it was held as follows:

“that the occupation of land by a tenant affects a purchaser of land with constructive notice of all that tenant’s rights including an agreement for sale to him by the vendor.”

Further in the judgment, the following observations were made:

“A tenant’s occupation is notice of all the tenants’ rights. It means that if a purchaser has notice that the vendor is not in possession of the property, he must make inquiries of the person in possession and find out from him what his rights are and, if he does not choose to do that, then whatever title he acquires as purchaser will be subject to the title or rights of the tenant in possession.”

In the present case, it is the 1st respondents’ contention that the applicant had constructive notice in that when he was taken to view the property he found them living on the premises with permanent structures erected thereon. They submitted that in that case if the applicant acquired title, it was subject to the rights of 1st respondents. They further relied on the Supreme Court’s decision in the case of **MWENYA AND RANDEE v KAPINGA**⁷ where they made the following observation:

“It is clear from the record and the judgment of the trial court that when the 2nd Appellant visited the property he found the Respondent in possession of the property. He had,

therefore, constructive notice and when he purchased the property, his purchase was subject to the Respondent's title or rights of the Respondent.....

**.....
We would hold as did the learned trial Judge, that the 2nd Appellant was not a *bona fide* purchaser for value without notice."**

In response to the applicant's assertions and innuendos contained in the arguments that the re-surveying and re-numbering of Lot Number 24048/M was done illegally, the 1st respondents submitted that they cannot be faulted. They submitted further that there is sufficient correspondence on record to justify the action taken by the 2nd respondent. They argued that even if the applicant was not consulted, which they deny, the omission should not disadvantage them as they were merely interested parties. They relied on the law of vicarious liability for their position that any misdeed or omission that could have been made by the 2nd respondent during the discharge of his duties cannot therefore adversely affect them. They also cited the case of **MANFRED KABANDA & KAGEN CONSTRUCTION v JOSEPH KASANGA**⁸ to fortify their argument.

The 1st respondents denied conniving with the 2nd respondent for purposes of the 2nd respondent issuing a certificate of title to the 1st respondents after the first one was cancelled. They argued that since the 2nd respondent was not a party to these proceedings and there was no

court order directly or indirectly to restrain the 2nd respondent from exercising their discretion to re-survey and re-number the property so as to cater for the 1st respondents' long outstanding interests.

In concluding, the 1st respondents prayed that the applicant's application for possession fails and be dismissed with costs.

The learned Senior State Advocate Mrs. Chomba relied on the 2nd and 3rd respondents' submissions filed into court. According to her submissions, there is only one main issue for determination by this Court. The same being whether or not the re-alignment or re-subdivision of Lot Numbers L/24044/M to L/24050, Lusaka was lawfully done.

In respect of the material facts, she submitted to the effect that the property in issue being Lot Number 24048/M Lusaka was created after repossession of Lot Number 10205/M which was owned by Bramtree Limited. After replanning of the said property, on 1st September, 2011, a 99 year State lease in respect of Lot Number 24048/M, Lusaka was registered in the Lands Register in favour of Simwinji Simwinji who was issued with certificate of title number 129033 on the same date. Prior to that date, the 1st respondent wrote letters on 11th March, 2011 and 3rd May, 2011 complaining that after the re-planning of the repossessed Lot Number 10205/M, her borehole and other developments fell in other people's plots. Consequently, by a letter dated 14th May, 2011 the Commissioner of Lands (2nd respondent) informed the 1st respondent of

his decision to re-subdivide the plots in order to accommodate the developments that fell in different properties after the replanning of Lot Number 10205/M, Lusaka.

She submitted further to the effect that a status report dated 14th December, 2011 of Lot Numbers 24022/M to 24050/M revealed that the survey of Lot Number 24048/M was incorrectly done and it was recommended that a re-survey be carried out according to the approved site plan. The same was done and on 18th December, 2011, Simwinji Simwinji wrote a letter to the Minister of Lands indicating his willingness to compensate the 1st respondent for the borehole. Mrs. Chomba further submitted that Lot Number 24048, Lusaka was re-surveyed in conformity with section 19(1)(b) of the Land Survey Act, Chapter 188 of the Laws of Zambia which provides as follows:

"19 (1) Whenever –

.....
.....

(b) the Survey-General's reports that the boundaries of the several parcels of land constituting such section or block are confused and need adjustment;

the Minister may order that such section or block be re-surveyed."

The learned Senior State Advocate further submitted that following the re-survey of Lot Number 24048/M, it was renumbered and the applicant was allocated Lot Number 26202/M which still bears the old certificate of title number whilst the 1st respondents' property bears the correct number. She submitted that they are alive to the contents of section 33 of the Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia which states that a Certificate of Title shall be conclusive evidence of ownership of land as from the date of its issue and upon and after the issue thereof. She argued that since both the applicant and the 1st respondent have certificates of title, the applicant's claim for repossession is misconceived. It is Mrs. Chomba's contention that the '**conclusive**' character of a certificate of title as to ownership is certainly not absolute. By way of explanation, she submitted that section 33(c) of the Act is one of the three exceptions to the said conclusive character of a certificate of title. The said exception states as follows:

"(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."

She submitted that the re-survey and re-planning was inevitable and lawful in accordance with section 19(1)(b) of the Land Survey Act. She argued that the applicant having been duly allocated Lot Number 26202/M, Lusaka, simply needs to accept his re-planned property and develop it in

accordance with the approved plans, if any. The learned Senior State Advocate concluded by submitting that it follows therefore that the applicant is not entitled to repossession as claimed.

I have considered the application for an order for possession of the subject property, namely, Lot Number 24048/M Lusaka, the affidavit evidence, exhibits, *viva voce* evidence by the 2nd respondent, and written submissions and arguments and the authorities.

The undisputed facts are that the applicant bought the subject property from one Simwinji Simwinji and that he is the holder of Certificate of Title Number 149887 in respect of the said piece of land. According to the Commissioner of Lands, the 2nd respondent herein, the said certificate that was alleged to have been cancelled has not been cancelled. A further dispute fact is that the 1st respondent comprising Lydia Siwake, her family members and other persons are on the said piece of land and by reason of which the applicant claims to have failed to develop the said land.

According to the 1st respondent's affidavit evidence and submissions she and her family have been on what was previously known as Lot Number 10205/M Lusaka which was cancelled and renumbered, since 1999. The claim was confirmed by the Commissioner of Lands who discovered an application for a certificate of title by one Lydia Siwake with attachments from Kafue District Council indicating that she was a settler on the said land. I further observed from the Commissioner of Lands'

testimony that an inspection of the property had revealed that there was a family living on the said land. The 1st respondent's occupation of Lot Number 10205, Lusaka is further confirmed by the copy of the letter of recommendation dated 15th July, 1999 from the Kafue District Council Secretary to the Commissioner of Lands.

According to the Commissioner of Lands' evidence, it was only in 2010 that a Mr. Simwinji Simwinji approached him to inform him that he had found possible alternative land on Lot Number 10205/M, Lusaka West. Therefore, taking all this into consideration, it is evident that the 1st respondent were already on the property, having been there as far back as 1999.

The applicant's contention that the 1st respondent are squatters who are in adverse possession and not entitled to any remedy from the court is supported by his reliance on the **NAMUNG'ANDU** and **HUMANE** cases.

However, in view of the fact that the 1st respondent were already in occupation of the land previously known as Lot Number 10205/M, Lusaka long before Simwinji Simwinji identified the said land for alternative allocation in 2010, the question that arises therefore is:

"If they are alleged to be on the said land without the invitation, consent or licence of the title holder, how could they have been invited or got consent from the title holder,

in this case the applicant, if he was not on the said land when they took up occupation of the said land?"

The 1st respondent relied on the case of **HUNT v LUCK** which refers to a tenant in occupation or possession of land and the notice of all tenant's rights including an agreement for sale to the vendor. From the available evidence, it is clear that the applicant and even the person who sold him the piece of land had constructive notice of the 1st respondent's occupation of the land, as squatters, trespassers or whatever at the time of allocation and purchase of the land respectively.

The evidence from the Commissioner of Lands revealed that the verification that was conducted to ascertain whether or not the survey was wrongly done, was directed by the Minister. The revelation that the survey done by Simwinji Simwinji's surveyors was wrongly done led to a re-survey of the property, and re-planning and re-numbering and which brings me to the Senior State Advocate's conclusion that there is only one main issue for determination by this court. In this case it is whether or not the re-alignment or re-subdivision of Lot Numbers L/24044/M to L/24050/M Lusaka was lawfully done.

According to the evidence, by a letter dated 14th May, 2011, the Commissioner of Lands informed the 1st respondent of his decision to re-plan by way of re-subdividing the plots. In view of the Senior State Advocate's submission that Lot Number 24048/M Lusaka was re-surveyed

in conformity with section 19(1)(b) of the Land Survey Act, Chapter 188 of the Laws of Zambia which was earlier reproduced for ease of reference. This provision permits the Minister to order the re-survey of any such property where the boundaries are confused and need adjustment.

I also had occasion to peruse section 3(4)(c) of the Lands Act which provides as follows:

(4) Notwithstanding subsection (3), the President shall not alienate any land situated in a district or an area where land is held under customary tenure –

(c) without consulting any other person or body whose interest might be affected by the grant."

The applicant alleged that the Commissioner of Lands acted illegally by ordering the re-survey, re-planning and re-numbering of Lot Number 24048/M Lusaka without consulting him as he was the title holder to the said piece of land. However, the Commissioner of Lands had earlier testified that at the time of the re-planning exercise he was dealing with Simwinji Simwinji who was aware of the said exercise. According to the evidence before the court, he attended the stakeholders' meeting on 30th December, 2011 that was convened by the Ministry of Lands.

The applicant seeks an order for possession of the subject property on the basis that he is the title to the said land and that the 2nd

respondent had no consent from him to re-survey and to re-number it. He had also challenged the 1st respondent's acquisition of a certificate of title and contents that it is null and void. Section 35 of the Lands and Deeds Registry Act, provides as follows:

"35. After land has become the subject of a certificate of title, no title thereto or to any right privilege or easement in, upon or over the same shall be acquired by possessor or user adversely to or in derogation of the registered proprietor."

The authorities of **LUMANYENDO AND ANOTHER v CHIEF CHIMUKA AND OTHERS** and **ZAMBIA TELECOMMUNICATIONS LTD v VALSON PHARMACY ZAMBIA LTD** support the applicant's contention that no rights by adverse possession can be acquired if land becomes the subject of a certificate of title. However, as the learned Senior State Advocate rightly submitted, the conclusiveness of a certificate of title is not absolute as there are some exceptions such as stated in section 33(c) of the Lands and Deeds Registry Act as where there is wrong description of boundaries.

In the present case, there was evidence that Simwinji Simwinji's surveyors wrongly surveyed the piece of land which resulted in a wrong description. In those circumstances, the directive by the Minister of Lands for the land to be re-surveyed was done in conformity with the provisions of section 19(1)(b) of the Land Survey Act. In my considered view because of the wrong description created by the wrong survey by Simwinji

Simwinji's surveyor, there was need for rectification by way of re-surveying and re-planning. The Commissioner of Lands, therefore, did not act illegally as alleged by the applicant.

I revert to the issue of the order for possession sought by the applicant on the ground that the 1st respondent are squatters who are not entitled to any remedy from the court. I observed that the 2nd respondent conceded in cross examination that the 1st respondents were squatters who were seeking to legalise their occupation. The fact that the 2nd respondent legalised their occupation after the re-survey and re-planning of the land by allocating them land on which they had set up structures and developed since their occupation in 1999, and issued one Lydia Siwake with a certificate of time, removed them from the category or status of squatters. In these circumstances, I decline to grant the order for possession on the authority of the case of **KUREBA v GOMA AND ATTORNEY GENERAL** where the issue of the status was dealt with when the court held as follows:

“(i) Doctrine that purchaser of land is entitled to evict squatters when he obtained the title does not apply in this case. The only consideration is the intention of the Commissioner of Lands when a first certificate of title is granted and he has the right to limit the extent of the land granted as well as the right to order rectification of the register.

(ii) The error that occurred in the case was one of those capable of rectification under s.11 of the Lands and Deeds Registry Act, Cap 287."

In the present case, I find that the applicant was duly allocated Lot Number 26202/M, Lusaka in the Commissioner of Land's attempt to rectify the problem created by the wrong survey. Even if his certificate of title was not cancelled, it ought to be cancelled so that a new one which bears the proper description of the extent of his property can be issued. To that effect I direct the cancellation of the applicant's certificate of title number 149887 in respect of Lot Number 24048/M Lusaka in favour of a new one for the newly re-numbered and allocated Lot Number 26202/M Lusaka.

In conclusion, the application fails for lacking merit. Costs to follow the event.

In default of agreement, costs to be taxed.

Leave to appeal within the prescribed period is granted.

DATED this^{11th}..... day of April, 2016 at Lusaka.



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F. M. Lengalenga
JUDGE