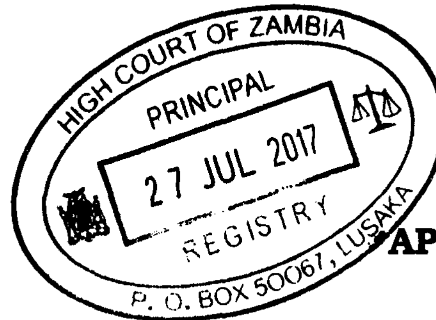
IN THE HIGH COURT FOR ZAMBIA **2013/HP/1850**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)



BETWEEN:

LISIMBA LIAMBANGO **APPLICANT**

AND

GETRUDE KANDUWO	**1ST RESPONDENT**
TAPSON KANDOLO	**2ND RESPONDENT**
ENOCK CHILINDI	**3RD RESPONDENT**
MR CHIKOPA	**4TH RESPONDENT**
AGGREY LINYAMA	**5TH RESPONDENT**
MR MUFAYA	**6TH RESPONDENT**
MR TALILLAI	**7TH RESPONDENT**
MR MAPANI	**8TH RESPONDENT**

BEFORE HONORABLE JUSTICE MR. MWILA CHITABO, SC

For the Applicant: *Mr. Lisimba Liambango (In Person)*

For the Respondent: *Mr. L. Mudenda of Messrs Tembo Ngulube & Associates*

J U D G M E N T

Cases referred to:

(i) *Khalid Mohamed v. The Attorney General (1982) ZR 49*
(ii) *Lt General Goejago Robert Chaswe Musengule v. The Attorney General 2004/HP/0589 (unreported)*

(iii) *Maurice Honirius Chilufya v. Chrispin Haluwa Kangunda (1999) ZR 166*
(iv) *Premesh Bhai Megan Patel v. Rephidin Institute Limited (2011) 3 ZR 134*
(v) *Lt. General Geojago Robert Chaswe Musengule v. Attorney General 2004/HP/0589*
(vi) *Sable Hand Zambia Limited v. Zambia Revenue Authority Appeal No. 5 2003*

Legislation referred to:

(i) *Lands and Deeds Registry Act, Chapter 185*
(ii) *Land Act, Chapter 184 of the Laws of Zambia*
(iii) *Lands and Deeds Registry Act*
(iv) *High Court Act, Chapter 27 of the Laws of Zambia*

Other Authorities

(i) *Administrative Circular No. 1 1985 (Minister of Lands and Natural Resources)*

This matter was originally commenced by mode of originating summons. The mode of commencement was subsequently ordered to have been deemed as commenced by way of writ of summons and statement of claim.

The plaintiff claims for:

(i) An order that as holder of title to land, he is the legal beneficial owner of Farm No. L/166/16/m Mumbwa District.
(ii) An order of eviction of the defendants from the land.
(iii) An order of injunction restraining the defendants from trespassing, interfering, harassing, aliening the said land.

(iv) Costs.

The defendant whilst conceding that the plaintiff was given traditional land in the village which was measuring 100 metres by 100 metres between 1992 and 2003, the plaintiff fraudulently obtained Title Deeds for a 14 year lease for an area measuring approximately 0.9999 and hectares sometime in February, 2005.

The defendants therefore counterclaims for:

(i) An order for cancellation of the certificate of Title over L/166/m for hectares same having been obtained by fraud and illegally or otherwise having been issued by mistake;

(ii) A declaration that the land occupied by the defendant falls under customary tenure and not statutory tenure;

(iii) Damages for the property which the "<u>defendants</u>" have destroyed;

(iv) Costs of and incidental to the proceedings.

In his reply and defence to counterclaim, the plaintiff denies demolishing dwelling structures and maintains that he was granted 6 hectares of land. He pleaded that the defendants were not entitled to any reliefs claimed.

<u>PW1</u> was the plaintiff himself <u>Lisimba Liambango</u> a 65 year old farmer of easy farm in Shamabondo village of Mumbwa.

The gravamen of his evidence was that he holds Title Deeds in particular a certificate of title No. 36080 registration number 16616/m/2 in extent of 6 hectares.

He narrated that initially that piece of land was traditional land. He approached **Chief Mumba** expressing interest to acquire land. The said Chief Mumba since deceased advised him to seek permission from headman **KAAZI** who has since passed away. He was granted the consent and he was given a letter dated 17th January, 1997 to take to the Chief. Letter appears at page 3 of the bundle of documents.

The Chief in turn gave him a letter to take to Mumbwa District Council. He paid an inspection fee of K200 (then unrebased) and the Council Development Committee inspected the land in his presence. The land was found to be free.

He was thereafter informed that his application was successful and the Council would make recommendations to the Commissioner of Lands. Extracts of council meetings of 26th August, 2001appears at pages 9 -11of the plaintiff's bundles. He subsequently obtained Title Deeds from the Commissioner of Lands sometime in the year 2005 appearing at pages 4 – 5 of the bundles.

PW1 also made reference to a letter dated 28th November, 2001 from Mumbwa District Council to the Commissioner of Lands enclosing application of Plaintiffs land application forms for Title Deeds – (appearing at page 12 of the Plaintiff bundles).

Referred to page 29 of the bundles of pleadings, the witness testified that the final hectares for final approval was 5 hectares. It was PW1's testimony that he evicted Getrude Musonda Shamabondo who is the daughter to the first Headman Kandolo who had received him when he went to that village. He had showed her the Title Deeds but she claimed the land belonged to her father and he had no business to be there.

He concluded by stating that he wanted to stop the defendants from trespassing on the his land.

Cross examined by Mr. L. Zulu, PW1 testified that he first went to Shamabondo village in 1990. He found people using the land by way of cultivation and many rearing chickens but not rearing cattle nor goats.

The land was customary or traditional and was not subject to customs, traditions of the land. As a visitor he would not be in a position to know which villager owned what piece of land. Headman Kandolo gave him the piece of land for setting a hammer mill and farming. At that time PW1 was already an adult married and was staying somewhere. He was not aware if the defendants were aware about the Headman Kandolo's offer of the land to him.

The later did not tell him that he had informed the defendants or his family about the land transaction, but that the village committee was informed.

The hectarage of the land was not mentioned by the Headman. He was only shown the area. He was authorised to cultivate the land for his food and the family. He however did not say that he should displace other people nor destroy homes of other people.

He conceded that it was not Headman Kandolo who wrote to the Chief about the offer of the land, and that the one who wrote the letter to the Chief was not present when Headman Kandolo gave him the piece of land.

It was his testimony that he continued to live in harmony with the villagers and neighbors from 1990 to about 1996 when he decided to get title deed. Problems started when he got title deeds. Headman Kaazi had given him 5 hectares and had consented to him getting title deeds. The letter to Chief Mumba was not signed by Headman Kaazi as he was illiterate, pressed under heated cross examination witness said he did not know if Kaazi could neither read and write, letter was written by Maybin Sikwela the village Secretary.

The letter does not show 5 hectares. He did not ask for 5 hectares from Headman Kandolo because by that time he was dead. He died in 1996 or 1997. He had applied verbally for five hectares to Headman. He was not aware that he was given only 100 x 100 metres piece of land. The area of 6 hectares reflected in the certificate of title is larger than the 5 hectares he applied for.

He denied that a mistake had been made. He admitted that he had engaged the services of a surveyor who produced survey diagrams which he later handed to the Ministry of Lands.

He admitted giving himself 6 hectares but quickly retraced the admission. He denied that certificate of title was a fraud. He further denied that the 5 hectares purportedly given by the Chief was a fraud. He maintained that <u>Headman Kaaze</u> gave him 5 hectares.

He denied having applied for 100 x 100 metres of land.

Shown document number 59 being a letter dated 24th December, 2013 from Mumbwa District Council to Headman Shamabondo reflecting 0.9999 hectares captured as bear land being developed by the Plaintiff; the witness charged that the letter was a fraud.

He conceded that he did not pay anything to either <u>Headman Kandolo</u> or <u>Headman Kaazi</u> in respect of the land.

The defendants do not stay at the village. The 4th defendant Chikopa trespassed on his land and that is why he was suing him.

Shown letter dated 24th December, 2013 from Mumbwa Police Station, at page 65 of the bundle of pleadings alleging that property belonging to 4th Defendant Chikopa worth K24, 060 was destroyed by the witness and Lateson Siamakumba; the witness denied the assertion pointing out that that was not independent evidence.

<u>Re-examined</u> by <u>Lisimba</u> and in so far as the answers are not repetitive, the witness testified that <u>Headman Kaaze</u> had given him

5 hectares of land as confirmed by letter dated 23rd December, 1996 appearing at page 4 of the plaintiffs supplementary bundle of documents.

He denied having been given only 100 x 100 metres of land. He had never seen the village Register showing that he was only given 100 x 100 metres of land. He denied having destroyed property (together with Lateson Siamukumba) belonging to Chikopa Darlison Defendant No. 4.

He asserted that the letter from police dated 24th December, 2013 appearing at page 14 of the Defendants bundles of documents was an afterthought. He pointed out that he commenced these proceedings on 12th December, 2013. In any event, he argued he was never convicted of any such offence of property destruction.

He denied ever seeing the Council valuation roll as reflected at page 9 of the Defendants bundles, that his area of land was 0.999 hectares, pointing out that had he been aware about it, he could have moved the Council to rectify the mistake.

He concluded by stating that the Defendants have just ganged up to grab his land and resale it as the common popular practice in that area.

He rested his case.

DW1 was 53 year old farmer Dalison Chikopa (Defendant No. 4) in residence at plot 288, Low Density Area, Mumbwa.

It was his testimony that he went to Shamabondo village in the month of May, 1990. Initially he was staying with his father in law Enerst Gondwe. Later he sought a piece of land from Headman Labson Kandolo and he was given 3 hectare piece of land. The land was in the direction of South East. He built a house and planted fruit trees, banana's, nuts and guava trees.

At that time there were people who were farming on the land namely Headman Kandolo, Julius Musonkomushi, and Aggrey Linyama.

In 1990, the village Headman took the Plaintiff Lisimba Liambango witness and informed him that he will be his neighbor. The Plaintiff had a hammer mill. The village committee measured and demarcated and gave 100 x 100 metres of land to the Plaintiff for purposes of putting up a piggery and hammer mill. The procedure is that when someone goes to a village he or she is placed in the village Register.

In the year 1994, he joined Barclays Bank of Zambia PLC and 2000 he was given accommodation in the township. He left his young brother Darius Chikopa and nephew Shanold Chikopa living in his house.

Initially the relationship with the Plaintiff was very cordial and they even dug a water well together where they were drawing water. The Plaintiff even used to store his building materials at his house. However relations deteriorated over the years and the Plaintiff and his son Liswaniso Liambango started threatening his brother and

nephew for former warning that something will befall or happen to them. The said relatives in due course fled from the house in view of the threats.

He later removed the iron sheets to secure them. In course he was later informed that his house had been demolished and fruit trees cut in the orchard. Defendant No. 1 is the one who briefed him. In consequence thereof he lost steady income for support of his school going children which quantified at K24 million. The police and the Agricultural officers were informed. A person named Siamakumba admitted having demolished the house and cut down the fruit plants and 288 banana plants on instructions from the Plaintiff.

The matter could not be amicably resolved since the Plaintiff produced title deeds whereupon the police said they could not take up the matter any further. The witness made reference to document at page 12 which was the police report. It was his evidence that the Plaintiff alleged that he had nothing to do with him and any trespasser.

It was his evidence that it was a lie that the Plaintiff had been given 5 hectares of land nor was he given 6 hectares. He concluded by testifying that Headman Enock Chilinda had denied giving his land away to the Plaintiff. According to him the Plaintiff wanted to deprive him and other Defendants of their pieces of land. He thus claimed additionally for compensation for moneys spent on building his house and moneys spent on the destroyed orchard.

Cross examined by Lisimba, the witness responded that he lives at Plot 288, in Mumbwa and he has Title Deeds for that plot which he obtained in 2004. The said plot is not in Shamabondo village.

He admitted that initially he was squatting at his brothers property but later he was given 3 hectares of land sometime towards the end of the year 1990.

According to him the allocated land was measured by the village committee and his name ought to have been entered in the village Register but he does not have Title Deeds for the land in Shamabondo's area.

He conceded that according to Council Roll at page 60 of the Plaintiffs bundle of documents, his name does not appear on the roll, but quickly pointed out that his name might be appearing in other rolls.

Chilinda became headman in 2006. He was not there when I was given land in 1990. He admitted that there were commercial developments going on around the Plaintiffs property. The plaintiff had only 1 hectare of land. He conceded that document at page 57 and 49 shows that Plaintiff has 6 hectares of land, but he pointed out that the same document shows .999 hectares.

The Plaintiff according to him destroyed his house in 2013. Matter was reported to police but could not proceed because the matter was in Court.

Re – examined by Zulu and in so far as the answers are not repetitive, the witness explained that his name was not appearing at page 60 or Councils roll because his name is in the village Register. He pointed out that the Plaintiffs plot number is L/16616/m in extent of .9999 hectares valued at K6, 000, 000 (unrebased).

DW2 was Gertrude Musonda a 49 year old psychosocial counselor of Chifundo clinic in residence.

It was her evidence that she is the last born daughter of the late Robson Kandolo Shamabondo. She recalled that sometime in 1990 a Lyambai who was an Agricultural extensions officer who was nephew to the Plaintiff approached his father to allow him to put up a hammer mill and that the Plaintiff would look after his business. He was given 100 x 100 metres. The said Lyambai passed on and the Plaintiff started living in the village and by 1992 he was fully registered in the village. He father passed on in 1993.

The people who were present when land was given to Lyambai were Julius Musokomushi who was first cousin to her father, the late Chikopa (nephew to her father) both of whom were village committee members, Tapson Musonda Kandolo Shamabondo (2nd Defendant) who was the first born of her father the late Enock Chilindi and current headman Shamabondo and 3rd Defendant the current headman.

The 4th Defendant Chikopa who joined his father in law Aggrey Linyama who had gone to settle in the village a long time ago even before she was born.

The 6th Defendant is a relative to the Plaintiff whilst the 7th Defendant is her uncle – Julius Sonkomushi.

The 8th Defendant Mapani is an extensions officer who does not live in Shamabondo village.

It was her testimony that before the Plaintiff went to the village, people were using land for cultivating. She denied that Plaintiff was given 5 hectares. She was surprised that Plaintiff is now even claiming owning 6 hectares. In her view the 6 hectares includes her land and those of the other Defendants. The witness outlined the procedure of acquisition of traditional land. The process starts with the village headman. Upon acceptance, the headman then writes to the Chief and the Senior Headman is also informed.

The Chief then writes to the headman requiring the personal attendance of the headman and the applicant together with the village committee. The Chief conducts interviews and once satisfied, if the applicant requires title deeds, the Chief simply writes to the Council to obtain "the simple document".

It was her evidence that letter of 23rd December, 1996 from the Chief at page 4 of the supplementary bundle of documents is from the Chief, whilst letter from Maybin Sikwela is dated 17th January, 1997.

She pointed out that the letter from the village Secretary should have come first, followed up by letter from the chief. The letter from

the Chief indicates 5 hectares whilst the other one does not show hectarage of land.

The certificate of title on the other hand shows 6 hectares. She saw major differences in the 3 documents and reveals false information and as such they are false.

She concluded by stating that as a daughter of late headman Kandolo, she and the family were entitled to be informed of what was happening in the village.

Cross examined by the Plaintiff and in so far as the answers were not repetitive, the witness testified that she stays in Shamabondo village. She has a home but it is not on the plaintiffs form. She has been ploughing on her father's farm. To determine the extent of the land allocated to an applicant, the neighbors have to be invited to witness the demarcation even the neighbors have to agree.

The Council upon receipt of letter from Chief recommending applicant to have land on title also has to visit the area who in turn interview village committee and the neighbor and the Headman. Thereafter the Council approves the application.

She was not aware that the Mumbwa Council officials had inspected the area and interviewed the Headman and his assistant. She was not aware that the Headman and the Deputy had no objection to the application.

Shown document number 8 in the Plaintiffs bundle of documents, the witness stated that there were no names of the village

committee on that document, in her view the said document could have been a fraud.

DW3 was 75 year old Enock C. Chilindi a farmer and village Headman of Shamabondo village. It was his testimony that he was appointed Headman on 16th June, 2006. In respect of title Deed No. 36680, certificate No. 16616m, he received a complaint from his subjects that the plaintiff was chasing them from their fields as he had title to land. These were Julius Musonkomushi, Aggrey Linyama, Matakala Shamabondo and Darlison Chikopa.

His portion of land given to him as village headman had also been taken and all pieces of land put on title. The affected persons were 9 as per document No. 9 in the defendants bundles dated 26th December, 2016. He then convened his village production committee who decided to summon the plaintiff. He defied the summons. Matter was then reported to His Royal Highness Chief Mumba.

The Chief then wrote letter to plaintiff inviting him to meet the former on 19th December, 2007 with all complainants who were allegedly being denied access to their fields. The plaintiff ignored the letter and instead chased the Chief's emissaries. He kept on giving various excuses, for example that he was unwell.

It was his testimony that his village was very tiny and one person could not have been given 5 hectares. His grandfather had only given plaintiff 100 x 100 metres.

He was aware that the plaintiff was only entitled to .9999 hectares piece of land and not 6 hectares. The witness made reference to documents No. 7 and 8 in the Defendants bundles of documents being letter from the witness to Mumbwa District Council in respect of this plaintiff's property and the Councils reply where they replied that the valuation roll of 2005 indicated that the plaintiff LOT L/16616/m measures 0.9999 hectares.

He pointed out that letter dated 23rd December, 1996 by Chief Mumba reflects 5 hectares as given to plaintiff whereas letter dated 19th January, 2017 by the village committee Secretary Sikwela does not mention the area.

It was his testimony that the plaintiff could not have applied for barren land because the only place where there are trees is the cemetery.

He concluded by stating that the land should be repossessed from the plaintiff as people were starving.

Cross examined by the Plaintiff and in so far as the answers are not repetitive, the witness testified that he lives Shamabondo's village and earns his living farming. He admitted being told by the plaintiff in the presence of one Mukuba and another Cholwe and his village committee that he had title deeds.

He admitted that District Secretary had invited him, the village committee and the plaintiff to him on the subject matter. He

confirmed 6 of the complainants had their homes in Shamabondo but had lost farming land.

He denied that any of the 6 complainants were selling land near corners in Shamabondo village. He admitted that some people had since obtained title deeds to land after he became headman. He denied that there was a conspiracy amongst himself and other defendants to displace him of his land.

He admitted that there was nothing in evidence or writing that His Royal Highness Chief Mumba had any objection to him being allocated 5 hectares.

The defence rested.

At the close of the hearing, I gave directions as to the filing of submissions. The said orders were not complied with by the parties. The first thing I have to do is to disclose my mind to the burden and standard of proof.

This was settled in the case of ***Khalid Mohamed v. The Attorney General***[1], where Ngulube DCJ, (as he then was) put it this way at page 51 lines 16 – 24:-

> *"An unqualified proposition that a Plaintiff should succeed automatically whenever a defence has failed is unacceptable to me. A Plaintiff must prove his case and if he fails to do so the mere failure of the opponents defence does not entitle him to Judgment. I would not accept a proposition that even if a plaintiff's case has collapsed of its inanition or for some reason*

or other, judgment should nevertheless be given to him on the ground that a defence set up by the opponent has also collapsed. Quite clearly a defendant in such circumstances would not even need a defence"

It is trite law that the burden of proof in civil matters is on the balance of probability. The exception to this general rule is in cases where fraud is alleged. His Lordship Mwanamwambwa, J (as he then was) had occasion to pronounce himself on the subject matter in the case of ***Lt General Geojago Robert Chaswe Musengule v. The Attorney General***[2], he held as follows:-

> *"(i) At law, he who alleges fraud carries the burden to prove it, and the standard of proof is greater than the simple balance of probabilities;*
>
> *(ii) The legal position is that the party that alleges a fact must prove it and generally except for fraud must prove it on the balance of probability"*

Faced with an action in respect of the rights of a certificate to Title holder and counterclaim in respect of a certificate of title obtained by fraud or mistake, I visited the case of ***Maurice Honorius Chilufya v. Chrispin Haluwa Kangunda***[3], where there Lordships of the Court of final resort had occasion to pronounce themselves on the subject matter. Ngulube, CJ (as he then was) put it in this way at pages 169 and 170

"Section 54 does not authorise fraud......... As a matter of fact, the issue of a certificate of title is aptly dealt with in <u>Section 33 of Cap 185</u>, which reads:

'a certificate of Title shall be conclusive as from the date of its 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 circumstances, liens estates or interests created after the issue of such certificate as my 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 omissions or misdescription of any right of way or other easement created in or existing upon any land.

(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 of boundaries'

The law thus contemplates that fraud will vitiate the certificate...."

In the case in casu the following facts are common cause.

(1) That the Plaintiff is the proved registered owner of certificate of title No. 3680, for Plot No. 16616/m in extent of 6.0000 hectares more or less being Lot 16616/M situated in Mumbwa.

(2) That His Royal Highness Chief Mumba on 23rd December, 1996 wrote a letter confirming that he had no objection of giving the Plaintiff 5 hectares of land for business.

(3) On 11th February, 1997 a letter from Mumbwa ward by J.M Chibesa was written to the Mumbwa Council Secretary recommending the Plaintiff to be given 5 hectares of land.

(4) On 27th June, 2001, the Mumbwa Council resolved to recommend and approve the Plaintiffs application for a 5 hectare piece of land.

(5) On 17th January, 1997, the Secretary to Shamabondo village productivity committee wrote to Chief Mumba requesting that

His Royal Highness Chief Mumba grants unspecified piece of land to the Plaintiff.

(6) The 1st, 2nd, 3rd and 7th Respondents are related in sanguinity whilst the 4th defendant is related to the 5th Respondent by way of affinity as the 5th Respondent is the father in law to the 4th Respondent. The 6th Respondent is a relative to the Plaintiff. The 8th Respondent is an extensions officer from Agriculture, who does not reside in Shamabondo village. All the other Defendants have

(7) The 1st, 2nd, 3rd and 7th Respondents trace their roots to Shamabondo village. Some have houses and farming land in the village but some do not stay in the village but have fields or farms in the village.

Faced with the action for a declaration or order that the Plaintiff is holder of Title Deed to the land subject of their proceeding, I consulted *Administrative Circular No. 1 1985* procedure on land alienation. I hereby reproduce the relevant excerpts:-

"**Reserves and Trust Lands**

(i) *In the Reserves and Trust Lands, the powers of the President in making grants or dispositions of land are limited by the requirements to consult the Local authorities affected by such grants or dispositions of land.*

(ii) *Local authority in the orders has been administratively understood to mean the Chief and District Council. This means therefore, that the consents of Chiefs and District Councils shall continue to be basis for any approval of applications for land in the Reserves and Trust Lands.*

(iii) *As has been the practice before to ensure that a local authority has been consulted, the Commissioner of Lands will insist that each recommendation is accompanied by the following:*

(a) Written consent of the Chief under his hand;

(b) Extracts of the minutes of the Committee of the Council responsible for land matters, embodying the relevant resolutions and showing who attended duly authenticated by the Chairman of the Council and the District Executive Secretary.

(c) Extracts of the minutes of the full council with the relevant resolution and showing who attended, duly authenticated by the Chairman of the Council and the District Executive Secretary.

(d) Four copies of the approved layout plan showing the site applied for duly endorsed by the Chief, Chairman of the Council and the District Executive Secretary.

(iv) *The preparation of the layout plan showing the area applied for, should be done by person possessed with cartographic know how. At annexure "B" of this circular is a model layout plan which provides the necessary details for an acceptable layout plan.*

(v) *It has been decided for this time being not to allocate more than 250 hectares of land for farming purposes in the reserves and Trust land areas. The District Councils are therefore advised not to recommend alienation of land on title in such areas in excess of 250 (two hundred and fifty) hectares as such recommendations would be difficult to consider.*

(vi) *In each case recommended to the Commissioner of Lands, the recommending authority shall certify that it has physically inspected the land applied for and confirm that settlements and other persons interests and rights have not been affected by the approval of the application"*

The above circular is anchored under Section 8 (i) of the Lands Act[2], which provides for conversion of customary tenure into leasehold tenure. The section provides for the requirement of approval of a Chief and a local authority in whose area the land to be converted is situated.

A perusal of the documents filed in this action clearly show that his Royal Highness Chief Mumba had agreed to the accession of 5 hectares of land to the Plaintiff. The Mumbwa District Council met and recommended in their resolution to the Commissioner of Lands that the Plaintiff be assigned 5 hectares of land.

A private surveyor was engaged by the Plaintiff who submitted the survey diagrams which led to the issue of certificate of title and alienation of 6 hectares. It was testified by DW1, DW2 and DW3 that as far as they were concerned the Plaintiff was given only 100 x 100 metres of land or 1 hectare.

I should summarily observe that that was hearsay evidence. In any event oral or extrinsic evidence cannot be admitted to tend to vary or contradict a written accord. It is trite law that a document is conclusive and exclusive about what it says about itself.

The Court of last resort had occasion to consider the subject in the case of ***Premesh Bhai Megan Patel v. Rephidin Institute Limited***[4], where her Ladyship Chibomba JS (as she then was) held as follows in holding 4:-

> *"The position of the law however is that a term will not be implied so as to contract any express term, and that a term might not be implied unless in considering the whole matter in a reasonable manner, it is clear that the parties intend that there should be the suggested stipulation"*

And in holding 4, it was held:-

> *"Extrinsic evidence can be admitted to prove any term where expressly or implied agreed by the parties, before or after the execution of the contract, where it is shown the agreement was not intended to incorporate all terms and conditions of the contract"*

It is quite obvious the point under discussion does not fall in the exceptions to the general rule. There is no evidence to tend to impeach the letter of authority of his Royal Highness Chief Mumba. Indeed DW3 conceded that the Chief is superior to a headman. In any event, the letter from the headman only confirms recommending the Plaintiff to get a piece of land. It does not mention the hectarage neither does it say the Plaintiff was not given or recommended 5 hectares of land.

Further, circular No. 1 of 1985 alluded to has now acquired the status of legal authority in alienation of Land in Zambia. That circular makes no mention of a headman's letter as a factor in the land alienation process. The Defendants approach in this matter has been to allege fraud generally.

To navigate this issue, I visited the case of ***Lt. General Geojago Robert Chaswe Musengule v. Attorney General***[5], where his Lordship Mwanamwambwa, J (as he then was) held as follows:-

> "(i) *At law, he who alleges fraud carries the burden to prove it and the standard of proof is greater than the simple balance of probability.*

(iii) *The legal position is that the party that alleges a fact must prove it and generally except for fraud must prove it on the balance of probability"*

I respectfully agree that this is the correct position of the law. Similar views were also expressed in the case of ***Sable-hand Zambia Limited v. Zambia Revenue Authority*[6], *Appeal No. 5 of 2003***.

It is also a legal requirement that fraud must be specifically pleaded and there must be sufficient evidence to support the claim. This is provided for in *Order 18 Rule (i) of the Supreme Court Rules of England*[2].

On the available evidence, I hold that allegations of fraud against the Plaintiff have not been proved.

This however does not end the matter. The impeccable evidence on record is that the parcel of land that was recommended by the Chief and Mumbwa District Council was for a parcel of land in extent 5 hectares to be given to the Plaintiff and not 6 hectares.

On the authority of ***Maurice Honorious Chilufya v. Crispin Kangunda*[3]**, I hold and find that the certificate of Title issued to the Plaintiff was issued by mistake in so far as it describes the parcel of land to be 6 hectares when it is supposed to be 5 hectares.

I am further fortified in this finding by the provisions of Section 33 (c) of the Lands and Deeds Registry Act which provides as follows:-

Section 33 *"A certificate of title shall be conclusive as from the date of issue notwithstanding the existence of any other person of any estate or interest.....................*

33 (a) ....

(b) ....

(c) *Except so far as regards any portion of land that may erroneously be included in the certificate of Title, evidencing the title of such registered property by wrong description or of boundaries.*

These sections should be read in conjunction with the provisions of Section *11 (2) of the Lands and Deeds Registry Act*[3], which provides as follows:-

"Any person aggrieved by any entry or omission made in Register after application to the Registrar under such section

(1) May apply to the Court for an order that the Register may be rectified and the Court may either refuse such application with or without costs to be paid by the applicant or it may if satisfied of the justice of the case, make an order as for the rectification of the Register in such a manner as it shall direct"

A reading of the above section confers power on the High Court for rectification of register where an application has initially been made to the Registrar. The unique situation herein however is that the matter was launched by the plaintiff to evict the Defendants who are said to have encroached on his piece of land.

The Defendants counterclaimed for cancellation of Title alleging fraud. In my view, the Court having found that mistake vitiates certificate of title and the Court enjoying original and unlimited jurisdiction and also seized of jurisdiction under *Section 13 of the High Court Act*[3], to administer law equity, this Court is seized of power and authority to make an order of rectification of the Register in respect of the Plaintiffs certificate of title.

In conclusion I make the following orders:-

(1) Certificate of Title No. 36080 for Lot No. 16616/m issued on 15th February, 2005 is nullified on account of mistake to the parcel of land which erroneously refers to 6 hectares instead of 5 hectares.

(2) It is directed that following the nullification of the certificate of Title, the Plaintiff surrenders the certificate of title aforementioned to the Registrar of Lands for cancellation and issue of a fresh certificate of title which will reflect 5 hectares as the legitimate parcel of land held by the plaintiff.

(3) In complying with order (2) above, the Registrar of Lands will pay due regard to the internal administrative and legal requirements relating to survey, subdivision or parceling the affected piece of land.

(4) The interlocutory order for injunction restraining the defendants from interfering with the quiet enjoyment of the Plaintiffs property granted on 21st December, shall continue to be in force until the exercise of rectification as outlined above is executed.

There was a counterclaim in respect of property allegedly destroyed by the Plaintiff. There is no independent evidence to support these claims. The Zambia police service report relied upon evidence of demolishing the structures is inadmissible on account of hearsay, as it was entirely based on what the complainant told the police. There was no legal suit to pursue the alleged claims of destruction of real property and the orchard.

There was indeed no independent evidence from the agricultural department to confirm the existence of the orchard alluded to; or indeed from any other witness nor was any independent quantification of alleged loss.

I have already somewhere in the preceding paragraphs alluded to the burden of proof that it lies on he who alleges as laid down in the celebrated case of ***Khalid Mohamed v. The Attorney General***[1] cited above. This claim is destitute of any merit and it is dismissed.

It is evident that I have traversed and dealt with all the substantive claims by the Plaintiff and the counterclaims by the Defendants but for the issue of costs.

The Plaintiff has partially succeeded whilst the Defendants have also registered a major victory in challenging the Plaintiffs certificate of title in so far as it relates to the hectarage.

The justice of the case is that each party bears its own costs.

The parties are informed of their respective rights of appeal to the Court of Appeal.

Under my hand and seal this 27th **day of July, 2017**

Mwila Chitabo, SC
Judge