

**IN THE HIGH COURT OF ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA**  
(Civil Jurisdiction)

2015/HP/2224

BETWEEN:

**PROGRESS CHUMBWE****PEGGY KAUTA****MORGAN MALOZA**

AND

**CHARLES CHIPALO SIMUTAMI****EUPHRASIA CHILONGOSHI****JENNY CHILESHE****CHILANGA DISTRICT COUNCIL****THE ATTORNEY GENERAL****1<sup>st</sup> PLAINTIFF****2<sup>nd</sup> PLAINTIFF****3<sup>rd</sup> PLAINTIFF****1<sup>st</sup> DEFENDANT****2<sup>nd</sup> DEFENDANT****3<sup>rd</sup> DEFENDANT****4<sup>th</sup> DEFENDANT****5<sup>th</sup> DEFENDANT**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 27<sup>th</sup> DAY OF  
SEPTEMBER, 2018**

*For the Plaintiffs* : *Mr W. Muhanga and Ms C. Bweupe, AKM Legal Practitioners*

*For the 1<sup>st</sup>-3<sup>rd</sup> Defendants* : *Mr M. Khunga, Barnaby and Chitundu Advocates*

*For the 4<sup>th</sup> Defendant* : *Mr J.B. Theu, Mwansa Phiri, Shilimi and Theu Legal Practitioners*

*For the 5<sup>th</sup> Defendant* : *No appearance*

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## **J U D G M E N T**

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CASES REFERRED TO:



1. *Royal British Bank V Turquand 1856 ALL ER 435*
2. *Morgan V Sim 1857 11 Poo PC 312*
3. *Miller V Minister of Pensions 1974 2 ALL ER 372*
4. *Sithole V State Lotteries Board 1975 ZR 106*
5. *Lyons Brooke Bond (Zambia) Limited V Zambia Tanzania Road Services Limited 1977 ZR 317*
6. *Rootkin V Kent County Council 1981 2 ALL ER 227*
7. *Billingsley V J.A Mundi 1982 ZR 11*
8. *Khalid Mohamed V The Attorney General 1982 ZR 49*
9. *Wilson Masauso Zulu V Avondale Housing Project Limited 1982 ZR 172*
10. *William David Carlisle Wise V EF Harvey Limited 1985 ZR 179*
11. *Mijoni V Zambia Publishing Company Limited Appeal No 10 of 1986*
12. *David Nzooma Lumanyenda and Goodwins Kafuko Muzumbwa V Chief Chamuka and Kabwe Rural District Council and Zambia Consolidated Copper Mines Limited 1988 - 1989 ZR 194*
13. *Eagle Charalambous Transport Limited V Gideon Phiri 1994 SJ 52*
14. *Zambia Bata Shoe Company Limited V Vin-Mas Limited 1994 SJ 35*
15. *Magic Carpet and Travel and Tours Limited V Zambia National Commercial Bank 1999 ZR 61*
16. *Yengwe Farms Limited V Masstock Zambia Limited, the Commisioner of Lands and the Attorney General SCZ No 11 of 1999*
17. *Honorius Chilfuya V Chrispin Haluwa Kangunda 1999 ZR 166*
18. *National Airports Corporation Limited V Reggie Ephraim Zimba and Savior Konie SCZ No 34 of 2000*
19. *Galaunia Farms Limited V National Milling Company Limited and National Milling Corporation Limited 2001 ZR 1*
20. *Zambia Consolidated Copper Mines Limited V Eddie Katalayi and Max Chilongo SCZ No 2 of 2001*
21. *Kankomba and others V Chilanga Cement PLC 2002 ZR 129*
22. *Nora Mwaanga Kayoba and Alizani Banda V Eunice Kumwenda Ngulube and Andrew Ngulube SCZ No 19 of 2003*
23. *Wesley Mulungushi V Catherine Bwale Mizi Chomba 2004 ZR 96*
24. *Sablehand Zambia Limited V Zambia Revenue Authority 2005 ZR 109*
25. *Anderson Mazoka and others V Levy Patrick Mwanawasa*



- 2005 ZR 138
26. *Enesi Banda V Abigail Mwanza* 2006/HP/A002
  27. *Justin Chansa V Lusaka City Council* SCZ No 29 of 2007
  28. *Frallen Investments Limited V Zambia Railways Limited, National College for Management Development* 2008 Vol 1 ZR 9
  29. *Zambia Railways Limited V Pauline S. Mundia, Brian Sialumba* 2008 Vol 1 ZR 278
  30. *Anti-Corruption Commission V Barnet Development Corporation Limited* 2008 ZR 69
  31. *Josia Tembo, Henry Jawa V Peter Mukuka Chitambala (sued as Administrator of the estate of the late Frank Macharious Chitambala)* 2005/HP/0208
  32. *Zamcaptial Enterprises Limited V Richard Mbale* Appeal No 21/2008 unreported
  33. *Zambia Telecommunications Company Limited V Valson Pharma Zambia Limited* SCZ No 3 of 2010
  34. *Clementine Banda and another V Boniface Mudima* 2011 Vol 3 ZR 162
  35. *Base Chemicals Zambia Limited Mazzonites Limited V Zambia Air Force and the Attorney General* SCZ No 9 of 2011
  36. *David Howes Daniel Simuloka Vivian Kanondo Walker Miyoba Janet B Musunga A.B. Mbata Constatine Chimuka Alfred Hanankuni Stemon Lumamba V Betty Butts Carbin (sued in her capacity as trustee of the estate of the late Daisy Butts)* SCZ No 5 of 2012
  37. *Charles Kajimanga V Marmetus Chilemya* Appeal No 50/2014 unreported
  38. *Thabale Jack Ngulube V Unza* SCZ/8/028/2015 Appeal No 80 of 2015

LEGISLATION REFERRED TO:

1. *The Common Leasehold Scheme, Chapter 208 of the Laws of Zambia*
2. *The Statute of Frauds Act, 1677*

OTHER WORKS REFERRED TO:

1. *The Law of Evidence in Zambia: Cases and Materials* by John Hatchard and Muna Ndulo
2. *The Land Circular No 1 of 1985*
3. *Blacks Law Dictionary, 9<sup>th</sup> Edition* by Bryan A. Garner
4. *Osborne's Concise Law Dictionary, 11<sup>th</sup> Edition*



The Plaintiff commenced this action on 20<sup>th</sup> November, 2015, by way of writ of summons claiming;

- a) *An order of injunction restraining the Defendants whether by themselves, their agents, servants or whomsoever from dealing with the land relating to Stand No 880 Chilanga in any way, including but not limited to disposition pending the determination of the matter or until further order of the court.*
- b) *A declaration that the certificate of title No 310353 issued in the joint names of Simutami Charles Chipalo and Euphrasia Chilongoshi was fraudulently obtained, and should therefore be annulled.*
- c) *A declaration that Simutami Charles Chipalo and Euphrasia Chilongoshi had no subsequent legal authority to sell the land relating to certificate of title No 310353 fraudulently obtained and that any sale undertaken thereof should be annulled and or cancelled ab initio.*
- d) *An order for cancellation of any subsequent certificate of title issued in respect of the said land, including the one issued to Jenny Chileshe under certificate No 4586 as it emanates from a fraudulent title.*
- e) *An order of reversion of the said land to the Plaintiffs.*
- f) *An order directing the Commissioner of Lands to complete the survey of the land and issue certificates of title to the Plaintiffs.*
- g) *Costs.*
- h) *Any other relief that the court may deem fit.*

According to the statement of claim, the Plaintiffs are Zambian nationals and former employees of the National Parks and Wildlife Services, at the time of the commencement of the writ known as the Zambia Wildlife Authority (ZAWA). The Plaintiffs state that they were sitting tenants of the houses of the former



National Parks and Wildlife Services, and were offered to purchase the said houses by the government of the Republic of Zambia.

The statement of claim shows that the 1<sup>st</sup> Defendant is and was a Surveyor in the employ of the Ministry of Lands and Natural Resources, and was engaged by the Plaintiffs to survey the land upon which they were sitting tenants, and upon which he became joint owner of Stand No 880 Chilanga under certificate of title No 31053 with the 2<sup>nd</sup> Defendant, while the 3<sup>rd</sup> Defendant is the alleged purchaser and current owner of Stand No 880, Chilanga held under certificate of title No 4586. The 4<sup>th</sup> Defendant is sued as a local authority with powers to administer land where the land in issue is situate, while the 5<sup>th</sup> Defendant has been sued pursuant to Section 12 of the State Proceedings Act, Chapter 71 of the Laws of Zambia.

It is stated that between the years 2000 and 2008, the Plaintiffs applied for, and were offered houses for sale as sitting tenants by the government following its policy to sell houses to sitting tenants as a way of empowering the citizens. The 1<sup>st</sup> Plaintiff in the year 2000 was offered to buy the property known as CHILA/270/CL/9, while the 2<sup>nd</sup> Plaintiff was offered to buy the property known as CHILA/270/CL/3, and the 3<sup>rd</sup> Plaintiff was offered to buy CHILA/270/CL/7. The statement of claim states that these properties offered to the Plaintiffs consist of a block which has seven other flats, which were also offered to the sitting tenants to buy.

That prior to the letters of offer being issued, the Ministry of Agriculture, Food and Fisheries then wrote to the Permanent Secretary of the Ministry of Works and Supply asking that consideration be given to subdividing the block of flats into individual flats, but this could not be undertaken by the Surveyors J.G. Nyangulu and Associates who were appointed. It is also stated that later, some overall site plan was released, which did not show that the flats offered to the Plaintiffs had been subdivided, and a Committee chaired by the 1<sup>st</sup> Plaintiff was constituted to spearhead the subdivision.



Through liason with the Ministry of Lands, the 1<sup>st</sup> Defendant who was an employee of the Ministry of Lands, was engaged as the Surveyor to survey the land, and issue the necessary diagrams and maps. It is stated that the 1<sup>st</sup> Defendant visited the site several times and collected contributions from the Plaintiffs in the form of money for his logistics on demand. That statement of claim also states that the 1<sup>st</sup> Defendant was to charge the Plaintiffs for the whole survey assignment upon its completion. However, the 1<sup>st</sup> Defendant stopped answering the Plaintiffs' phone calls, and he did not report back to the Plaintiffs on the progress of the survey, prompting the Plaintiffs to engage another Surveyor also employed by the Ministry of Lands, known as David Mubanga.

The Plaintiffs contributed to David Mubanga's logistics, and in or about the year 2006, David Mubanga issued the Plaintiffs with a site plan, which demarcated the block of flats into numbered individual properties from CL/1 to CL/10 awaiting the survey diagrams. The Plaintiffs also state that they used the said site plan to obtain letters of offer from the government, that is the parent Ministry, and the Ministry of Lands. The Plaintiffs further aver that they paid the purchase prices for the houses in full, and thereafter in about the year 2012, the Ministry of Finance wrote to the Commissioner of Lands advising that it would have no further claim to the properties, and that title deeds should be released for the respective properties to the purchasers, among them the Plaintiffs.

It is the Plaintiffs assertion that however, the Ministry of Lands advised that it could not issue the title deeds until the property was subdivided into individual and single properties, and survey diagrams issued, which to date has not been done. That from about 2007 some known and unknown individuals among them a Mr Phiri who was a driver at the Ministry of Lands working together with the 1<sup>st</sup> Defendant started interfering in the Plaintiffs properties prompting



the Plaintiffs to write to the Local Authority then, the Kafue District Council for intervention.

It is stated that Kafue District Council wrote to Mr Phiri and the other intruders to stop the illegal construction, and that while the Plaintiffs were pursuing the survey diagrams around the month of July, 2014, a person called Jenny Chileshe, the 3<sup>rd</sup> Defendant herein approached them claiming that she had bought the land in question which formed part of the Plaintiffs properties from the 1<sup>st</sup> Defendant. The Plaintiffs allege that during that visit the 3<sup>rd</sup> Defendant requested the 1<sup>st</sup> Plaintiff to show her the beacons on her property and the extent of the land that she claimed, and the Plaintiffs challenged her to avail documentation relating to the land.

It is further stated that the 3<sup>rd</sup> Defendant later took earth moving equipment to the property with the intention of demolishing the existing structures that included the toilets on the plots, but the Plaintiffs chased the intruders. The Plaintiffs state that they complained to the Minister of Local Government and his Excellency the President of the Republic of Zambia, but despite these complaints, the 1<sup>st</sup> Plaintiff's wife Ruth Chumbwe was dragged to court by the 3<sup>rd</sup> Defendant under cause No 2015/HP/0371 claiming possession of the land in question, but the matter was dismissed for irregularity. It is also stated that the Plaintiffs came to learn from that case that the 1<sup>st</sup> Defendant had obtained title to their property after they had engaged him to survey the same, and that the 3<sup>rd</sup> Defendant equally had title to said property, after she bought the same from the 1<sup>st</sup> Defendant.

The assertion is that the 1<sup>st</sup> Defendant abused his position as an employee of the Ministry of Lands to create and offer the property to himself, and or influenced to be offered the said land, fraudulently so, and he subsequently obtained a certificate of title No 310353 within the short period of time, which reflects that he owned the land jointly with Euphrasia Chilongoshi, the 2<sup>nd</sup> Defendant. It is further the Plaintiffs contention that the said land belongs to



- iv. *The certificate of title belonging to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in respect of the land shows that it was issued in June, 2014 and immediately transferred to the 3<sup>rd</sup> Defendant in September, 2014, but the 3<sup>rd</sup> Defendant by July, 2014 had already been on site claiming ownership of the said land when no copy of a contract of sale existed.*
- v. *The drawing attached to the certificate of title shows the period of the survey as when the 1<sup>st</sup> Defendant was tasked to undertake the survey for the Plaintiffs, and he used his position to acquire the land at the expense of the poor Plaintiffs and did not follow the laid down procedures to acquire the land.*

The 1<sup>st</sup>-3<sup>rd</sup> Defendants entered appearance and filed their defence on 18<sup>th</sup> December, 2015, in which the 1<sup>st</sup> Defendant states that he is the joint owner of Stand No 880 Chilanga under certificate of title No 31053 with the 2<sup>nd</sup> Defendant. The Defendants state that the contents of paragraphs 3 to 10 of the statement of claim are within the peculiar knowledge of the Plaintiffs, and that they are unaware that the 1<sup>st</sup> Plaintiff was appointed Chairperson of the Resident's Committee that was formed over the land.

The 1<sup>st</sup> Defendant denies that he was appointed to undertake a survey of the land and issue the necessary diagrams, and his defence is that he was engaged to survey a block of flats for purposes of creating units under the common leasehold scheme, which task he did not undertake, as he learnt that the said block of flats had not been numbered by the Ministry of Lands at the time of the purported survey. Further, that he advised the Plaintiffs to engage the Ministry of Works and Supply to prepare site plans and have them numbered by the Ministry of Lands.

His assertion is further that the Plaintiffs engaged him in his personal capacity and not as an employee of the Ministry of Lands, and that at no time did the Ministry of Lands liaise with the Plaintiffs concerning the 1<sup>st</sup> Defendant's engagement to survey the block of flats on behalf of the Plaintiffs. The 1<sup>st</sup>



Defendant denies paragraph 13 of the statement of claim that he visited the site several times after the Plaintiffs engaged him, or that they gave him monies that they contributed for his logistics and lunches, and that he was to charge them for the whole survey assignment upon its completion.

The 1<sup>st</sup> Defendant also denies that he stopped answering the Plaintiffs phone calls after he was engaged, and that he did not report back to them on the progress of the survey. He expresses ignorance on the Plaintiffs having engaged another Surveyor from the Ministry of Lands David Mubanga, whom they also paid for his logistics, or that David Mubanga produced a site plan which demarcated the block of flats into numbered individual properties from CL/1 to CL/10, awaiting survey diagrams.

The 1<sup>st</sup> Defendant expresses ignorance on the assertion that the site plan produced by David Mubanga was used to pursue letters of offer from the parent ministries, and the Ministry of Lands, and that after making full payment, in or about the year 2012, the Ministry of Finance wrote to the Commissioner of Lands advising that the government had no further claim to the properties, and that title deeds should be released for the said properties. The assertion that the Ministry of Lands advised that title deeds could not be issued until the property was subdivided into individual and single properties, is stated to be within the Plaintiffs peculiar knowledge.

The 1<sup>st</sup>-3<sup>rd</sup> Defendants deny that Mr Phiri and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants interfered with the Plaintiff's land, or that the land in issue belongs to the Plaintiffs. Further, that the said land was not purchased by the Plaintiffs from the government, as it does not form part of the block of flats that were sold by the government to the Plaintiffs. The contention is that the land belonged to Kafue District Council, and which land was lawfully allocated to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, who eventually sold it to the 3<sup>rd</sup> Defendant.

The contention by the 1<sup>st</sup>-3<sup>rd</sup> Defendants is that the land in contention was properly surveyed, and that there is a road in between the block of flats



occupied by the Plaintiffs, and the land subject of this suit, which demarcates the properties. It is also contended that the land in question is lawfully held on title by the 3<sup>rd</sup> Defendant.

The 1<sup>st</sup>-3<sup>rd</sup> Defendants agree that the Kafue District Council wrote to Mr Phiri and other intruders, and their position is that several meetings were held by the Council following the protests by the Plaintiffs, and it was indicated at those meetings that the land in issue does not belong to the Plaintiffs, and the Plaintiffs were cautioned to refrain from interfering with the Defendants quiet enjoyment of the land.

The 1<sup>st</sup>-3<sup>rd</sup> Defendants agree that the 3<sup>rd</sup> Defendant in July, 2014 approached the Plaintiffs, and informed them that she had bought the land from the 1<sup>st</sup> Defendant, and it is their defence that she asked the Plaintiffs to demolish the pit latrines that they had erected on her property. The 3<sup>rd</sup> Defendant denies that she was challenged by the Plaintiffs to produce documentation relating to her ownership of the land, and that she failed to do so. Her assertion is that it is the Plaintiffs that failed to prove their legal claims to the land, and that the 3<sup>rd</sup> Defendant has a certificate of title, which is conclusive ownership of the land.

The allegations that the 3<sup>rd</sup> Defendant took earthmoving equipment with the intention of demolishing the existing structures that included toilets on the property is said to be within the Plaintiffs peculiar knowledge, and she denies that the dispute between the Plaintiffs and the 3<sup>rd</sup> Defendants was brought to the 4<sup>th</sup> Defendant's knowledge. The 1<sup>st</sup>-3<sup>rd</sup> Defendants however aver that the 4<sup>th</sup> Defendant advised the Plaintiffs that the land legally belongs to the 3<sup>rd</sup> Defendant.

The 1<sup>st</sup>-3<sup>rd</sup> Defendants express ignorance over the assertion that the 1<sup>st</sup> Plaintiff's wife was dragged to court by the 3<sup>rd</sup> Defendant under cause No 2015/HP/0371 claiming ownership of the property, and that the said action was dismissed due to irregularities. Further, the assertion that from that action



the Plaintiffs learnt that the 1<sup>st</sup> Defendant had title to the land which he was assigned to survey, and that the 3<sup>rd</sup> Defendant equally had title to the property saying that she bought the land from the 1<sup>st</sup> Defendant, is within the Plaintiffs peculiar knowledge.

The allegations that the 1<sup>st</sup> Defendant abused his position and powers and took advantage of the Plaintiffs situation to create and offer the land to himself, and or influenced to be offered to himself the said land, and fraudulently obtained title to the land within the shortest period of time, is denied. The 1<sup>st</sup>-3<sup>rd</sup> Defendants deny that the land for which the 1<sup>st</sup> Defendant obtained the certificate of title belongs to the Plaintiffs, and formed part of the existing structures sold to them by the government, and has never been free. It is contended that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants did not fraudulently obtain title to the land, and their defence is that they were allocated the land in question by the Council after they successfully applied for it.

The 3<sup>rd</sup> Defendant asserts that she was directly allocated Plot No 882 by the Commissioner of Lands, after she applied for the same at Chilanga District Council. She also alleges that Plot No 882 is adjacent to Plot No 880, the property subject of this suit, which she bought from the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, as Plot No 882 was too small for her to build a dwelling house for her and her family. She contends that Plot No 880 was lawfully acquired as had that not been the position, the Plaintiffs would have claimed Plot No 882 if Plot No 880 truly belongs to them.

The 4<sup>th</sup> Defendant in its defence filed on 24<sup>th</sup> December, 2015 admits that the land in dispute is located within its jurisdiction, and contends that the allegations in paragraphs 6-39 of the statement of claim are within the Plaintiffs peculiar knowledge, and have nothing to do with the 4<sup>th</sup> Defendant. Further, the 4<sup>th</sup> Defendant denies any liability associated with the disposal of or dealings with the land in question, and it contends that the Plaintiffs do not make any specific claim or allegation against it in respect of the said land.



The 4<sup>th</sup> Defendant's contention is that the land in question is titled property, thereby making it a preserve of the Commissioner of Lands, and the Local Authority, being the 4<sup>th</sup> Defendant, should not be a party to these proceedings, as it does not administer such land. The 4<sup>th</sup> Defendant alleges that it has been wrongly added to these proceedings. The 5<sup>th</sup> Defendant did not enter appearance or file a defence.

At the trial, the Plaintiffs called three witnesses, while the 1<sup>st</sup> and 3<sup>rd</sup> Defendants testified and subpoenaed two witnesses, and the 4<sup>th</sup> Defendant indicated that it would not call any witnesses, but would file written submissions. The land in dispute was also visited by the court on 30<sup>th</sup> August, 2017.

PW1 was Morgan Maloza, the 3<sup>rd</sup> Plaintiff in this matter. His evidence was that he used to work for Zambia Wildlife and Parks Service, after having been employed in 1988. He told the court that when the government decided to sell the houses, he was staying at a block of flats that had ten families. PW1 further testified that the Department of Wildlife and the Department of Fisheries sat down and set up a Committee, and a surveyor named Mr Nyangulu was called to survey the land, and that after the survey was done, the Plaintiffs were given letters which they took to the Ministry of Tourism.

He stated that the Ministry of Tourism forwarded the letters to the Ministry of Works and Supply, and the Plaintiffs were thereafter given letters to take to the Ministry of Finance to pay the amounts stated in the offers. PW1 still in evidence stated that after they made payment, they were given letters to take to the Ministry of Lands, and they were offered the houses, and told to engage a surveyor apart from Mr Nyangulu. He went on to state that they were given a surveyor from the Ministry of Lands, the 1<sup>st</sup> Defendant, and his evidence was that when Mr Nyangulu surveyed the land, he left the land where the toilets are, which are communal.



He continued testifying that when they were given the 1<sup>st</sup> Defendant as the surveyor, the Plaintiffs would pay for the 1<sup>st</sup> Defendant's lunch and transport, and they awaited his completion of the survey so that they could be given offer letters, and beacons be placed as a demarcation of the area. However, nothing was forthcoming, and the next thing they saw were people who went to demolish the toilets. On being asked, the said people claimed the land as theirs. It was also stated that the people left, and then a man went with his wife, who is the 3<sup>rd</sup> Defendant, on a date that PW1 could not recall in the morning, with a grader from the National Service. They stopped him from doing the demolition, and he went to the police, and returned with two armed police men.

PW1 told the court that the police said that the land belonged to the man, and the Plaintiffs were called to go to Chilanga Police, and they gave statements. He added that they were sued the next day. On when they bought the houses, PW1 testified that it was in 2008, and he could not recall the dates that they had dealt with the 1<sup>st</sup> Defendant, or when they had quarreled with the 3<sup>rd</sup> Defendant. It was PW1's testimony that all the Defendants had been sued as the 1<sup>st</sup> Defendant was a surveyor on behalf of the government, and he sold the land without telling them. For the 2<sup>nd</sup> Defendant it was because she owned the land jointly with the 1<sup>st</sup> Defendant, and with regard to the 3<sup>rd</sup> Defendant, it was stated as being because she bought the land from the 1<sup>st</sup> Defendant.

PW1 further testified that the 4<sup>th</sup> Defendant had been sued as it owned the land in issue, while the 5<sup>th</sup> Defendant had been sued as the 1<sup>st</sup> Defendant worked for it. PW1 stated that they had disagreed with the 4<sup>th</sup> Defendant when it said that the 3<sup>rd</sup> Defendant owned the land in dispute, with their contention being that the land was for the National Parks and Wildlife, and was offered to them. With reference to pages 15 and 16 of the Plaintiffs bundle of documents, PW1 told the court that David Mubanga, a Senior Surveyor at the Ministry of Lands allocated them the 1<sup>st</sup> Defendant.



PW1 asked that the land be given back to the Plaintiffs, as they were sold the land, and that the land sold is where the toilets are. He went on to state that one cannot have land without a toilet.

In cross examination, PW1 testified that there are ten families at the flats that they had bought, and that only three of them had sued, as the land in issue affected only the three of them that were in the middle. He stated that there are three toilets, but that the ten families use them. PW1 further testified that the other seven families had been affected by the sale of the land where the toilets are, and that the letters of sale included the area where the pit toilets are.

When referred to page 24 of the Plaintiff's bundle of documents, PW1 stated that it was a letter that the 1<sup>st</sup> Plaintiff wrote to the Council Secretary on 14<sup>th</sup> July, 2008 and that the said letter referred to the site plan that was before the court, at page 17 of the Plaintiffs bundle of documents. PW1 agreed that the document had a date stamp for the Ministry of Works and Supply dated 22<sup>nd</sup> August, 2008, but stated that it did not have one from the Ministry of Lands. His explanation for the absence of the Ministry of Lands date stamp was that the said Ministry of Lands referred them to the Ministry of Works and Supply.

PW1 agreed that the site plan he had referred to was for the block of their flats, and did not indicate the toilets anywhere. He further agreed that the site plan had road reserves on either side of the flats. It was also PW1's evidence in cross examination that the toilets were after the road, and not on the road reserve. He stated that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants land was not across the road, but on the same land. Further, that there was a foot road before the toilets, although the document at page 17 showed that it was a road reserve. He denied that the road reserve separated the flats from the toilets.

PW1 further agreed that the Ministry of Lands gave them David Mubanga as the Surveyor in 2003, and he denied that the said David Mubanga received the monies at pages 15-16 of the Plaintiffs bundle of documents, stating that it was the 1<sup>st</sup> Defendant. Whilst acknowledging that the Plaintiffs did not have a



certificate of title for the land that they claimed, and agreeing that the 3<sup>rd</sup> Defendant had a certificate of title for the same, PW1 maintained that they still claimed the land.

When cross examined further, PW1 testified that the money was given to David Mubanga after the Plaintiffs went to the Ministry of Lands and saw him. He also told the court that he was not aware that at the time the 1<sup>st</sup> Defendant was not working for the Ministry of Lands, as when David Mubanga referred them to the 1<sup>st</sup> Defendant, it was at an office within the Ministry of Lands, and that this was after David Mubanga had called the 1<sup>st</sup> Defendant to his office, and the Plaintiffs thereafter proceeded with him to Chilanga.

His evidence was further that the Department of Wildlife built the toilets, and he agreed that he had built another house on the land that he had been offered, after the Council allowed him to do so. PW1 stated that David Mubanga completed the survey works, and he produced a site plan, which was at pages 17 and 18 of the Plaintiffs bundle of documents. When referred to page 16 of the Plaintiffs bundle of documents, PW1 agreed that the document stated that he and David Mubanga prepared the site plan for the flats, but his evidence was that while the document showed so, David Mubanga prepared that document alone, although he was present.

PW1 stated that he had no problems with the site plan that was prepared by David Mubanga. His evidence was also that he was not aware that the land where the toilets are is a common area. His evidence as regards the letter at page 30 of the Defendants bundle of documents, was that it was a letter from Chilanga District Council, but he denied that they live in Sangalala, and that their flats were numbered 207. PW1 agreed that they went to the police where they were told that the land belonged to the 3<sup>rd</sup> Defendant, and that they should go to the Council to resolve that matter.

He told the court that the Council said that they would call them, but the 3<sup>rd</sup> Defendant sued. PW1 maintained that they had engaged the 1<sup>st</sup> Defendant to



survey the land for them, but he did not do so, and he was nowhere to be seen. He stated that they went back to the Ministry of Lands who said that they would call them.

PW2 was Peggy Kauta, the 2<sup>nd</sup> Plaintiff in this matter. She confirmed that there are ten flats on the block that they bought. Her evidence was that there was no space to build toilets there, and that is how toilets were put up in front of the houses. She asked that the Plaintiffs be given the land where the toilets are, stating that the said land was sold to other people who obtained title for the same.

In cross examination, PW2 testified that the land in dispute is in front of the flats. She stated that the 1<sup>st</sup> Defendant acquired title to the said land after they asked him to survey it, which was fraudulent. She confirmed that David Mubanga was the initial surveyor, but that he had referred them to the 1<sup>st</sup> Defendant. PW2 also testified that initially there was one toilet that the ten families used, but it fell down, and she constructed two toilets that were demolished. PW2 denied having constructed a house behind her flat, or that the others had built toilets behind their flats. Her evidence was that only the 3<sup>rd</sup> Plaintiff had constructed behind his flat.

PW2 could not say whether there was space behind the flats, and her evidence was that the block of flats was between two roads, and that one of the roads had been closed by the person who had built on the other side, and which road went to the Council. She added that it was a foot path, and not a road. PW2 also testified that there is a tap at the 3<sup>rd</sup> Plaintiff's house which all the people in other flats use, as there is no running water in the flats. She also testified that there is no water across the flats, and that she was offered her flat in 1995.

The third witness was the 1<sup>st</sup> Plaintiff. He testified that he bought one of the flats after they were offered to buy the same by the National Parks and Wildlife through the Ministry of Lands. PW3 further testified that the block of flats was



not surveyed and they were advised to engage a surveyor, and they went to the Ministry of Lands where they saw David Mubanga, who introduced them to the 1<sup>st</sup> Defendant. However, the 1<sup>st</sup> Defendant disappeared, and they went back to David Mubanga who did the survey and prepared the site plan, and they started waiting for the survey diagrams from the 1<sup>st</sup> Defendant.

It was further his evidence that the next thing they saw were people who went to construct on the land, and someone went with a grader to demolish the toilets. This prompted the Plaintiffs to go to Chilanga District Council to complain, and were advised that they would be called. Then the 3<sup>rd</sup> Defendant sued them. PW3 asked that they be given back the land as they use it as a communal toilet. He told the court that the toilets had been there since he was born, and from the time of the National Parks and Wildlife. His evidence was also that the 1<sup>st</sup> Defendant sold the land that they asked him to survey.

When cross examined, PW3 testified that the three Plaintiffs had sued on behalf of the other seven families that had not sued. He agreed that the other seven families use the remaining two toilets as well, following the demolition of the others. PW3 also told the court that when they were sold the flats, they were supposed to have been given the toilets as well. He went on to state that the land where the toilets are was supposed to be given to them, as they were waiting for the survey diagrams, and letters to the Council to that effect.

Still in cross examination, PW3 stated the 1<sup>st</sup> Defendant was initially engaged, and when he disappeared, David Mubanga came in, and that the 1<sup>st</sup> Defendant was not paid anything for the survey. PW3 agreed that Mr Phiri who owns land on the disputed land, had not been sued, and that his land which had been developed and he resides in, is next to the 3<sup>rd</sup> Defendant's. PW3 also stated that the toilet that was on Mr Phiri's land was demolished, and he could not confirm if the 1<sup>st</sup> Defendant had sold the land to Mr Phiri. It was also his testimony that the Council had advised them to go for the 1<sup>st</sup> Defendant, and leave Mr Phiri.



This witness like PW1 testified that they were happy with the site plan that David Mubanga gave them, and that they got the letters of offer based on that site plan. He further told the court that there are two official roads, one behind the flats and one in front them, and a foot path in front of the flats. He could not say if the site plan included the toilets, as he is blind, and did not see it. He did however state that David Mubanga did not explain the area covered by the site plan. PW3 agreed that he had extended the flat to include a spare bedroom and kitchen and he stated that hygienically there is no space to put a toilet there.

PW3 further stated in cross examination that the flats just have a sitting room and a bedroom, and that there are plants fenced around the block of flats, with the road outside the plants. His explanation was that the plants were put there as people used to pass there.

When cross examined by Counsel for the 4<sup>th</sup> Defendant, PW3 testified that the 4<sup>th</sup> Defendant was not involved in the surveying of the area, and that it was Kafue District Council that wrote to Mr Phiri over intrusion on the land.

In re-examination, PW3 clarified that Sangalala is a few kilometres from Block 207 where the Plaintiffs are.

The first defence witness was the 3<sup>rd</sup> Defendant. She testified that she bought the property from the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in 2014, and that the certificate of title at pages 24 to 25 of the 1<sup>st</sup> to 3<sup>rd</sup> Defendant's bundle of documents was issued to her in respect of the land. Her evidence was that the land was sold to her at K20, 000.00, and it is Stand No 880, Chilanga. Still in her testimony, the 3<sup>rd</sup> Defendant stated that two weeks prior to commencing the construction, she went to the Plaintiffs who had planted vegetables and had put up two small toilets on the land, and told them to clear them, as she wanted to start building. She explained that they had told her that she had done well, as they were stoning anyone who went there, as they wanted the land.



The 3<sup>rd</sup> Defendant went on to testify that two weeks later she hired a grader from the National Service to prepare the land, and on arrival she was met by stones and sticks at the instance of the three Plaintiffs. It was stated that the Plaintiffs said that they would not allow the grader, and DW1 went to Chilanga Police who advised her to report to the Council. There, she was told that it was not first time that the Plaintiffs had behaved like that. Her evidence was further that later they sat to discuss the matter at the Council, and it was found that the 1<sup>st</sup> Defendant owned the land which she had bought.

The 3<sup>rd</sup> Defendant told the court that she was referred to the police so that peace could prevail, and the police advised her to sue, and that is how she had sued under cause No 2015/HP/0371. She explained that she had drafted the documents in person, and the matter was dismissed, as the documents were not correct. When she engaged counsel, the Plaintiffs sued, and obtained an order of injunction, and the result was that she had been unable to develop the property. The 3<sup>rd</sup> Defendant testified that when she bought the land it had two small toilets.

She was not cross examined by Counsel for the 4<sup>th</sup> Defendant. In cross examination by Counsel for the 1<sup>st</sup>- 3<sup>rd</sup> Defendants, she testified that she went to the land in dispute in July, 2014. The 3<sup>rd</sup> Defendant agreed that she has another piece of land near the Plaintiffs property, and that when she told them to clear the vegetables and the toilets, the 1<sup>st</sup> Plaintiff's wife told her that she had done well as they had stoned others who had tried to build there without asking. The 3<sup>rd</sup> Defendant also testified that on the first day she was welcomed, and that she was stoned two weeks later when she went back, and the Plaintiffs claimed the property as theirs.

It was her evidence that she was with officers from the Zambia National Service whom she had hired to clear her plot, but she denied that they demolished the toilets that were there. The 3<sup>rd</sup> Defendant could not recall the date when she bought the property, but her evidence was that a contract of sale was executed,



and she was not represented by Counsel in that transaction. Further in cross examination, the 3<sup>rd</sup> Defendant testified that the contract of sale was not before court, and she stated that the 1<sup>st</sup> Plaintiff's wife claimed ownership of the property, and that is why she had sued her.

She could not recall how much time elapsed between the execution of the contract of sale and the assignment being executed, but her evidence was that the assignment that was before the court was registered on 15<sup>th</sup> September, 2014, and it was at pages 19-23 of the 1<sup>st</sup>-3<sup>rd</sup> Defendant's bundle of documents. The 3<sup>rd</sup> Defendant agreed that when she went to clear the land in July, 2014, the land was not yet hers, and she further stated that the date stamp at page 5 of the 1<sup>st</sup>-3<sup>rd</sup> Defendant's bundle of documents was not clear so she could not tell if it was from Chilanga District Council. She also agreed that the document at page 6 of the 1<sup>st</sup>-3<sup>rd</sup> Defendant's bundle of documents had no date stamp from any Council, and the same went for the documents at pages 7 and 8 of the said bundle of documents.

When referred to the document at page 30 of the 1<sup>st</sup>-3<sup>rd</sup> Defendant's bundle of documents, the 3<sup>rd</sup> Defendant testified that it was dated 24<sup>th</sup> November, 2014, and was addressed to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, and that at the time she did not have title to the land. She agreed that the said letter was not copied to the Plaintiffs, and that she did not serve them a copy of the same. The 3<sup>rd</sup> Defendant also agreed that paragraph 3 of that letter stated that the Council had discovered that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had title to the property. She could not say the circumstances under which the 1<sup>st</sup> and 2<sup>nd</sup> Defendants obtained title to the property, but her evidence was that they so obtained title, before they sold the property to her.

Her evidence was further that she built a house there in 2005, and she was therefore conversant with the area. The 3<sup>rd</sup> Defendant stated that the plot in issue was bare land, and she did not know who owned it, and that the Plaintiffs flats were across the road on the left side. The 3<sup>rd</sup> Defendant could



not say what toilets the Plaintiffs used, or that the Plaintiffs flats had no toilets inside their houses. Still in cross examination, the 3<sup>rd</sup> Defendant told the court that she did not know the 1<sup>st</sup> Defendant prior to him selling her the land, adding that her neighbor Aggie informed her that the 1<sup>st</sup> Defendant was selling the land. She stated that she did not come across any advertisement from the Ministry of Lands or the Council advertising land in the area for sale.

DW2 was the 1<sup>st</sup> Defendant. He testified that he was the title holder to the property known as Stand No 880 Chilanga, and that he acquired the said land in the year 2000, after he applied for it at the Kafue District Council, as seen on the document at page 1 of the 1<sup>st</sup>-3<sup>rd</sup> Defendants bundle of documents. The 1<sup>st</sup> Defendant told the court that after he made the application, he was called to attend interviews, and recommendations were made to the Ministry of Lands for him to be offered the property by the Kafue District Council.

He further testified that the plot was already in existence as it had been numbered by the Ministry of Lands, and that he was given the letter of offer in 2014, which letter was at page 9 of the 1<sup>st</sup>-3<sup>rd</sup> Defendant's bundle of documents. The 1<sup>st</sup> Defendant stated that he decided to sell the said piece of land as he already had another piece of land on which he was constructing, and wanted to complete. His evidence was that he sold the land to the 3<sup>rd</sup> Defendant, and before they could complete the process of changing ownership, they received a complaint of harassment prompting them to write to the Chilanga District Council. That the 3<sup>rd</sup> Defendant was the complainant even though the property was still in the names of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

However, the response from the Council came after the property had been changed into the 3<sup>rd</sup> Defendant's name, and as they had already sold her the property, they had no claim to it. He identified the document at page 18 of the 1<sup>st</sup>-3<sup>rd</sup> Defendants bundle of documents as the letter that they wrote to Kafue District Council, and the one at page 30 of the said bundle of documents as the reply from the Kafue District Council.



The 1<sup>st</sup> Defendant denied having fraudulently acquired the piece of land, stating that he acquired it before he met the Plaintiffs at Mulungushi House, after Mr Mubanga introduced them to him, and asked him to help them with their issues. He agreed that he went with the Plaintiffs to property in dispute and upon checking the documentation that they had, he found that it was challenge, as the block of flats that they occupied had no property number. He testified that he had advised the Plaintiffs that since the flats were institutional houses, they should go to the Ministry of Works and Supply and be given a plot number. He had noted that the Plaintiffs neighbours who were also beneficiaries of government houses, and their properties had been surveyed by Mr Nyangulu, and had plot numbers.

The 1<sup>st</sup> Defendant stated that on that basis he declined to take up the job, and he would thereafter meet the Plaintiffs at the Ministry of Lands, and learnt that they had letters of offer, yet they had testified that they were waiting for him to go back and complete the job. With reference to page 5 of the 1<sup>st</sup>-3<sup>rd</sup> Defendant's bundle of documents, the 1<sup>st</sup> Defendant told the court that it was the numbered site plan from the Ministry of Lands which showed the block of flats, while the one at page 6 was a working plan prepared by the Surveyor and was extracted from the site plan for purposes of doing the survey, showing the properties on the ground.

He stated that it showed the numbered properties including Stands 879, 880 and 881, which were independent properties from those at page 5. The 1<sup>st</sup> Defendant further testified that page 7 of the said bundle of documents was the same site plan as the one on page 5, except that it showed details of the subdivision. He went on to testify that a common lease is prepared where there is a block of flats, and has common areas for parking and movement. That in this case, there was nothing in common as the flats were independent.

He told the court that page 6 of the 1<sup>st</sup>-3<sup>rd</sup> Defendants bundle of documents showed the site plan on page 5 on the eastern side of the road, adding that



they were two independent sites, and that Alex Chikwari, a private Surveyor prepared it, and he signed as having surveyed the area. The 1<sup>st</sup> Defendant stated that he acquired the title deed for the property which was at page 10 of the 1<sup>st</sup>-3<sup>rd</sup> Defendant's bundle of documents in 2014, and it was for Stand No 880, Chilanga. It was further his evidence that at page 15 of the said bundle of documents was the survey diagram describing the property in relation to its neighbours, with Stand No 879 on the eastern side, while 881 was on the other side.

He also testified that at page 5 of the said bundle of documents was the boundary, being the road separating the properties, and that the Plaintiffs property was on the other side of Stand No 880, after the road reserve. The 1<sup>st</sup> Defendant told the court when the Plaintiffs engaged him as a surveyor, he was working at ACM Land Survey, where he still works.

During the testimony of the 1<sup>st</sup> Defendant, the court moved to view the land in dispute, and found the structures as portrayed at pages 5 and 6 of the 1<sup>st</sup>-3<sup>rd</sup> Defendants bundle of documents, with the Plaintiffs block of flats being opposite Stands 879, 880 and 881. The 1<sup>st</sup> Defendant told the court that Stand No 881 belonged to Aggie who initially bought it from Maggie Mulenga, and that the house on that property had a toilet inside.

In cross examination by Counsel for the 4<sup>th</sup> Defendant, the 1<sup>st</sup> Defendant testified that he had applied for the plot at Kafue District Council where he attended interviews. When cross examined by Counsel for the Plaintiffs, the 1<sup>st</sup> Defendant's testimony was that page 5 of the 1<sup>st</sup>-3<sup>rd</sup> Defendants bundle of documents did not show the road reserve. He stated that the road was created by the planners from the Kafue District Council, even though there was no document to that effect. He agreed that there was a water pipe at the end of the road reserve after the block of flats, but he could not say for how long it had been in existence.



road was not indicated, and he maintained that this was the position even with regard to page 6 of the 1<sup>st</sup>-3<sup>rd</sup> Defendants bundle of documents.

The 1<sup>st</sup> Defendant went on state that there was need for an approved diagram for the plots, and while stating that the document at page 8 of the 1<sup>st</sup>-3<sup>rd</sup> Defendants was a general plan, he told the court that it had not been approved. He explained that there was need for a general plan that should have been taken to the Town and Country Planning, and he stated that site plans are prepared by Planners at the District Council or Lusaka Province Planning Department, and are thereafter submitted to the Ministry of Lands for numbering. That after re-numbering is done, a site plan is used by Surveyor to survey properties according to the plan, and the survey diagram is then approved by the Surveyor General after the diagram is given a survey record number.

The 1<sup>st</sup> Defendant told the court that in the event of any queries over approval of a survey, the survey record number is the reference, and that in this case at page 15 of the 1<sup>st</sup>-3<sup>rd</sup> Defendants bundle of documents there was a survey record number indicated as 52/2012, indicating that the survey was conducted in the year 2012, and the drawing at that page extracted, and which forms part of the certificate of title. It was further the 1<sup>st</sup> Defendant's evidence that had he done the survey in 2004, as requested by the Plaintiffs, there would have been a survey diagram.

Still in evidence, the 1<sup>st</sup> Defendant testified that procedure was followed in acquiring the land, and his testimony was that page 8 of the 1<sup>st</sup>-3<sup>rd</sup> Defendants bundle of documents showed the property number for the block of the Plaintiffs flats. He explained that an architect does a survey on a common leasehold, and not a cadastral surveyor. The 1<sup>st</sup> Defendant further stated that he asked the Plaintiffs to provide a site plan, so that he could do the survey, but they did not. He agreed that the letter at page 23 of the Plaintiffs bundle documents



authored by the 1<sup>st</sup> Plaintiff to the Council Secretary of Kafue District Council indicated that the land in front of the blocks served as an ablution block.

The 1<sup>st</sup> Defendant further agreed that the 1<sup>st</sup> Plaintiff wrote the letter at page 24 of the Plaintiffs bundle of documents to the Council Secretary, Kafue District Council on 14<sup>th</sup> July, 2008, in which he complained over allocation of the land in front of the block of flats, which they used as toilets, to people. It was also stated that the letter at page 26 of the Plaintiffs bundle of documents dated 9<sup>th</sup> September, 2014, and authored by the Acting Council Secretary of Chilanga District Council to the Council Secretary, Kafue District Council asked Kafue District Council to avail the occupants of block of flats including the Plaintiffs extracts of the minutes, so that the land dispute could be resolved.

At page 27 of the Plaintiffs bundle of documents, Kafue District Council on 24<sup>th</sup> September, 2014 wrote back to Chilanga District Council stating that they had no records relating to Block 270 Chilanga, and that Chilanga District Council should resolve the issue. The 1<sup>st</sup> Defendant told the court that David Mubanga used to be his workmate, and they both worked in the Survey Department at the same level, but in different sections. He maintained that David Mubanga introduced him to the Plaintiffs so that he could survey their land.

The 1<sup>st</sup> Defendant agreed that although his wife's name appeared on the certificate of title at pages 10 and 11 of the 1<sup>st</sup>-3<sup>rd</sup> Defendants bundle of documents, the offer at page 9 of the same documents only reflected his name. He further agreed that while in September, 2014 the title moved to the 3<sup>rd</sup> Defendant from the 1<sup>st</sup> and 2<sup>nd</sup> Defendants names, there was no application fee in the bundle of documents.

In re-examination, he testified that the tampered with beacons could be located using the information in the survey record. He could not say who prepared the document at page 5 of the 1<sup>st</sup>-3<sup>rd</sup> Defendants bundle of documents, being the site plan, and his evidence was that its dimensions were not indicated. Further,



that page 5 showed that the site plan was numbered on 29<sup>th</sup> April, 2008. He stated that the document at page 6 was a working plan of Stands 879-881 and was part of the site plan, while page 8 showed the actual dimensions achieved after the survey was done. The 1<sup>st</sup> Defendant also confirmed that he could not carry out the survey as the Plaintiffs did not have a site plan that was numbered, and that an architect carries out common lease plans, as the boundaries in such cases are shared, and that architects have the mandate to do so.

He stated that he had lost the receipt that showed how much he had paid for the land, and stated that page 1 of the 1<sup>st</sup>-3<sup>rd</sup> Defendants bundle of documents showed that he applied for the land in 2002, and that he indicated the plot number on the application, as the plot was already in existence, but that the land was not surveyed at the time. The 1<sup>st</sup> Defendant further testified that he had asked the Lands Officer to include his wife as a joint holder on the title deed.

DW3 was Paul Phiri, a Senior Field Survey Officer at the Ministry of Lands in the Survey Department. He told the court he had worked in the Survey Department for twenty-three (23) years at the time, and the plot in dispute was 880, and some other properties. Further in his testimony, DW3 explained that Chilanga is surveyed and that the beacons have been placed on the ground. He told the court that the survey was approved on a date he could not recall, and that a private surveyor, Alex Chikwari did the survey.

He went on to testify that a survey gets guidance from an approved site plan which should have been numbered through the office of the Commissioner of Lands, as the surveyor interprets the information on the site plan onto the ground. DW3 stated that the planning authority proposes the site plan, and prepares it, adding that individuals can propose site plans which are submitted to the planning authority, and which conducts verification on the ground. Once satisfied, the planning authority approves the site plan. DW3 told the court



that the site plan for Stand No 880 was in the custody of the Surveyor General, and that he had not brought it to court as he thought it had already been produced.

He further testified that as a department, they did not see anything wrong with the way the survey was done in this matter, and stated that once the planning authority submits the site plans to the Commissioner of Lands, that office verifies and approves, and they are then submitted to the Surveyor General for numbering.

In cross examination by Counsel for the 4<sup>th</sup> Defendant, DW3 testified that he was aware that Chilanga District Council had been sued. He stated that a perusal of the site plan showed that Chilanga District Council was not involved, as the Lusaka Province Planning Authority stamp was not on the said site plan.

When cross examined by Counsel for the Plaintiffs, DW3 stated that Alex Chikwari surveyed Stand No 880 using the site plan numbered by the Commissioner of Lands, and the Commissioner of Lands should therefore have site plans. He stated that the planning authority is the Lusaka Province Planning Authority, and that the local authority plays a role through the office of Director of Engineering, who gives approval for planning. He stated that he was assigned to go on site when the matter was before Judge Mchenga, and he went with the parties, and he had shown the boundaries for Stand No 880, specifying three beacons.

DW3 testified that the beacons were not found and they were replaced, being the two which defined the road frontage, on the second visit. He added that the one at the back which fell could not be replaced, as a house sits on it, on the south western side. When referred to the document at page 17 of the Plaintiffs bundle of documents, DW3 stated that it was a site plan, but that it was not approved by the office of the Commissioner of Lands or the Surveyor General, as it did not have the stamps for those two offices. He explained that a surveyor



cannot use a site plan that is not approved to survey land. His evidence was that the site plan at page 17 of the Plaintiffs bundle of documents was approved by the Ministry of Works and Supply, but he agreed that when a survey is being undertaken, the interests of those people on the ground should be taken into account.

Whilst agreeing that he had been subpoenaed in this matter, DW3 told the court that he had not said anything in relation to Stand No 270 Chilanga, as he had not brought any documents in compliance with the subpoena, as he thought that the matter was coming up for continued trial. He testified that the drawing at page 46 of the Plaintiffs bundle of documents showed that the property 880 was surveyed, and the diagram number allocated in 2012. When referred to pages 46 and 49 of the Plaintiffs bundle of documents, DW3 stated that at page 47 the drawing number was 1469/2012, while at page 53 on the assignment it was indicated as 1469/2014.

DW3 testified that he did not deal with Stand No 270 Chilanga before he went to verify the beacons, and he agreed that he had worked with the 1<sup>st</sup> Defendant in the same department, but could not recall under what circumstances the 1<sup>st</sup> Defendant left the Ministry. It was further DW3's evidence that when one applies for land, they indicate their names, which names will appear on the certificate of title, and his evidence was that one cannot instruct verbally to have another person added on a certificate of title.

In re-examination, DW4 testified that the document at page 17 of the Plaintiffs bundle of documents was prepared by the Ministry of Works and Supply and the same document was part of the one at page 18 of the same bundle of documents, and was a common leasehold. He stated that Architects or Valuation Surveyors prepare such documents, and once prepared, it goes straight to the office of the Registrar of Lands and Deeds who lodges it with the office of the Surveyor General for the purpose of giving it a number, and that in



this case it was not done. He went on to state that the Director of Buildings measures the structures on the ground for accuracy.

DW3 further stated that he went to the land in dispute twice to verify the boundaries, but on the first occasion he did not have the GPS, and he could not locate the boundaries. On the second occasion, he had the GPS and he replaced the front two beacons which were critical, and he determined the position of the third beacon. Further in re-examination, DW3 stated that the Council gives approval for the acquisition of land by ensuring the identification of the site, preparation of the site plan and that the actual applications are in order. Further, that the Council ensures that the land applied for has no encumbrances.

He maintained that the document at page 17 of the Plaintiffs bundle of documents was not approved by the Surveyor General, as it has no number. It was also his evidence that when a surveyor goes on the ground they follow the approved site plan, and should interpret the situation on the ground. He added that if it is discovered that the measurements are affecting others, the survey has to be adjusted according to the situation on the ground. Whilst agreeing that the diagram number 1469 of 2012 at page 36 of the Plaintiffs bundle of documents was the same as that at page 38, DW3 agreed that the said number was different from that at page 41 of the Plaintiffs bundle of documents, being 1469 of 2014. He could not say why the years were different on the documents.

The last witness called was Musamvu Wanki, also a subpoenaed witness. He told the court that he is a Senior Lands Officer at the Ministry of Lands, having worked in the Lands Department for seventeen (17) years. In relation to his duties, DW4 told the court that he advises the public on land alienation procedures, issues offer letters for land to successful applicants, and he scrutinizes applications and or recommendations for land from the Council in order to ensure that everything is in order before approval. DW4 further told the court that he prepares lease agreements and examines leases to ensure



that they are properly prepared. With regard to this matter, DW4's testimony was that the properties in dispute were Stand No 880 Chilanga and Stand No 270 Chilanga.

He stated that the Commissioner of Lands had been subpoenaed, and he was representing that office. DW4 went on to testify that the subpoena required him to produce documents pertaining to the two stands, as well as Stands 879 and 881. DW4 told the court that Stand No 881 was allocated to the 1<sup>st</sup> Plaintiff, and his evidence was that he had the Lands Register for Stands 879, 880 and 881 and 270. However, he had been unable to bring the Lands Register for Chila/270/CL/1-10 as the properties were not yet on title. It was his testimony that he had the site plans for CHILA/270/CL/1-10 and for Stands 879-883, and that he had a photocopy of the diagram for Stand No 880 Chilanga.

On how land is alienated, DW4 testified that the procedure for land alienation is stipulated in the Lands Circular No 1 of 1985. He explained that the said circular states that when Councils create plots, they are required to submit the lay out plan to the Commissioner of Lands for numbering, and the Commissioner of Lands on being satisfied that the plans are in order, requests the Surveyor General to number the site plan.

Once the site plan is numbered, the Council will advertise, requesting members of the public to apply for the plots, and successful applicants are thereafter recommended to be allocated the land to the Commissioner of Lands. It was stated that the Commissioner of Lands on receipt of the applications, issues letters of offer to successful applicants, and that the said offer letters give conditions for the land being given out, one being the payment of the lease charges.

Still on land alienation, DW4 told the court that once lease charges are paid, the properties are surveyed, and the survey diagrams are remitted to the Commissioner of Lands so that the leases are prepared, which the lessees sign, and the Commissioner of Lands also signs on behalf of the President. He added



that thereafter the leases are lodged at the Lands and Deeds Department for title deeds to be prepared.

On what the Commissioner of Lands considers when approving recommendations for the allocation of land, DW4 told the court that these are whether the applicant qualifies to own land in Zambia, that is whether they are Zambian, and are above the age of twenty-one (21) years. He further testified that the layout plan originates from the Council being the agents that plan and are the planning authorities. DW4 explained that Stands No 879-881 were properties that were created by the Council, and were approved for numbering by the Commissioner of Lands. Thereafter, the plots were offered to the successful applicants, and upon the land being surveyed, the applicants were issued with certificates of title.

With regard to CHILA/270/CL/1-10, it was DW4's evidence that the property was owned by the government, who through the Ministry of Works and Supply recommended to the Commissioner of Lands that it be offered to the sitting tenants. He stated that after the sitting tenants were recommended to the Commissioner of Lands to be offered the properties, letters of offer were issued to them, after they were approved. However, the title deeds had not yet been issued to the sitting tenants.

DW4 still in evidence explained that he had no information as to when Stands No 879-881 were created, but stated that they were numbered on 30<sup>th</sup> November, 2001 as per the site plan, a copy of which was on the file. His testimony was that he could not find the original at the Lands Registry in the Lands Department, but stated that a site plan has a date stamp from the Council. DW4 continued stating that when it is numbered the Surveyor General stamps it, and indicates the stand numbers allocated to the plots. Further, that the person numbering the plots also signs the same.

On the letters of offer, DW4 stated that they have the property numbers, the name of the offeree, the lease charges and the name of the person who issues



the offer letter on behalf of the Commissioner of Lands, as well as their signature, and the date when the offer is generated.

As regards the certificate of title, it was stated that it will have a lease which should be signed by the lessee and the Commissioner of Lands, and has a page headed certificate of title with the names of the title holder, and is signed by the Registrar. It also has a date for the commencement of the lease, and there is a diagram in the said certificate of title which has a number, property number, the size of the plot, and the signature of the Surveyor General. With reference to the bundle of documents from the Commissioner of Lands dated 24<sup>th</sup> May, 2018, DW4 testified that page 1 of that document was the sketch plan for Stand No 270 Chilanga, while the diagram for the said Stand was at page 2.

He further testified that Stand No 270 is located near the Lusaka-Kafue Road or the Great North Road, and his evidence was that the said site plan was prepared in 1999 by the Surveyor General. It was also stated that the stand is 2397 square metres in size, and the diagram number for the Stand is 1387/2001. The said Stand was signed by the Surveyor General who approved the survey done by the surveyor R. Mwanza, a government Surveyor and it was prepared on 27<sup>th</sup> February, 2001.

DW4 testified that pages 9-12 of the Commissioner of Lands bundle of documents was the lease that was executed between the President and Vantra Hafiza, while page 13 was the Lands Register for Stand No 270, Chilanga, and page 16 reflected the current owner of the Stand as Elias Dudhia Vantra. With regard to property number 879, DW4 testified that page 17 of the said bundle of documents was the Lands register which reflected that Abraham Phiri holds the Stand on a fourteen (14) year lease.

Further, that page 18 of the said bundle of documents shows that Christopher Chitete holds Stand No 881 Chilanga on a ninety-nine (99) year lease effective 1<sup>st</sup> September, 2002, while page 19 was for Stand No 882 and Chileshe Jenny



and Julius Chileshe hold that property on a ninety-nine (99) year lease effective 1<sup>st</sup> December, 2004. He added that the property was nine hundred and ninety (990) square metres in size, and it was surveyed in September, 2009, by J.Minango. This witness told the court that pages 4 and 5 of the Commissioner of Land's bundle of documents was the certificate of title for Stand No 882 Chilanga in the name of the 3<sup>rd</sup> Defendant, stating that the original title deed went missing, and the owner applied for a duplicate certificate to be issued.

DW4 explained that the survey diagram for Stand No 879 Chilanga was at page 5 of the said bundle of documents, and it was surveyed in June, 2008 by a Surveyor called Chibwani, and the Surveyor General approved it on 9<sup>th</sup> March, 2012. The survey diagram for Stand No 881 Chilanga was said to be at page 6 of the said bundle of documents, and that it was also surveyed by Chibwani in June 2008, and the Surveyor General approved it on 9<sup>th</sup> March, 2012. He stated that page 7 of the said bundles was the certificate of title for Christopher Chitete for Stand No 881 Chilanga issued on 22<sup>nd</sup> June, 2002, while page 8 was the certificate of title for Stand No 879 in the names of Abraham Phiri issued on 9<sup>th</sup> July, 2012.

DW4 told the court that whether there was a common leasehold or Stand No 270, but that there could only be one property number, being Stand No 270 Chilanga. He continued stating that the common leasehold could only be numbered from a Stand, which did not exist elsewhere, and therefore, it was an anomaly to use a property that was already on title to number it again, as a common leasehold, as the two properties existed separately.

When cross examined by Counsel for the 4<sup>th</sup> Defendant, DW4 testified that the recommendations from the Chilanga District Council were not before the court, but he agreed that the properties were allocated by the Commissioner of Lands, without recommendation, as he had not produced the said recommendations. He however stated that it was not fatal as allocation may be done without recommendations.



In cross examination by Counsel for the Plaintiffs, DW4's testimony was that he agreed that he had not talked about Stand No 880, or produced documents in relation to it, although he was aware that it was in contention. He denied that he had deliberately left out the said Stand, stating that it was because he could not find the original documents, as Counsel had objected to the copies. DW4 went on to state that while he had difficulties finding the documents for Stand No 880, they existed, but that their record keeping had let them down, as even what he had brought to court was not complete.

DW4 agreed that the Ministry of Lands generated the letter of offer to the 2<sup>nd</sup> Plaintiff which was at page 8 of the Plaintiffs bundle of documents with the property number as CHILA/270/CL/3 on 23<sup>rd</sup> September, 2008. He also testified that Stand No 270 was created for Mrs Vantra after the property was offered to Kachingwe Silungwe on 1<sup>st</sup> January, 1998. DW4 agreed that CHILA/270/CL/3 exists in Chilanga, as does CHILA 270, and his evidence was that the two properties were not the same, and they were not next to each other.

When referred to page 1 of the Commissioner of Lands bundle of documents, being the sketch plan for Stand No 270 Chilanga, he testified that this parcel of land is on the left side as one goes to Kafue from Lusaka. He agreed that there was an anomaly in numbering two stands as 270 by the Surveyor General, and he also agreed that Stand No 270 for Mrs Vantra had nothing to do with the Plaintiffs claims.

DW4 further agreed that the survey diagram at page 2 of the Commissioner of Lands bundle of documents was based on the sketch plan at page 1, and added that the said survey diagram relating to the stands before court should have been based on site plan, although either could be used to produce a survey diagram. This, he qualified by stating that there was a sketch plan as the land was on a fourteen (14) year lease. DW4 further told the court that a site plan is approved by the Provincial Planning Authority, and on approval by



they were two independent sites, and that Alex Chikwari, a private Surveyor prepared it, and he signed as having surveyed the area. The 1<sup>st</sup> Defendant stated that he acquired the title deed for the property which was at page 10 of the 1<sup>st</sup>-3<sup>rd</sup> Defendant's bundle of documents in 2014, and it was for Stand No 880, Chilanga. It was further his evidence that at page 15 of the said bundle of documents was the survey diagram describing the property in relation to its neighbours, with Stand No 879 on the eastern side, while 881 was on the other side.

He also testified that at page 5 of the said bundle of documents was the boundary, being the road separating the properties, and that the Plaintiffs property was on the other side of Stand No 880, after the road reserve. The 1<sup>st</sup> Defendant told the court when the Plaintiffs engaged him as a surveyor, he was working at ACM Land Survey, where he still works.

During the testimony of the 1<sup>st</sup> Defendant, the court moved to view the land in dispute, and found the structures as portrayed at pages 5 and 6 of the 1<sup>st</sup>-3<sup>rd</sup> Defendants bundle of documents, with the Plaintiffs block of flats being opposite Stands 879, 880 and 881. The 1<sup>st</sup> Defendant told the court that Stand No 881 belonged to Aggie who initially bought it from Maggie Mulenga, and that the house on that property had a toilet inside.

In cross examination by Counsel for the 4<sup>th</sup> Defendant, the 1<sup>st</sup> Defendant testified that he had applied for the plot at Kafue District Council where he attended interviews. When cross examined by Counsel for the Plaintiffs, the 1<sup>st</sup> Defendant's testimony was that page 5 of the 1<sup>st</sup>-3<sup>rd</sup> Defendants bundle of documents did not show the road reserve. He stated that the road was created by the planners from the Kafue District Council, even though there was no document to that effect. He agreed that there was a water pipe at the end of the road reserve after the block of flats, but he could not say for how long it had been in existence.



The 1<sup>st</sup> Defendant also stated that the road did not go further than the water pipe, and it was further his evidence that Stands 880 and 881 were created by the Kafue District Council on 30<sup>th</sup> November, 2001. His evidence was that he did not go the site prior to the plots being created, and he did not know that there were toilets there. He agreed that he used to work at the Ministry of Lands in the Survey Department, having been employed in 1991 as a Clerk in that department. The 1<sup>st</sup> Defendant also agreed that he worked in the department that is involved in land survey, and he stated that he left that Ministry in 2004, but that prior to that, he was sponsored to school at the Copperbelt University, and he became an Assistant Surveyor in 2003.

Whilst agreeing that as a Clerk in the Survey Department, he handled records and did filing, and opening of files, he denied having handled survey diagrams, stating that his job was to file what had been worked on, including survey diagrams. On how he left the Ministry of Lands, the 1<sup>st</sup> Defendant testified that it was because he was accused of doing jobs wrongly in 2004, and that the Republican President was Levy Mwanawasa at the time. He denied that he heard the President say that the Ministry of Lands stank of corruption, but agreed that some people were removed from that Ministry at the time, and that he was not one of them. He stated that his issue involved boundary verification in Nalubuto Road, Rhodespark.

The 1<sup>st</sup> Defendant testified that he had no document to show that a road was created in front of Block 270, Chilanga. He did however state that at page 7 of the 1<sup>st</sup>-3<sup>rd</sup> Defendants bundle of documents was the site plan approved by the Buildings Department, as it bore their date stamp, and it indicated the road reserve. When cross examined further, the 1<sup>st</sup> Defendant testified that the said document at page 7 was not a survey diagram, and he went to state that survey diagrams indicate the location of everything, including the beacons. He agreed that page 7 was a plan of what was expected, as what is contained on the site plan is transferred into a drawing. The 1<sup>st</sup> Defendant further agreed



that the drawing for the site plan at page 7 was not before the court, and he told the court that the land on page 7 was surveyed as a block.

Still in cross examination, the 1<sup>st</sup> Defendant testified that it was difficult to tell where the beacons for the block flats were. He agreed that the block of flats existed before the plots were created, and that the block of flats was not surveyed, and that is why David Mubanga introduced him to the Plaintiffs for that purpose. When referred to page 3 of the Plaintiffs bundle of documents, the 1<sup>st</sup> Defendant stated that it states that the 3<sup>rd</sup> Plaintiff was allocated the flat in 1999, and that was before the new plots were created. That page 7 of the Plaintiffs bundle of documents was a letter to the Commissioner of Lands dated 22<sup>nd</sup> July, 2008, recommending that the 3<sup>rd</sup> Defendant be offered to buy the flat, by the Permanent Secretary of the Ministry of Works and Supply.

He agreed that the document at page 12 of the Plaintiffs bundle of documents states that the properties were to be surveyed at the offeree's cost, and that he was approached to do the survey in late 2004, when he had qualified as a Surveyor. The 1<sup>st</sup> Defendant's defence was that he did not conduct the survey as the property was not numbered, and he denied that he had property at the time which he sold. It was his evidence that he applied for the land at Kafue District Council in 2002, and he attended interviews in the same year, agreeing that he had specifically applied for Plot No 880 Chilanga, as a Councilor had told him about it, and denied that it was reserved for him.

The 1<sup>st</sup> Defendant stated that there were five plots ranging from 879-883 and that his application to the Council was before Court, as well as the approval. He told the court that at page 4 of the 1<sup>st</sup>-3<sup>rd</sup> Defendant's bundle of documents was indicated the minute number, and he agreed that the minutes were not before the court. The 1<sup>st</sup> Defendant denied that the documents at pages 17-18 of the Plaintiffs bundle of documents were survey diagrams, stating that they were site plans, and he stated that the distance between the block flats to the



the Commission of Lands, the site plan is numbered and a sketch plan which the Surveyor General approves is produced from the site plan.

It was stated that without the Provincial Planning Authority approving the site plan, a survey diagram cannot be done. Whilst agreeing that the document at page 17 of the Plaintiffs bundle of documents was a site plan, DW4 said that it was not approved by the Provincial Planning Authority. He stated that there was no letter of offer for Stand No 880 Chilanga, but that there was a certificate of title in the names of Charles Chipalo Simutami and Euphrasia Chilongoshi, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, dated 17<sup>th</sup> June, 2014. He agreed that the letter of offer for the 3<sup>rd</sup> Plaintiff came before the certificate of title issued to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

The testimony of DW4 was that in the absence of documentation, he could not say what happened in the allocation of Stand No 880 Chilanga. He stated that it was a mix up when he testified that Stand No 881 was allocated to the 1<sup>st</sup> Plaintiff and that Stands No 880-887 belonged to the Plaintiffs in this matter. When referred to the document at page 19 of the Commissioner of Lands bundle of documents, DW4 testified that page 19 showed that the lessee was the 3<sup>rd</sup> Defendant and Julius Chileshe for Stand No 882 Chilanga, and that page 3 of the same bundles related to the said property. He added that the certificate of title on page 4 however showed only the 3<sup>rd</sup> Defendant as title holder of Stand No 882 Chilanga.

DW4 agreed that the documents that he had produced before court were taken from the green file kept at the Ministry of Lands, and stated that the said documents had no folio numbers despite the fact that documents are given folio numbers when placed in a file. He stated that Kafue District Council created Stands No 879-881, and recommended the allocation of the plots to the Commissioner of Lands, which recommendations were on the green file at the Ministry. He further told the court that the documents for Stand No 880 were



not before the court as he could not trace the file, and that it is the mandate of the Council, and not the Commissioner of Lands to create plots.

His evidence with regard to the document at page 1 of the 1<sup>st</sup>-3<sup>rd</sup> Defendants bundle of documents was that it was an annexure application that an applicant fills in at the Council. He agreed that at the bottom of page 4 of the said bundle of documents was a certificate indicating that there was a full Council Meeting on 11<sup>th</sup> August, 2002, which approved the application. When referred to the document at pages 26 and 27 of the 1<sup>st</sup>-3<sup>rd</sup> Defendant's bundle of documents, DW4 stated that page 26 was a letter from Chilanga District Council to Kafue District Council under which Chilanga District Council previously fell. He agreed that page 27 was a letter from Kafue District Council stating that it had no records for Block 270 Chilanga being tabled in its meetings.

Whilst agreeing that page 1 of the 1<sup>st</sup>-3<sup>rd</sup> Defendants bundle of documents was endorsed that the allocation was approved, DW4 could not say who wrote it, as it had no signature. DW4 told the court that he had no document to show when Stand No 880 was surveyed, even though he agreed that a property is allocated a number after the Commissioner of Lands receives it, and requests that it be numbered, and the said number is used by the Surveyor to survey the property.

When cross examined further, DW4 testified that the document at page 1 of the 1<sup>st</sup>-3<sup>rd</sup> Defendants bundle of documents showed that the approval of the allocation by the Council was in the year 2002, and according to that document, the approval was done before the survey was done. He agreed that Lands Circular No 1 of 1985 states that the advertisement for land is done once land is created. He could not say if Stand No 880 was advertised to members of the public.

Still in cross examination, DW4 testified that he had never dealt with properties that had certificates of title from the Council, or for Council houses



that had toilets outside the houses. Whilst agreeing that the 4<sup>th</sup> Defendant in paragraphs 3, 4 and 5 of its defence had stated that it had no dealings with the properties CHILA/270/CL/9, CHILA/270/CL/3 and CHILA/270/CL/7 and others on the block, as well as Stand No 880, DW4 disagreed with this defence, stating that there were applications and minutes from the Council approving the same. He agreed that the said minutes were not before the court, but his evidence was that the Council Secretary endorsed the certificate, and the extract of the minutes were attached to the recommendation. DW4 further agreed that the extract of minutes was not before the court.

In re-examination, DW4 testified that even if the minutes were not before the court, the Council considered the properties as the Council Secretary indicated the minute number on the application, and even signed it. With reference to pages 4 and 15 of the 1<sup>st</sup>-3<sup>rd</sup> Defendants bundle of documents, DW4 stated that when properties are created by the Council, they are not immediately surveyed, and the plans are submitted to the Commissioner of Lands for numbering. It is after the numbering that the Council proceeds to recommend applicants to be allocated the same plots, even before the survey is done.

He stated that the subpoena requested him to bring the documents relating to Stands No 879-881 and Stand No 270 Chilanga and CHILA/270/CL/1-10, but he had not brought the documents for CHILA/270/CL/1-10 as he could not find them. He also testified that when there was an anomaly in numbering, and that one number was supposed to be cancelled and re-numbered. He further testified that the law that applies to the Commissioner of Lands is the Lands Act, and that the custodian of the green files is the Lands and Deeds Department which operates under the Lands and Deeds Registry Act. DW4 added that documents on the green file are not folioed.

The Plaintiffs filed submissions on 14<sup>th</sup> June, 2018 in which they stated that the burden of proving the case rested on them on a balance of probabilities, as was held in the cases of **ZAMBIA RAILWAYS LIMITED V PAULINE S. MUNDIA**,



**BRIAN SIALUMBA 2008 VOL 1 ZR 278** and **MILLER V MINISTER OF PENSIONS 1974 2 ALL ER 372**. That the principles in the above case were approved in a number of cases among them, **KHALID MOHAMED V THE ATTORNEY GENERAL 1982 ZR 49**, **WILSON MASAUSO ZULU V AVONDALE HOUSING PROJECT LIMITED 1982 ZR 172** and **GALAUNIA FARMS LIMITED V NATIONAL MILLING COMPANY LIMITED AND NATIONAL MILLING CORPORATION LIMITED 2001 ZR 1**.

It was submitted that the Plaintiffs alleged fraud against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in the manner that they obtained title to the land in issue, being Stand No 880 Chilanga, and which land they subsequently sold to the 3<sup>rd</sup> Defendant. The Plaintiffs acknowledged that the onus lay on them to prove the fraud at a much higher standard than a balance of probabilities required in civil matters, but that the standard is not beyond all reasonable doubt. The case of **SITHOLE V STATE LOTTERIES BOARD 1975 ZR 106** was relied on as authority.

It was submitted that the Plaintiffs through their evidence had established the fraud alleged, which evidence pointed to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants having obtained the certificate of title to the land without following procedure, and that the land obtained encroached on part of the land that the Plaintiffs used as toilets. Further, that the land was offered to the Plaintiffs by the government to purchase as sitting tenants through the government housing empowerment policy. The submission was further that page 1 of the Plaintiffs bundle of documents showed that the flats that the Plaintiffs were offered to buy were built by the Ministry of Works and Supply, and were occupied by the Zambia Wildlife Authority (ZAWA) which existed under the Zambia Wildlife Act No 12 of 1998, as a government department, previously known as the National Parks and Wildlife Services.

It was also submitted that the letters of offer indicated the property as Plot No 270, and it comprised a flat occupied by ten families. The submission was



further that page 2 of the Plaintiffs bundle of documents being a letter dated 8<sup>th</sup> May, 1995 was a letter addressed to the 2<sup>nd</sup> Plaintiff advising that she had been allocated a house, while the letter allocating the house to 3<sup>rd</sup> Plaintiff was at page 3 of the Plaintiff's bundle of documents.

I was asked to take judicial notice of the fact that in or about 1996, the government of the Republic of Zambia issued a housing empowerment policy where the government sold its houses to the sitting tenants, and that this position was amplified in the case of **THABALE JACK NGULUBE V UNZA SCZ/8/028/2015 APPEAL NO 80 OF 2015**.

The submission was that PW1 testified a Surveyor called Mr Nyangulu went and surveyed the houses, and afterwards he and others were given letters to take to the Ministry of Tourism, and thereafter to the Ministry of Works and Supply, so that they could be offered the properties. It was further submitted that the Plaintiffs were given letters to take to the Ministry of Finance so that they could pay for the properties, and upon payment they were given letters by the Ministry of Finance to take to the Ministry of Lands.

Still on how the Plaintiffs were offered the properties, it was submitted that the Ministry of Lands asked the Plaintiffs to engage a surveyor, and that is how the 1<sup>st</sup> Defendant, a government surveyor was engaged to survey the property. However, despite visiting the property, and being provided lunch and transport by the Plaintiffs, the 1<sup>st</sup> Defendant did not give the Plaintiffs feed-back on the survey, and the next thing they saw were people who wanted to demolish the toilets sometime in 2016, as they claimed that the land was theirs.

The contention was that the Ministry of Lands informed them that the land on which the toilets are is theirs, and that the 1<sup>st</sup> Defendant left out the toilets when he did the survey. Further, that PW1 testified that the houses could not be sold without the toilets, and that the Plaintiffs received offers for the houses and the site plans, but were still awaiting the beacons and the demarcations,



which did not happen. It was submitted that this evidence given by PW1 was echoed by PW3, the 1<sup>st</sup> Plaintiff.

The submission was that both DW1, the 3<sup>rd</sup> Defendant and DW2, the 1<sup>st</sup> Defendant supported the Plaintiffs claims, as the 1<sup>st</sup> Defendant in cross examination gave evidence that supported the Plaintiffs claims that the 1<sup>st</sup> and 2<sup>nd</sup> Defendant obtained the certificate of title fraudulently. It was submitted that the 1<sup>st</sup> Defendant on his evidence as to how he came to know about the plot was not supported by the law. That the 1<sup>st</sup> Defendant's testimony was that he came to know that five plots being Plots No 879-883 Chilanga had been created through a former Councillor, Mr Chimute, and he subsequently applied for Plot No 880 Chilanga.

The submission was further that the 1<sup>st</sup> Defendant had admitted that he was familiar with the procedure for land alienation by the Council, and that the Council should have advertised the plots for sale. It was submitted that the Plaintiff obtained the land contrary to the land policy, which in the Land Policy Administrative Circular No 1 of 1985, regulation (ii) on allocation of Stands provides that;

***“(ii) Before Stands are recommended, the District Council concerned may advertise them in the national press inviting prospective developers to make applications to the District Council in the form appended hereto and numbered as Annexure A.”***

It was submitted that the Supreme Court in the case of **JUSTIN CHANSA V LUSAKA CITY COUNCIL 2007 ZR 256** interpreted the above provision in the Lands Circular when it held that;

***“(1) The authority to consider applications for land allocation from members of the public is vested in the President of Zambia who has delegated this authority to the Commissioner of Lands.***



***(2) An applicant for land has in terms of circular Number 1 of 1985, an option either to apply directly to the Commissioner of Lands, or to apply through a Local Authority which has been delegated powers to receive applications for land from members of the public.***

***(3) Where a member of public opts for the second route, a Local Authority is mandated to advertise any land available, receive applications from members of the public and make recommendation to the Commissioner of Lands.***

***(4) The powers to allocate land and make offers to successful applicants is reposed in the Commissioner of Lands”.***

The Plaintiffs contended that the 1<sup>st</sup> Defendant had not produced any evidence to show that Kafue District Council advertised the created plots to members of the public, and therefore the 1<sup>st</sup> Defendant’s application and acquisition of Stand No 880 Chilanga was marred with procedural impropriety and illegality. The Plaintiffs had therefore discharged the burden of proving their case on a balance of probabilities that the plots in issue were created without due regard to the law and the procedures that exist for land allocation.

It was further submitted that once the Plaintiffs proved the assertion, the onus was upon the Defendants to disprove the assertions by the Plaintiffs, and relied on the case of ***ZAMCAPTIAL ENTERPRISES LIMITED V RICHARD MBALE APPEAL NO 21/2008 UNREPORTED*** where it was stated that;

***“the evidential burden of proof shifts when a claimant for example proves to the court that the dismissal was wrongful. The evidential burden shifts so that the party who is taken court bears the burden of disproving the facts that the claimant has brought to court”.***

On further evidence showing the illegality associated with the 1<sup>st</sup> Defendant’s acquisition of Stand No 880, the submission was that while the 1<sup>st</sup> Defendant in his testimony stated that he applied for the land in 2002, the approval was



in the year 2000. That this in itself showed that the land was approved even before it was offered, and further that the 1<sup>st</sup> Defendant told the court that Kafue District Council created the plots on 30<sup>th</sup> November, 2001, entailing that the 1<sup>st</sup> Defendant obtained approval not only for a non-existent application, but also for an unknown plot, as the plot had not yet been created.

Therefore, the documents in the 1<sup>st</sup>-3<sup>rd</sup> Defendants bundle of documents were unreliable, and raised the probability of fraud on how the plot was offered to the 1<sup>st</sup> Defendant. It was submitted that secondly, approval is given by the Local Authority, but the 1<sup>st</sup> Defendant had failed to produce minutes before the court signifying that approval on the basis that the Kafue District Council was the custodian of the said minutes. That the 1<sup>st</sup> Defendant gave no explanation as to why he made no efforts to obtain the said minutes, and looking at how the approval was done, it was logical to conclude that the minutes did not even exist.

It was submitted that this conclusion was corroborated by the evidence of DW4 who testified that he did not deal with the allocation of the land in contention, and at pages 26 and 27 of the Plaintiffs bundle of documents was the correspondence that Block 270 had never been dealt with, otherwise the Council would have seen that Plot 880 was not created in the manner done, encroaching on the toilets for Block 270.

It was submitted that thirdly, the 1<sup>st</sup> Defendant in cross examination testified that he applied for the land in his own names as shown at page 1 of the 1<sup>st</sup>-3<sup>rd</sup> Defendants bundle of documents, yet the certificate of title for the property was issued in both the 1<sup>st</sup> and 2<sup>nd</sup> Defendant's name, and there was no application on record to show that the necessary application was made to have the 2<sup>nd</sup> Defendant included as a joint owner of the property.

The Plaintiffs submitted that the evidence that was before the court was that the 1<sup>st</sup> Defendant testified that he had verbally instructed that the 2<sup>nd</sup> Defendant, his wife, be included on the certificate of title. It was submitted that



this left much to be desired, if the Ministry of Lands acted on verbal instructions, and went to show that the 1<sup>st</sup> Defendant had influence over the processing of Stand No 880 Chilanga, as he was once an employee of the Ministry of Lands, which position he had used at the expense of the poor Plaintiffs.

Still in submission, it was stated that it was highly probable that the 1<sup>st</sup> Defendant had Stand No 880 alienated to himself and the 2<sup>nd</sup> Defendant fraudulently and/or due to impropriety, and that this court has the authority to declare so, and cancel any certificate of title issued in respect thereof, as the first owners had no legal authority to sell and pass on title. To this effect the case of **ANTI CORRUPTION COMMISSION V BARNET DEVELOPMENT CORPORATION LIMITED 2008 ZR 69**, was relied on.

The Plaintiffs submitted that when the court visited the site, the 1<sup>st</sup> Defendant had testified that the Kafue District Council had planned a road between Stand No 880 Chilanga and CHILA/270/CL/1-10 which is the block of flats that were offered to the Plaintiffs and others, but there was no documentation to that effect. Further, that having gone on site, I would note that what was said to be a road reserve had water pipe infrastructure, seemingly suggesting that a road could not go further, as there is a dead end.

The Plaintiffs conceded that their land had not been surveyed, and contended that as a result, it could not be ascertained from the site plans which had been placed on record that the road is indeed a road reserve. That it was the reason why the Plaintiffs had engaged the 1<sup>st</sup> Defendant to survey the land, and which he agreed to, before the new plots were created. The Plaintiffs view was that had the land been surveyed before the plots were created, the new plots would not have encroached on their land. It was also the Plaintiffs submission that both the 1<sup>st</sup> and 3<sup>rd</sup> Defendants admitted that they found toilets on the land.

Reference was made to the evidence of DW3 a Senior Field Survey Officer at the Ministry of Lands that when a survey is done, the surveyor gets guidelines from



an approved site plan which is numbered through the Office of the Commissioner of Lands, after that office verifies the site plan submitted by the Planning Authority, it is then submitted to the Surveyor General for numbering. That this witness stated that the document at page 17 of the Plaintiffs bundle of documents was not approved by the Surveyor General and it could therefore not be used to conduct any survey.

Thus, the Plaintiffs in this matter did not have an opportunity to have an approved site plan based on which a survey could have been done, while the survey done with regard to Stand No 880 had disregarded the existing structures and interests of the Plaintiffs. It was also submitted that when Stand No 880 was surveyed, the survey did not take into account the other interests on the ground, as DW3 testified that one of the beacons on Stand No 880 could not be replaced, as there was a house sitting on it, which house had not been demolished.

Reliance was placed on the case of **CLEMENTINE BANDA AND ANOTHER V BONIFACE MUDIMA 2011 VOL 3 ZR 162** which held that;

***“16. At law and in equity, the basic rule is that estates and interests primarily rank in the order in which they are created.***

***17. In equity, the result is expressed more directly in the maxim: “qui priorest tempore potior est jure.” That is, “he who is earlier in time is stronger in the law”.***

***18. Where there are two competing equitable interests, the general rule of equity is that the person whose equity attached to the property first will be entitled to priority over the other.***

***19. Where equities are equal, and neither claimant has the legal estate, the first in time prevails.***



**20. Prior equitable interest in law can only be defeated by a bona fide purchaser for value without notice.**

**21. The following requirements need to be fulfilled when relying on the doctrine of bona fide purchaser for value without notice; a purchaser must: act in good faith; be a person who acquires an interest in property by grant rather than operation of law; must have given value for the property; must generally have obtained the legal interest in the property; and must have had no notice of the equitable interest at the time he gave his consideration for the conveyance.**

**22. A purchaser is affected by notice of an equity where: the equity is within his own knowledge; actual notice, equity would have come to his own knowledge if proper inquiries had been made; constructive notice and where his agent as such in the course of the transaction has actual or constructive notice of the equity; imputed notice”.**

The submission was that the Plaintiffs were earlier in time, and thus stronger at law, as their offers were from the government to purchase government houses, and logically the toilets were earlier in time. Therefore, at equity, the court should give the Plaintiffs the benefit of the enjoyment of the maxim **“qui priorest tempore potior est jure”**, submitting that such a maxim could only be defeated by a bonafide purchaser for value, without notice as held in the **CLEMENTINE BANDA** case.

It was submitted that none of the Defendants had relied on this principle, and that it is trite that parties are bound by their pleadings, and the cases of **WILLIAM DAVID CARLISLE WISE V E.F HARVEY LIMITED 1985 ZR 179, ANDERSON MAZOKA AND OTHERS V LEVY PATRICK MWANAWASA 2005 ZR 138, NORA MWAANGA KAYOBA AND ALIZANI BANDA V EUNICE KUMWENDA NGULUBE AND ANDREW NGULUBE SCZ No 19 of 2003** and **LYONS BROOKE BOND (ZAMBIA) LIMITED V ZAMBIA TANZANIA ROAD SERVICES LIMITED 1977 ZR 317** were relied on as authority.



These cases held that parties are bound by their pleadings, and that the function of pleadings is to give fair notice of the case which has to be met, and to define the issues which the court will adjudicate on in order to determine the dispute between the parties. As the Defendants did not plead the principle bonafide purchaser for value, they could not rely on it. The submission in the alternative was that even assuming that the Defendants relied on the same principle, their hands were soiled, as the 1<sup>st</sup> Defendant was aware of the existence of the toilets and he conceded that knowledge. Further, he was engaged in good faith to do the survey, but he disappeared after he visited the site, which evidence was not shaken.

The Plaintiffs also submitted that the 2<sup>nd</sup> Defendant on the other hand did not apply for the land, but found her name on the certificate of title, while the 3<sup>rd</sup> Defendant agreed that she was aware of the existence of the toilets, and her evidence was that she had a plot neighbouring the Plaintiffs, prior to her purchasing Stand No 880. Therefore, even her hands were equally soiled, and she should have made enquiries or ought to have been aware of the Plaintiffs interests.

The submission was that DW4 did not produce any documentation with regard to the Stands in dispute being Stand No 880 and CHILA/270/CL/1-10, and that he had testified with regard to Stand Nos 879, 881, 882 and 270 Chilanga which were not in contention in this matter. Further, that DW4 brought out the issue of double numbering as the Plaintiffs block of flats is No 270, a property number that exists in another location in the same district. The Plaintiffs submitted that DW4's evidence that the allocation of land without recommendation was not fatal, flew in the teeth of the 1<sup>st</sup> Defendant's evidence. Further, that when he cross examined further, DW4 stated that the recommendation letters for Stands 879-881 were in the Lands and Deeds Registry, but not in the green file, and he could not bring them to court as he had been unable to trace them.



The contention was that this evidence, coupled with the irregularities connected with the acquisition of Stand No 880 Chilanga, led to the inference that there was no recommendation that was made to the Commissioner of Lands over the property, but that the 1<sup>st</sup> Defendant used his position at the Ministry of Lands at the time, to acquire the said land. The Plaintiffs relied on the case of **WESLEY MULUNGUSHI V CATHERINE BWALE MIZI CHOMBA 2004 ZR 96**, submitting that in that case it was held that a sitting tenant of a government house had an accrued right to buy a house based on the empowerment policy.

That the acquisition of the certificate of title by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants which they passed to the 3<sup>rd</sup> Defendant was soiled with fraud, and reliance was placed on the case of **CHARLES KAJIMANGA V MARMETUS CHILEMYA APPEAL NO 50/2014 unreported**. The other case relied on was **HONORIUS CHILFUWA V CHRISPIN HALUWA KANGUNDA 1999 ZR 166**. On that basis it was submitted that the Plaintiffs had proved their case on a balance of probabilities, and the fraud on a higher degree, and prayed that the Plaintiffs be granted the reliefs as prayed. The prayer in the alternative was that the court uses its inherent powers to order the variation of the 3<sup>rd</sup> Defendant's certificate of title, and sever therefrom, the land containing the toilets, and which should be surveyed, and removed from the 3<sup>rd</sup> Defendants land.

The 1<sup>st</sup>-3<sup>rd</sup> Defendants submissions filed on 11<sup>th</sup> July, 2018, referred to the case of **KANKOMBA AND OTHERS V CHILANGA CEMENT PLC 2002 ZR 129** on the burden of proof in civil matters. That this position was reiterated in the case of **ANDERSON KAMBELA MAZOKA, LT GENERAL CHRISTON SIFAPITEMBO, GODFREY KENNETH MIYANDA V LEVY PATRICK MWANAWASA, THE ELECTORAL COMMISSION OF ZAMBIA, THE ATTORNEY GENERAL 2005 ZR 138** cited by the Plaintiffs, as well as the cases of **MORGAN V SIM 1857 11 Moo PC 312** and **EAGLE CHARALAMBOUS TRANSPORT LIMITED V GIDEON PHIRI 1994 SJ 52**.



That going by this position of the law, the fact that the Defendants failed to file a defence did not entitle the Plaintiffs to judgment, as the burden rests on the Plaintiffs to prove their case. On the shifting of the burden of proof, the 1<sup>st</sup>-3<sup>rd</sup> Defendants submitted that the case of **ZAMCAPITAL ENTERPRISES LIMITED RICHARD MBALE APPEAL No 21 of 2008**, held that ***“the evidential burden of proof shifts when the claimant for example proves to the court that the dismissal was wrongful.”***

It was submitted that the evidential burden would only shift to the Defendants once the Plaintiffs brought proof to the court of the facts in issue, such as the non-existence of a road between the Plaintiffs and Defendants properties. However, the Plaintiffs had not adduced any evidence showing that the land that they were sold by the government extended across the road, to encompass both the road and property. Further, that there was no proof that the Defendants acted fraudulently in the acquisition of Stand No 880 Chilanga, and therefore in the absence of such evidence, there could be no shift in the burden of proof.

The case of **BASE CHEMICALS ZAMBIA LIMITED MAZZONITES LIMITED V ZAMBIA AIR FORCE AND THE ATTORNEY GENERAL SCZ No 9 of 2011**, was relied on with regard to the standard of proof when fraud is alleged. The definition of fraud in Black’s Law Dictionary, 9<sup>th</sup> Edition as ***“a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment”*** was relied on. Further reliance was placed on the definition in the **Osborne’s Concise Law Dictionary, 11<sup>th</sup> Edition** which defines fraud as ***“the obtaining of a material advantage by unfair or wrongful means; it involves obliquity”. It involves the making of a false representation, knowingly, or without belief in its truth or recklessly”***.

The 1<sup>st</sup>-3<sup>rd</sup> Defendants submission was that the particulars of fraud outlined in paragraph 39 of the Plaintiffs statement of claim did not come anywhere near



to imputing fraud on the Defendants part. This submission was based on the contention that contrary to the Plaintiffs pleadings, the 1<sup>st</sup> Defendant was not engaged by the Plaintiffs by virtue of his position as a Surveyor at the 5<sup>th</sup> Defendant, and that the monies were paid to David Mubanga, and not the 1<sup>st</sup> Defendant.

It was also submitted that this was confirmed by the Plaintiffs own evidence that David Mubanga prepared the site plan that was to be used for the survey of their property, and that the purported inconsistencies on Annexure A Form regarding the dates of the minutes did not change the 1<sup>st</sup> Defendant's evidence or impute fraud on his part because he did not author of the document, but rather it was the Kafue District Council whom the Plaintiff chose neither to sue or subpoena to testify.

It was further submitted that PW2 conceded that his evidence was hearsay, and he could therefore not prove the facts alleged. To this end, the case of **BILLINGSLEY V J.A MUNDI 1982 ZR 11** was relied on. As regards the claim that the land be reverted to the Plaintiffs, the 1<sup>st</sup>-3<sup>rd</sup> Defendants submitted that this claim was not supported by any evidence. That what was on record as testified by PW3 was that the toilets extended to Mr Phiri's land, but they had opted not to sue Mr Phiri, as he had already built on the land. This, it was submitted, reinforced the fact the Plaintiffs did not own the land, and it was the 1<sup>st</sup>-3<sup>rd</sup> Defendants contention that the Plaintiffs built the toilets on the property in an attempt to build a case for themselves. I was urged to uphold that submission.

The 1<sup>st</sup>-3<sup>rd</sup> Defendants also submitted that the Plaintiffs were attempting to claim ownership of the property by adverse possession which the law frowns upon, and the case of **DAVID NZOOMA LUMANYENDA AND GOODWINS KAFUKO MUZUMBWA V CHIEF CHAMUKA AND KABWE RURAL DISTRICT COUNCIL AND ZAMBIA CONSOLIDATED COPPER MINES LIMITED 1988 - 1989 ZR 194** was relied on. It was submitted that the holding in the above



case was upheld in the case of **ZAMBIA TELECOMMUNICATIONS COMPANY LIMITED V VALSON PHARMA ZAMBIA LIMITED SCZ NO 3 OF 2010**, as well as the case of **DAVID HOWES DANIEL SIMULOKA VIVIAN KANONDO WALKER MIYOBA JANET B MUSUNGA A.B. MBATA CONSTATINE CHIMUKA ALFRED HANANKUNI STEMON LUMAMBA V BETTY BUTTS CARBIN (Sued in her capacity as Trustee of the Estate of the Late DAISY BUTTS) SCZ NO 5 OF 2012**.

The 1<sup>st</sup>-3<sup>rd</sup> Defendants based on the above authorities, submitted that the Plaintiffs claims should be dismissed, and the Defendants certificate of title upheld. It was also submitted that it is trite that dealings in land must be evidenced in writing, and that the Plaintiffs had not adduced evidence to show that they are the legal owners of the property that they claim. That in the absence of such evidence, the Plaintiffs could not claim ownership of the said land, and Section 4 of the Statute of Frauds 1677 as amended by The (English) Law Reform (Enforcement of Contracts) Act, 1954 was authority.

Further, that the case of **MIJONI V ZAMBIA PUBLISHING COMPANY LIMITED APPEAL No 10 of 1986** held that a note or memorandum in writing of an agreement is sufficient, provided that it contains all the material terms of the contract such as the names, or adequate identification of the subject matter, and the nature of the consideration. The 1<sup>st</sup>-3<sup>rd</sup> Defendants also relied on the cases of **ANTI CORRUPTION COMMISSION V BARNET DEVELOPMENT CORPORATION LIMITED 2008 ZR 69**, **HONORIUS CHILFU YA V CHRISPIN HALUWA KANGUNDA 1999 ZR 166**, and **ENESI BANDA V ABIGAIL MWANZA 2006/HP/A002**, which held that a certificate of title is conclusive evidence of ownership of land unless there is fraud in the acquisition of that title.

Further, that in the case of **JOSIA TEMBO, HENRY JAWA V PETER MUKUKA CHITAMBALA (Sued as Administrator of the estate of the late Frank Macharious Chitambala) 2005/HP/0208**, it was stated that legal ownership of land is evidence by way of production of a certificate of title for it, and that



as the Plaintiffs did not have a certificate of title for the land that they claimed, they could not be declared legal owners of the said land. It was submitted that the evidence on record showed that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants initially owned the land, and were issued a certificate of title for the same. It was further submitted that DW4 had explained the procedure for land alienation to the court, which similar evidence was given by DW3, and that the survey of Stand No 880 was done in accordance with the site plan, and the 3<sup>rd</sup> Defendant was therefore the beneficial and registered owner of the said Stand.

With regard to the issue of bonafide claim, the 1<sup>st</sup>-3<sup>rd</sup> Defendants submission was that the 3<sup>rd</sup> Defendant was a bonafide purchaser for value, without notice, and that she acquired the land in dispute from the 1<sup>st</sup> and 2<sup>nd</sup> Defendants without any adverse interest or encumbrance, as there was no evidence to show that the land was encumbered. It was submitted that the 3<sup>rd</sup> Defendant testified that the land was bare when she purchased it from the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, and she registered the assignment, and obtained a certificate of title. It was also the 1<sup>st</sup>-3<sup>rd</sup> Defendants submission that at the trial it was suggested that there was something amis in the deed of assignment and certificate of title being bearing the same date, but their submission was that Section 7 (2) of the Lands and deeds Registry Act, Chapter 185 of the Laws of Zambia provides that the date of registration shall be the date when the document shall first be lodged for registration in the Registry.

In this case the assignment was lodged for registration on 15<sup>th</sup> September 2014, and both the assignment and certificate of title bore the same date. The case of **MAGIC CARPET AND TRAVEL AND TOURS LIMITED V ZAMBIA NATIONAL COMMERCIAL BANK 1999 ZR 61**, which held that, ***“a person who acquires title to land in the absence of any encumbrances and who does so without having notice of a prior fraudulent transaction, acquires good title to land”*** was relied on. Further reliance was placed on the case of **FRALLEN INVESTMENTS LIMITED V ZAMBIA RAILWAYS LIMITED**,



**NATIONAL COLLEGE FOR MANAGEMENT DEVELOPMENT 2008 VOL 1 ZR 99**, in which the Supreme Court held that *“we hold that there is no justification to inflict injustice on the 2nd Respondent, an innocent bonafide purchaser for value”*.

The cases of **CLEMENTINA BANDA, EMMANUEL NJANJE V BONIFACE MUDIMBA 2011 VOL 3 ZR**, and **ZAMBIA CONSOLIDATED COPPER MINES LIMITED V EDDIE KATALAYI AND MAX CHILONGO SCZ NO 2 OF 2001**, were also relied on with respect to the principles governing an innocent purchaser for value, with the submission being that the 3<sup>rd</sup> Defendant was an innocent purchaser for value, without notice of any encumbrances or adverse interest in Stand No 880 Chilanga, as she acted in good faith, and the same was true in the absence of evidence to the contrary or to prove fraud or sharp practice on her part.

The 1<sup>st</sup>-3<sup>rd</sup> Defendants in their submissions also addressed the issue of land alienation procedures and the law. Their submission was that the defence witnesses had led evidence with regard to the land alienation procedure touching on the process of creation, approval, numbering, allocation and surveying of land, and that the evidence was consistent that the property in contention was created in 2001, along with other properties. It was submitted that the evidence of the 1<sup>st</sup> Defendant was that he had applied for the property, and attended interviews at the Kafue District Council which made recommendation to the Commissioner of Lands that he be allocated the land.

The submission was further that during the trial an impression was attempted to have been created that the 1<sup>st</sup> Defendant was responsible for producing the minutes of the Kafue District Council, which recommended that he be allocated the land, when such a burden lay on the authors and custodian of the minutes being the Kafue District Council, and not with the 1<sup>st</sup> Defendant who had merely completed the first part of the form, and the rest was handled by the Kafue District Council.



In this regard the 1<sup>st</sup>-3<sup>rd</sup> Defendants submitted that according to the indoor management rule formulated in the case of **ROYAL BRITISH BANK V TURQUAND 1856 ALL ER 435**, a person dealing with the company is entitled to assume that all the necessary internal procedures of the company have been complied with, and is assumed not to be concerned with domestic or indoor formalities. The cases of **ROOTKIN V KENT COUNTY COUNCIL 1981 2 ALL ER 227**, **ZAMBIA BATA SHOE COMPANY LIMITED V VIN-MAS LIMITED 1994 SJ 35** and **NATIONAL AIRPORTS CORPORATION LIMITED V REGGIE EPHRAIM ZIMBA AND SAVIOR KONIE SCZ NO 34 OF 2000** were also relied on as authority.

It was submitted that the unreliability of the land alienation process at Kafue District Council could not be determined to the Defendant's detriment on the basis that the law presumes that all the necessary internal resolutions were duly passed. The submission in the alternative was that being mere recommendations, the decision of the Kafue District Council or the lack thereof could not alter the interest of the defendants as the final authority in land alienation is the Commissioner of Lands, from whom the 1<sup>st</sup> Defendant obtained the letter of offer. It was also submitted that DW4 had testified that the alienation of Stand No 880 complied with the established procedure as laid down in the Lands Circular No 1 of 1985, and that DW3 had testified that there was nothing unusual with the survey of the property, as it was done in accordance with the numbered site plan.

Reference was made to the case of **YENGWE FARMS LIMITED V MASSTOCK ZAMBIA LIMITED, THE COMMISSIONER OF LANDS AND THE ATTORNEY GENERAL SCZ NO 11 OF 1999**, with the submission being that the case interpreted Land Circular No 1 of 1985, and held that the circular was not addressed to the Commissioner of Lands, but to District Councils, and that the Commissioner of Lands was not precluded by the circular. That it was stated in that case that;



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

It was submitted that the case of **JUSTIN CHANSA V LUSAKA CITY COUNCIL SCZ NO 29 OF 2007** decided on similar lines as the **YENGWE FARMS LIMITED** case.

The 4<sup>th</sup> Defendant in its submissions dated 10<sup>th</sup> July, 2018, stated that it was not in dispute that the land in question is situated within its’ jurisdiction. However, the 4<sup>th</sup> Defendant was only created in 2011, and that there was no evidence that since its creation as a body corporate, it had dealt with any of the matters relating to the land in question being claimed by the Plaintiff.

It was also submitted that the Plaintiffs case had not disclosed any claim against the 4<sup>th</sup> Defendant, in respect of the land, subject of these proceedings, and the 4<sup>th</sup> Defendant should not have been made a party to these proceedings, as it did not administer the land in question. The prayer was that it be misjoined from the proceedings.



I have considered the evidence in this matter. There is no dispute in this matter that the Plaintiffs were among other persons who were offered to buy the properties comprised in a block of flats, as sitting tenants, following the government policy to sell houses to sitting tenants, and empower its citizens, and that they did buy the said flats. It is also not in dispute that the Plaintiffs and other purchasers of the flats on the block pursued a process of having the said block of flats subdivided into individual properties so that they could obtain certificates of title for the same, and to this effect they engaged the Ministry of Lands in pursuance of the same.

There is no dispute that a site plan was produced to that effect by David Mubanga, and it is common cause that the 1<sup>st</sup> Defendant came into contact with the Plaintiffs during the process of the Plaintiffs interaction with the Ministry of Lands with a view to having the block of flats surveyed. It is also not in dispute that the Plaintiffs block of flats was not surveyed, and there is further no dispute that the Plaintiffs protested to the Chilanga Council and the Kafue District Council that persons were interfering with the land that they were claiming as theirs, which land included that bought by the 3<sup>rd</sup> Defendant from the 1<sup>st</sup> Defendant, resulting in this action.

There is no dispute in this matter that the 1<sup>st</sup> Defendant acquired a title deed for the land known as Stand No 880 Chilanga in the area claimed by the Plaintiffs as theirs, and that he sold it to the 3<sup>rd</sup> Defendant. The question is whether the Plaintiffs have on a balance of probabilities proved that they are entitled to the reliefs sought? The evidence as given by the Plaintiffs shows that they used to work for the Zambia Wildlife and Parks Service which later became the Zambia Wildlife Authority (ZAWA), and after the government policy to sell all houses to sitting tenants, they were offered to buy the flats comprised on a block of ten flats by the Commissioner of Lands, as seen on the documents at pages 8 and 11 of the Plaintiffs bundle of documents.



The 1<sup>st</sup> Plaintiff who testified as PW3 told the court that after they were offered the flats to buy, they were advised that the block of flats was not surveyed, and that this needed to be done. He further testified that they saw Mr Mubanga at the Ministry of Lands who introduced them to the 1<sup>st</sup> Defendant, who after going to the site disappeared. They went back to Mr Mubanga, who produced a site plan, which is at pages 17-18 of the Plaintiffs bundle of documents, and pages 7 and 5 of the 1<sup>st</sup>-3<sup>rd</sup> Defendants bundle of documents.

This witness also testified that they thereafter began waiting for the survey diagram from the 1<sup>st</sup> Defendant, but he did not show up. The next thing they saw were people who went to construct on the land where their properties are, and a grader went to demolish the toilets that were on the land. The 1<sup>st</sup> Defendant who testified as DW2, agreed to having met the Plaintiffs at Mulungushi house through Mr Mubanga, who asked him to help the Plaintiffs with their issues. He further agreed that he went to the land in issue, and his evidence was that when he checked the documentation that the Plaintiffs had, he found that he had challenges assisting the Plaintiffs, as the block that they occupied had no property number, and he referred them to the Ministry of Works and Supply to obtain the same.

Later, he learnt that the Plaintiff's had letters of offer. The 1<sup>st</sup> Defendant also testified that he was the title holder to Stand No 880 Chilanga, referring to page 1 of the 1<sup>st</sup>-3<sup>rd</sup> Defendant's bundle of documents as being the application that he wrote to the Kafue District Council, who upon interviewing him, recommended to the Commissioner of Lands that he be allocated the land. This witness also told the court that the plot was already in existence and had been numbered when he had applied for it, and that the Commissioner of Lands offered him the land on 12<sup>th</sup> May, 2014, as seen on the letter of offer at page 9 of the 1<sup>st</sup>-3<sup>rd</sup> Defendants bundle of documents. He subsequently sold the land to the 3<sup>rd</sup> Defendant in this matter, who testified as DW1.



The contention by the Plaintiffs is that the land on which Stand No 880 is, houses the toilets that they use, and PW1 in re-examination explained that the toilets are outside the flats. This evidence was confirmed by PW2, the 2<sup>nd</sup> Plaintiff, as well as PW3, the 1<sup>st</sup> Plaintiff. During the testimony of the 1<sup>st</sup> Defendant, a scene visit was conducted on 30<sup>th</sup> August, 2017, so that I could have a view of the area in relation to the Plaintiffs claims. What I found is that the Plaintiff's block of flats is opposite where Stand No 880 is. At the site where Stand No 880 is, are toilets that the Plaintiffs use, as the block of flats have no toilets inside. Separating the two pieces of land is an access road.

When the 1<sup>st</sup> Defendant was cross examined at the scene as to whether the access road is in fact a road reserve, he had responded that the planners from Kafue District Council had created the road reserve, although there was no document to that effect. He agreed that at the end of what he was calling the road reserve that separated the block of flats from Stand No 880, is a water pipe, and that he did not know that from there, the road does not go further.

The contention by the Plaintiffs was that the 1<sup>st</sup> Defendant fraudulently acquired Stand No 880 Chilanga by virtue of his position as a surveyor, and an employee of the 5<sup>th</sup> Defendant, who was found at the Ministry of Lands, and was engaged by the Plaintiffs to undertake the survey of their block of flats. DW4 Musamvu Wanki, a Senior Lands Officer at the Ministry of Lands took the court through the procedure for land alienation, stating that the same is stipulated in the Lands Circular No 1 of 1985. That in line with that circular, Councils on creating parcels of land, are required to submit lay out plans to the Commissioner of Lands, who upon being satisfied with the lay out plan will request the Surveyor General to number the site plan.

He further testified that upon the site plan being numbered, the Council will advertise, requesting members of the public to apply for the plots, and that successful applicants are recommended to the Commissioner of Lands, who offers the properties to the successful applicants. Applicants on accepting



those offers will pay the lease fees, and the properties are then surveyed and survey diagrams submitted to the Commissioner of Lands so, that leases are prepared. The leases upon being prepared will be lodged with the Lands and Deeds Registry for title deeds to be prepared. This procedure outlined by DW4 was amplified in the case of **YENGWE FARMS LIMITED AND MASSTOCK ZAMBIA LIMITED V THE COMMISSIONER OF LANDS AND THE ATTORNEY GENERAL SCZ NO 11 OF 1999** cited in this matter.

DW4 told the court that he had not brought the Lands Register for CHILA/270/CL/1-10, which is the block of flats which the Plaintiffs and others bought, as that property is not yet on title, but he had the site plan for the property, and a photocopy of the diagram for Stand No 880 Chilanga. His evidence was further that Stands 879-881 Chilanga were properties that were created by the Council, and were approved for numbering by the Commissioner of Lands, and then offered to successful applicants, who were issued certificates of title.

On CHILA/270/CL/1-10, DW4 testified that this property was owned by the government, and that the Ministry of Works was mandated to recommend offer of that property to the Commissioner of Lands. That after that recommendation was made, the Commissioner of Lands issued the successful applicants with letters of offer, but that the properties were not yet on title. DW4 also told the court that he had no information as to when Stands 879-881 were created, but that they were numbered on 30<sup>th</sup> November, 2001, as seen on the site plan.

When DW4 attempted to refer to a copy of the site plan, objection was raised by Counsel for the Plaintiff on the ground that the original was not before court, and the witness who was subpoenaed had not explained the whereabouts of the original, stating that files are kept in the Lands Registry in the Lands Department, which is accessible by the Lands Officers. Counsel for the Plaintiff had asked that the matter adjourns so that the documents referred to by DW4 could be filed and served on all the parties, and the adjournment was granted.



When the matter next resumed, DW4 had filed a bundle of documents headed as bundle of documents from the Commissioner of Lands. At page 2 of that bundle of documents is a survey diagram for Stand No 270 Chilanga which was approved on 27<sup>th</sup> February, 2001. He told the court that this land is located near the Lusaka-Kafue Road or the Great North Road, and that the sketch plan for the property was prepared in 1999, as seen at page 1 of the Commissioner of Lands bundle of documents. DW4 had further stated that as could be seen at page 9 of the said bundle of documents, the property was offered to Vantra Hafiza, and that page 13 of the said bundle of documents shows the current owner of that Stand as Elias Dudhia Vantra.

DW4 had testified that Stand No 882 is owned by Chileshe Jenny and Julius Chileshe who have a certificate of title for the land, issued on 1<sup>st</sup> September, 2010, and he did not produce the Lands Register for Stand No 880 Chilanga. In cross examination he gave the reason for the failure to avail the documents for Stand No 880 as being because Counsel for the Plaintiff had objected to the unclear copies. When cross examined further, he testified that he had problems finding the documents for Stand No 880, and insisted that they exist, but that their record keeping had let him down. When DW4 was cross examined by Counsel for the 4<sup>th</sup> Defendant he agreed that the recommendations from the 4<sup>th</sup> Defendant were not before the Court. The documents brought by DW4 had nothing to do with the issues in contention in this matter, but just established that there are two properties with the number 270 in Chilanga.

When the 1<sup>st</sup> Defendant testified, he had stated that the document at 15 of the 1<sup>st</sup>-3<sup>rd</sup> Defendant's bundle of documents was the survey diagram for Stand No 880 Chilanga which was approved on 9<sup>th</sup> March, 2012. He told the court that he used to work at the Ministry of Lands and he left in 2004, after he was wrongly accused of doing certain jobs. That when he met the Plaintiffs, he was working for ACM Land Survey. He also told the court that the block of flats bought by the Plaintiffs and others existed and was offered to the Plaintiffs



before the properties such as Stand No 880 were created, although the block of flats was not surveyed. He also confirmed that David Mubanga asked him to survey the block of flats.

The offer letter at page 11 of the Plaintiffs bundle of documents from the Commissioner of Lands at page 12 states that the 3<sup>rd</sup> Plaintiff was to have the property known as CHILA/270/CL/7 surveyed at his own cost. The same goes for the 2<sup>nd</sup> Plaintiff at page 9 of the said bundle of documents. This is what necessitated that Plaintiffs to approach David Mubanga who in turn referred them to the 1<sup>st</sup> Defendant to have the block of flats surveyed. The letter at page 4 of the Plaintiffs bundle of documents dated 12<sup>th</sup> June, 2002 shows that Zambia Wildlife Authority who was the Plaintiffs employer submitted the list of approved applicants to buy the government houses to the Ministry of Works and Supply, and at page 7 of the said bundle of documents, the Ministry of Works and Supply wrote to the Commissioner of Lands to offer the flat to the 3<sup>rd</sup> Plaintiff.

It can be seen that the procedure for offering the Plaintiffs the properties to buy was followed, and a snag was reached at the point of survey of the block of flats. The 1<sup>st</sup> Defendant in cross examination stated that when the Plaintiff's asked him to survey the land, he did not own Stand No 880, Chilanga as it was offered to him on 12<sup>th</sup> May, 2014, after he had applied for it in 2002. It was also his evidence that the Plaintiffs asked him to survey the property in 2004. The 1<sup>st</sup> Defendant in cross examination also testified that the block of flats which the Plaintiffs bought is a common leasehold, and that an architect, and not a cadastral surveyor, surveys such properties.

This evidence was confirmed by DW3 in re-examination. Section 4 (1) of the Common Leasehold Act, Chapter 208 of the Laws of Zambia provides that;

***“4.(1) The Registered Proprietor of a parcel of land on the Lands Register may apply to the Registrar for the registration of a common leasehold***



*scheme in relation to the parcel by lodging with him a copy of the proposed scheme in a form approved by the Registrar.*

*(2) The application shall be accompanied by a certificate made by a registered architect or a registered quantity surveyor that-*

*(a) in the case of a proposed common leasehold scheme other than a phased development-*

*(i) all the buildings and other fixtures marked on the plan of the scheme are in place;*

*(ii) the plan shows their position with reasonable accuracy;*

*(iii) they are all structurally sound;*

*(iv) they are within the boundaries of the parcel and any caves, guttering or other projections are the subjects of registered easements; and*

*(v) they conform to the planning permit applying to the parcel; or*

*(3) The Registrar shall register the common leasehold scheme if he is satisfied that the application satisfies this Act.*

*(4) A common leasehold scheme shall not be registered unless the Surveyor-General has given each prospective unit an identifying number”*

In terms of what a common leasehold scheme contains, Section 5 of the Common Leasehold Schemes Act provides that;

*“5. (1) A proposed common leasehold scheme shall-*

*(a) identify the parcel of land by the identifying number provided by the Surveyor-General;*

*(b) specify the external surface boundaries of the parcel by means of a diagram or plan conforming with section twelve of the Lands and Deeds*



**Registry Act and specify the location in relation thereto of all buildings and fixtures existing and proposed to be built under the scheme;**

**(c) divide the land and existing and proposed buildings and fixtures into the parts belonging to the several units, together with common property, defining the boundaries of each unit's property;**

**(d) include a plan illustrating the units and stating for each the identity number provided by the Surveyor-General;**

**(e) show the approximate floor area of the part of any unit that is part of a building, and the approximate area of the part that is not a part of any building;**

**(f) specify the unit entitlement of each unit, being a whole number, and state the sum of the unit entitlements of all the units;**

**(g) state a physical or postal address of the body corporate for the purpose of service of notices under section twenty-seven; and**

**(h) contain such other particulars as the approved form may require.**

Therefore, the block of flats which the Plaintiffs were offered to buy was required to be surveyed in line with the above law, in order for them to have title to the land. What the Plaintiffs produced before this court was the site plan for the block of flats which is at pages 17 and 18 of the Plaintiffs bundle of documents. It will be noted from the evidence of DW4 that the block of flats that the Plaintiffs were offered, was the property of the government, which it sold in order to empower the sitting tenants. This land falls within the jurisdiction of the 4<sup>th</sup> Defendant now, and at the time within the jurisdiction of the Kafue District Council.

Therefore, going by the evidence of DW4 there was need for the Kafue District Council to produce a lay out plan of the area where the block of flats is, being a common leasehold, and submit it to the Registrar of Lands for approval



together with a certificate from an architect or a quantity surveyor, and thereafter the Registrar of Lands would have submitted it to the Surveyor General for numbering, if satisfied. The evidence on record shows that the site plan at pages 17 and 18 of the Plaintiffs bundle of documents was the document that was used to offer the flats for sale to the Plaintiffs.

However, it will be noted that the site plan at page 17 of the Plaintiffs bundle of documents has only date stamps from the Ministry of Works and Supply dated 22<sup>nd</sup> August, 2006 and the Zambia Wildlife Authority dated 2<sup>nd</sup> December, 2008. The site plan does not have any date stamps from the Kafue District Council or the Registrar of Lands date stamp showing approval or indeed from the Surveyor General, entailing that it was not approved. This failure resulted in the Plaintiffs block of flats being numbered Block 270, when there is in existence Stand No 270 in the same Chilanga where the Plaintiffs block of flats is located, as seen from the evidence of DW4, which was numbered in 1999.

The question that however arises in this matter is whether the Plaintiffs can claim the land on which Stand No 880, lies in view of the fact that a plan for their block of flats was not submitted to Kafue District Council, the Registrar of Lands or indeed the Surveyor General for numbering after an architect or quantity surveyor produced a certificate for the common leasehold? It is trite that a common leasehold scheme may have areas of common use such as parking, movement, and in this case the contention is that the toilets for the flats offered to the Plaintiffs, which are used in common fall on Stand No 880.

The 1<sup>st</sup> Defendant in his testimony stated that the Kafue District Council planned for the area where Stand No 880 is, and thereafter he applied for the Stand, and the Commissioner of Lands offered him the land, after the Kafue District Council recommended that he be offered the land. His evidence was that the document at page 1 of his bundle of documents is the application letter that he wrote for the land. This document at page 4 on the bottom part under certificate indicates that the 1<sup>st</sup> Defendant's application was approved on



11<sup>th</sup> August, 2010 under minute number KDC/PWD/40/07/2, and the rest is not clear. That part has a date stamp for the Kafue District Council dated 28<sup>th</sup> June, 2002.

The date when the 1<sup>st</sup> Defendant made that application is not indicated on the document but in cross examination, he testified that he applied for the land in 2002. The 1<sup>st</sup> Defendant was offered the property in 2014, as seen at page 9 of the 1<sup>st</sup>-3<sup>rd</sup> Defendants bundle of documents. The 1<sup>st</sup> Defendant testified that page 5 of the 1<sup>st</sup>-3<sup>rd</sup> Defendants bundle of documents was a numbered site plan from the Ministry of Works and Supply for the block of flats, which were offered to the Plaintiffs. He also testified that at page 6 was a working plan for Stands No 879-881 which were extracted from a site plan and used to conduct the survey. It was prepared by A. Chikwari, a private surveyor.

The survey diagram for the property Stand No 880 was identified as that at page 15 of the 1<sup>st</sup>-3<sup>rd</sup> Defendant's bundle of documents. It has been seen from the evidence given by DW4 that when Councils as agents of the Ministry of Lands create parcels of land, they are required to submit lay out plans to the Commissioner of Lands who on being satisfied with the plan, will ask the Surveyor General to number the plan, and thereafter the Council can advertise the plots for sale.

When the 1<sup>st</sup> Defendant was cross examined, he told the court that there was no general plan for the plots 879, 880, and 881 that was approved, and he also testified that a site plan is prepared by the planners at the District Council which is submitted to the Commissioner of Lands for numbering. That the site plan is used to survey the properties. There is no site plan for Stands No 879-881, and the document at page 5 has no name of the author, but has a date 29<sup>th</sup> April, 2008. The evidence on record is that David Mubanga prepared it. While the Plaintiffs alleged that they gave the 1<sup>st</sup> Defendant monies for his lunch and transport so that he could have their land surveyed, the documents at pages 15-16 of the Plaintiffs bundle of documents show that it is David



Mubanga, and not the 1<sup>st</sup> Defendant who requested for the money, and in fact worked on the site plan with the Plaintiffs.

The 1<sup>st</sup> Plaintiff was clear in his evidence that when the 1<sup>st</sup> Defendant disappeared, it was David Mubanga who did the work, and I am therefore at a loss as to how the Plaintiffs were waiting for the 1<sup>st</sup> Defendant to give them the survey diagram, when he did not undertake the works. When the 1<sup>st</sup> Defendant was referred to the document at page 8 of the 1<sup>st</sup>-3<sup>rd</sup> Defendant's bundle of documents, he testified that it was a general plan that was not approved. This document is a plan for Stands 879-881 Chilanga.

As already observed, a perusal of the evidence shows that there is no general plan or indeed a site plan that was prepared by the Kafue District Council which was sent to the Commissioner of Lands, and who on approval sent it to the Surveyor General for numbering for Stands 879, 880, and 881. Both DW3 and DW4 testified that there was a general plan that was submitted by the Kafue District Council to the Commissioner of Lands, which was approved for numbering by the Surveyor General, but both said that it was not before Court.

DW3 attributed the failure to avail the same before court as being due to the fact that he thought that it had already been produced before court, as the matter was coming up for continued trial. He further told the court that the office of the Surveyor General keeps such records. DW4 on the other hand initially stated that he had not produced the site plan in the Commissioner of Lands bundle of documents, as Counsel for the Plaintiffs had objected to the copy that he sought to produce as no reason was advanced for the whereabouts of the original. When cross examined further, he testified that it was because he had been unable to find it.

There is therefore no evidence on record to show that in fact the Kafue District Council did create plots 879-881, and submitted a lay out plan to the Commissioner of Lands for approval, and thereafter a site plan was numbered by the Surveyor General, like the one at page 1 of the Commissioner of Lands



bundle of documents, being the site plan for where Stand No 270 Chilanga is. It is from a document such as this one that a survey can be done, or as seen from the evidence by DW4, from a sketch plan which is produced from a site plan, and is approved by the Surveyor General.

Counsel for the 1<sup>st</sup>-3<sup>rd</sup> Defendants argued that the 1<sup>st</sup> Defendant should not be prejudiced by the failure by the Kafue District Council to comply with its internal procedures when it comes to land alienation, as the 1<sup>st</sup> Defendant going by the authorities cited would presume that there had been compliance with the said internal procedures. This submission is true only to the extent where the 1<sup>st</sup> Defendant was not an accomplice in any breach of the procedures.

I have noted that the 1<sup>st</sup> Defendant in his evidence testified that the document at page 5 of the 1<sup>st</sup>-3<sup>rd</sup> Defendant's bundle of documents is the site plan for the Plaintiffs block of flats that David Mubanga came up with, dated 29<sup>th</sup> April, 2008. It will be noted that Stands 879-881 captured at page 6 of the same bundle of documents are not captured at page 5, yet the evidence of the 1<sup>st</sup> Defendant was that these stands were created on November, 2001, before the site plan for the Plaintiffs block of flats was done by David Mubanga on 29<sup>th</sup> April, 2008.

If indeed the Stands 879-881 existed at the time David Mubanga prepared the document at page 5, he would have captured the said stands on the document like he had captured the others stands that were there. It can therefore be concluded that the said stands did not exist as at 29<sup>th</sup> April, 2008 when David Mubanga prepared the site plan. Following from this, one can also reasonably infer that there is no general plan that the Kafue District Council submitted to the Commissioner of Lands for numbering, and which the Surveyor General numbered, as it did not create the plots. That is why DW3 and DW4 who are officers from the Ministry of Lands and subpoenaed witnesses, failed to produce the document. This is the position even if the letters at pages 26 and



27 of the Plaintiffs bundle of documents referred to only Block 270 Chilanga and not Stands 879-881, as not having been tabled by the Kafue District Council, as page 5 of the 1<sup>st</sup>-3<sup>rd</sup> Defendants bundle of documents does not show that the properties 879-881 existed as at 29<sup>th</sup> April, 2008.

One can only wonder how Mr Chikari surveyed the property as seen at page 15 of the 1<sup>st</sup>- 3<sup>rd</sup> Defendant's bundle of documents. Coupled with this, is the fact that the 1<sup>st</sup> Defendant testified that he applied for the land in 2002, yet the document at page 4 of the 1<sup>st</sup>-3<sup>rd</sup> Defendants bundle of documents shows that the 1<sup>st</sup> Defendant's application was approved on 11<sup>th</sup> August, 2000. This was way before the 1<sup>st</sup> Defendant alleges that he made the application, and even before the said plots were created on 30<sup>th</sup> November, 2001, going by his evidence, even though his argument was that errors on the part of the Kafue District Council could not be attributed to him.

However, as the document at page 5 of the 1<sup>st</sup>-3<sup>rd</sup> Defendants bundle of documents as already seen shows that Stands no 879-881 did not exist as at 29<sup>th</sup> April, 2008, it would therefore be reasonable to infer that the 1<sup>st</sup> Defendant in collusion with others generated the documents at pages 1-4 of the 1<sup>st</sup>-3<sup>rd</sup> Defendant's bundle of documents, and had the land surveyed and approved and a certificate of title issued to that effect.

The Plaintiffs in the statement of claim states that the fraud was committed by the 1<sup>st</sup> Defendant using his position as a servant of the 5<sup>th</sup> Defendant who was found at the Ministry of Lands, and did so when the Plaintiffs had engaged him to survey their land. Fraud as held in the case of **SABLEHAND ZAMBIA LIMITED V ZAMBIA REVENUE AUTHORITY 2005 ZR 109** is required to be proved on a standard higher than a balance of probabilities. It was held in that case that;

***“1. Where fraud is an issue in the proceedings, then a party or wishing to rely on it must ensure that it is clearly and distinctly alleged. Further, at the trial of the cause, the party alleging fraud must equally***



***lead evidence, so that the alleging fraud must equally lead evidence, so that the allegations is clearly and distinctly proved.***

***2. Allegations of fraud must, once pleaded, be proved on a higher standard of proof, than on a mere balance of probabilities, because they are criminal in nature”.***

The evidence before this court as already seen shows that Stand No 880 was surveyed without being approved by the Planning Authority, the Commissioner of Lands and the Surveyor General. The evidence reveals that this property was surveyed by Alex Chikawari in 2012. The 1<sup>st</sup> Defendant testified that he left the Ministry of Lands in 2004, and therefore at the time that he came into contact with the Plaintiffs, he was no longer an employee of the Ministry of Lands.

The Plaintiffs did not rebut that defence, but the evidence which has not been disputed is that the 1<sup>st</sup> Defendant did deal with the Plaintiffs after he had left the Ministry of Lands through David Mubanga over the survey of the land where the block of flats that they were offered to buy is. The 1<sup>st</sup> Defendant conceded to having met the Plaintiffs at the Ministry of Lands, and the Plaintiffs could not be faulted for concluding that the 1<sup>st</sup> Defendant worked there, as their evidence that David Mubanga had called the 1<sup>st</sup> Defendant to his office when the Plaintiffs went there, and thereafter the 1<sup>st</sup> Defendant took them to an office within the same Ministry before he went with them to the land in issue was not challenged in cross examination, and it remained credible evidence.

Therefore, while the 1<sup>st</sup> Defendant may not have been an employee of the 5<sup>th</sup> Defendant at the time Stand No 880 was offered to him, he was aware of the existence of the land as he had gone to the Plaintiffs block of flats prior to the land being allocated to him, and which was before David Mubanga produced the site plan at page 5 of the 1<sup>st</sup>-3<sup>rd</sup> Defendants bundle of documents, and page 17 of the Plaintiffs bundle of documents. Although there is no evidence to show what documents the 1<sup>st</sup> Defendant used to have the land alienated to himself,



page 5 of the 1<sup>st</sup>-3<sup>rd</sup> Defendant's bundle of documents shows that Stand No 880, Chilanga did not exist as at 29<sup>th</sup> April, 2008, when David Mubanga prepared the site plan.

Further, the 1<sup>st</sup> Defendant's wife appears on the title deed at page 11 of the 1<sup>st</sup>-3<sup>rd</sup> Defendants bundle of documents, when the letter of offer at page 9 of the said bundle of documents only has his name as an offeree. His wife's name could only appear on the title deed as a joint owner with his input, as there is no evidence on record to show that an application was made to include her as a joint owner of the property, and this the 1<sup>st</sup> Defendant conceded in cross examination. In re-examination, he testified that he had verbally instructed the Lands officer to include the 2<sup>nd</sup> Defendant as a joint owner of the property on the title deed, which goes to show that he had influence in the land being allocated to him.

The evidence on record with regard to the creation and offer of Stand No 880 Chilanga to the 1<sup>st</sup> Defendant establishes fraud. This is because, going by the definition in Blacks Law dictionary quoted by the 1<sup>st</sup>-3<sup>rd</sup> Defendants fraud, is a knowing misrepresentation of the truth, which in this case, was the representation that the land where Stand No 880 is, was planned and created by the Kafue District Council and submitted to the Commissioner of Lands for approval, and the Surveyor General on approval numbered the properties in 2001, when this was not the position.

The fraud has been proved on a standard higher than a balance of probabilities looking at the documents on record, and the defence that the Commissioner of Lands is the final authority in the land allocation process cannot stand, as in this case, the land is said to have been created by the Council, and the provisions of the Land Circular No 1 of 1985 had to be complied, which was not done. The evidence shows that the 1<sup>st</sup> Defendant in concert with others created the said land and falsely represented that the Kafue District Council had done so.



I therefore find that 1<sup>st</sup> and 2<sup>nd</sup> Defendants fraudulently acquired the certificate of title No 310353, and it is accordingly cancelled, as it is trite going by the decision in the case of **ANTI CORRUPTION COMMISSION V BARNNET DEVELOPMENT CORPORATION LIMITED 2008 VOL 1 ZR 69**, that a certificate of title may be cancelled on the ground of fraud or for reason of impropriety in its acquisition. The 3<sup>rd</sup> Defendant argued that she was an innocent purchaser for value without notice of any encumbrances on the property, and relied on the authorities in the 1<sup>st</sup>-3<sup>rd</sup> Defendants submissions. Whilst it is true that when the 1<sup>st</sup> Defendant offered the 3<sup>rd</sup> Defendant Stand No 880 no objection was raised by the Plaintiffs, this was because they were unaware of the sale. However, the evidence on record shows that the Plaintiffs protested over allocation of the land as far back as 2008, and the 3<sup>rd</sup> Defendant is on record as being the owner of Stand No 882 in the same area, and which she developed, having acquired it in 2004.

She was therefore aware of the area, and when she went to the property to clear it in July, 2014, she found two toilets at the site, and was confronted by the Plaintiffs who claimed ownership of the land. The assignment for Stand No 880 to the 3<sup>rd</sup> Defendant at pages 19- 23 of the 1<sup>st</sup>-3<sup>rd</sup> Defendants bundle of documents was lodged on 15<sup>th</sup> September, 2014, yet the lease for the land is dated 13<sup>th</sup> June, 2014, and the certificate of title at pages 24-29 dated 1<sup>st</sup> March, 2014 shows that the property was registered on 17<sup>th</sup> June, 2014 in the 1<sup>st</sup> and 2<sup>nd</sup> Defendants names.

This shows the irregularities that characterized the issuance of the title deed to the 3<sup>rd</sup> Defendant, and goes to show that the 3<sup>rd</sup> Defendant was aware of the claim to the property by the Plaintiffs, and had the certificate of title hurriedly issued in her name. She was not an innocent purchaser for value without notice, and her certificate of title number 4586 to the said land is equally cancelled. The 5<sup>th</sup> Defendant is accordingly directed to cancel the said certificates of title forthwith.



The Plaintiffs were offered the flats on a block to buy which are subject to the Common Leasehold Schemes Act, Chapter 208 of the Laws of Zambia, when it comes to their alienation. They shall comply with the law in order that their properties can be surveyed and certificates of title issued to them. In line with this, the 4<sup>th</sup> Defendant who is the custodian of the land in question, is directed to come up with a plan for the area where the flats are situated, at the Plaintiffs instance.

The plan shall consider any common areas such as for movement and ablution blocks, as the flats as seen from the evidence on record, have no toilets inside. The Plaintiffs shall bear the costs of and incidental to the processes relating to the acquisition of the certificates of title for their properties. The 1<sup>st</sup> Defendant shall bear the own costs of the proceedings, to be taxed in default of agreement. Leave to appeal is granted.

**DATED THE 27<sup>th</sup> DAY OF SEPTEMBER, 2018**

S. Kaunda  
**S. KAUNDA NEWA**  
**HIGH COURT JUDGE**