

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

2018/HP/2198

BETWEEN:



PATRICK SAMBI MALALA

PLAINTIFF

AND

JUSTIN CHINYAMA

1st DEFENDANT

LUKA KANYISHI KADOLI

2nd DEFENDANT

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 28th DAY OF
JANUARY, 2020**

For the plaintiff : Mr Butler Sitali, Butler and Company

For the Defendants : Ms Gladys Kasoma, Legal Aid Counsel, Legal Aid Board

J U D G M E N T

CASES REFERRED TO:

1. ***R v Holy Trinity 1827 7 B & C 611***
2. ***Mwiinda v Gwaba 1974 ZR 188***
3. ***Khalid Mohamed v The Attorney General 1982 ZR 49***
4. ***Wilson Masauso Zulu v Avondale Housing Project Limited
1982 ZR 172***
5. ***Village Headman Mupwaya and Singh v Mbaimbai
SCZ/41/1999***
6. ***Still Water Farms Limited v Mpongwe District Council,
Commissioner of Lands, Dawson Lupunga and Bautis Kaoul
LAT/30/2000***
7. ***Rosemary Chibwe v Austin Chibwe SCZ Judgment No. 38 of
2000***
8. ***Nora Mwaanga Kayoba and Alizani Banda v Eunice
Kumwenda Ngulube and Andrew Ngulube SCZ Judgment***

- No.19 of 2003**
9. **OTK Limited v Amanita Zambiana Limited, Diego Gan-Maria Casilli, Amanita Premium oils limited, Amanita Milling Limited 2005/HPC/0199**
 10. **Anort Kabwe and Charity Mumba Kabwe v James Daka, The Attorney General and Albert Mbazima 2006 ZR 12**
 11. **Simumba v Banda Appeal No. 73 of 2009 Supreme Court Judgment No. 12 of 2013**
 12. **Zulu v Kalima SCZ No 2 of 2014.**

LEGISLATION REFERRED TO:

1. **Wills and Administration of Testate Act, Chapter 60 of the Laws of Zambia**
2. **The Lands Act, Chapter 184 of the Laws of Zambia**

OTHER WORKS REFERRED TO:

1. **The Nature of African Customary law by T.O Elias, Manchester University Press, Manchester, 1956**
2. **United Nations Survey of Zambia by Van Loenen in Bastiaan Loenen, Land Tenure in Zambia, page 5, 1999 in Mvunga M.P, Land Law and Policy in Zambia; Gweru: Mambo Press, 1982, P17**

In this matter, the plaintiff commenced the action on 27th December, 2018, by way of writ of summons and statement of claim claiming;

1. *An Order of injunction ordering the defendants to vacate the land measuring approximately 56 hectares which had been given to the late Francis Sintema Malala at Kankomba village, in Kaoma district and to restrain the defendants from selling, buying, or disposing of the land or in any way interfering with the plaintiff's quiet enjoyment, possession and ownership thereof.*
2. *An order that the plaintiff is entitled as beneficial owner, to exclusive possession of the land situate at Kankomba village measuring approximately 56 hectares which had been given to the late Francis*

Sintema Malala and shown on a sketch map submitted in these proceedings.

3. *Damages;*
4. *Interest;*
5. *Costs; and*
6. *Such other relief as the court may consider appropriate.*

According to the statement of claim, the plaintiff is the beneficial owner, and administrator of the estate of his late father Francis Sintema Malala (the deceased), who was the owner of a piece of land situate at Kankomba village in Kaoma in Western Province of the Republic of Zambia measuring approximately 56 hectares.

It is stated that in March, 1986 after the deceased's retirement from formal employment, he approached the then headman, Kankomba Shimoka requesting for a piece of land on which to settle, and the headman gave him the land in question. The plaintiff further avers that the headman then took the deceased to Naliele Royal Village and presented him before Chief Litiya for final approval, which approval he was accordingly granted.

It is also stated that the deceased was not issued with any documents of title, but he was merely issued with a number as this was the practice at the time. However, his family particulars and the extent of the land that he was given were recorded in the village register kept and maintained by the headman. The statement of claim also shows that upon being granted that piece of land, the deceased and his family settled on it, and built some houses, cleared part of the land, and started cultivating various crops including maize and vegetables.

The statement of claim further states that the deceased died in 1999 leaving a written will in vernacular, dated 6th April, 1995, in which he gave his land, fields, cattle and his goods to his wife and children, and his gun to the plaintiff. The plaintiff avers that from 2011 to 2016 the deceased's wife was in Monze nursing one of her sons who was ill, and that during that time, the deceased's children and other family members had at different times remained at, and continued to live on the land, which they continued to cultivate.

Then in 2012, the headman died, and he was succeeded by the 2nd defendant, Luka Kanyinsha Kadoli as Headman. The plaintiff states that in June 2018, the 1st defendant entered upon the land and proceeded to occupy one of the houses thereon, claiming that he had been sold the land by the 2nd defendant because the Malala family had abandoned the land for a period of fifteen (15) years. It is averred that since the land was given to the deceased, the Malala family has been in continuous and unbroken occupation of it, and that as recent as 2016/2017 farming season, the Malala family cultivated on the land.

It is further stated that in September 2018, the matter of the illegal occupation of the land by the 1st defendant was taken to the Lands Committee which ruled that contrary to the defendants' allegation, the land had never been abandoned by the Malala family, and that the house that had been occupied by the 1st defendant belonged to the plaintiff.

However, despite that decision, the 2nd defendant maintained his decision of having been sold the land to the 1st defendant, and he stated that unlike the plaintiff's family, the 1st defendant had rendered him assistance. Further, that since none of the plaintiff's family attended his

father's funeral, he was going to chase them from the village, hence his decision to sell their land to the 1st defendant.

The plaintiff also states that in an effort to legitimize his scheme, the 2nd defendant has failed to produce the original land register containing the Malala family as owners of the land, claiming that it was destroyed by termites. The plaintiff states that the 2nd defendant has compiled a fresh village register by himself omitting the entire Malala family, and that despite numerous demands to vacate, by the plaintiff's family, the 1st defendant has refused to do so, and has continued to interfere with the plaintiff's possession and quiet enjoyment of the land.

The plaintiff contends that the 1st defendant has made changes to one of the houses, and has cultivated on the land that was cleared by the plaintiff's family, thus preventing the plaintiff's family from cultivating on it, in the 2017/2018 farming season.

The defendants filed their defence and counterclaim on 2nd February, 2019. They state therein that the plaintiff's claims with regard to the deceased having been given the land, and that he lived there and cultivated thereon until his death in 1999, as being within the peculiar knowledge of the plaintiff. The same goes with regard to the averment that the deceased left a will in which he left the land, the field, the cattle and goods to his wife and the children, and the gun to the plaintiff.

The defendants also state that the averments with regard to the plaintiff's mother having left to go and nurse her son in Monze from 2011 until 2016 when he died, is also within the plaintiff's knowledge, as is the allegation that Headman Kankomba Shimoka died in 2012, and was succeeded by the 2nd defendant.

The defendants dispute the plaintiff's assertion that to his astonishment, the 1st defendant entered upon his land which was given to the deceased, and he occupied one of the houses, claiming that he had been sold the land by the 2nd defendant, to the extent that the 1st defendant did not occupy one of the houses on the land, but that he moved into a house he built himself.

Further, that he was not sold, but was given the land after he requested for it, and that Chief Libinga consented by a written letter which letter was taken to the Royal Local Court, where the 1st defendant was issued with a certificate. The defendants state that the 2nd defendant position is that the land was abandoned, and lay in waste from 2004 to 2018, until it was given to the 1st defendant.

They further aver that the 1st defendant did not cultivate on the land that was cleared by the plaintiff, but on the land that he cleared himself, and that he did not find any occupants on the land. The defendants deny that the plaintiff has suffered any loss or damage, as his family did not cultivate on the land.

They state that, to the contrary, it is the 1st defendant who has suffered loss and damage as a result of the plaintiff's inconvenience, as he has been unable to carry out his activities. The defendants counterclaim;

1. *Damages for inconvenience.*
2. *Interest.*
3. *Costs.*

At the trial, the plaintiff testified and called five witnesses, while the defendants also testified and called one witness. PW1 was the plaintiff. He stated that in March 1986, the deceased settled in Kankomba, Kaoma

and approached headman Kankomba Shimoka for a piece of land on which to settle. The headman gave him the land, and the deceased was taken to Naliele Royal Village to Chief Litiya, where the offer of the land was approved, and the deceased was given a number for the land as a symbol.

The plaintiff told the court that the land is about fifty six (56) hectares in size, and that by being given the number, he acknowledged the offer which in Lozi language is called 'Kushawelega Mibui'. He also stated that thereafter the deceased returned to Kankomba Village where his name and that of his family was entered in the village register for Kankomba. Further that, the deceased settled on the land with his family and build houses, reared cattle, goats, chickens and cultivated maize and fruits.

He further testified that the deceased died on 7th April, 1999 leaving a will in vernacular, which was dated 6th April, 1995. Referring to the said will at page 2 of the plaintiff's bundle of documents, the plaintiff read it out as follows;

'the land and farm, garden, cattle, items from the house are for my children and Mrs. Malala. The gun is for P.S Malala. No other person shall come and trouble them or mislead them'.

The plaintiff stated that in 1999, barely a week after the deceased's death, unknown persons set fire and burnt two houses, one which was the big house where the deceased used to reside, and that all the property was destroyed by the fire. The plaintiff also testified that in 2011 he called his mother to join him in Monze, so that she could rest, and his siblings, Phelem Malala and Damian Malala and the other family members remained on the land.

He told the court that when headman Kankomba died, the 2nd defendant took over as headman. It was also the plaintiff's evidence that in 2018 his sister and brother found the 1st defendant on the land, and when asked what he was doing at the land, he said that he was given or sold the land by the 2nd defendant. The plaintiff explained that the 1st defendant occupied a hut on the land, and he removed the thatched roof and replaced it with his own roofing. He also testified that the matter was taken to the Lands Committee for verification and investigation.

The evidence was that the Lands Committee ruled that the Malala family were the sole owners of the land, but despite this being communicated to the 1st and 2nd defendants, the 2nd defendant went ahead and gave the land to the 1st defendant stating that the Malala family had abandoned the said land for fifteen (15) years, which was not true. Further, that the 2nd defendant stated that the 1st defendant had been given the land because he had rendered a service to the 2nd defendant when he had a funeral, when his father died.

The other reason advanced by the 2nd defendant for giving the 1st defendant the land, was that the Malala family did not attend his father's funeral. The plaintiff stated that this was not true as his elder brother attended the funeral. Still in his testimony, the plaintiff stated that the matter was referred to Chief Libinga for further determination, who ruled in favor of the defendants, and stated that if the land had been given to the 1st defendant, the Malala family should be given alternative land.

The plaintiff also told the court that the 2nd defendant failed to produce the village register where the name of the deceased appeared, with the reason being given that it had been destroyed by termites. He stated that a fresh register was written which did not indicate the Malala family.

In cross examination, the plaintiff agreed that the deceased's will had no witnesses' signatures, but his testimony was that the deceased signed it. He agreed that forensic experts had not confirmed whether or not it was the deceased's signature on the said will. The plaintiff also stated that without other evidence, it could not be confirmed that the deceased wrote and signed the will. His testimony was that the property and the land were left to his mother, and the deceased's children.

Still in cross examination, the plaintiff testified that when a person dies, traditional land is left to the family, and an administrator is appointed to look after the estate. He stated that the land in question had no title, and that he would not know if there was a certificate of title as the house was burnt. The plaintiff told the court that there is a Lands Committee which was established by Chief Libinga to assist the Chief in land matters. He stated that he did not have the minutes of the Lands Committee meeting, but that the Chief held that the land belonged to his father.

The plaintiff also testified that a dead person can own land, and that as per procedure, they were to continue developing the land, and there was no reason to change it from their father's name or to indicate to the Chief that they would remain on the land. He however stated that he did not know the procedure.

PW2 was Petronella Kalumbu Mubita. She testified that she left Kasama in 1999 after the deceased called her husband, Phelem Malala, who was unwell. She stated that they arrived at Kankomba in April 1999, and found that the deceased had died a day after they left Kasama. PW2 stated that they found the deceased's wife, John Malala and Damian Malala there. She also testified that in 2000 the house their parents left was set on fire at 02:00 hours.

Still in her evidence, PW2 testified that they stayed on the land until 2008 when they relocated to Kasama where her husband found a job, and John, Damian and the deceased's wife remained at the land until 2009, when John also moved to Lusaka after he found work there. PW2 stated that she would go to the farm and cultivate maize and millet, and in 2012, John died. After that, the deceased's wife was diagnosed with high blood pressure, and the plaintiff got her, and started living with her.

It was PW2's testimony that Damian who had remained at the village got a job in 2012 at a borehole drilling company, Village Water. Then between 2013 to 2014, they got Damian to go and live with them, as the house at the land was burnt in a fire by unknown persons. Damian would however go back to the land to cultivate it, during the rainy season. PW2 further stated that she got her nephew Morris Kanyanga to stay and cultivate on the land from 2014 to 2016, and she would also go there to cultivate.

PW2 told the court that when Morris no longer lived on the land, they would just go there to check and cultivate, and in November, 2016, her husband, Vernon Zuze and herself cultivated maize and rice on the land. She also stated that Vernon hired a tractor, and they cultivated two (2) hectares of land. PW2 further testified that in 2017, they only cultivated maize on the ridges, as they had no fertilizer, and they harvested it in 2018, and no one went to claim the land during that period.

Continuing with her evidence, PW2 stated that in August 2018, she sent a 16-year-old child to the farm to finish off the plastering of the house, but he returned around 14:00 hours, crying and stated that there were people that had entered the house, and had removed the grass thatched roof. She also stated that when she asked the people there, they told her

that it was their village, and not the deceased's, and they gave her a phone number to call.

PW2 told the court that when she called the number, she was told that it was for John Chinyama, the 1st defendant. He told her that he had been given the land by the chairman, because they had left it fifteen (15) years ago. PW2 added that the 1st defendant had told her that they could go wherever they wanted to go, and that he had married the Chief's daughter. She testified that they went to Chief Libinga to complain over the land, and he referred them to the Lands Committee, as he could not see very well.

She explained that on the day of the hearing, the 2nd defendant did not appear, and that they were given another date. On that date, the 1st defendant called PW2 and told her that she was wanted at Naliele court, and she was told that she should carry her certificates for the land. Her testimony was that she said that they could not go to Naliele court as the direction by the Chief was that they should go to the Lands Committee. However, the 1st defendant refused to go to the Lands Committee, stating that they should go to Naliele.

She further testified that she said that they could not go to Naliele as this go against the Chief's direction, unless a call out or summons was issued. That is how the 1st defendant had told PW2 that he would inform them that she had refused to go to Naliele. Further in her evidence, PW2 testified that they went to Kankomba, but the 2nd defendant was not in attendance, and they heard that he had told Damian that their names had been removed from the village register.

From there, they conducted a search at the messenger's office and they did not find their names in the register. When they asked why, they were

told that they did not know. PW2 stated that she heard that the Lands Committee and the 2nd defendant prepared the register. She also testified that they were given a call out by the Chief which they served on the 2nd defendant, but he still did not attend. Further, the Lands Committee referred the matter to Chief Libinga where the 2nd defendant was present, and stated that he had given the land to another family. He was advised that he gives the plaintiff the land, and that the other family should be found alternative land, but he refused.

PW2 stated that she took the resolutions of the Lands Committee to Chief Libinga, as he had requested for them. She read the resolutions which were at page 3 of the plaintiff's bundle of documents, and were to the effect that the issue was between the 2nd defendant and the Malala's, with the Malala's complaining that the 2nd defendant had sold the land without any reason. The Lands Committee found that in the fifteen (15) years, the Malala Family had been on the land.

Then in 2011, Mrs Malala went to Lusaka, and Malala equally left for Lusaka in 2012. The Lands Committee also found that in 2016-2017, Phelem Malala cultivated rice and maize on the land, and that the 1st defendant was living in Phelem's house. The Lands Committee referred the matter back to the Chief for ruling. Her evidence was that the resolutions of the Lands Committee were signed by Anania Chikunga as headman for Kankomba, Paul Chinyama and Samuel Chingunde signed as members of the Committee.

She also stated that they took the letter to Chief Libinga who informed them that he had heard the matter, and that they should go back to Naliele and get their certificate of ownership. They, however, told the

Chief that they did not have one as the deceased's house was burnt, and that the deceased's name could also not be found in the book.

PW2 testified that they conducted a second search in the village register, and they were asked when the deceased was given the land. She had responded stating that it was on 11th May, 1986, and she was informed that certificates were not yet being given in that year, but receipts. PW2 told the court that she was told that Mr. Manana and Mr. Kakumbi were there at the time, and she was asked to provide K1,500.00 to call Chief Libinga and discuss with him, so that the 1st defendant could be given alternative land.

She stated that they provided the money and took it to Naliele, but they were informed that the Chief had said that the land had already been given to someone else, and could not be given back to them. PW2's evidence was that she explained to them that the land had been grabbed from the deceased, but she was told that they had no power, and that it was only the Chief that possessed the power. She further stated that they were told to surrender the land as many people were dying as a result of land issues.

In cross examination, PW2 stated that in 2016 she harvested rice with Phelem Malala and her friend Vernon Zuze. She also stated that they searched for the deceased's name in the village register, and that after he died, they had shown interest in continuing with the farming in 1999 after the Administrator was chosen. PW2 explained that this was after Mwendo went to court in Kalundu, and her evidence was that the current Administrator is the plaintiff.

When crossed examined further, she stated that Chief Libinga could not give them back the land as he had already given it to someone else. PW2

stated that the Lands Committee asked them to provide a certificate of ownership, but they provided evidence in the form of farming activities on the land, and the people who lived on it. She also stated that she gave K1,500.00 to Alinani, and when referred to the document at page 3 of the plaintiff's bundle of documents, being the document authored by the Lands Committee, she stated that Alinani's name and signature was not on the document.

PW2 further stated that the first name on the document was Anania Chikunga, and that the money was paid to Naliele court. Further, that Anania Chikunga was the headman chosen by the Kankomba community as authorized by the Chief. Her evidence was also that she did not know if the Chief appoints the headmen, but that she knew Anania Chikunga as headman, and they would refer matters to him. Still in cross examination, PW2 testified that the 2nd defendant was the headman of the village, but that Anania Chikunga was chosen by the Committee for land issues.

She also testified that the 2nd defendant's headman ship came from ethnicity. PW2 further stated that there are two forms of headman ship, and that when they went to the Lands Committee, the 1st Defendant was present.

In re-examination, PW2 testified that they stayed with one headman being the 2nd defendant, and that there were other headmen with different groups, such as Anania Chikunga and Joseph.

Damian Malala was PW3. He testified that he lived in Kaoma at Kankomba village from 2008 to 2013 when he left for Kasama. He returned to Kaoma in August 2018, and he was told by his in-law that people had occupied the land. PW3 stated that he went to Chief Libinga

over the matter, and with Zuze and Mukelebai to meet the Lands Committee and call the village headman. He stated that he found three committee members, who included the chairman.

PW3 testified that he had explained the situation to the 2nd defendant, who was also asked questions by Phelem Malala and PW2. The 2nd defendant had explained, stating that he had met PW3's elder brother, whom he had asked if he was still building at the land, and he had responded that he was not. Further, PW3's elder brother had told the 2nd defendant that he would not return at the land as there was witchcraft in Kankomba. However, his elder brother had refused having met the 2nd defendant.

PW3 denied that they left the village fifteen (15) years ago, stating that they still cultivated on the land. He also stated that the Lands Committee wrote a letter stating that the 2nd defendant had not proved the years that the Malala family had not been at the farm, and that the said letter was taken to Chief. He further stated that upon receiving the letter, the Chief stated that the land that had been given to someone else could not be given to a different person.

Further, that he could not help them, and they should go Naliele as the person to whom land had been given had brought title deeds, and they should do the same. PW3 stated that they went to Naliele and explained what had happened. There, they were told that in 1986 numbers and not title deeds were given. PW3 also testified that they were told to go back to Chief Libinga, but before they could do so, they were asked to take K1,500.00 so that land could be found for the person who had built on their land.

He stated that they took the K1,500.00 so that Naliele could talk to Chief Libinga, only to be told that the land had been given to another person and could not be given to someone else.

In cross examination, PW3 stated that when the land was given to someone else he was not staying in Kankomba as he was working in Kasama. He also stated that it was not true that Chief Libinga did not give them the land because they did not provide proof that they were living at the land. He however agreed that Chief Libinga had requested for the title to the land, but they were told that only numbers and not certificates of ownership were given in 1986.

When cross examined further, PW3 stated that he was not aware that certificates of ownerships were being given in 1999, and that they did not ask for title after the deceased died.

PW4 was Paul Chinyama, a member of the Lands Committee. He testified that PW3, PW2 and Phelem Malala went to his house in 2018 over a problem concerning the land. They had informed him that the 1st defendant had taken their land after he was given the same by the 2nd defendant. PW4 stated that he told them he was not involved when the land was given.

This witness testified that the Committee was set up by the Chief to witness the giving and ascertaining of boundaries of land. He also stated that there were six (6) members of the Committee, but as at the time of his testimony, they were only three (3), as the others had died. He named the three (3) as himself, Samuel Chingunde and Anania Chikunga who were chosen by the community. PW4 also testified that they have one Chief in the area, who is Libinga, and three (3) headmen, Anania Chikunga within Kankomba, Joseph Mbambi who had died two months

earlier, and the 2nd Defendant in Chimoka village. He stated that Anania Chikunga was the chairman of the Lands Committee.

PW4's evidence was that he directed the plaintiff and the others to go and see Chief Libinga who was present when the land was given. He stated that four (4) days later they returned to him, stating that they had been referred back to the Committee and the 2nd defendant to solve the problem. PW4 testified that a meeting was set up which only took place on the 10th of September, on the fourth attempt.

At the said meeting, the 2nd defendant stated that he had given the land to the 1st defendant because the Malala family were not there for fifteen (15) years. PW4 stated that they went on to establish whether the allegation was true, and found that it was not, as the Malala family had been on the land and or were carrying on activities on the land. He also stated that they suggested as a Committee that the 1st defendant be given alternative land, and the Malala family be given back their land.

However, the 2nd defendant said that he had to discuss the same with his family. PW4 told the court that as he stays in Chimoka Village, the Committee decided that he sits down with the 2nd defendant and his family to resolve the issue. To that effect, on 23rd September, he met the 2nd defendant and his family and they discussed the issue with the family members who were present, and the issue was summarized. During that meeting, the 2nd defendant stated that their parent Shimoka died, and the Malala family did not attend the funeral or contribute to the community activities.

The 2nd defendant had further stated that he had told Phelem Malala to go back to the land, but he had refused, and that as such they could not accommodate them in Kankomba Village. PW4 testified that he reread

the minutes of the meeting, and they were approved, and he gave them to the Malala family, and he had since not discussed the issue with them. He also stated that on 10th September, 2019 the minutes were handed over to the Malala family and they took them to the Chief. With reference to page 3 of the bundle of documents, he stated that the Lands Committee signed the same.

In cross examination, PW4 stated that he was part of the Committee that was appointed by the Chief, but that the Chief did not appoint him. He stated that a meeting was held where the Chief appointed a Committee when he visited, but that the community chose the members. He also stated that the Chief recognized him as a member of the Committee. PW4 stated that the 2nd defendant said that he gave the land to another person as the Malala family were not there for fifteen (15) years.

Further, that in the meeting, the 2nd defendant said that he met one of the members of the Malala family who told him that they were not going back to the village. He also stated that as a Committee, they reviewed the years, and found that the Malala family were on the land, and that people of the community could confirm that finding. However, they were not before court.

When further cross examined, he said that he did not state that the Malala family were on the land because they paid them K1,500.00, but that the reasons for not allowing the Malala family on the land were written down. PW4 however stated that the minutes were not before court, but were in the possession of headman Anania Chikunga. PW4 stated that the matter was referred to the Chief who is the final authority on a matter. He stated that he did not ask about the matter from the

Chief or the Malala family after the referral, and that he was not present when the Malala family went back to the Chief.

It was also his evidence that he heard that the matter had been brought to court, and that he had also heard that the Chief had refused to give the land back to the Malala family, but he did not know if the reason was because the family had no land certificate. He stated that the land in dispute is in Chimoka village where the 2nd defendant is the headman. PW4 further stated that proof of ownership of land is a land certificate, and that the 1st defendant has a land certificate.

Anania Chikunga was PW5, and he stated that he is village headman for Chikunga. That amongst his duties is to maintain peace in the community. PW5 testified that the matter was taken to himself, PW4 and Chingunde in their capacity as Land Committee members, with the complaint being that the defendants had sold the plaintiff's land. He testified that PW3 went by himself stating that Chief Libinga had referred him to the Lands Committee.

However, they told him that they needed to see the person that had bought the land. PW5 told the court that they had another land dispute, and in sorting it out, they met the 1st defendant, and they told him that they should discuss the land issue. He stated that the 1st defendant told them that he had already gone to the Chief, but they told him that they needed to sit down with him. PW5 testified that they told the Malala family that they had to meet, but that the 1st defendant was going in a different direction and nobody went for the meeting.

He stated that they decided that the matter be taken back to Chief Libinga, and his evidence was that they never met as a Committee with the parties. With reference to the document at page 3 of the plaintiff's

bundle of documents, PW5 stated that he remembered the document, and that it was a letter they wrote as the Lands Committee, and he had signed it. That nothing happened after they met.

When cross examined, PW5 stated that he was chairman of the Lands Committee, and that they witness the giving of land when told to do so by the Chief. He stated that no one from the Malala family approached them after the death of the deceased stating that they wanted to remain on the land. With regard to the meeting to discuss the land issue, PW5 stated that the 2nd defendant had told them that he was busy, and that they would meet the next day, but no one went for the meeting.

He also testified that they came up with the document at page 3 because PW3 went to see them, and they gave him the letter to take to the Chief. PW5 stated that the letter was generated without a proper meeting. He further stated that he knew the procedure for acquiring land, and that a long time ago, land certificates were not given, and that the issuance of the same only started in 2002.

Still in cross examination, PW5 stated that in order to prove ownership of land one had to show a land ownership certificate, and that he was not aware that the 1st defendant had a certificate of ownership. He further stated that no one from the Malala family went to ask for a land ownership certificate as they still wanted to remain on the land.

In re-examination, PW5 when referred to the letter at page 3 of the plaintiff's bundle of documents, clarified that the letter was written to Chief Libinga by the Lands Committee stating that they had failed to resolve the matter. He stated that it had 3 signatures as the Committee members were together with the Malala family, but not with the other family.

PW6 was Vernon Zuze. He testified that in November 2016 he was in the rice business. PW2 and himself would buy rice, re pack it and sell it. He stated that in October, rice was scarce and so they went to look for rice. He testified that they went to the outskirts of Kaoma, Kankomba and that when they were just about to cross the Luena river, they found really good plains. PW2 told him that it was the boundary of their farm.

PW6's evidence was that he was shocked and amazed as the land was very fertile. He stated that they then bought rice and started a rice project on the land. With reference to the document at page 6 of the plaintiff's bundle of documents, he stated that it was a receipt that was given to them when they hired a tractor from Mr Mikenge. He testified that it was dated 12th November, 2016, and that his name was indicated on the document.

PW6 testified that they ploughed two (2) hectares of the land in Kankomba, and that no one went to stop them. He stated that he took pictures of the ploughed land on his Nokia 302 phone, which had been in his custody since the pictures were taken. He also told the court that Vincent Malala the owner of the farm heard about the project, and he sent him pictures.

PW6 identified pages 7 to 9 of the Plaintiff's bundle of documents as pictures that he took which showed the two (2) hectares of the rice that they cultivated in 2016, and that the same was harvested in 2017. He also stated that the tractor was hired to disk the rice.

In cross examination, he stated that PW2 is Phelem Malala's wife. He testified that she told him that the river was the boundary of the farm. PW6 further stated that they found a small house on the farm, and PW2 told him that the person there was the caretaker for the farm. He

however stated that she did not show him papers of ownership of the land. When referred to the picture at page 7 of the plaintiff's bundle of documents, PW6 testified that the man on the tractor was Phelem Malala.

He agreed that there was no date on the photo, and stated that he could not confirm the details of the date the on photo, but could confirm that the phone had been in his safe custody since he captured the said photos. PW6 agreed that people touched his phone, and that it had passed through several hands, as people used it to make phone calls. However, this was done in his presence. That marked the close of the plaintiff's case.

DW1 was the 1st defendant, Justin Chinyama. He testified that in January 2018, he went in search for land, and he approached the 2nd defendant for the same. The 2nd defendant told him to give him some time, and he would get back to him. Then on 1st March, 2018, the 2nd defendant called him and told him to go to Kaoma at Kankomba as there was vacant land, that used to be occupied by the Malala family, who had not been on it for a long period of time.

The 1st defendant testified that when he went to see the land with the 2nd defendant, they found only two (2) trees, and two (2) burnt mango trees. He stated that the 2nd defendant took him to the Chief Libinga who confirmed that the land had been vacant for a long time. Further in his testimony, the 1st defendant stated that the Chief and the 2nd defendant recommended that he be taken to the Royal Local Court to obtain a land certificate.

He identified the document at page 1 of his bundle of documents as the said land certificate, and stated that it was dated 2nd March. He however

stated that, the year of the certificate was not indicated, but that it was given to him in 2018. Further in his testimony, the 1st defendant testified that at Naliele court, he was told that he should occupy the land within six (6) months or the land certificate would be revoked.

Thus, after three (3) months, the 1st defendant went to the land and cleared it. He built two (2) houses which were occupied by his young sister and nephew. Further, he began to cultivate on the land, garden it and he dug fish ponds. Then in August, two (2) men who said they were from within Kankomba, being Chinyama and Ananias, went to the land and asked him who had given him the land.

The 1st defendant testified that he had told them that it was given and not sold to him by the 2nd defendant and Chief Libinga. They told him that the following morning they should meet with him and the Malala family, as the 1st defendant would be going to Mongu in the afternoon. It was the 1st defendant's testimony that he waited for them that morning but they did not show up, so he travelled to Mongu. He further stated that when he occupied the land, there was no person or rice that had been planted. He also stated that the Malala family did not occupy the land next to his land, and that they claimed the land that he occupies.

In cross examination, the 1st defendant stated that he was told that the land belonged to other people, and that he found out that they lived in Kaoma Boma. He testified that he did not go to ask them about the land. The 1st defendant also stated that he would move from Mongu to Kaoma which is about 250 kilometres, but that he did not know the distance between the land and where the Malala family was staying. His evidence was that he may or may not have found them in Kaoma.

Further in cross examination, the 1st defendant testified that he was told that the Malala family had been on the land for ten (10) years, but that the land and trees told him otherwise, as it looked like a bush, and there were burnt mango trees. He further stated that he was given a certificate of ownership on 2nd March, 2018. The 1st defendant told the court that the Induna's of the Royal Court signed it, but that they were not there when he was given the land.

He stated that he was with the 2nd defendant and the Vice headwoman, Mary Kankomba, the mother to the 2nd defendant. When referred to page 1 of his bundle of documents, the second defendant stated that he was at Kita when the document was signed and stamped, and that the year was at the back of the original document, and not on the front. He denied that the year was left blank on the document to fix the plaintiff.

He stated that he did not agree that the certificate had no start date, and his testimony was that he could not go to the previous owners of the land, as he knew that the land belongs to the Chief. The 1st defendant denied that they were defrauding the owners of the land.

When cross examined further, the 1st defendant stated that he did not recall being found by a child on the land, and he gave the said child his phone number. He however stated that someone he did not know called him concerning the land, and he told the person to ask the 2nd defendant and Chief. He agreed that the person said they were the owners of the land, and his evidence was that his phone went off until he received the summons.

Continuing with cross examination, the 1st defendant testified that he was concerned when he got the call, but he did not call back as he was on his way to Mongu, and the network was bad. Further, he had a low

phone battery, and when he got to Mongu, the children were playing with his phone after it was charged, and he went to Kaoma a month later. He said that he called the person who sold him the land, and he said that they should go to him, and they would discuss the matter, and that he should not worry.

The 1st defendant also stated that at that time, he had already built on the land, and he knew that the owners of the land were talking about it. He testified that he went to Kaoma in September 2018, and he met the person that gave him the land, and he said that they should go to the Chief and the Local Court. His evidence was that he went to the 2nd defendant to complain, and he was told that he was the owner of the land.

Still in cross examination, the 1st defendant stated that he did not go with the Malala family to the Local Court, and that the certificate states that the land is 48 hectares, which is 800 meters by 600 meters. The 1st defendant testified that he did not know that the land that he was given is within the Malala family land, and that he was not aware that there is a Lands Committee in the area.

The evidence was that the 1st defendant was told to meet Chinyama and Chikumba, but he did not ask in what capacity. He however stated that he did not attend any committee meeting, and that the Malala family did not call him and vice versa.

In re-examination, the 1st defendant stated that the date stamp on the certificate had no year, but that the clear stamp was at the back of the certificate. He also clarified that he did not call the original owners of the land as the children were playing with his phone and they deleted the

information on it. Further, that he was told that the land had reverted back to the Chief when it was given to him.

DW2 was the 2nd Defendant, Kadoli Lipanjika Kankomba who testified that he is a village headman. He stated that in January 2018 he was approached by the 1st defendant who asked for some land. He told him to wait so that he could see the Chief, as there were possible pieces of land, being that which was occupied by the Kangai and Malala families, which had been left. He stated that the Chief asked him if the Malala land had any buildings and he had responded that there were only two (2) burnt mango trees.

The 2nd defendant further testified that he was told to give the 1st defendant that land. Thus, on 2nd March, 2018, he took the 1st defendant to go and see the Chief, and the Chief asked if the Malala family were returning to the land. The 2nd defendant stated that he had informed the Chief that he had met one of the family members, who had told him that they would not return as there was witchcraft in the area.

From there, he went with the 1st defendant and the Chief to Naliele and showed them the land, and he decided to give the land to the 1st defendant. He further stated that he went to the Royal Court with the 1st defendant after the Chief wrote a letter to be taken there, and that he was present when the 1st defendant was given a certificate of ownership, and it was date stamped.

The 2nd defendant testified that he did not recall the date when they went to the Royal Court, but stated that the 1st defendant was told to develop the land quickly or it would be repossessed.

In cross examination, the 2nd defendant stated that he used to live in the Boma from 2016 to 2017. He stated that he was not aware whether the Malala family grew rice in the village in 2016. He agreed that he used to cultivate in Kankomba, and that the Chief told the 1st defendant that the land would be repossessed if it was not developed quickly. The 2nd defendant stated that as village headman, he had never repossessed land, but stated that if someone did not live on the land for ten (10) years or more, it is repossessed.

He further stated that a person is normally asked about the land, as he did the Malala's, and the response was that they would not return as there was witchcraft in Kankomba. The 2nd defendant testified that he repossessed the land but did not write a letter to that effect. His testimony was that there is no Lands Committee in his area at Kankomba, and he denied having attended a Lands Committee meeting on 10th September, stating that he was not informed.

The 2nd defendant agreed that he knew Anania Chikunga, and PW4, but denied that they were Lands Committee members. He stated that in his area they use the Lands Committee for the Chief in Kalundu to give land to people. He stated that they did not recognize the Lands Committee in Kankomba. The 2nd defendant's evidence was that he was not lying when he said that PW4 went to his house and met him and his mother over the land suggesting that a meeting be held.

Further, that he stated that Chief Libinga sent him, but that the Chief said that he did not send him to deal with the matter in their Committee. The 2nd defendant however stated that Chief Libinga mentioned the Committee, but that he did not ask him which Committee he was referring to. When cross examined further, the 2nd defendant testified

that he recalled a meeting he had with PW4 at his house, where PW4 said that the 2nd defendant should give the 1st defendant a different piece of land so that the land goes back to the Malala family.

The 2nd defendant stated that he told PW4 that it was not possible as the Malala family had not been on the land for fifteen (15) years, and that trees had grown on it. He also stated that he was aware that the Lands Committee had looked into the matter, but not that the Malala family had been on the land. The 2nd defendant also testified in cross examination that he knew Phelem and PW2, but that they did not grow rice on the land in 2016.

His evidence was that the fifteen (15) years began in 1999, when the deceased died, but he was not aware that the deceased's wife was on the land until 2012, or that Morris was on it from 2014 to 2016. He stated that no one was staying on the land, and that he did not see a tractor on it. The 2nd defendant further testified that he had told the 1st defendant that the land that he was giving him belonged to people that had left it a long time ago. He denied that he did not give the 1st defendant the Kangai land as another person wanted it.

It was also the 2nd defendant's evidence that he was neither paid for the land nor was he given anything for it, but that he just assists people. He stated that a small amount was given to get documents at the Royal Court, and the Chief was given K500.00. The 2nd defendant however stated that he did not know if the 1st defendant gave the Chief that amount, as he left the house at that time to go to the bathroom, and when he returned, he found that things had been concluded.

He also stated that he did not know how much was paid at the Royal Court as he had remained outside. The 2nd defendant told the court that

he had not lied earlier when he stated that he witnessed the signatures. He testified that the money was put together with the papers at the Royal Court. It was further his evidence that his father died in 2011, and he remembered the deceased who was friends with his grandfather, and that his family and the Malala family are friends.

The 2nd defendant also testified that he kept the village register, as village headman. He said that the first book was burnt when his grandfather's house was burnt, while the second one was eaten by termites after being taken by people who wanted to obtain national registration cards. Thus, he created a new one in 2018 which did not include the Malala family. The 2nd defendant stated that when someone is given land, they are also given title to the land. He did not recall when they started giving title to land, and he stated that he was sixteen (16) years old in 1995.

Still in cross examination, the 2nd defendant testified that his grandfather complained that the Malala family had gone for good. He denied that he had complained that the Malala family did not attend his father's funeral, and that was the reason that he did not want them on the land. The 2nd defendant also stated that he did not tell his young brother, Derrick Kalima to stay on the land, but that he stays on Kamwange. He stated that he gave the 1st defendant the land verbally, and he informed the Chief.

DW3 was Kenny Walitekano Libinga, the area Chief. He testified that before the year 2018, the 2nd defendant informed him that the land had been deserted by the Malala family years back. He stated that the said land is along the road to Katoya which is DW3's first village. DW3 also testified that he had been using the said road since 2008, and no one was on the land, and it had been turned into a grazing place for animals.

Further in his testimony, DW3 stated that he knew the deceased, but that the family did not inform him about his death as per tradition, and neither did they inform him that they were leaving the farm. He testified that on 1st March, 2018, the 2nd defendant went with the 1st defendant and asked him for a letter to enable them to get a land ownership certificate for the land. DW3 stated that he gave them a letter as he was aware of the situation surrounding the land.

It was also his testimony that sometime later he saw the Induna for Naliele with the Malala family around 19:00 hours who stated that their land had been given away by the Kankomba headman. DW3 asked them if they appeared in the village register or had a land ownership certificate, and they had responded that they did not. That is how DW3 told them that they had to be in the village register, and should have obtained a land certificate which remains in the family at death.

DW3 further stated that he informed them that as they did not have documents, and he had already given the land to the 1st defendant, it was a taboo to reverse such an action. Continuing with his evidence, DW3 stated that the Induna from Naliele Royal Establishment is Nyambe Mukelebai, and the title of the court is Imusho. He explained that in Lozi culture, when a headman dies, this has to be reported to the Chief where the land was obtained. That this will enable the Chief to know who will be holding the village.

He stated that the deceased had no position in the village, and that he was just a subject in Kankomba. Further, that his death was not reported by his family. DW3 also testified that there was no one and no structures on the land after the deceased's death.

With regard to the procedure for obtaining land, he stated that a person that wants land has to approach the headman who identifies the land. The headman informs him, as Chief, and he authorizes that a land certificate be given to the person after confirmation. DW3 stated that he confirmed that the land was vacant, and that in approving the land, he wrote a letter authorizing the obtaining of the land certificate at Naliele, as the Litunga owns the land.

He further stated that K1,000.00 is paid to obtain a land certificate, and the area Chief is paid K500.00. He also stated that he has a Committee at Mutata that goes where there are cases to be heard, and not the people that went to him. DW3's evidence was that they went after he had given the land to the 1st defendant. He also stated that he had never seen the document at page 3 of the plaintiff's bundle of documents.

In cross examination, DW3 testified that he was paid K500.00 for the land, and he issued a receipt, and his Committee was present at the time. He stated that he had been Chief since 1999, and that he knew the deceased. DW3 told the court that he only heard from people that the deceased had died, and his expectation was that the family would have gone to him to report the death as per tradition, as if they did not, he would not know about their intention of continuing to stay on the land.

He however stated that this was not the reason why he took the land. He also stated that not reporting a death was not an offence, unless if it was a traditional leader. Further in cross examination, DW3 stated that a person must have a title deed for land that they are given, but that he did not know if everyone who claims ownership of land has one.

He further stated that he was aware that laws govern citizen's rights, but that they are not superior to the laws in Kaoma. DW3 however stated

that he could not revoke the grant of land to the 1st defendant, and that he was not aware that the court could do so.

His evidence was also that the 1st and 2nd defendants went to request for a certificate on 1st March 2018, and it was issued them on 2nd March, 2018. He stated that he was aware that between ten (10) to fifteen (15) years ago there were no people on the land. That in his jurisdiction, he gives two (2) years before he repossesses abandoned land, and stated that notice of the same is not given, if the person is not seen. DW3 also stated that he did not know if the Malala family were given notification or that they were in Kaoma at the time and that they grew rice on the land in 2016.

He testified that he constituted a Lands Committee at his palace called the Mutata Committee, which looks into land problems and advises people in the village on how to live well. He stated that the Lands Committee sometimes witnesses the giving of land, and the headman is at liberty to use the Committee if he so wishes. It was his evidence that the purpose of the Committee was to ensure transparency in the giving of land and avoid future disputes. DW3 also testified that he trusted the headman in land allocation, even if they did not use the Committee.

He agreed that when the 1st defendant was given land, his Committee was not called, and there was no reason for them to go there. His evidence was that he did not recall all the names of the Committee members, but among them were Mbambo and Kamunu. DW3 stated that they were chosen by the community at a traditional meeting in 2005.

DW3 further stated that there was also PW4, but that he did not know if Anania and Chingunde were also in the Committee. He however stated that they could be in the Committee, but that it was not functional. DW3

testified that the Committee was supposed to look into land disputes and problems and report to him. He denied having dismantled the Committee and informed the community or the committee members. DW3 agreed that as long as the Committee had not been dismantled it was supposed to execute its' mandate.

When referred to the letter at page 3 of the plaintiff's bundle of documents, DW3 stated that the Committee allegedly wrote the letter. He testified that the Malala family went to him over the land, but he denied that he had referred them to the Lands Committee. He further stated that it was the first time that he was seeing the letter at page 3, and he agreed that it states that the Malalas did not leave the land. He denied that he was called to Naliele Court over the land, and his testimony was that he was not aware that the first village register got burnt in the headman's house.

Further, that he was not aware that the second village register was eaten by termites, but that he is aware that the current village register does not include the Malala's. DW3 denied that this was because he intended to sell the land, but rather because the Malala's had deserted the land. When further cross examined, DW3 stated that small land certificates were being given in 1985, and that he was not aware that the Malalas were only given a number.

He stated that he would drive past the land and there was no one there. DW3 testified that the land in issue is 800 by 400 metres, which is about forty eight (48) hectares, and that he had no record that the Malalas had sixty (60) hectares. It was DW3's evidence that he did not ask where the Malala's were, as they did not go to him. He also testified that he was not told that one of them was in Kaoma Boma.

I have considered the evidence and the submissions that were filed by the parties. It is not in contention that the plaintiff's deceased father Francis Sitema Malala settled on customary land in Kankomba village in Kaoma of the Western Province, sometime after he retired from gainful employment in 1986. It is common cause that the deceased died sometime in 1999, and he was survived by a wife and children, and that he authored a document leaving the land to his wife and children.

It is not in contention that in 2018, the 2nd defendant gave the 1st defendant the land on which the deceased had settled, which allocation of land was approved by the Chief, DW3. The question is whether the plaintiff is entitled to the reliefs sought?

The first claim is for an order that the plaintiff as administrator of the estate of the deceased Francis Sitema Malala is the beneficial owner of the land situated in Kankomba Village in Kaoma measuring approximately fifty six (56) hectares. The evidence as adduced by the plaintiff is that the deceased and his family settled on the land, and he built houses, cultivated on the land and reared animals there. That after the deceased died in 1999, the family did not abandon the land.

The plaintiff however told the court that upon the deceased's death, two houses on the land were burnt, among them the big house in which the deceased had lived, and all the property was burnt. This evidence was confirmed by PW2. The plaintiff also testified that his mother only left the village in 2011 to go and look after his brother who was unwell, but she left the other family members on the land.

PW2 who is a wife to the plaintiff's brother testified that they went to live on the land in 1999, and stayed there until 2008 when her husband

found a job in Kaoma. When they left, the plaintiff's mother, John and Damian remained on the land.

She also testified that John left the land in 2009 when he found a job, and PW2 would go to the land to cultivate maize. This witness also told the court that John died in 2012, and the plaintiff took his mother who was diagnosed with high blood pressure, and that is how Damian remained on the land. Damian also left the land in 2012 when he found a job, and on his return in 2014, he found that his house had been burnt.

From there, PW2 sent her sister's son Morris to live on the land, and he stayed there from 2014 until 2016, but he left as his wife had left him. Morris would however go to the land to check it, and in 2016, PW2 cultivated rice on the land with PW6 and her husband. The rice was harvested in 2017, and in 2018 they grew maize. In the bundle of documents at pages 7 to 9, the plaintiff produced photographs that show that they were cultivating on the land as late as 2016, and a receipt/invoice for the hiring of a tractor for the same is at page 6.

On other evidence that the Malala family did not abandon the land, PW4 testified that as a Lands Committee, they sat and deliberated over the matter, and found that the Malala family had been present on the land over the years.

PW5 also a member of the Lands Committee stated that after the issue of the land dispute was brought to the Lands Committee's attention, they intended to meet the Malala family and the 1st defendant, but that did not happen as no one turned up for the meeting. That it was resolved that the matter be referred to the Chief. However, the Lands Committee signed the document at page 3 of the plaintiff's bundle of documents.

The evidence given by the defendants on the other hand was that the Malala family abandoned the land for fifteen (15) years, which was after the death of the deceased. The 2nd defendant told the court that he had asked Phelem Malala, PW3's elder brother, if he would go back to the land, but he had refused stating that there was witchcraft there. Further, DW3 testified that he uses the road along the land to go to his village, and he could see that the land was abandoned. The 1st defendant testified that he found no one at the land.

The evidence given by PW2 on who lived on the land at what point, and when cultivation was done, there was not challenged in cross examination. It therefore remained credible evidence. Further, while DW3 testified that he passed on the road housing the land, and he could see that it had been abandoned, this land is said to be between forty eight (48) to fifty six (56) hectares in size, and it is therefore big.

Therefore, if there was activity in the middle of that land, one would not know. DW3 did not tell the court that he had actually inspected the interior of the land, and found that indeed it had been abandoned for many years. The plaintiff and PW2 testified that after the deceased's death, two houses on the land were burnt, and PW2 further testified that in 2014, Damian found that his house was burnt. This evidence was also not discredited in any way in cross examination.

It was put to the 2nd defendant that he had differences with the Malala's as he was aggrieved that they did not attend his father's funeral, and that they did not assist him, while the 1st defendant provided him with assistance, and that is why he gave him the land. The 2nd defendant denied that it was as a result of the alleged differences that he gave the land to the 1st defendant.

DW3 on the other hand told the court that as a Chief, he was not informed about the deceased's death, and that even after the death, the Malala family did not approach him to indicate whether they intended to stay on the land, as per tradition. While the 1st defendant testified that he met no one at the land when he went there, he admitted in cross examination that he was told that the land belonged to some people, and he established that they were in Kaoma Boma.

When asked if he had not found a child on the land, and he gave the child his phone number, the 1st defendant denied. He however agreed that someone had called him over the land, and he had referred them to the headman or the Chief.

From the evidence, it can be seen that the plaintiff and his witnesses gave evidence with regard to the fact that the Malala family did not abandon the land. The plaintiff even produced evidence in the form of copies of photographs, and a receipt/invoice to show that as late as late as 2016 and 2017, they were cultivating on the land. However, the evidence of the photographs produced was challenged in cross examination on the basis that they do not contain dates when the photographs were taken, or that they were actually taken at the land.

The rules of evidence require that primary evidence as opposed to secondary evidence be produced where possible. The plaintiff in this matter produced photocopies of the photos alleged to have been taken at the land. It is trite that before any document is produced in court, the party producing it must lay foundation to authenticate it. This position was reiterated in the case of **OTK Limited v Amanita Zambiana Limited, Diego Gan-Maria Casilli, Amanita Premium Oils limited, Amanita Milling Limited** ⁽⁹⁾.

The court in that case quoted from ***Evidentiary Foundations*** by **Edward J. Imkwinkelried**, at page 2 stating:

“For our purpose, the most important procedural rule is that the proponent of an item of evidence must ordinarily lay the foundation before formally offering the item into evidence. For example, the proponent of a letter must present proof of its authenticity before offering the letter into evidence. Proof of the letter's authenticity is part of the letter's “foundation” or “predicate”. Substantive Evidence Law makes proof of authenticity a condition precedent to the letter's admission into evidence.”

In civil matters before the High Court, after discovery and inspection are conducted, a party that has any issues with the authenticity of any documents sought to be produced, is at liberty to raise with the same. This is because once documents are filed in the bundle of documents, they are evidence. At trial, a witness will lay foundation to authenticate the document filed in the bundle of documents in line with the rules of evidence.

In this case, PW6 laid foundation before referring to the photographs at page 7 to 9 in the plaintiff's bundle of documents. He testified that he and PW2 ploughed two (2) hectares of the land in Kankomba, and that he took pictures of the ploughed land on his phone. He also stated that he has had the phone with him, being a Nokia 302, since the pictures were taken. PW6 also stated that Vincent Malala the owner of the farm heard about the project and he sent him pictures. Again the evidence of this witness was not discredited by cross examination, and it is therefore credible.

I do however note that the evidence given by PW5 who is a member of the Lands Committee however, does not corroborate that of PW4 who is also a member of the same body, as the two contradicted themselves. PW4 stated that when they reviewed the number of years and they found that the Malala family had never abandoned the land. PW5 on the hand stated that the minutes at page 3 of the plaintiff's bundle of documents were actually generated without a meeting being held. This entails that no hearing took place to establish if indeed the Malala's had actually abandoned the land.

Rather, it appears that the Lands Committee came with those resolutions based on their own opinions. In fact, the 2nd defendant clarified that PW4 met him without the other parties. The 2nd defendant denied that there is a Lands Committee that hears and determines land matters. DW3 also initially denied the existence of this Committee stating that there is a Committee at the palace called Mutata that does so. However, when cross examined further, he agreed that the Lands Committee exists.

I have alluded to the fact that PW2's evidence with regard to who lived on the land at what stage, and what activities were being carried out on the land remained unchallenged. Further, PW6's evidence that he grew rice on the land with PW2 and her husband in 2016 remained unshaken in cross examination. This evidence is credible and establishes that the land was not abandoned. It can therefore be seen that the plaintiff and his witnesses established that the land was never been abandoned, and I find as such.

Having so found, the next question is whether the plaintiff is entitled to the land? With regard to the security of tenure of land held under customary tenure, the ***United Nations Survey of Zambia by Van***

Loenen in Bastiaan Loenen, Land Tenure in Zambia, page 5, 1999 cited by Mvunga in *Mvunga M.P, Land Law and Policy in Zambia; Gweru: Mambo Press, 1982, P17* observed that;

“The security of tenure provided under tribal customary law is almost equivalent to the security of tenure provided under freehold. Any individual who establishes his residence in the village can acquire customary rights over land, although nobody can lay claim to land over which another individual has established rights. The rights are permanent unless they are extinguished by abandonment or death”.

Further, *The Nature of African Customary law by T.O Elias, Manchester University Press, Manchester, 1956* states that;

“A member’s right to his holding is in the nature of a possessory title which he enjoys in perpetuity and which confers upon him powers of user and of disposition scarcely distinguishable from those of an absolute free-holder under English law. His title is, therefore, in a sense that of a part-owner of land belonging to his family. He is not a lessee; he is not a licensee; he is not as is often said, an usufructuary. He pays tribute to nobody, is accountable to no one but himself, and his interests and powers transcend those of the usufructuary under the Roman law..... Again, the individual’s holding does not come to an end at his death, it is heritable by his children to the exclusion of all others. In short, he is a kind of beneficial part-owner with perpetuity of tenure and all but absolute power of disposition”.

From this, it can be seen that there is security of tenure for land held under customary law, and such right can only be lost upon death or where the person abandons the land. Further, where a person who holds land under customary tenure dies, his children have a right to inherit the land. Therefore, while DW3 testified that the Malala family did not approach him upon the death to deceased and inform him that they intended to stay on the land, this was not fatal, as the children of the deceased had a right to inherit the land upon his death.

The plaintiff exhibited a will, which was alleged to have been executed by the deceased, leaving the land to the family, which is at page 2 of the plaintiff's bundle of documents.

This document was not signed by any witnesses, as required by Section 6 of the *Wills and Administration of Testate Act, Chapter 60 of the Laws of Zambia*, which provides that;

“6. (1) A will shall be valid if it is in writing and-

(a) is signed at the foot or end, by the testator or by some other person in the testator's presence and by his direction; and

(b) the signature referred to in paragraph (a) is made or acknowledged by the testator in the presence of two witnesses present at the same time who have also signed at the foot or end of the will”.

It is therefore not a valid will. There was an argument that was advanced by the defendants to the effect that ownership of land held under customary tenure is by proof of certificate of ownership. The plaintiff conceded that he had no certificate of title to the land. His evidence was that a long time ago, only numbers and not certificates of title were

issued for land. PW4 supported this testimony. DW3 on the other hand stated that a long time ago small certificates were issued to people. He told the court that he became Chief in 1999. The 2nd defendant was only fifteen (15) years old in 1986, and he did not testify that he had knowledge that certificates of title were being issued at the time, although he stated that this was the position.

The plaintiff testified that the number for the land that the deceased was given got burnt after a fire was set to the house after the deceased died. He also testified that the deceased was however entered in the village register and also recorded was the extent of his land. The 2nd defendant in his testimony told the court that he was the custodian of the village register, being the Headman. He alleged that the first village register was burnt, while the second one was eaten by termites. The 2nd defendant agreed that he compiled the third village register which had excluded the Malala family.

While the plaintiff did not show that the deceased had a certificate of ownership for the land, it is not in dispute that the deceased was given the land to settle on. The evidence of whether certificates of title were being issued in 1986 when the deceased was given the land can only be independently determined from the evidence of PW4 and DW3, who are not parties to this matter. PW4 was shown to have lied on whether the Lands Committee sat to determine the matter before it came up with the resolutions at page 3 of the plaintiff's bundle of documents.

DW3 on the other hand, while he is not a party to these proceedings had an interest in this matter, being the Chief that approved the allocation of the land to the 1st defendant. Neither of these two witnesses was creditworthy.

However, the evidence that the deceased's house which had all his belongings was burnt shortly after his death was not disputed. That being the position, any documents relating to his ownership of the land would therefore not be there, and the fact that the 2nd defendant did not dispute that the deceased had actually appeared in the initial village register, establishes that there was some record of the deceased's ownership of the land.

The defendants however concluded that the failure by the plaintiff to produce the ownership certificate shows that they did have one. In support of this, they quoted from the case of ***R v Holy Trinity*** ⁽¹⁾ which states that;

'...the contents of a written document cannot be proved without producing it...'

The evidence as it is, has not ruled out the possibility that at the time the deceased was given the land by the headman and Chief then, there were no certificates of title that were being issued, as it is insufficient. What is clear is that it has been admitted that the Malala family appeared in the initial village register, and this discloses that they had interest in the land that they occupied.

In the submissions, the plaintiff stated that the question for determination is whether a person who has been allocated customary land can be dispossessed of such land, without notice, and without being accorded a hearing. The plaintiff also stated that the Malala family were neither given an opportunity to dialogue with the traditional leaders before the land was repossessed, nor was notice of such repossession given.

In support of this submission, they relied on the case of **Anort Kabwe and Charity Mumba Kabwe v James Daka, The Attorney General and Albert Mbazima** ⁽¹⁰⁾. That while this case speaks to land held under statutory tenure and not customary land, the plaintiff's argument was that the jurisprudence represented in that case commends itself with equal force in the current case with customary law.

The plaintiff also submitted that the Lozi custom as intimated by DW3 that when a parent dies, the children have to inform the Chief of such death, so that they may continue to occupy the land, which was allocated to the deceased parent, is repugnant to natural justice, equity and good conscience.

The plaintiff relied on Article 118(3) of the Constitution of Zambia, and the case of **Rosemary Chibwe v Austin Chibwe** ⁽⁷⁾. The plaintiff argued that DW3's testimony that it is a taboo to reverse the decision to allocate land should have equally applied to the plaintiff before repossession of the land. Further that, the power bestowed on the Chief to repossess land without hearing the affected party is against the cited authorities.

It was further the plaintiff's submission that no one should be a judge in his own case, and that DW3 did not do justice in this matter, as he received K500.00 from the 1st defendant, and then the findings of the Lands Committee were forwarded to him for a decision. The plaintiff also submitted that it is an immutable principle of law that no person should be judge in his own cause.

The plaintiff also argued that contrary to the impression that DW3 tried to create, the Western Province is also subject to and protected by the same laws which apply to the rest of Zambia. Section 7 of the Lands Act

Chapter 184 of the Laws of Zambia which recognizes and protects land holdings under customary tenure was also relied on.

The defendant's submission was that DW3 stated that notification is not given if the person is not seen, while the 2nd defendant testified that what normally happens is that a person is asked, like he did a member of the Malala family, who told him that they would not return as there was witchcraft in the village, then repossession is done. DW2 however, stated that he did not write a letter to that effect.

The submission by the defendants was that the land reverted back to the President, and thus under the control of the Chief. It was also the defendants' submission that the plaintiff has failed to prove the allegations, and they relied on the case of **Wilson Masauso Zulu v Avondale Housing Project Limited** ⁽⁴⁾, which decision was adopted by the Supreme Court in the case of **Khalid Mohamed v The Attorney General** ⁽³⁾, and the recent case of **Zulu v Kalima** ⁽¹²⁾.

That in **Zulu v Kalima** ⁽¹²⁾, it was stated that;

“An unqualified proposition that a Plaintiff should succeed automatically wherever a defence has failed is unacceptable to me. A Plaintiff must prove his case and if he fails to do so the mere failure of the opponent's defence does not entitle him to judgment. I would not accept a proposition that even if a Plaintiff's case has collapsed of its own volition or for some reason or other, judgment should nevertheless be given to him on the ground that a defence set up by the opponent has also collapsed. Quite clearly a Defendant in such circumstances would not even need a defence...”

Further, in support of their case, the defendants relied on Sections 3(1), 7(1) and 9(1) and (2) of the Lands Act Chapter 184 of the laws of Zambia. The defendant submitted that customary land just like state land is vested in the President who holds it in perpetuity, for and on behalf of the people of Zambia. They also stated that customary tenure does not bring about registration of ownership rights, but recognition is merely meant for the protection of use and occupancy rights.

The defendants also referred to *Land Administration in Zambia* and submitted that *Kelvin Mwiche* stated therein that the starting authority in the occupation of land under customary tenure is the Chief. They also quoted as authority the case of *Mwiinda v Gwaba* ⁽²⁾, and stated that the chief merely performs the role of control and regulation in the acquisition of land and its use.

With regard to land in Zambia, Section 3 (1) of the Lands Act provides that;

“3. (1) Notwithstanding anything to the contrary contained in any other law, instrument or document, but subject to this Act, all land in Zambia shall vest absolutely in the President and shall be held by him in perpetuity for and on behalf of the people of Zambia”.

Section 7 of the said Act provides for the security of land held under customary tenure. It states that;

“7. (1) Notwithstanding subsection (2) of section thirty-two but subject to section nine, every piece of land in a customary area which immediately before the commencement of this Act was vested in or held by any person under customary tenure

shall continue to be so held and recognised and any provision of this Act or any other law shall not be so construed as to infringe any customary right enjoyed by that person before the commencement of this Act.

(2) Notwithstanding section thirty-two, the rights and privileges of any person to hold land under customary tenure shall be recognized, and any such holding under the customary law applicable to the area in which a person has settled or intends to settle shall not be construed as an infringement of any provision of this Act or any other law except for a right or obligation which may arise under any other law”.

To prove that the 1st defendant is the owner of the land in contention, the defendants exhibited a Land ownership certificate, and DW3 testified on the procedure for obtaining customary land in the area. From the testimony of the defendants and DW3, it appears that this procedure was followed when the land was given to the 1st defendant.

However, there is conflict on whether the Malala's were notified of the intention to repossess the land. Further, having found that the Malala's did not abandon the land, could the land be repossessed? From the evidence given by the 2nd defendant and DW3 in this case, it clear that notification is a requirement before repossession of land held customary tenure is made. This is akin to the procedure in Section 13 of the Lands Act, Chapter 184 of the Laws of Zambia.

Affording a hearing to a person to be affected, enhances the rules of natural justice, which apply whether land is held under customary tenure of or not, as it is a fundamental principle. The evidence on record

is silent on how a person holding land under customary tenure is notified of the intention to repossess the land. However, especially where one abandons the land, there must be some form of record to show that even if the person cannot be found, efforts to trace them were made to notify them of the intention. Further, some record of the decision to repossess the land should be kept by the Chief or a Committee so authorised.

Phelem Malala who is alleged to have told the 2nd defendant that they would not return to the land because of witchcraft in the area did not testify in this matter. Therefore, whether he told the 2nd defendant that he would not return to the land has not been properly established, as the 2nd defendant did not record this anywhere, and Phelem signed such record. Even assuming that Phelem Malala had stated that he would not return to the land, he is just but one of the sons of the deceased, and there was need to engage the other children of the deceased in that respect.

In the case of *Mwiinda v Gwaba* (2), the plaintiff had settled on land he was given in Chikonga village, but he decided to move his cattle to land across the river as there was no grazing ground, and he continued to reside to Chikonga village. He kept herdsmen to herd the cattle across the river, and the defendant who was the headman removed him from the village register. The court found that the plaintiff had not ceased to be an inhabitant by having grazing fields across the village.

It can be seen that there is security of tenure for land held under customary tenure, and that people must be notified of the intention to repossess the land. The plaintiff relied on the case of *Anort Kabwe and*

Charity Mumba Kabwe v James Daka, The Attorney General and Albert Mbazima ⁽¹⁰⁾. It was stated in that case that;

“...if the notice is properly served, normally by providing proof that it was by registered post using the last known address for the lessee from whom the land is to be taken away, the registered owner will be enabled to make representations, under the law, to show why he could not develop the land within the period allowed under the lease”.

The plaintiff also relied on the case of ***Simumba v Banda Appeal No. 73 of 2009 Supreme Court*** ⁽¹¹⁾ which at pages J20 and J21, the Supreme court confirmed their decision in the ***Anort*** case and stated that;

“... if repossession is effected in circumstances where the lessee is not given an opportunity to explain, such repossession could not be said to be valid”.

While the principles of notification before repossession is done as provided under the Lands Act cannot be said to apply to land held under customary tenure, what is paramount is that there must be some form of notification of the intention to repossess the land, and the person affected to give their position on the same.

Therefore, other than just giving the land to the 1st defendant and without having a record of what Phelem Malala or the rest of the Malala family’s position on the matter was, some form of record of the decision to repossess the land should have been kept. This is more so as there were allegations that the 2nd defendant may have been against the Malala’s, and DW3 as Chief appeared aggrieved that the Malalas did not notify him when the deceased died. Further, the 2nd defendant testified

that his family and the Malala family are friends and he may have had knowledge of their whereabouts.

The plaintiff also submitted that the 1st defendant was not an innocent purchaser for value, as he was aware that the Malala family had not abandoned the land, as he had an encounter with one of them who had been sent to the land. Further, that the 1st defendant had received a phone call from one of the Malala family members over the land, which call he did not return.

The plaintiff submitted that while this matter does not involve the sale of land, the Supreme Court in the case of ***Nora Mwaanga Kayoba and Alizani Banda v Eunice Kumwenda Ngulube and Andrew Ngulube*** ⁽⁸⁾ is still of assistance. That it was stated in that case that much more serious inquiries must be conducted to establish if a property in question has any encumbrances.

The plaintiff also submitted that the land ownership certificate that was issued to the 1st defendant is liable to being cancelled. That although the land in question is not one where a certificate of title was issued, ***Sections 33 (c) and 34 (d) of the Lands and Deeds Registry Act***, are of assistance. That these sections provide protection to a person whose land has been included in someone else's certificate of title.

The defendant submitted that the case at hand is distinguishable from the cases of ***Village Headman Mupwaya and Singh v Mbaimbai*** ⁽⁵⁾ and ***Still Water Farms Limited v Mpongwe District Council, Commissioner of Lands, Dawson Lupunga and Bautis Kaoulu*** ⁽⁶⁾ as the 1st defendant followed the right procedure in acquiring of the land, and should therefore not be penalized.

I have found that there is no evidence of the notification of the intention to repossess the land that was given to the Malala family so that they could have been heard on the issue. Therefore, the 2nd defendant's decision to give the land to the 1st defendant and DW3 to approve the same when the evidence on record shows that there was activity on the land after the deceased died was irregular.

The 1st defendant cannot be said to be an innocent purchaser for value, as he had notice that the land belonged to the Malala family before the 2nd defendant gave it to him. In cross examination, he testified that he saw no need to ask the Malala family about the land as he knows that land belongs to the Chief, and in this case the Chief, DW3 approved the land that the 2nd defendant gave him.

It is also on record that the 1st defendant spoke with PW2 over the land, and he told her that she could go anywhere she wanted. The 1st defendant had actual notice of the Malala's interest in the land, and that being the case, the irregular allocation of the land to him, cannot defeat the plaintiff's interest in the land.

That being the position, the plaintiff as administrator of the estate of the deceased is entitled to the land, and I accordingly declare that he is legal owner of the land that the deceased held in Kankomba Village in Kaoma. Therefore, any land held by the 1st defendant which falls within the plaintiff's land shall accordingly be surrendered to the plaintiff, and the 1st defendant's certificate of title which covers any portion of the plaintiff's land shall accordingly be cancelled.

The plaintiff also claims damages, but did not elaborate or plead the nature of the damages claimed. That claim will accordingly fail, and it is dismissed. The defendants counterclaim for damages will fail, as the 1st

defendant is not entitled to the land that belongs to the plaintiff. I award the plaintiff the costs of the action, to be taxed in default of agreement. Leave to appeal is granted.

DATED AT LUSAKA THIS 28th DAY OF JANUARY, 2020

S. Kaunda

**S. KAUNDA NEWA
HIGH COURT JUDGE**