IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT NDOLA
(Civil Jurisdiction)

Appeal No. 90/2016
SCZ/8/214/2015

REPUBLIC OF ZAMBIA
SUPREME COURT OF ZAMBIA
JUDICIARY
11 MAR 2019
SUPREME COURT REGISTRY 2
P.O. BOX 50067, LUSAKA

B E T W E E N :

SAILAS NGOWANI	**1ST APPELLANT**
CHANFYA LAWRENCE	**2ND APPELLANT**
CHITAU JOYCE	**3RD APPELLANT**
TEWESHE MATELO	**4TH APPELLANT**
MUTINTA DOMINIC	**5TH APPELLANT**
LONGWANI DAVY	**6TH APPELLANT**
MACHONA MOSES	**7TH APPELLANT**

AND

FLAMINGO FARM LIMITED	**RESPONDENT**

Coram: **Hamaundu, Malila, Kaoma, JJS**
On 5th March, 2019 and 11th March, 2019

For the Appellants: N/A
For the Respondents: Mr. Z. Muya, Muya & Company

J U D G M E N T

MALILA, JS delivered the Judgment of the Court.

Cases referred to:

1. *Still Water Farm Limited v. Mpongwe District Council and Others (SCZ Appeal No. 90 of 2001)*
2. *John Mugala and Kenneth Kabenga v. The Attorney General (1988-1989) ZR 171*
3. *Attorney General v. Tall and Zambia Airways Corporation Limited (1995/ 1997) ZR 54*
4. *London Ngoma and others v. LCM Company & Another (1999) ZR 75*
5. *Wilson Masauso Zulu v. Avondale Housing Project Limited (1982) ZR 172*
6. *Attorney General v. Marcus Kapumbu Achiume (1983) ZR 1*
7. *Siwale v. Siwale (1999) ZR 84*
8. *Winnie Zaloumis (in her capacity as National Secretary of MMD) v. Felix Mutati & 3 Others (Selected Judgment No. 28 of 2016)*
9. *Teddy Puta v. Ambidwire Friday (Selected Judgement No. 43 of 2017)*

Legislation and other sources referred to:

1. *Lands and Deeds Registry Act, chapter 185 of the laws of Zambia*
2. *High Court Act, chapter 27 of the laws of Zambia*
3. *Land Circular No. 1 of 1985*
4. *Lands Act, chapter 184 of the laws of Zambia*
5. *Statutory Instrument No. 89 of 1999*
6. *Halsbury Laws of England (4th Edition)*

This appeal raises a somewhat disquieting issue regarding the effect of a grant of a certificate of title in what is traditionally a customary area, and in particular whether there is room for the survival of some customary practices in respect of such land.

The appellants were small scale farmers and subjects of Chief Lesa of the Lamba people of the Copperbelt Province. They were allocated various adjoining pieces of land on diverse dates going back

to 1993. The land was allocated for both farming and residential purposes. They allege that the total area delineated to them collectively had more than 300 people related to or connected with one or the other of the appellants.

From the appellants' perspective, in 1996, the caretaker Chief Lesa, Elliot Juma, assigned a Mr. Kabwe a piece of land adjoining that of the first appellant. Mr. Kabwe later sold that piece of land to Mr. Sandie Sinyangwe. The latter engaged a land surveyor to mark and demarcate the land he had bought. That marking and demarcation exercise was, according to the appellants, done in the absence of the appellants and the local traditional leadership known as 'ba chilolo' in total contravention of the procedure for customary land alienation.

It is the appellants' further claim that due to failure on the part of Mr. Sinyangwe to develop or otherwise utilize the land, a subsequent Chief, Chieftainess Lesa, Margaret Musonda, repossessed the land in 1996 and allocated it to the second and third appellants. Around the same time as Chieftainess Lesa repossessed

the land from Mr. Sinyangwe, the latter purported to transfer the land in question by way of sale to Flamingo Farm Limited, the respondent in these proceedings.

In their continued narration, the appellants claim that Chief Lesa did between 2003 and 2006 make further allocations of the subject land to the fourth, fifth, sixth and seven appellants. The respondent, who had since obtained a certificate of title without following procedure for obtaining such title in a customary area, now had the audacity of threatening the appellants with eviction. They allege further that the transfer of the land from Mr. Kabwe to Mr. Sinyangwe and finally to the respondent was all done without the Chief's consent and in contravention of land alienation procedures in a customary area.

It is on the basis of the foregoing facts that the appellants then approached the High Court with a view to obtaining from the court, an order for the cancellation of the certificate of title issued in respect of the subject property; a declaratory order that the appellants were the lawful owners of the land in question; an injunction restraining

the respondent from forcibly evicting or removing the appellants from the said land; costs and any other relief.

The respondent, of course, resisted most categorically the appellants claims. From its perspective, the appellants were never allocated the land in question by Chief Lesa as claimed, but had occupied the land upon being wrongly informed that Mr. Sinyangwe, the previous owner, had died. The respondent admitted, however, that the land had been assigned by Chief Lesa to Mr. Kabwe who sold the same to Mr. Sinyangwe. According to the respondent, Chieftainess Lesa never repossessed the subject land as alleged nor did she allocate it to the second and third appellants, but reiterated that the land had been occupied upon some misinformation that Mr. Sinyangwe had passed on to glory.

The respondent maintains that at the time it purchased the property in question from Mr. Sinyangwe, it was already on title and there was thus no obligation to follow the procedure for obtaining title in a customary area. The respondent adds that the transfer of the land from Mr. Kabwe to Mr. Sinyangwe's company, Santrade

Investment Limited, was done with the authorization and consent of the Chief and that the subsequent sale between Santrade Investment Limited and the respondent required no further adherence to the procedures under customary land as the land was already on title.

The respondent counterclaimed damages for illegal occupation by the appellants of its land; a declaration that it was the lawful owner of the land in issue; an injunction restraining the appellants from interfering with the respondent's right to possession and quiet enjoyment of the land, costs and any other relief.

After hearing the parties at trial, and considering the evidence deployed before him, the learned High Court judge held that the appellants' claim was doomed to fail. He heard evidence from Mr. Sinyangwe on how he bought the land from Mr. Kabwe, obtained the Chief's consent, applied to the Council and submitted all the requisite documents for approval and recommendation to the Commissioner of Lands for the eventual issuance of the certificate of title. Upon being satisfied, the Council approved the application and recommended to the Commissioner of Lands to issue a title deed in

the name of Santrade Investments Limited, a company in which Mr. Sinyangwe had an interest. From the evidence available to him, the judge was satisfied that all this happened way back in 1999.

Guided by sections 33 and 34 of the Lands and Deeds Registry Act, chapter 185 of the laws of Zambia, the judge held that cancellation of a certificate of title could only be done where fraud or impropriety in its acquisition has been proved. The judge found from the evidence available before him that, Mr. Sinyangwe bought the land from Mr. Kabwe in 1996 and the land capability map was endorsed by Chief Lesa on 26th January 1997, while the Council approved and recommended the issuance of title deeds in 1999. The land, according to the judge, belonged to Mr. Sinyangwe long before the alleged allocations were purportedly made to the second and the seventh appellants.

The learned judge accordingly dismissed the appellants' claims and declared the respondent as the rightful owner of the land in question. He also issued an injunction restraining the appellants' possession of the land and directed that the respondent forthwith

evicts the appellants from the land. The judge also ordered damages against the appellants for illegal occupation of the appellants' land which damages were to be assessed by the Deputy Registrar.

The lower court judgment has so riled the appellants that they have now approached this court with the following complaints against the lower court judge:

1. **The court below erred and misdirected itself in law when it held that the appellants ought to have pleaded fraud for them to succeed in their action and that fraud was the only ground on which a certificate of title could be cancelled. Further that the issue to be determined or the dispute between the parties was the cancellation of the certificate of title No. 236233 for Lot No. N/295/M.**

2. **The court below erred and misdirected itself in law when it held that it was necessary to join the respondent's sole witness, a Mr. Sandies Sinyangwe, to the proceedings in order for the appellants to succeed in their claims.**

3. **The trial court erred and misdirected itself in law when it ordered the appellants to close their case before calling all their witnesses and later on holding that there was no evidence to prove the appellants' claim.**

4. **The trial court erred and misdirected itself in law and fact when it failed in its duty to adjudicate upon every aspect of the suit between the parties so that every matter that was in controversy was determined to finality.**
5. **The court below misdirected itself in law and fact when it held that the plaintiffs misapprehended their case.**
6. **The court below erred and misdirected itself in law and fact when it found that the land was already on title and as such it could not be subject to the customary law.**

Very interesting developments were recorded at the hearing of this appeal. Counsel for the appellants had duly filed the heads of argument but stayed away from the hearing for reasons not immediately obvious to us. The usual rule 69 notice of non-appearance was not filed. On the other hand, we had Mr. Muya, learned counsel for the respondent, ready to argue the case. He had, however, not filed the heads of argument in accordance with the applicable rules.

We declined his application to file the heads of argument out of time. This appears to have caught Mr. Muya on the wrong foot. He was thus unable to participate meaningfully in the appeal. In adjourning the matter for judgment on a date to be advised, but

within the session, we assured Mr. Muya that we would, as usual, take a judicious approach which entails that the mere fact that the appellants had their heads of argument filed while the respondent did not, does not *ipso facto* mean the appeal succeeds.

In the heads of argument filed on behalf of the appellants by Messrs Derrick Mulenga & Company, it was contended, in support of ground one, that the lower court judge was wrong to hold that in order to support the appellants' plea that the certificate of title be cancelled, the appellants had to allege fraud and, at trial, prove such fraud on the part of the respondent in the acquisition of the land in question. According to counsel for the appellants, certificates of title have been cancelled on other grounds than fraud as well. They cited the case of *Still Water Farm Limited v. Mpongwe District Council and Others*[1] where a certificate of title was cancelled because the land in issue was not alienated in accordance with section 3(4) of the Lands and Deeds Registry Act.

It was also submitted that from the authorities cited by the learned lower court judge in his judgment, the judge correctly noted that impropriety was also a ground for cancelling a certificate of title, yet the learned judge chose to make fraud the focus and reason for his judgment.

The appellants in their case in the court below were claiming ownership of the land in issue. Their claim was that they owned different pieces of land now known as Lot No. N/295/M in Chieftainess Lesa's Chiefdom. This was the gist of the dispute between the appellants and the respondent. At the core of resolving that dispute was a consideration of the procedures and steps followed in the acquisition of the land from the initial owner to the respondent. According to counsel for the appellants, the pleadings are clear as to what the case was about. It was, therefore, astonishing that the lower court judge stated in his judgment as follows:

> **Before I refer to the parties' submissions, I wish to state for clarity what this case is all about. The Plaintiff have sought an order for cancellation of the Defendant's certificate of title No. 236233 relating to lot No. N/295/M situated at Masaiti in the Copperbelt Province of**

the Republic of Zambia. Thus, the declaratory order sought can only be made after the certificate of title has been cancelled.

According to counsel for the appellants, the fact that the respondent had purchased land that was on title was not in issue. What was in issue was that the respondent was not a bonafide holder of the title to the land.

The appellants' case was that the predecessor in title did not follow procedures of land alienation and conversion to statutory leasehold in a customary area, as such good title could not pass to the respondent. Had the learned trial judge considered this aspect of the matter he would have come to a different conclusion.

According to counsel for the appellants, for the appellants to succeed in their claim they had to show that the predecessors in title had not passed good title to the respondent and that the procedures in the allocation and conversion of the land had not been followed. Counsel ended by reiterating that this matter was not about pleading fraud but about irregularities in the manner in which title was obtained in a customary area, particularly the failure to follow procedure.

As regards ground two of the appeal, the appellants took issue with the lower court's suggestion that Mr. Sandie Sinyangwe, whose company Santrade Limited had sold the subject land to the respondent, should have been joined as a party to the proceedings rather than merely be called as a witness.

The learned counsel submitted that an action cannot be defeated merely on account of non-joinder or misjoinder. Order XIV rules 5(1) and rule 3 of the High Court Rules, chapter 27 of the laws of Zambia, were cited to buttress the point that a trial judge has power to order joinder of any person who the judge considers would be entitled to, or claims some share or interest in the subject matter of the suit or is likely to be affected by the result of the suit. Counsel also quoted from the case of *John Mugala and Kenneth Kabenga v. The Attorney General*[2], where we reiterated that Rule 5(3) did not allow an action to be summarily defeated by reason of non-joinder or misjoinder of parties.

Counsel, therefore, argued that in light of the foregoing authorities, it was open to the judge to join Santrade Investment/Mr. Sandie Sinyangwe granted that an action cannot fail on grounds of non-joinder of a party that could easily be joined to the proceedings at any stage.

Counsel also quoted the case of *Attorney General v. Tall and Zambia Airways Corporation Limited*[3] where we stated that:

> **In our view, without prejudicing the outcome of the trial court's judgment, but going by the documentary and oral evidence on record, the joining of the Attorney General in these proceedings would be necessary to ensure that the matter in the cause may be effectually and completely determined and adjudicated upon to put an end to any further litigation. Both our Order 14 and the English Order 15 as well as s.13 of Cap. 50 are intended to avoid a multiplicity of actions. Although the learned trial court relied on a wrong provision of the law in joining the Attorney General to these proceedings, the court had still the inherent jurisdiction to make the order in the interest of justice.**

The case of *London Ngoma and Others v. LCM Company & Another*[4] was also cited to buttress the same point.

Counsel reiterated that the lower court judge had both the power and the obligation to order joinder of Santrade/Mr. Sinyangwe in order to achieve a just result.

Moving to ground three of the appeal, counsel for the appellants criticized the trial judge on a procedural issue. It was submitted that the judge was wrong to have ordered the appellants to close their case before calling all their witnesses and later holding that there was no evidence adduced to prove the appellants' claim.

The appellants' counsel quoted, rather extensively, from the judgment of the lower court before submitting that the ordering of the appellants to close their case led to a failure to challenge the authenticity of the minutes produced by the respondent, and to call the current Chief as witness to speak to matters of repossession of the land and how it was done.

The appellants' counsel also grumbled that by stopping the appellants from calling their other witnesses, they were disenabled from calling a witness to testify that the respondent had been advised against purchasing the land in issue. Equally, the evidence relied

upon by the court that the appellants went to settle on the land after information wrongly filtered that Mr. Sinyangwe had passed on, could only be rebutted or confirmed by evidence from the Chief who could not, in the circumstances explained, be called as witness.

Although the appellants did make an application for reopening the appellants' case so as to call other witnesses, that application was not entertained by the lower court judge thus severely prejudicing the appellants.

Under ground four, the judgment of the lower court was impugned on account of its apparent failure to cover every aspect of the suit between the parties so that every aspect in controversy was determined in finality. For this submission, our decision in *Wilson Masauso Zulu v. Avondale Housing Project Limited*[5] was cited as authority. Counsel also referred to our judgment in *Attorney General v. Marcus Kapumbu Achiume*[6] where we held that an unbalanced evaluation of the evidence, where only the flaws of one side but not of the other are considered, is a misdirection which no trial court should reasonably make.

After quoting section 13 of the High Court Act, chapter 27 of the laws of Zambia, counsel submitted that the trial court had prejudiced the matter when he suggested that anyone who had a certificate of title over land could not have his ownership challenged. According to counsel, 'the trial court was interpreting sections 33, 34, and 35 before the sections could be invoked into play.'

Counsel also contended that the lower court did not address the issue how the respondent's hectarage increased from 50 hectares to 277 hectares when the law clearly stipulates that a Chief cannot grant land in excess of 250 hectares. This is in accordance with Ministry of Lands, Land Circular No. 1 of 1985. Further, the predecessor in title purchased land from Mr. Kabwe who had 50 hectares and this evidence was unchallenged.

The court below, according to counsel for the appellants, did not pronounce itself on the authenticity of the land capability map. It did not make any finding on the stamps *vis a vis* the procedure with regard to alienation of land in a customary area.

Counsel ended his submission on ground four by restating that the court below was bound to consider all the evidence produced before it. It did not.

Turning to ground five of the appeal, the appellants disputed the lower court's holding that the appellants had misapprehended their case. It was in fact the trial court, according to counsel, which misapprehended the appellants' case and this is evident from the way the judge handled the injunction application. The lower court's insistence that an owner of land on title cannot be challenged except on grounds of fraud was, according to the counsel for the appellants, wrong. Section 7(1) of the Lands Act, chapter 184 of the laws of Zambia provides 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 recognized 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.**

According to counsel for the appellants, the afore quoted provision recognizes the rights of individuals holding land under customary tenure and the trial court failed to appreciate this reality.

The focus of the appellants' argument under ground six of the appeal was on procedure for acquisition of land in a customary area. It was submitted that the court below misdirected itself when it found that the land was already on title and as such could not be subjected to the customary law of the area. Counsel quoted section 3(4) of the Lands Act which enacts, among other things, that the President shall not alienate any land situated in an area where it is held under customary tenure without consulting the Chief and the Local Authority in the area and without consulting any other person or body whose interest might be affected by the grant. Further, the President shall not alienate such land where the applicant for leasehold title has not obtained the prior approval of the Chief and the Local Authority within whose area the land is situated.

Counsel then quoted section 8(2) and (3) of the Lands Act as regards some of the requirements to be fulfilled when converting customary land to statutory land. Also quoted were Regulation 2(4) of Statutory Instrument No. 89 of 1999 and Land Circular No. 1 of 1985.

According to counsel for the appellants, the sole witness of the respondent testified that the procedure as set out in the law, was followed. That evidence however ignored the important role played by the traditional leadership.

It was, therefore, counsel's fervent prayer that the appeal be allowed and that the respondent be condemned in costs.

We had earlier on in this judgment indicated that Mr. Muya's request to file the respondent's heads of argument at the hearing of the appeal was rejected. He thus made no submission in support of his client's position.

After carefully considering the documents available in the record of appeal as well as the appellants' heads of argument, we form the view that the overarching issue is whether legitimate

occasion had arisen for cancelling the certificate of title issued to the respondent. On the facts, the learned High Court judge found that fraud in the issuance of the said certificate was not pleaded and proved as required and, therefore, the certificate of title could not be cancelled. This position effectively supports the respondent's stand. The appellants, however, are of the view that it is not only fraud, properly pleaded and proved, that would justify the cancellation of a certificate of title. Other instances short of fraud such as failure to follow procedures for land alienation would, according to the appellants, have the same effect.

We have carefully addressed our minds to section 33 of the Lands and Deeds Registry Act, upon which the lower court judge appeared to have anchored his decision. The section provides that:

> **A certificate of Title shall be conclusive as from the date of its issue and upon and after the issue thereof, notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the President or otherwise, which but for Parts III to VII might be held to be paramount or to have priority; the Registered Proprietor of the land comprised in such Certificate shall, except in case of fraud, hold the same subject only to such encumbrances, liens, estates or interests as may be shown by such Certificate of Title and**

any encumbrances, liens, estates or interests created after the issue of such Certificate as may be notified on the folium of the Register relating to such land but absolutely free from all other encumbrances, liens, estates or interests whatsoever:

(a) Except the estate or interest of a proprietor claiming the same land under a current prior Certificate of Title issued under the provisions of Parts III and VII; and

(b) Except so far as regard the omission or misdescription of any right of way or other easement created in or existing upon any land; and

(c) Except so far as regards any portion of land that may be erroneously included in the Certificate of Title, evidencing the title of such Registered Proprietor by wrong description of parcels or of boundaries.

Section 34 then stipulates instances when an action for possession or other action for recovery of land shall be sustained against the registered proprietor holding a certificate of title. These instances include the case of a mortgagee against a mortgagor in default; in the case of the President as against the holder of a State Lease in default; the case of a person deprived of or claiming any land included in any certificate of title of the other land by misdescription etc.

Our view of all these requirements is that notwithstanding the mandatory rendition of section 33 of the Act, fraud is not the only ground upon which a certificate of title may be canceled. Some of the instances set out in section 34 may equally lead to cancellation of a certificate of title.

If we retreat and go back to section 3(4) of the Lands Act, we note that the President has no authority to alienate any land held under customary tenure:

> **(a) without taking into consideration the local customary law on land tenure which is not in conflict with this Act;**
>
> **(b) without consulting the Chief and the Local Authority in the area in which the land to be alienated is situated...**
>
> **(d) if an applicant for a lease hold title has not obtained the approval of the Chief and the Local Authority within whose area the land is situated."**

The real question we ask is what this limitation of the powers of the President to alienate land in customary areas entails in practice. In other words, what is the situation where, despite these prescriptions, a certificate of title is obtained in such area, anyway? We do not

think that the situations envisaged in section 3(4) contemplate fraud. We shall develop this point later on in this judgment.

In *Still Waters Limited v. Mpongwe District Council & Others*[1], to which counsel for the appellants referred in their heads of argument, the situation was not dissimilar from the one before us, taking the appellants narration *pro veritate*. There, the Chief allocated land to the appellant company after consulting traditional councilors (ba chilolo). The third and fourth respondents claimed that they were interested in the land because it was adjacent to their farms and that the previous Chief had already allocated the land to them. Regrettably, the then Chief neither consulted nor obtained the third and fourth respondents' 'no-objection' or concurrent before allocating the land to the appellant company. In a judgment delivered on our behalf by our learned sister, Chibesakunda JS, we stated as follows:

> **Although we agreed with Dr. Sakala's forceful argument that the Chiefs enjoy autochthonic powers over land held under customary tenure and especially undeveloped land nonetheless section 3(4) of the Lands Act is couched in such a way that it is mandatory for the third and fourth respondents to have been consulted before allocating the land to the appellant company. Failure to do so results in the purported allocation to be null and void...In *Siwale v. Siwale*[7] the**

deceased, who had been given land by the colonial authorities with the approval of the local Chief sometime in 1929, died intestate. The appellants, who were his siblings, objected to their last brother obtaining 'title' deeds to the land without their consent. This court agreed with them that under section 3(4) it was obligatory on the part of the traditional Chief to seek their consent, as according to that section, their interest would have been affected by one of their brothers, obtaining title deeds to the land. This court pointed out to the fact that land held under customary tenure can only be alienated if consent is obtained by the traditional Chief from those whose interest may be affected by such allocation. In the *Siwale*[7] case the core contention was exactly the same contention as in the case before us. In this case before us, the core question is whether or not the procedure adopted by the current Chief in allocating to the appellant company without consulting the third and fourth respondents was a proper procedure. Our view is that the procedure adopted by the current Chief was wrong and as such the allocation of the land to the appellant is null and void.

We agree therefore with counsel for the appellants that fraud as specified in section 33 of the Lands and Deeds Registry Act does not provide the only pathway by which a certificate of title may be cancelled. Other transgressions of the law such as circumvention of the procedure prescribed in the law which would render null and void the allocation of land, would be just as fatal.

Where fraud is the basis for the application for an order directing cancellation, such fraud must be specifically alleged in the pleadings and proved at trial. To this extent the lower court judge cannot be faulted. The approach of the lower court judge, however, does not appear to us to accord with the position of the law as we have explained it, that is to say, other instances than fraud could possibly lead to cancellation of a certificate of title. The judge proceeded from the premise that:

> **in order for the Plaintiffs to succeed, it was incumbent upon them to firstly allege fraud and at trial prove fraud on the part of the defendant in its acquisition of the land in issue from Santrade Investment Limited...**

We believe that this narrowing of the approach the appellants should have taken is without legal justification whatsoever. Much as the appellants had prayed for an order of cancellation of the certificate of title as one of the principal relief, they did not plead that such cancellation should be on the basis of fraud. In their statement of claim, they state as follows:

> **11. The Defendant has since obtained Certificate of Title No. 236233 for Lot No. N/295/M without following procedure for obtaining title in a customary area.**

12. The Defendant is now threatening the Plaintiffs with eviction and a meeting was held with the Council Secretary for Mpongwe District with the aim of resolving the impasse.

13. The transfer of the land from Mr. Kabwe and finally to the defendant was done without obtaining of the Chief's consent and following land alienation procedures under customary land.

It is on the basis of these factors that the cancellation of the certificate of title was sought – not fraud. We agree therefore with the appellants that they did not need to plead and prove fraud for them to succeed in an action premised on failure to follow procedure. We have already pointed out earlier that failure to follow procedure could render the whole land acquisition process null and void as we stated in *Still Water Farms Limited v. Mpongwe District Council and Others*[1]. The effect of such a finding is that the certificate of title is liable to be cancelled.

Ground one of the appeal is therefore bound to succeed, and we uphold it.

Under ground two, the appellants fault the lower court judge for suggesting that Mr. Sandie Sinyangwe, owner of Santrade Limited, should have been joined to the action. The authorities cited by

counsel for the appellants on the power of the court to join a party to proceedings either *suo motu* or on application by a party, are all properly located. We have already captured the gist of those authorities in this judgment. A judge may order joinder of a party if this will advance the course of justice in a matter. It is also correct to state, as does the appellants' counsel, that failure to join a party to proceedings does not defeat an action.

There are, however, two points that we need to consider critically under this ground of appeal. First, did the judge really hold that for the appellants to succeed they needed to have joined Mr. Sinyangwe? Second, was Mr. Sinyangwe bound to be affected by the outcome of the dispute between the two protagonists in this appeal so as to make his joinder imperative?

We have read the judgment of the lower court over and over. We do not see any statement in it to the effect attributed by the appellants to the judge that it was necessary to join Mr. Sinyangwe to the proceedings if the appellants were to succeed in the claim. The closest the learned lower court judge came to making an intimation

of the desirability of joining Mr. Sinyangwe is when he stated in the passage quoted by counsel for the appellants that:

> **I however, observe that the vendor of the said land, Santrade Investment Limited, the previous owner was not and has not been sued and is not even a party to these proceedings. These facts must be borne in mind and are very central to these proceedings...It must be borne in mind that Mr. Sinyangwe only came as a witness and not as a party. Like I said he has never been sued concerning how he obtained title of the land he sold to the defendant.**

Although we note the underlying message in this passage that it would have been preferable, from the judge's perspective, to have joined Mr. Sinyangwe/Santrade Limited to the proceedings, we are not able to go so far as to conclude, as the appellants have done, that the judge stated that the failure to join Mr. Sinyangwe to the proceedings would doom the appellants' case. Our own view is that Mr. Sinyangwe, appearing as a witness in the matter was sufficient for purposes of providing such information in his recollection as would be necessary for the just disposal of the dispute. As far as the testimony is concerned, we do not see the difference between that of Mr. Sinyangwe as a party to the proceedings and that of Mr. Sinyangwe as a witness.

This brings us to the other subsidiary question we had asked: was Mr. Sinyangwe or Santrade bound to be affected by the outcome of these proceedings so much so that his joinder to the action became indispensable? We think not. Mr. Sinyangwe had transacted with Mr. Chanda and with the Chief before he entered into a separate sale agreement with the respondent. He received his payment from the respondent; ended the chapter and closed his books. It would, in our view, be unfair to hound him over a transaction which the buyer of his interest can quite ably explain. More importantly, whatever the outcome of the dispute between the present parties is not bound to affect him directly. If it were to be found that the procedure by which he acquired title over the land was tainted or irregular he would have his own issues to settle with either the respondent or Chief Lesa to which the appellants would not be privy. Yet if it were held that the respondent's acquisition of title to the subject land was impeccable, again Mr. Sinyangwe would have no business with the appellants.

More grievously perhaps, joinder of parties should first and foremost be the prerogative of either of the parties to the dispute. It is not for the court to choose who should be a defendant in what matter. It is not in the province of the court to contrive claims against third parties to actions before it.

From what we have stated above, ground two has no merit and should fail. We dismiss it accordingly.

Turning to ground three, the appellants' grievance is that they were ordered to close their case before vital witnesses were called. The appellants' complaint here inevitably has to be contextualised. We need to understand precisely what transpired if the attitude of the judge has to be appreciated. To this end we have perused the record of proceedings for the 4th and 5th June 2015.

Apparently, trial commenced on 3rd February 2015. After hearing one witness, the matter was adjourned to the 4th and 5th June at 09:00 hours on both dates. On 4th June, counsel for the appellants indicated that he had two witnesses to call who were, however, running late. He sought for the matter to be stood down for 1 hour

30 minutes. The judge declined the application to step the matter down in view of the fact that when the hearing date and time was agreed, both parties' counsel were present.

Counsel for the appellants then asked for an adjournment which the court granted to the following day, 5th June 2015, given that trial had been scheduled for two days.

On the 5th June 2015, one more witness, a surveyor, gave evidence on behalf of the appellants before counsel for the appellants once more intimated that he wished to call two more witnesses. He sought an adjournment for that purpose. Counsel for the respondent raised a dignified objection to the application for an adjournment. The judge declined the application for an adjournment. Counsel for the appellants then proceeded to close the appellants' case. The respondent then opened its case and called its sole witness.

It is under these circumstances that the appellants are now grumbling that they were forced to close their case before they could call some vital witness.

Our view is that this ground spins on the issue of case management. When a trial judge gives directions on the conduct of a matter, the parties to it are bound to respect such directions or apply timely to vary them if it proves impossible to comply with them.

The learned authors of **Halsbury Laws of England** (4th ed. Vol. 37 para. 489 at page 170) remind us that a failure to comply with directions, including in this case readiness to proceed with trial on the scheduled date, should not lead to postponement of a trial unless the circumstances of the case are exceptional.

A trial court is clothed with general powers to actively and effectively manage any case before it. We cannot emphasise enough that any trial judge ought to take charge and be in control of proceedings before him or her. In *Winnie Zaloumis (in her capacity as National Secretary of MMD) v. Felix Mutati & 3 Others*[8] we described the lower court judge's handling of proceedings as a 'classic case of failure in case management.' We also pointed out that:

> **...the rules of court require that when matters are filed and allocated to a judge, they should be court driven by way of a judge giving appropriate directions in relation to application before him.**

To this, we added in *Teddy Puta v. Ambidwire Friday*[9] that:

> **In our view, effectively driving proceedings also entails spelling out lawful sanctions for delinquent parties, and for the judge to effect those sanctions as prescribed by the law.**

Our view is that in handling the matter as he did, the trial judge was merely being true to his calling and normal expectations in case management within the broad ideal of court driven proceedings. We think ground three is destitute of merit.

The appellants' complaint under ground four are that contrary to established precedent, the lower court did not adjudicate upon every aspect in the suit between the parties. Two issues that the judge allegedly did not address are:

(a) that issue of ownership of the subject property, in particular that the judgment does not show how the respondent and on what evidence it could be said to be the lawful owner of the land in issue as contrasted with that of the appellants; and

(b) that issue of how the respondent's hectarage increased from 50 hectares to 277 hectares when clearly the law is that a Chief cannot grant land in excess of 250 hectares. Related to this issue, the appellants claim that Santrade Investment

Limited purchased 50 hectares from Mr. Kabwe and the variance cannot be explained.

When we insist in various case authorities that trial courts must decide every issue in controversy, we do not mean that every question that arises ought to be determined. Issues in controversy refers to those issues central to the determination of a dispute. In the course of putting forward one's claim and defence, many questions arise which may not be material to the overall resolution of the dispute. An issue in controversy must be discernable from the pleadings of the parties. It is raised either in the statement of claim, the defence or a reading of both of these.

An examination of the pleadings of the parties filed in the court below, it is clear that the dispute as set out in the statement of claim is simply that the respondent's title to the subject land is vitiated by irregularity in its acquisition and thus ought to be cancelled. There is no relief sought that the history of ownership be traced, nor is there any question regarding the size of the hectarage raised.

The final ground of appeal questions the learned lower court judge's holding that the land in question was already on title and as such could not be subject to the customary law and practices of the area.

We think, as we intimated at the beginning of this judgment, that this is the crucial issue in the present appeal. It is largely factual, but also legal in substance. The factual aspect of it answers the question whether the land was already under a certificate of title at the time the respondent bought it from Santrade Investment limited. This to us is a straight forward issue. The appellants would not have been making the claims they are making here if the land was not a subject of the certificate of title. Evidence on record indicates that title to the land was obtained in the period between the sale of the land by Mr. Kabwe to Santrade Investment Limited and the sale from Santrade Investment Limited to the respondent. The finding of fact by the judge below that the land was on title when the respondent purchased it was not perverse. It is supported by evidence and cannot be assailed.

The question is whether once a piece of land becomes a subject of a certificate of title it continues to be administered under customary tenure. Our answer to this question must be in the negative. Once a conversion of land ownership occurs from customary tenure to leasehold tenure, the land is governed by a completely new regime. The obligation of the title holders are set out in the lease and in the certificate of title none of which refers to customary land administration. The title holder henceforth becomes liable to pay ground rent and council rates, as appropriate, which does not happen under customary land tenure. The period of the lease is set in the certificate and the right of quiet enjoyment and the exclusion of others from the land become actualized.

Section 3(4) which the appellants' counsel quoted to buttress their view that customary methods of land administration continued to prevail in respect of land under title has been, in our considered view misinterpreted, and so has section 8(2) and (3) of the Lands Act. All these provisions apply in such a manner as to stop or prevent the land in question being converted to leasehold in the first place. The

land envisioned in those sections does not pass the test for conversion until it meets the conditions set out in those provisions. The provisions do not apply to land such as the land in dispute in this case that has ceased to be under customary tenure.

Ground six is equally without merit. We dismiss it.

The net result is that this appeal is dismissed on all grounds except ground one. The nominal success of the appeal on that one ground means that we in substance uphold the judgment of the lower court together with orders made therein.

We make no order as to costs.

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E. M. Hamaundu
SUPREME COURT JUDGE

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M. Malila
SUPREME COURT JUDGE

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R. M. C. Kaoma
SUPREME COURT JUDGE