IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 84/2014**
HOLDEN AT KABWE
(CIVIL JURISDICTION)

BETWEEN:

TRESFORD CHALI **APPELLANT**

AND

BWALYA EMMANUEL KANYANTA NG'ANDU **RESPONDENT**

CORAM: MAMBILIMA, CJ, HAMAUNDU, WOOD, JJS
On 1st November, 2016 and 9th January, 2017

For the Appellant: **Mr. H. H. Ndhlovu, SC, of Messrs. H. H. Ndhlovu and Company**
For the Respondent: **Mr. M. Chiteba of Messrs. MMK Legal Practitioners.**

JUDGMENT

MAMBILIMA, CJ delivered the Judgment of the Court.

CASES REFERRED TO:

1. **DAVID LUMANYENDA & ANOTHER V. CHIEF CHAMUKA & 2 OTHERS (1988-89) ZR 194;**
2. **NKONGOLO FARMS LIMITED V ZAMBIA NATIONAL COMMERCIAL BANK LIMITED, KENT CHOICE AND CHARLES HARUPERI (2005) ZR 78;**
3. **YENGWE FARM LIMITED V. MASSTOCK ZAMBIA, COMMISSIONER OF LANDS AND ATTORNEY-GENERAL, SCZ JUDGMENT NO. 11 OF 1999;**
4. **ANTONIO VENTRIGLIA, MANUELA VENTRIGLIA V. EASTERN AND SOUTHERN AFRICAN TRADE AND DEVELOPMENT BANK, SCZ JUDGMENT NO. 13 OF 2010;**
5. **KHALID MOHAMED V. ATTORNEY GENERAL (1982) ZR 49;**

6. **NKONGOLO FARMS LIMITED V. ZAMBIA NATIONAL COMMERCIAL BANK LIMITED, KENT CHOICE LIMITED (IN RECEIVERSHIP) CHARLES HURUPERI (2007) ZR 149;**
7. **GINTY V. BELMONT BUILDING SUPPLIES LIMITED (1959) ALL ER 44;**
8. **SITHOLE V. STATE LOTTERIES BOARD (1975) Z.R. 106; AND**
9. **WILSON MASAUSO ZULU V. AVONDALE HOUSING PROJECT LIMITED (1982) ZR 172.**

LEGISLATION REFERRED TO:

a. **LANDS AND DEEDS REGISTRY ACT, CHAPTER 185 OF THE LAWS OF ZAMBIA;**
b. **LANDS ACT, CHAPTER 184 OF THE LAWS OF ZAMBIA;**
c. **LAND (CUSTOMARY TENURE) (CONVERSION) REGULATIONS S.I. NO. 89 OF 1996;**
d. **ZAMBIA (STATE AND RESERVES) ORDER 1928 TO 1964;**
e. **RULES OF THE SUPREME COURT, 1999 EDITION;**
f. **HIGH COURT RULES, CHAPTER 27 OF THE LAWS OF ZAMBIA; AND**
g. **INTERPRETATION AND GENERAL PROVISIONS ACT, CHAPTER 2 OF THE LAWS OF ZAMBIA.**

This appeal is from a decision of the High Court, given on 10th January, 2014, dismissing the Appellant's case against the Respondent for lack of merit. By Originating Summons, the Appellant had moved the Court below, seeking the following Orders:

(a) that Lot L/19962/M situated in Chibombo District belongs to him;
(b) that he holds a superior title to this land and that any title held by the Respondent to the same piece of land is inferior and should be cancelled; and
(c) that the Respondent or his agents should not enter this property without his permission.

The facts, on which the Appellant relied, were contained in his affidavit which he filed in support of the Originating Summons. These are that he bought the property in question, which was

customary land, on 7th February, 2006, from one Lloyd CHIKOLOMA, at a sum of twenty four million Kwacha (K24,000,000.00). According to the copy of the contract of sale exhibited to the affidavit, the farm was approximately 24 hectares in extent. He requested for the farm to be surveyed after which he obtained a provisional survey map. On 28th July, 2006, Headwoman CHIPALAYA wrote to support the Appellant's intention to put the land on title. In the said letter, the Headwoman stated that she had no objection to the Appellant ***'being assisted in putting land on title.'*** A recommendation was later made by Her Royal Highness Chieftainess MUNGULE, to Chibombo District Council, for the Appellant to be given title deeds in respect of the land. The Appellant was invited for interviews at Chibombo District Council and thereafter, approval was given to convert the customary tenure of the land into leasehold tenure. The Appellant stated that in August 2008, the property was offered to him and after payment of the rent and requisite fees, he was given a Certificate of Title granting him a 99 year lease.

The Appellant further deposed in his affidavit in support, that in about August, 2009, he was informed by his workers that there

was a man who used to drive around his farm. He stated that later, a man invited him for lunch at Pamodzi Hotel to meet the Respondent and discuss the possibility of selling the farm to the Respondent but he declined the invitation. He explained that the Respondent thereafter employed people to cut down trees in the farm, prompting the Appellant to instruct his lawyers to engage him. He claimed that after his lawyers had written to the Respondent, the Respondent's employees stopped cutting the trees but that the Respondent reappeared after three years. He claimed further that the Respondent again employed some people who invaded his land and started cutting down trees.

The Appellant contended that the Respondent is bent on grabbing his land. That if the Respondent had any title to the land, it was either inferior to his or he got the land without following the procedure for converting customary land to State land. He prayed to the Court below to grant him the reliefs that he sought.

The Respondent filed an Affidavit in Opposition to the Appellant's Originating Summons in which he gave his side of the story. He deposed that in 1999, he was given a piece of land directly by Chief MUNGULE in the Chief's area. He explained that he

applied to convert this piece of land from customary to leasehold title and both the Chief and the local authority consented to his application. He exhibited a proposed diagram of the property which was stamped both by the Chief and the local authority. He explained that he had the land surveyed by a registered surveyor and a survey diagram was produced which was approved by a Government Surveyor. On 19th March, 2001, he was issued with a Certificate of Title in respect of the property as Lot No. 13647, Central Province of Zambia. He claimed that he is the first registered owner of this property.

The Respondent further deposed that he later discovered that the Appellant was trespassing on his land and when he inquired from the Ministry of Lands, he was told that the Appellant had been erroneously granted a Certificate of Title on his land; that the Appellant had taken a Surveyor to the land who was shown the Respondent's beacons. The Respondent produced a copy of a letter from the Surveyor stamped 13th May, 2013, in which the Surveyor stated that the Appellant '***personally showed him***' the beacons already on the plot. The Respondent told the lower Court that upon discovering this mistake, the Surveyor-General invited them both

for a meeting with a view to resolving the matter, but the Appellant refused to attend the meeting stating that the matter was *subjudice*.

The parties did not call *viva voce* testimony. The matter was thus decided on affidavit evidence. It is on record that the Respondent had applied to allow the parties to call *viva voce* evidence but the Appellant resisted and objected to the application.

Upon considering the summons and the affidavit evidence that was before her, the learned Judge in the Court below found that both the Appellant and the Respondent have Certificates of Title substantially for the same piece of land. She also found that the Appellant's land is 14.9 hectares in extent, and his Certificate of Title was issued in 2008; while the Respondent's land is 18 hectares and his Certificate of Title was issued in 2001.

The Appellant contended in the lower Court, that he had a superior title to that of the Respondent in that he complied with all the formalities to apply for the land and convert it from customary tenure to leasehold tenure. He argued that the lease in the Respondent's Certificate of Title is invalid. He alleged that the Respondent's land could have been fraudulently obtained.

The Respondent on the other hand, also produced documents to show that he applied for the land from the local chief and went through the formalities of converting it to leasehold tenure before he was issued with a Certificate of Title in the year 2001. This was after the land had been surveyed and beacons placed to demarcate the property. The Respondent produced a letter written by the surveyor who was engaged by the Appellant in which the surveyor stated that he did not survey the land but was shown existing beacons by the Appellant from which he drew the diagram that is appearing in the Appellant's Certificate of Title.

The Court below found that the Respondent's lease was granted to him by the President after it was confirmed by the Chief and after a survey was done. The Court also found that the Respondent's title was prior to that of the Appellant; that Section 33 and 35 of the **LANDS AND DEEDS REGISTRY ACT**[a] provide against adverse possession of land which is subject of title. The Court stated that in this case, no rights accrued to the Appellant by adverse possession because the Respondent had title since the year 2001. The Court relied on our decision in the case of **DAVID LUMANYENDA & ANOTHER V. CHIEF CHAMUKA & 2 OTHERS**[1]

in which we stated that ***'no rights by adverse possession can be acquired if land becomes a subject of a Certificate of Title.'*** The Court found that the Appellant bought the land in 2007, after it had already been surveyed and was a subject of a Certificate of Title.

On the suggestion that the Respondent could have fraudulently obtained his title, the Court found that the Appellant did not plead fraud in his pleadings and did not give any particulars of the said fraud. The Court cited the case of **NKONGOLO FARM LIMITED V. ZAMBIA NATIONAL COMMERCIAL BANK LIMITED, KENT CHOICE AND CHARLES HARUPERI**[2], a High Court decision, in which the learned trial Judge held-

> **"Where a party relies on misrepresentation, fraud, breach of trust willful default or undue influence by another party, he must supply the necessary particulars of the allegation in the pleadings...."**

The Court was of the view that it would have helped the Appellant if he had called an officer from the Ministry of Lands to assert his case, since it is that Ministry which prepares leases and issues Certificates of Title. According to the Judge, if anyone was to be blamed, it would be the Ministry and not the Respondent. The Judge discounted the Appellant's story that the Respondent wanted

to buy the land in issue from him because the Appellant did not give the name of the person he spoke to or particulars or the phone number of that person. At the end of the day, the Judge found that the Appellant had failed to prove his case and dismissed it for lack of merit.

The Appellant is contesting this decision of the lower Court before us. He has advanced fourteen (14) grounds of appeal. He has argued the first five (5) grounds of appeal together. These are that-

> **"1. the learned trial Judge erred in law and fact, when she failed to find that the provisions of Section 8 of the Lands Act are mandatory and cannot be circumvented by the Zambia (State Lands and Reserves) Orders 1928 to 1964;**
>
> **2. the learned trial Judge erred in law and fact when she failed to hold that the provisions of Section 8(3) of the Lands Act can only be satisfied by confirmation in FORM II in accordance with Statutory Instrument Number 89 of 1996 and as exhibited in 'TC 8' and NOT as exhibited in 'BEKN1'**
>
> **3. the learned trial Judge erred in law and fact by holding that the Respondent satisfied the provisions of Section 8(1) of the Lands Act.**
>
> **4. the learned trial Judge erred in law and fact when she failed to find that the Court did not need witnesses from Ministry of Lands to show that the Respondent's title was issued pursuant to a repealed law.**
>
> **5. the learned trial Judge erred in law and fact when she failed to observe from the record that the Appellant's land was surveyed twice and therefore the second surveyor expected to find beacons on the land."**

The learned Counsel for the Appellant, Mr. Ndhlovu, SC, has submitted, in support of the five grounds of appeal, that Section 3(4) of the **LANDS ACT**[b] only allows the President to alienate land held under customary tenure after consulting the Chief and the local authority in whose area the land is located. Counsel also referred us to the provisions of Section 8(1)(a), (2) and (3) of the said Act and submitted that **S.I. NO. 89 OF 1996** containing the **LAND (CUSTOMARY TENURE) (CONVERSION) REGULATIONS**[c], was passed to operationalise Section 8 of the Act. He submitted that Regulation 2 of the S.I. allows a holder of customary land to convert it to leasehold tenure.

Counsel further submitted that the Appellant, as could be seen from the documents on the record of appeal, complied with the procedure stipulated by law. He contended that if a person holds title to land which was converted from customary law without the consent of the Chief, that title is invalid. According to Counsel, the Respondent herein does not have any document to show that he converted the land from customary to leasehold tenure. He has argued that since the Respondent claims to have been given the land by the Chief in 1999, he ought to have complied with the

Regulations and produced the necessary forms since by then, the **LANDS ACT**[b] of 1995 and the Regulations were already in force.

Counsel referred us to a portion of the judgment of the lower Court in which it stated that Section 8(3) of the **LANDS ACT**[b] does not work against the Respondent's title ***"...as he has shown that the land in issue was confirmed by the Chief as per diagram marked as 'BEKN1' upon which the land was surveyed and Certificate of title issued."*** Counsel argued that the law does not refer to a date stamp but to the Chief filling in the prescribed form. He argued further that the Chief and the Council must consent, while the Commissioner of Lands must approve. It was Counsel's submission that the Respondent has not satisfied the provisions of Section 8(1) of the Act. It was his further submission that the Respondent did not have the right to use the land, having appeared three years after the Appellant had settled on the land; and having heeded the Appellant's lawyers' advice to stop trespassing on the land. Counsel submitted that the lower Court, therefore, had no basis to hold that the Respondent had satisfied the provisions of the Act. In his view, the Respondent's title is null and void.

Counsel further submitted that according to his lease, the Respondent purports to hold the land in the Lenje Reserve. He contended that the **ZAMBIA (STATE AND RESERVES) ORDER**[d] was repealed by Section 32 of the **LANDS ACT**[b]. According to him, this extinguished the power of the President to make grants or disposition of land in Reserves to any person through the Commissioner of Lands. He stated that this Court was alive to this position when we stated, in the case of **YENGWE FARM LIMITED V. MASSTOCK ZAMBIA, COMMISSIONER OF LANDS AND ATTORNEY-GENERAL**[3], that-

> **"We would however, like to observe that tenure in trust lands and Reserves was governed by the Northern Rhodesia (Nature Trust Land) Orders in Council 1947 to 1963 as amended by Zambia (Trust Lands) Order 1964 repealed and replaced by the Lands Act 1995."**

On the statement by the Court below, that under Section 2 of the **LANDS ACT**[b], customary land includes land described in the schedule to the **ZAMBIA (STATE LAND AND RESERVES) ORDERS**[d], Counsel advanced the opinion that this section was meant to accommodate people who held customary land before the commencement of the **LANDS ACT**[b]; which is not the case with the Respondent.

Mr. Ndhlovu, SC went on to submit that the land in this case, was surveyed twice. He explained that the first survey placed beacons on the land which the second surveyor found. He stated that the survey diagrams in this case were duly stamped, numbered and endorsed with the words ***'No Planning Objection'*** from the Provincial Planning Office. He stated further that the second surveyor was shown the beacons so that he could do a 99 year lease after realising that the earlier survey would only enable the Appellant to obtain a 14 year lease. Counsel urged us to allow the five grounds of appeal.

Mr. Ndhlovu, SC, argued the sixth, seventh and eighth grounds of appeal together. These grounds are couched as follows:

> **"6. The learned trial Judge erred in law and fact when she failed to appreciate that since the Respondent was claiming a bigger piece of land, the beacons cannot be in the same spots or positions as those on the Appellant's land.**
>
> **7. The learned trial Judge erred in law and fact when she misinterpreted exhibit 'BEKN5' by stating that the land was not surveyed.**
>
> **8. The learned trial Judge erred in law and fact when she failed to find that a matter becomes subjudice upon being filed into Court."**

In arguing these three grounds of appeal, Counsel referred us to the survey diagrams which showed that the Appellant's land is

14.9 hectares while the Respondent's land is 18 hectares. He argued that the beacons for the smaller piece of land, which the Appellant owns, cannot be on the same spots or positions as those of the Respondent's land. Counsel argued that the Respondent should have applied to join the Attorney-General to these proceedings to enable the Surveyor-General to bring the information which he wanted to share with the parties at the meeting he had called. On the basis of the above submissions, Counsel prayed that this Court should uphold these grounds of appeal.

The ninth ground of appeal is that:-

> **"9. The learned trial Judge erred in law and fact when she held that the Appellant should not have refused to change the mode of commencement."**

In support of this ground, Counsel submitted that, the Respondent applied before the lower Court for the matter to proceed as if it was commenced by writ of summons. He argued that although the Appellant objected to that application, the Court retained the discretion, under Order 28 of the **RULES OF THE SUPREME COURT, 1999 EDITION**[e], to still proceed to grant the application. Counsel contended that Order 28 gives the Court power to change the mode of commencement. He stated that the fact that

the Court allowed the matter to proceed by way of affidavit evidence meant that the Court had agreed with the objection by the Appellant to the Respondent's application.

Counsel, therefore, submitted that the Court could not turn around and condemn the Appellant for having objected to the application. According to him, if the Court was of the view that justice could only have been done if the matter was treated as if it was commenced by writ of summons, it should have overruled the objection by the Appellant. It is his view that since the Court did not overrule the objection and proceeded on affidavit evidence, justice was not done.

Counsel went on to fault the lower Court for having arrived at the conclusion that the Appellant's evidence was speculative. Counsel argued that the Appellant's evidence was factual because he simply stated that the Respondent did not comply with the **LANDS ACT**[b] in acquiring his title to the land in dispute. Counsel further argued that the Appellant's evidence that the Respondent's title was issued pursuant to a repealed law cannot be considered to be speculative. Counsel urged us to allow this ground of appeal.

The Appellant's tenth ground of appeal is that-

"10. the learned trial Judge erred in law and fact when she ignored the conduct of the Respondent including his wanting to buy land from the Appellant."

In arguing this ground of appeal, Counsel has advanced the view that the conduct of the Respondent was not consistent with his claim of being the title holder in that there is unchallenged evidence that the Respondent attempted to buy the land from the Appellant. Counsel faulted the learned trial Judge for having found that the Appellant should have provided particulars and the phone number of the person he alleged had called him on behalf of the Respondent to offer to purchase the land. In Counsel's opinion, this argument should have come from the Respondent and not the Court. According to him, the fact that the Respondent kept quiet on this issue meant that he had admitted the allegation.

Counsel went on to argue that when the Appellant's lawyers wrote to the Respondent asking him to stop trespassing on the land in dispute, the Respondent did not respond to the letter but simply stopped trespassing on the land. Further, that the Respondent did not approach the Appellant to demand that the Appellant had occupied his farm.

Basing his contention on the foregoing, Counsel submitted that a prudent title holder cannot shy away from asserting his ownership of land in the manner the Respondent did. In Counsel's opinion, this only shows that the Respondent is not the true owner of the land. Accordingly, Counsel contended that this ground of appeal should also succeed.

The eleventh ground of appeal has been framed as follows:

"11. the learned trial Judge erred in law and fact when she failed to order, as a consequence of her decision, that the Appellant be compensated for any improvements on the land."

In support of this ground of appeal, Counsel submitted that the lower Court did not find the Appellant to have been a squatter. He contended that there was evidence before the learned trial Judge that the Appellant had lived on the land for over seven years and that he had made improvements to the land. According to Counsel, the Court should have, therefore, awarded the Appellant compensation for the improvements on the land. He urged us to equally uphold this ground of appeal.

Counsel for the Appellant has couched the twelfth ground of appeal as follows:

"12. the learned trial Judge erred in law and fact when she failed to find that despite the LANDS ACT not having a model lease, the Commissioner of Lands is bound by law and therefore cannot issue a lease pursuant to a repealed law."

On this ground of appeal, Counsel argued that the learned trial Judge should have held that the Commissioner of Lands cannot issue a certificate of title pursuant to a repealed law. It was his contention that the certificate of title issued to the Respondent was either issued in error or fraudulently obtained. That in either of the cases the Respondent's title cannot supersede the Appellant's title. He, therefore, submitted that the twelfth ground of appeal has merit and should be allowed.

Counsel for the Appellant has argued the thirteenth and fourteenth grounds together. These are couched as follows:

"13. the learned trial Judge erred in law and fact when she held that the Appellant failed to prove fraud in the absence on record of the required documents the Respondent presented to the Ministry of Lands to be granted his title deeds.

14. the learned trial Judge erred in law and fact when she contradicted herself by holding that the Ministry of Lands would be blamed but she proceeded to find against the Appellant."

The kernel of the submissions by Counsel on these grounds of appeal was that the Respondent did not have the documents required to be submitted to the Ministry of Lands before a piece of

land could be converted from customary tenure to leasehold tenure. Counsel contended that conversely, the Appellant followed all the procedures required by the law in obtaining his title. In his view, the Appellant, accordingly, deserved the protection of this Court. To augment his arguments, he cited the **YENGWE FARMS LIMITED**[3] case where the Respondent was restrained from disturbing the Appellant's quiet enjoyment of its farm because the Appellant had followed all the normal procedures and there was no mistake in the Commissioner of Lands issuing it with Title Deeds.

Counsel went on to argue that the issuance of the Respondent's Certificate of Title, pursuant to a repealed law, cannot be blamed on the Appellant just in the same way that the lower Court held that it could not be blamed on the Respondent. That the lower Court should have, therefore, ordered the Respondent to pursue his issue with the Ministry of Lands and let the Appellant remain with his land.

In sum, Counsel submitted that the Appellant's appeal should succeed.

In response, the learned Counsel for the Respondent, Mr. Chiteba, filed written heads of argument on 28th October, 2016. On the first, second, third, fourth and fifth grounds of appeal, Counsel submitted that, in his originating process, the Appellant did not plead the issue relating to the procedure for converting land from customary to leasehold tenure. Counsel, consequently, argued that the Appellant cannot raise these issues before this Court because they were not raised in the lower Court. To support his arguments, Counsel referred us to the case of **ANTONIO VENTRIGLIA, MANUELA VENTRIGLIA V. EASTERN AND SOUTHERN AFRICAN TRADE AND DEVELOPMENT BANK**[4] where we said that-

> **"We agree that the principle of law has been laid down in a plethora of authorities by this Court that in order not to ambush the other party, only issues that were pleaded and raised in the Court below can be raised in this Court as this is a Court of record."**

In the alternative, Counsel contended that the Appellant has not cited any law to support his contention that if a person holds title to land which was converted from customary tenure to state tenure, without the consent of the Chief, then that title is invalid. He pointed out that in any case there was no evidence led by the Appellant to show that the Respondent did not obtain the consent

of the Chief when converting his land from customary to state land. He submitted that the burden was on the Appellant to provide cogent and compelling evidence to show that the Respondent did not follow the procedure laid down in Section 8 of the **LANDS ACT**[b]. For the above submissions, Counsel referred us to the case of **KHALID MOHAMED V. ATTORNEY GENERAL**[5] where we said that-

> **"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."**

Counsel further referred us to Section 33 of the **LANDS AND DEEDS REGISTRY ACT**[a] which provides that a Certificate of Title is conclusive evidence of ownership of land. He contended that the Appellant should have produced evidence to show that the Respondent's title could not be conclusive evidence of ownership on account of fraud, misdescription or prior interest.

Counsel went on to argue that contrary to the submissions on behalf of the Appellant, the Respondent's Certificate of Title clearly shows that it was issued pursuant to Section 45 of the **LANDS AND DEEDS REGISTRY ACT**[a] and not a repealed law.

that there was no burden on the Respondent to proceed in the manner suggested by the Appellant.

Counsel went on to submit that the issue as to whether this matter was *subjudice* when the Surveyor General called for a meeting was a peripheral matter and was not one of the issues to be determined by the lower Court.

On the ninth ground of appeal, Counsel submitted that the lower Court was on firm ground when it held that the Appellant should not have refused to have the matter proceed as if commenced by writ of summons. According to Counsel, these sentiments by the lower Court were in relation to the fact that the Appellant had not adduced evidence to substantiate his claims because the matter was determined exclusively on the basis of Affidavit evidence. Counsel further argued that the Appellant had a duty to conduct his matter in the best way he thought would lead to justice and that it was not for the Court to conduct the matter on his behalf.

Counsel supported the learned trial Judge's holding that the Appellant's evidence on the validity of the Respondent's lease was

speculative. He contended that the Appellant should have adduced evidence to establish the proper format and content of the lease issued by the Ministry of Lands and whether errors in the lease operate to invalidate a Certificate of Title. He added that the question of whether a lease issued by the Ministry of Lands is invalid is a matter of fact that requires proof by way of evidence from a competent witness. That in any case, a Certificate of Title is not inferior to a lease and, therefore, that an error in a lease cannot affect the validity of a Certificate of Title.

With regard to the tenth ground of appeal, Counsel argued that the claim by the Appellant that the Respondent called him and offered to buy the farm is not supported by any evidence on the record of appeal. Counsel submitted that the only evidence on the record of appeal was that the Appellant was called by an unknown person on an unknown date purporting to be representing the Respondent. Counsel stated that this allegation by the Appellant did not meet the requirements of Order 5 Rule 18 of the **HIGH COURT RULES**[f] which provides that-

> **"When the belief of a witness is derived from information received from another person, the name of his informant shall be stated, and**

reasonable particulars shall be given respecting the informant, and the time, place and circumstances of the information."

Counsel contended that findings by the learned trial Judge in relation to the unknown person who allegedly called the Respondent were findings of fact and not arguments by the Court. He, accordingly, urged us not to interfere with the said findings of fact. In this regard, he referred us to our decision in the case of **NKONGOLO FARMS LIMITED V. ZAMBIA NATIONAL COMMERCIAL BANK LIMITED, KENT CHOICE LIMITED (IN RECEIVERSHIP) CHARLES HURUPERI**[6] where we held that-

"As a general rule an appellate court rarely interferes with the finding of fact by the lower court, unless such findings are not supported by evidence on record or the lower court erred in assessing and evaluating the evidence by taking into account matters which ought not to have been taken into account or failed to take into account some matters which ought to have been taken into account or mistakenly, the lower court failed to take advantage of having seen and heard the witnesses and this is obvious from the record or the established evidence demonstrates that the lower court erred in assessing the evidence."

With regard to the eleventh ground of appeal, Mr. Chiteba argued that the Appellant's claim, that the lower Court should have order that the Appellant be compensated for developments on the land, is an admission that the land does not belong to him. Counsel stated further that the Appellant, in any case, is not entitled to any compensation because there is no evidence to show that the

buildings erected on the land in issue were erected with the consent or approval of the Respondent.

It was Counsel's further contention that the Appellant did not raise any issue of compensation in the Court below. Counsel reasoned that the Appellant cannot, therefore, raise that issue before this Court. To support these arguments, he again referred us to the **ANTONIO VENTRIGLIA**[4] case, which we have already cited elsewhere in this judgment.

Counsel stated that should this Court decide to entertain the Appellant's arguments on compensation, he would argue that the Appellant was not entitled to any compensation. He submitted that this is because, from the beginning, the Appellant was aware that the land in issue did not belong to him. Counsel based this contention on the finding by the lower Court that the Appellant showed his surveyors already existing beacons on the land. Accordingly, Counsel submitted that the Appellant cannot benefit from his own wrongdoing. For this argument, he referred us to the case of **GINTY V. BELMONT BUILDING SUPPLIES LIMITED**[7] where the Plaintiff sued his employer for damages for injury he

suffered while on duty. It was, however, found as a fact that the Plaintiff had willfully disregarded safety regulations when carrying out the assigned task. Pearson, J, said the following in his judgment:

> **"... there is the common law principle that a person cannot derive any advantage from his own wrong. As applied to this case, that means a person cannot by his own wrongful act impose on his employer the liability to pay damages to him... ."**

On the twelfth ground of appeal, Counsel submitted that there was no evidence before the lower Court to show that the lease held by the Respondent was issued pursuant to a repealed law. He pointed out that in fact the learned trial Judge found that the Appellant had failed to show that the said lease was invalid.

Counsel further submitted that the Appellant did not plead fraud. For this he referred us to the case of **NKONGOLO FARMS LIMITED**[6] where this Court said that where a party relies on fraud that party must supply the necessary particulars of the allegation in the pleadings. And that the fraud must be strictly proved.

On the thirteenth and fourteenth grounds of appeal, Counsel submitted that the case as pleaded by the Appellant before the

lower Court did not raise any issue with regard to the procedure followed by the Respondent in obtaining his Certificate of Title.

On the basis of the above submissions, Mr. Chiteba urged this Court to dismiss the appeal on all the fourteen grounds.

We have carefully considered the evidence on record, the arguments of Counsel and the judgment appealed against. In our view, the first, second, third, fourth, fifth, twelfth, thirteenth and fourteenth grounds of appeal are interrelated. The thrust of the arguments advanced by Mr. Ndhlovu, SC, on these grounds of appeal is that, in converting his land from customary tenure to leasehold tenure, the Respondent did not follow the procedural stipulations contained in Sections 3(4)(b) and 8(1)(a), (2) and (3) of the **LANDS ACT**[b]. Further, that the Respondent did not adhere to the procedural requirements contained in Regulation 2 of the **LAND (CUSTOMARY TENURE) (CONVERSION) REGULATIONS**[c]. Counsel for the Appellant has also argued that the learned trial Judge should have held that the Commissioner of Lands is bound by law and cannot issue a lease pursuant to repealed law.

The gist of the arguments in response by Mr. Chiteba is that in the lower Court, the Appellant did not raise the issues relating to procedure for converting land from customary tenure to leasehold tenure. Further, that, the Appellant did not adduce any evidence to establish that the Respondent did not follow the said procedures. That, by arguing that the Respondent should have produced documents to support the regularity of the conversion of the land to leasehold tenure, the Appellant is shifting the burden of proving his case to the Respondent. Counsel has also argued that Section 33 of the **LANDS AND DEEDS REGISTRY ACT**[a] makes a Certificate of Title conclusive evidence of ownership of land. In light of that section, Counsel has insisted that the burden is on the Appellant to prove that the Respondent's title is inconclusive.

We have carefully considered and analysed the respective positions of the parties on these grounds of appeal. Counsel for the Appellant has particularly anchored his arguments on Sections 3(4)(b) and 8(1)(a), (2) and (3) of the **LANDS ACT**[b] and Regulation 2 of the **LAND (CUSTOMARY TENURE) (CONVERSION) REGULATIONS**[c]**.** Section 3(4)(b) of the **LANDS ACT**[b] provides to the

effect that the President should not alienate land held under customary tenure without consulting the Chief and the local authority in the area in which the land to be alienated is situated. Sections 8(1)(a), (2) and (3) of the **LANDS ACT[b],** and Regulation 2 of the **LAND (CUSTOMARY TENURE) (CONVERSION) REGULATIONS[c],** provide the detailed procedure for converting customary land to state land.

We must state from inception that we agree with Counsel for the Appellant that the procedure stipulated in the above provisions of the law, for converting land from customary tenure to leasehold tenure, must be adhered to. The underlying consideration of the law is that there must be consent of both the chief and local authority before the President can alienate land held under customary law under the **LANDS ACT[b]**. The Respondent's document which is a proposed diagram for the small holding was stamped by both the chief and the local authority before title was issued, signifying approval by these institutions. The argument by the Appellant, however, is that he followed to the letter, the procedures outlined in the Regulations by filling in the necessary

forms and ending by attending interviews. In our view unless the consent of the traditional ruler and local authority can be impugned, the alienation of land held under customary law by the President cannot be faulted. And, once one has obtained a Certificate of Title, Section 33 of the **LANDS AND DEEDS REGISTRY ACT**[a] comes into play. It provides as follows:

> **"33. 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 to VII; and**
>
> **(b) Except so far as regards 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."** (Emphasis ours)

It is clear from Section 33 that once a Certificate of Title is issued, it becomes conclusive evidence of the ownership of the land to which it relates. This implies that once a person is issued with a

Certificate of Titles, that Title raises a presumption that the person followed the requisite procedures for obtaining title to land. This presumption is rebuttable and can be dislodged under the circumstances provided by Section 33 itself, notably, in the case of fraud. Counsel for the Appellant has cited fraud as the factor that this Court should hold to have vitiated the conclusiveness of the Respondent's title. He has alleged that the Respondent obtained his title fraudulently.

The law regarding the pleading and proving of fraud is well settled. It is trite that fraud must be distinctly alleged and proved. This is evident from Order 18/8/16 of the **RULES OF THE SUPREME COURT, 1999**[e], which states that **'Any charge of fraud or misrepresentation must be pleaded with the utmost particularity....'** Order 18/12/18 of the **RULES OF THE SUPREME COURT, 1999**[e], is also couched in similar terms. It provides that **'Fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.'**

In addition, the standard of proof for an allegation of fraud is higher than proof on a balance of probabilities, but lower than proof beyond reasonable doubt. A case on point in this regard is our decision in the case of **SITHOLE V. THE STATE LOTTERIES BOARD**[8] where we held that if a party alleges fraud, the extent of the onus on the party alleging is greater than a simple balance of probabilities.

In the case in casu, the Appellant's pleadings, which comprise his affidavits in support and in reply did not allege fraud with sufficient particularity and did not prove it to the required standard. However, Counsel for the Appellant maintained, throughout his heads of argument, that the Respondent should have brought documentary evidence to show that he obtained the necessary consents from the Chief and the local authority before being issued with the Title. We have alluded to the documents on page 89 and 90, which show that the document containing the Respondent's proposed small holding was stamped by both Chibombo Council and Chief Mungule in 1999. The Surveyor approved the drawing on 30th August 2000 and the Certificate of

Title was issued in March 2001. These events show that the relevant authorities were engaged before title was obtained.

Counsel has also advanced the view that the Respondent should have joined the Surveyor-General to come and adduce evidence in defence of the Respondent's position. Clearly, Counsel's arguments are based on the misconception that the burden of proof was on the Respondent to show that his Title was superior to that of the Appellant. We have said in a plethora of cases that he who alleges must prove. The Appellant has, without evidence, made numerous allegations against the regularity of the Certificate of Title held by the Respondent and expects the Respondent to prove that his Title is regular. In the case of **WILSON MASAUSO ZULU V. AVONDALE HOUSING PROJECT LIMITED**[9], we said the following:

> **"... it is accepted that where a plaintiff alleges that he has been wrongfully or unfairly dismissed, as indeed in any other case where he makes any allegation it is generally for him to prove those allegations. A plaintiff who has failed to prove his case cannot be entitled to judgment, whatever may be said of the opponent's case."**

We, therefore, hold that the Respondent has no burden to establish that, in obtaining his Certificate of Title, he followed all the requisite procedural requirements for converting land from customary tenure. The fact that the Respondent was issued with a

Certificate of Title raises a presumption that he followed all the procedural requirements for converting the land in dispute. This presumption has not been rebutted. The Appellant has not adduced any credible evidence that would cast doubt on the conclusiveness of the Respondent's Certificate of Title. But as we have stated above, there is evidence from the Respondent that he obtained the consent of the Chief and the local authority before he was issued with the Certificate of Title by the Ministry of Lands. He also had his land surveyed and beacons placed to mark the extent of his land before his surveyor came up with survey diagrams. He produced some documents to support the foregoing evidence. In fact the learned trial Judge found as a fact that the Respondent's evidence that the Appellant showed his surveyor already existing beacons was not challenged by the Appellant in his affidavit in reply. The Appellant's surveyor himself, in a letter produced by the Respondent, categorically stated that he drew the diagrams appearing in the Appellant's Certificate of Title without actually surveying the land. He stated that he was instead shown the beacons by the Appellant.

The Appellant has also contested the validity of the lease signed by the Respondent with the Commissioner of Lands. He has argued that the Title was issued pursuant to repealed law. We have carefully looked at the lease in issue. We agree with the learned trial Judge's holding that although the **LANDS ACT**[b] repealed the **ZAMBIA (STATE LANDS AND RESERVES) ORDER**[d], the Regulations made under that Order remained in force by virtue of Section 15 of the **INTERPRETATION AND GENERAL PROVISIONS ACT**[g]. That section provides that-

> **"15. Where any Act, Applied Act or Ordinance or part thereof is repealed, any statutory instrument issued under or made in virtue thereof shall remain in force, so far as it is not inconsistent with the repealing written law, until it has been repealed by a statutory instrument issued or made under the provisions of such repealing written law, and shall be deemed for all purposes to have been made thereunder."**

The Appellant has not challenged the finding by the learned trial Judge that the **LANDS ACT**[b] did not have a schedule or model lease. In the premises, we are of the view that the use of the model lease, under the Regulations made pursuant to the repealed **ZAMBIA (STATE LANDS AND RESERVES) ORDER**[d], did not invalidate the Respondent's Certificate of Title.

With regard to the issue of the land having been surveyed twice, we are of the view that proof of that fact is immaterial to the discharge of the burden of proof on the Appellant as to whose Certificate of Title is superior. Proof that the Appellant had the land surveyed twice does not change the fact that the Respondent holds a Certificate of Title issued earlier than that of the Appellant. It is not in dispute that at the time that the Appellant was having the land surveyed, whether once or twice, the land was already held on Title by the Respondent.

With regard to the sixth, seventh and eighth grounds of appeal, Counsel for the Appellant has argued that the Appellant's land is 14.9104 hectares while the Respondent's land is 18.0054 hectares. Counsel has also argued that the beacons on the Respondent's piece of land could not, therefore, have been exactly the same for the Appellant to have showed the surveyor already existing beacons.

In our view, the above argument by the Appellant is simplistic. It is not in dispute that the Appellant and the Respondent are claiming substantially the same piece of land. It is also not in

dispute that the Appellant and the Respondent were issued with Title Deeds in relation to the same piece of land. If that was not the case, the Appellant would not have dragged the Respondent to court. It is our considered view, therefore, that the issue of the sizes of the pieces of land is immaterial for purposes of determining whose Certificate of Title should be upheld.

On the ninth ground of appeal, Counsel for the Appellant has argued that the lower Court should have ordered the matter to proceed as if commenced by way of a writ of summons and statement of claim, despite the objection raised by the Appellant against proceeding in that way. It is clear from the record of appeal that when Counsel for the Respondent applied to have the matter treated as if commenced by writ of summons and statement of claim, Counsel for the Appellant objected to that application and insisted that the matter should be determined on affidavit evidence and submissions. We, therefore, find it strange that the Appellant has now turned around and faulted the learned trial Judge for having decided the case on affidavit evidence and submissions. Mr. Ndhlovu's submissions in this regard are, accordingly, untenable.

On the tenth ground of appeal, Counsel for the Appellant has argued that the conduct of the Respondent was not consistent with a title holder. It is our firm view that the alleged conduct on the part of the Respondent, cannot vitiate the validity of the Respondent's Certificate of Title in terms of section 33 of the **LANDS ACT**[b].

Coming to the eleventh ground of appeal, the Appellant has claimed for compensation for the improvements made on the land. Counsel for the Appellant has submitted that since the learned trial Judge did not find that the Appellant was a squatter, she should have ordered compensation for him. Counsel for the Respondent has objected to this ground. He has argued that the Appellant knew that the land did not belong to him. He has further stated that the Appellant proceeded to effect the alleged improvements without the consent of the Respondent. Counsel has also stated that in any case, the Appellant did not plead nor adduce evidence to support his claim for compensation.

We have carefully looked at the originating process for this action. Clearly, the Appellant did not claim for compensation as one of the reliefs in the event that the Court found that the Respondent

was the rightful owner of the disputed land. In fact the Appellant did not adduce any evidence before the lower Court to support his claim for compensation. In our view, the Appellant cannot fault the lower Court for not having ordered compensation when he neither asked for it in his pleadings nor laid any evidence to found his entitlement to compensation. Our holding in this regard is well founded on our decision in the **ANTONIO VENTRIGLIA**[4] case where we said the following:

> **"We agree that the principle of law has been laid down in a plethora of authorities by this Court that in order not to ambush the other party, only issues that were pleaded and raised in the Court below can be raised in this Court as this is a Court of record."**

The Appellant's claim, that he lived on the land for over seven years, does not make him accrue any rights against the Respondent. This is because Section 35 of the **LANDS AND DEEDS REGISRTY ACT**[a] protects the Respondent from acquisition of rights by any person through adverse possession. That section provides that-

> **"35. After land has become the subject of a Certificate of Title, no title thereto, or to any right, privilege, or easement in, upon or over the same, shall be acquired by possession or user adversely to or in derogation of the title of the Registered Proprietor."**

On the totality of the issues in this case, we find no merit in the appeal. We dismiss it on all the fourteen grounds of appeal with costs for the Respondent, to be taxed in default of agreement.

I.C. Mambilima
CHIEF JUSTICE

E.M. Hamaundu
SUPREME COURT JUDGE

A.M. Wood
SUPREME COURT JUDGE