

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

2005/HP/0712

**BETWEEN :**

MAUREEN LUNGU CHIRWA  
DUNCAN CHIRWA

**1<sup>ST</sup> PLAINTIFF****2<sup>ND</sup> PLAINTIFF****AND**

ELIAS TEMBO  
THE ATTORNEY GENERAL  
LUSAKA CITY COUNCIL  
PEGGY KANDESHA

**1<sup>ST</sup> DEFENDANT****2<sup>ND</sup> DEFENDANT****3<sup>RD</sup> DEFENDANT****3<sup>RD</sup> PARTY**

**Before Honorable Mrs. Justice M. Mapani-Kawimbe on the 16<sup>th</sup> day of  
November, 2017**

<i>For the Plaintiffs</i>	:	<i>Mr. K. Kaunda, Messrs Ellis &amp; Co.</i>
<i>For the 1<sup>st</sup> Defendant</i>	:	<i>Mr. R. Mainza, Messrs Mainza &amp; Co.</i>
<i>For the 2<sup>nd</sup> Defendant</i>	:	<i>No Appearance</i>
<i>For the 3<sup>rd</sup> Defendant</i>	:	<i>No Appearance</i>
<i>For the 3<sup>rd</sup> Party</i>	:	<i>No Appearance</i>

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

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**Cases Referred To:**

1. *Yengwe Farms Limited v Masstock Zambia Limited, The Commissioner of Lands and The Attorney General (1999) ZR 65*
2. *Justine Chansa v Lusaka City Council SCZ Judgment No. 29 of 2007*

3. *Anti-Corruption Commission v Barnet Development Corporation Limited* (2008) ZR 69 Volume 1 (SC)
4. *Nkongolo Farms Limited v Zambia National Commercial Bank Limited, Kent Choice Limited (In receivership) and Charles Haruperi SCZ Judgment No. 19 of 2007*
5. *Khalid Mohamed v The Attorney General* (1982) ZR 49

**Legislation Referred To:**

1. *Lands and Deeds Registry Act, Chapter 185*

The Plaintiffs issued a Writ of Summons and Statement of Claim seeking the following reliefs:

- i. *Damages for encroachment, mesne profits and for trespass on Stand No. 24594, Lusaka.*
- ii. *An injunction to restrain the Defendants, their agents, servants or whomsoever from encroaching on Stand No. 24594, Lusaka.*
- iii. *Interest on mesne profits and damages*
- iv. *Any other relief the Court may deem fit.*
- v. *Costs.*

The Statement of Claim discloses that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs are the registered proprietors of Stand No. 24594, Lusaka. In June, 2005, the Defendant engaged unknown persons to dig holes on their property and transport earth or soil leaving large holes on it, and it caused destruction to the natural landscape.

The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs aver that they made several attempts to meet the Defendant and to prevent him from encroaching on

their property, but he refused to meet them. They claim that they suffered loss and damage because of the Defendant's actions.

The 1<sup>st</sup> Defendant settled a Defence where he states that he was lawfully on the property and had every right to build on it. He denied that he encroached Stand No. 24594, Lusaka because he was the owner. He built a foundation box on the plot after following due procedures.

The 1<sup>st</sup> Defendant further states that the Commissioner of Lands never served a notice of withdrawal or revocation of his offer letter and as such he remains the legitimate owner of the property. The 1<sup>st</sup> Defendant avers that he submitted survey diagrams to the Commissioner of Lands so that it could prepare his lease and title deeds but he has neglected to act on his documentation.

The 1<sup>st</sup> Defendant states that in 2005, he was charged with the offence of criminal trespass by Chilenje Police Station and was later acquitted by the Court. The 1<sup>st</sup> Defendant states that after his release, he conducted a search on the Lands and Deeds Register



and discovered that a Certificate of Title was issued to a 3<sup>rd</sup> Party when he already had existing interest in the property.

The 1<sup>st</sup> Defendant avers that the Commissioner of Lands offered the 3<sup>rd</sup> Party the property in breach of the law because he did not submit an application letter. He also avers that he discovered that the Plaintiffs bought the property from Oggie Kandesha who was not the beneficial owner at the material time.

The 1<sup>st</sup> Defendant alleges that the transaction between Oggie Kandesha and the Plaintiffs was fraudulently done and is null and void *ab initio*. He also alleges that the 3<sup>rd</sup> Party and Plaintiffs offer letter and Certificate of Title were fraudulently obtained from the Commissioner of Lands. The particulars of the fraud being:

- (i) **The 3<sup>rd</sup> Party caused the Commissioner of Lands to generate a letter of offer in his name despite the said 3<sup>rd</sup> Party not having submitted any application letter either to the Commissioner of Lands or Lusaka City Council to be allocated Stand No. 24594, Libala south Lusaka as required by law.**
- (ii) **As the 3<sup>rd</sup> Party well knew or ought to have known at the time of procuring the offer letter and Certificate of Title, it is not legally tenable for the Commissioner of Lands to allocate the said property without submitting an application letter.**
- (iii) **The sale of the property between the Plaintiffs and Oggie Kandesha was fraudulent in that Oggie Kandesha was not a purported beneficial owner at the material time.**

The 1<sup>st</sup> Defendant states that the Commissioner of Lands erred when he generated an offer letter in favour of the 3<sup>rd</sup> Party, whilst his was subsisting. He avers that the Certificate of Title issued to the 1<sup>st</sup> Defendant and later conveyed to the Plaintiffs is liable for cancellation on the ground that it was issued in error or misrepresentation by the Registrar of Lands and Deeds and the 3<sup>rd</sup> Party. Further, that it was erroneous for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to have maintained two active files on the property. The 1<sup>st</sup> Defendant counter-claims:

- (i) *A declaration that the 1<sup>st</sup> Defendant is the legal owner of Stand No. 24594, Libala South, Lusaka and that his offer letter subsists.*
- (ii) *A declaration that the offer letter and Certificate of title issued to the 3<sup>rd</sup> Party by the Commissioner of Lands and Registrar of Lands and Deeds respectively are null and void ab initio on account of fraud or errors and mistakes committed by the Commissioner of Lands and Registrar of Lands and Deeds and the 3<sup>rd</sup> Party.*
- (iii) *An order compelling the Commissioner of Lands and Registrar of Lands and Deeds to issue the 1<sup>st</sup> Defendant with a Lease and Certificate of Title in respect of Stand No. 24594, Libala South, Lusaka.*
- (iv) *A declaration that the 1<sup>st</sup> Defendant pursuant to Clause 4(1) of offer letter to legally construct dwelling structure at the subject stand thereby spending in excess of K150,000.00.*
- (v) *A declaration that the dwelling structure constructed on Stand No. 24594, Libala South, Lusaka is legal and not amenable to demolition.*
- (vi) *A declaration that the Plaintiffs are not innocent purchasers of value without adverse notice.*
- (vii) *A declaration that a contract of sale between Oggie Kandesha and the Plaintiffs be cancelled owing to fraud committed by the parties.*
- (viii) *Damages for unnecessarily inconvenience occasioned on the 1<sup>st</sup> Defendant by the Plaintiffs.*
- (ix) *Costs*



- (x) *Interest found due on any of the above.*
- (xi) *Any other reliefs the Court may deem fit.*

The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and the 3<sup>rd</sup> Party did not enter appearance.

**Duncan Chirwa** testified as **PW1**. His evidence was that the Plaintiffs bought the property from Peggy Ngandu Kandesha at K4,000,000 in 2002. He is in possession of an offer letter from the Ministry of Lands, a service charge letter from Lusaka City Council and Title Deed issued in his name and all shown in the Plaintiffs' Bundle.

PW1 stated that he bought the property from Oggie Kandesha upon confirming that he had valid property documents. He also stated that a sale agreement was executed and change of ownership was effected. All statutory payments were made and a Certificate of Title was issued in the Plaintiffs' names. PW1 testified that in 2005 his wife informed him that the 1<sup>st</sup> Defendant had built a structure on their property. He reported the matter to Chilenje Police Station and thereafter took out this action against the 1<sup>st</sup> Defendant.

In **cross-examination**, PW1 testified that he purchased the property from Peggy Kandesha Ngandu and that he was familiar with the procedures for land acquisition. PW1 stated that a letter of sale was prepared and a contract signed by the parties. He stated that he could not recall the date when he signed the contract nor the law firm that prepared the contract.

The property was purchased in the 1<sup>st</sup> Plaintiff's name. Further that, the signature at page 22 of the Defendants' Bundle was not his wife's. He stated that there was a Deed of Transfer signed by Oggie Kandesha and the Plaintiffs. The Plaintiffs followed the normal procedure in acquiring a Certificate of Title. A search at the Ministry of Lands revealed that Peggy Kandesha was offered the property and an offer letter was generated at 15.35 hours while the 1<sup>st</sup> Defendant's letter was issued at 09.40 hours.

PW1 was not **re-examined**.

**DW1** was **Elias Tembo** who testified that he responded to an advertisement in the Daily Mail, which was placed by Lusaka City

Council (LCC) inviting applications for residential plots in Libala South, Lusaka. He later received a letter from LCC informing him that he had been recommended to Commissioner of Lands for the allocation of Plot No. 24594, Libala South. On 15<sup>th</sup> August, 2001, he received his offer letter and he immediately accepted the offer by paying the prescribed fees as shown in the Defendant's Bundle. DW1 testified that on 29<sup>th</sup> September, 2002, he received a demand letter from Lusaka City Council for service charges and he paid K59,200.00 on receipt no. 19613. On 14<sup>th</sup> January, 2005, the Commissioner of Lands confirmed that he had paid the service charge.

DW1 further testified that he applied for building permission and S.N. Besa Surveyors were engaged to survey the property. His building plans were approved on 20<sup>th</sup> December, 2005 by the Lusaka City Council after which he began to build a house. Sometime in 2006, he was served an injunction order by the Plaintiffs.



DW1 testified that he conducted searches at LCC and Ministry of Lands where he discovered that the Plaintiffs bought the property from Oggie Kandesha and an offer letter was issued to Peggy Kandesha after DW1's offer letter. He also discovered that there was contract of sale and assignment between Oggie Kandesha and Maureen Lungu Chirwa as well as a Deed of Transfer between Oggie Kandesha and the Plaintiffs.

DW1 further discovered that Peggy Ngandu Kandesha never submitted an application for the property. The Commissioner of Lands had not withdrawn his offer letter and the LCC has been demanding property rates from him, which he paid. DW1 testified that the transaction between Oggie Kandesha and the Plaintiffs was fraudulent because Oggie Kandesha was not the owner of the property and had no power of attorney from Peggy Ngandu Kandesha to execute the assignment.

DW1 testified that the Commissioner of Lands breached the law when he offered Peggy Kandesha the property, when his offer letter had not been cancelled. He prayed to the Court to enforce his

offer letter and to cancel the Plaintiffs' Certificate of Title. He also prayed to the Court to order the 2<sup>nd</sup> Defendant to issue him a lease and Certificate of Title as the bonafide offeree.

In **cross-examination**, DW1 stated that he was aware that LCC was an agent of the Ministry of Lands and he was not aware that the Ministry of Lands could override its agent. He was not aware that the recommendation of an agent was not binding on the Ministry. DW1 stated that he was not issued a lease for the property and the Registrar of Lands and Deeds did not issue him a certificate of title. He could not confirm that the Certificate of Title in this matter was initially issued to Peggy Kandesha. The Certificate of Title in the Plaintiffs' Bundle referred to Stand No. 24594, Lusaka, and the lease was granted to Peggy Ngandu Kandesha by the President. DW1 stated that he was not aware that the Plaintiffs purchased the property from Peggy Kandesha.

DW1 conceded that the Plaintiffs' Bundle had receipts, which showed that Peggy Kandesha paid the LCC service charges. Further, there was a Consent to Assign executed by Peggy Ngandu

Kandesha and Maureen Chirwa in respect of Stand No. 24594. There was a property transfer letter between Peggy Kandesha and the Plaintiffs. Further, entry no. 1 on the Lands Register showed that the lessee as the President, the lessor/assignor as Peggy Ngandu Kandesha and the assignees as the Plaintiffs. DW1 stated that there was no proof in Court to show that the Commissioner of Lands mistakenly issued the Plaintiffs' title.

In **re-examination**, DW1 stated that he only saw the assignment between Oggie Kandesha and the Plaintiffs and not with Peggy Kandesha. There was nothing in the Plaintiffs' Bundle to show that there was an assignment between Peggy Kandesha and the Plaintiffs.

Learned Counsels for the parties filed written submissions for which I am indebted. I shall not reproduce them suffice to state that I will refer to them in the judgment.

I have seriously considered the pleadings, evidence adduced and the written submissions filed herein. It is common cause that



the Plaintiffs bought Stand No. 24594, Libala South, Lusaka from Peggy Ngandu Kandesha. The transaction was facilitated by Oggie Kandesha. At the time of acquiring the property, Peggy Ngandu Kandesha had a certificate of title. The 1<sup>st</sup> Defendant was offered the same property by the Ministry of Lands following a recommendation by the Lusaka City Council. It was shown to the Court that the 1<sup>st</sup> Defendant was offered the property before Peggy Ngandu Kandesha. However, he was never issued title.

The issue that falls for determination is whether the 1<sup>st</sup> Defendant has the right to occupy Stand No. 24594, Libala South? The Plaintiffs claimed that they are the rightful owners of the property and have a valid certificate of title. They acquired the property after fulfilling all the legal requirements in land acquisition.

The 1<sup>st</sup> Defendant contended that Peggy Ngandu Kandesha sold the Plaintiffs property, which she illegally acquired from the Commissioner of Lands. Because of the illegality, the Plaintiffs were not innocent purchasers and have no legitimate right to the

property as opposed to him. He also asserted that the Commissioner of Lands wrongly issued the Plaintiffs title.

Section 33 of the Lands and Deeds Registry Act provides that:

**"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, estate 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."**

According to section 33 of the Lands and Deeds Registry Act, a certificate of title is conclusive proof of ownership of property. A certificate of title can only be challenged when an allegation of fraud has been proved according to section 34 of the Lands and Deeds Registry Act.

PW1's evidence in Court to support his claim of ownership, was in the form of Peggy Ngandu Kandesha's offer letter from the Ministry of Lands, a receipt showing payment of service charges to

that Ministry and the certificate of title first issued to her and later to themselves. They also produced a Lands Register, which showed the transactions on the property. It described the President as the lessee, the lessor/assignee as Peggy Ngandu Kandesha and the Plaintiffs as assignees.

DW1 contended that the property in dispute was first offered to him. He lodged documents with the Commissioner of Lands so that he could prepare a lease, which has not been processed to date. DW1 alleged that the Plaintiffs bought property from Peggy Ngandu Kandesha who according to his findings on the Lands Register did not lodge an application letter with the Ministry of Lands. He also testified that the Plaintiffs transactions with Oggie Kandesha who was not the legal owner of property and had no power of attorney were illegal.

Section 58 of the Lands and Deeds Registry Act provides that:

**“Except in the case of fraud, no person contracting or dealing with or taking or proposing to take a transfer or mortgage from the Registered Proprietor of any estate or interest in land in respect of which a Certificate of Title has been issued shall be required or in any manner concerned to inquire into or ascertain the circumstances in or the consideration for which such Registered**



**Proprietor or any previous Registered Proprietor of the estate or interest in question is or was registered, or to see to the application of the purchase money or of any part thereof, or shall be affected by notice, direct or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding, and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud."**

Section 59 of the Lands and Deeds Registry Act reads:

**"59. Nothing in Parts III to VII shall be so interpreted as to render subject to action for recovery of damages, or for possession, or to deprivation of any land in respect to which a Certificate of Title has been issued, any purchase or mortgagee bona fide for valuable consideration of such land on the ground that his vendor or mortgagor may have become a Registered Proprietor through fraud or error, or under any void or voidable instrument, or may have derived from or through a Registered Proprietor through fraud or error, or under any void or voidable instrument, and this whether such fraud or error consists in wrong description of the boundaries or of the parcels of any land, or otherwise howsoever."**

The cited provisions of the Lands and Deeds Registry Act entail that a purchaser of valuable consideration from a registered proprietor who has title is not required to investigate how the proprietor acquired title. Further, an action cannot lie for the recovery of damages or possession or deprivation of any land in respect of which a certificate of title has been issued. A purchaser can only be dispossessed of property when fraud has been proved.

In casu, the question is whether the Plaintiffs' certificate of title deriving from Peggy Ngandu Kandesha's title is tainted with fraud so as to invoke its cancellation.

DW1 testified that his offer letter was issued before Peggy Ngandu Kandesha's following his application to the Lusaka City Council (LCC) submitted on 14<sup>th</sup> January, 2000. He stated that this was a requirement under Circular No. 1 of 1985 on land acquisition. On 15<sup>th</sup> May, 2000, the 3<sup>rd</sup> Defendant recommended him to the Commissioner of Lands for Stand No. 24594 Lusaka. His offer letter was subsequently generated on 15<sup>th</sup> August, 2001 at 09.40 hours. He accepted the offer and paid the consideration fees. DW1 testified that Peggy Ngandu Kandesha did not apply for the property according to the Lands Register and failed to comply with Circular No. 1 of 1985.

Learned Counsel for the 1<sup>st</sup> Defendant contended that a person who desires to acquire land in Lusaka is obliged to submit a written application to the LCC. He stated that the LCC has delegated powers to receive land applications from members of the

public or directly to the Commissioner of Lands as provided for by Circular No. 1 of 1985. Counsel cited the case of **Yengwe Farms Limited v Masstock Zambia Limited, The Commissioner of Lands and The Attorney General**<sup>1</sup>, where the Supreme Court stated that:

**"4. Accordingly, the following procedures have been laid down and it will be appreciated if you shall ensure that the provisions of this Circular are strictly adhered to."**

As stated earlier in this judgment, a certificate of title serves as conclusive proof of ownership of land. Land can be acquired through the local authorities who are the agents of the Commissioner of Lands, or directly from that office. Albeit, the Commissioner of Lands can alienate land to any person of his choice and is not bound by the recommendations of his agents. In the case of **Justine Chansa v Lusaka City Council**<sup>2</sup>, the Supreme Court held that:

- "(1) The authority to consider applications for land allocation from members of the public is vested in the President of Zambia who has delegated this authority to the Commissioner of Lands.**
- (2) An applicant for land has in terms of circular No. 1 of 1985, an option either to apply directly to the Commissioner of Lands, or to apply through a local authority, which has been delegated powers to receive applications for land from members of the public.**



- (3) Where a member of public opts for the second route, a local authority is mandated to advertise any land available, receive applications from members of the public and make recommendation to the Commissioner of Lands.
- (4) The powers to allocate land and make offers to successful applicants is reposed in the Commissioner of Lands."

The Supreme Court further held, in relation to recommendations or proposals by a local authority, that:

**"The powers to allocate land and make an offer to successful applicants still remains in the Commissioner of Lands. The respondent only makes recommendation to the Commissioner of Lands. The Commissioner of Lands after receiving these recommendations from the respondents has the discretion to either accept or reject the recommendations made by the respondent."**

It is clear from this authority that the Commissioner of Lands is reposed with the final decision on land allocation. He can allocate land to any person of his choice. In the present case, the Plaintiffs acquired title from a registered proprietor, Peggy Ngandu Kandesha. In my view, they were not under any obligation to inquire how she obtained it.

I am alive to the fact that there are two offer letters on record. DW1 alleges fraud mainly because of the other offer letter on record. He did not call evidence from the Ministry of Lands to

clarify the nuisance in its record. As an interested party, DW1 who is not a representative of Ministry of Lands. My view is that he is not an authoritative source to explain the existence of the two offer letters on the same property. It is quite probable that there could be another explanation for the two offer letters other than fraud. I cannot impute fraud merely because DW1's offer letter was generated earlier than that of Peggy Ngandu Kandesha who was subsequently issued title for Stand No. 24594, Lusaka. There must be a deeper explanation, which can only be offered by the Ministry and not DW1.

I am fortified by the case of **Nkongolo Farms v Zambia National Commercial Bank Limited, Kent Choice Limited (In receivership) and Charles Haruperi<sup>4</sup>**, quoted with approval the learned authors of Halsbury Laws of England (Volume 16 paragraph 663), where they state:

**"The Court has never ventured to lay down, as a general proposition, what constitutes fraud. Actual fraud arises from acts and circumstances of imposition. It usually takes the form of a statement of what is false or a suppression of what is true."**

I am therefore, disinclined to find that the Plaintiffs who bought land from the registered proprietor made false statements or suppressed the truth about how they acquired their property from the registered proprietor. They are innocent purchasers who acquired valid title to the property. I also find that the 1<sup>st</sup> Defendant has no legitimate claim to the property and illegally encroached thereon. He is liable to be condemned in damages.

All in all, I hold that the Plaintiffs have succeeded in their first claim. The Plaintiffs did not lead evidence on their claim for mesne profits and interest thereon, it accordingly fails.

In the counterclaim, the 1<sup>st</sup> Defendant seeks to be declared as the legal owner of Stand No. 24594, Libala South, Lusaka. Associated to that claim, the 1<sup>st</sup> Defendant seeks the Court's intervention to declare the offer letter issued to Peggy Ngandu Kandesha null and void on account of fraud. He also seeks an order to compel the Commissioner of Lands to issue him title. The particulars of fraud are largely that the Commissioner of Lands



generated an offer letter to Peggy Ngandu Kandesha when she did not apply for the property.

In the case of **Anti-Corruption Commision v Barnet Development Corporation Limited**<sup>3</sup>, the Supreme Court held inter alia as follows:

**"1. Under section 33 of the Lands and Deeds Registry Act, a certificate of title is conclusive evidence of ownership of land by a holder of a certificate of title. However, under section 34 of the same Act, a certificate of title can be challenged and cancelled for fraud or reasons of impropriety in its acquisition."**

I have carefully considered the evidence tendered by DW1 on his counterclaim. I find that it is largely based on his perception of the searches that he conducted at the LCC and Ministry of Lands. It is his account that Oggie Kandesha had no authority to act on behalf of Peggy Ngandu Kansehsa. He also imputed fraud in the actions of the Commissioner of Lands and those of Oggie Kandehsa without presenting other evidence that would have strengthened his assertions.

In **Khalid Mohamed v The Attorney General**<sup>5</sup>, the Court stated that:

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

In my view, the overarching consideration is that DW1 is an interested party and there might be a number of other probabilities to explain the nuisance on the Ministry of Land's record. It does not necessarily impute fraud as an obvious variable. This issue can only be resolved if evidence is adduced from the Commissioner of Lands and Registrar of Lands and Deeds.

I therefore, find no merit in the 1<sup>st</sup> Defendant's counter-claim and accordingly dismiss it.

I award costs to the Plaintiffs to be taxed in default of agreement.

Leave to appeal is granted.

Dated this 16<sup>th</sup> day of November, 2017.

*M Mapani*

M. Mapani-Kawimbe  
**HIGH COURT JUDGE**