

**IN THE COURT OF APPEAL OF ZAMBIA**

**APPEAL No. 214/2019**

**HOLDEN AT LUSAKA**

*(Civil Jurisdiction)*

**BETWEEN:**

**ALICK HANGILI**

**AND**

**ROSE AMON NUMA**

**LENNIE MAKUNGU**



**APPELLANT**

**1<sup>ST</sup> RESPONDENT**

**2<sup>ND</sup> RESPONDENT**

**CORAM: CHASHI, SICHINGA SC AND NGULUBE, JJA.**

***On 8<sup>th</sup> April, 2021 and 22<sup>nd</sup> October, 2021.***

***For the Appellant*** : C. Kaela, Messrs G.M. Legal Practitioners

***For the Respondents*** : J. Mataliro, Messrs James and Doris Legal Practitioners

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

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**NGULUBE, JA**, delivered the Judgment of the Court.

**Cases referred to:**

1. *Nkhata and others vs Attorney- General (1966) Z.R.124*
2. *Nkongolo Farm Limited vs Zambia National Commercial Bank and others (2007) Z.R.149*
3. *Mususu Kalenga Building Limited and another vs Richman's Money Lenders Enterprises (1999) Z.R.27*

**Legislation referred to:**

1. *The High Court Rules, Chapter 27 of the Laws of Zambia*
2. *Land (Customary Tenure) (Conversion) Regulations, Statutory Instrument Number 89 of 1996*

**INTRODUCTION**

1. This is an appeal against a Judgment of the High Court delivered by Makubalo, J on 16<sup>th</sup> September, 2019 at the Kitwe High Court. By that Judgment, the court found that the issuance of certificate of title number 264709 was null and void as there was no evidence that settlers in Makungu and Lumingu villages were consulted prior to the conversion of their land from customary to leasehold tenure. The court also found that the plaintiff (the appellant herein) had failed to prove that he was the rightful owner of Farm Number 31140, Solwezi and that the Plaintiff was only entitled to Farm Number 264709, with the exception of the two portions of land that covered Makungu and Lumingu villages.

**BACKGROUND**

2. The Plaintiff (who we will refer to as the appellant in this Judgment) commenced an action by writ of summons on 14<sup>th</sup> July, 2016, seeking the following reliefs-

- (i) A declaration that he is the title holder and legal owner of Farm Number 31140 Solwezi;
- (ii) Damages for trespass;
- (iii) An order of injunction restraining the respondents from interfering with the appellant's quiet possession of Farm Number 31140, Solwezi;
- (iv) Interest and costs.

3. In the statement of claim, the appellant averred that he was allocated thirty-two hectares of farm land in Chief Kapijimpanga's chieftdom in June, 1980. His application to convert the land from customary to statutory was approved at the Solwezi Municipal Council meeting that was held on 27<sup>th</sup> March, 2006. The appellant was issued with a letter of offer by the Ministry of Lands which he accepted and paid all the requisite fees, resulting in the issuance of a certificate of title. In 1994, the appellant allowed the first respondent's brother and the second respondent to occupy part of the land on a temporary basis but they have since refused to vacate the land.
4. The respondents filed a defence as well as a counter claim, stating that they were not consulted prior to the appellant's

acquisition of title to the subject land. They averred that they settled on the land in issue in 1975 as subjects of Chief Kapijimpanga and that their rights and interests were disregarded in the alienation of the subject land.

5. In the lower court, the first witness, Emelda Hangili, who held a power of attorney on behalf of the appellant testified that on 30<sup>th</sup> June, 1980, Chief Kapijimpanga gave the appellant a letter of offer for the farm in issue and the Solwezi Municipal Council subsequently approved it, resulting in the issuance of a certificate of title. Disputes between the appellant and the respondents led to them seeking audience before Chief Kapijimpanga where the induna confirmed the boundaries of the land in issue.
6. The first respondent testified that in 1975, Chief Kapijimpanga allocated her a piece of land which she has now settled on, being the land in issue. However, in 2012, the appellant claimed seven hectares of the land but according to the first respondent, Chief Kapijimpanga confirmed that they had been in occupation of the land in issue for thirty-five years. The first respondent's names were registered in the palace records.

7. The second respondent gave sworn evidence that her mother was allocated the piece of land in 1992 by Chief Ng'ombe and that she has lived there ever since. In 2012, she saw the first respondent taking measurements of the land which included her portion for purposes of putting up a sewerage. The appellant also claimed ownership of the land and stated that he had title to the land. According to the second respondent, Chief Kapijimpanga questioned the appellant's title deeds and recognized the second respondent as the legal owner of the land.
8. The third witness for the respondents was Aran Kabwita, also known as Sub Chief Ng'ombe who stated that Lumingu village had been in existence since 1975 while Makungu village had been in existence since 1992. According to the sub-chief, there was a complaint in 2015 to the effect that the appellant wanted to displace the villagers in Makungu and Lumingu villages. That the appellant's letter of offer was written by Chief Kapijimpanga and that the appellant also had a land inspection report from Solwezi Municipal Council. He however stated that the inspection report was not genuine as it stated that there

were no people around the area covered by the appellant's title deed, when this was not the case.

9. The court made the following findings of fact:
  1. That the parties to this action are all from Chief Kapijimpanga's area with the appellant coming from Hangili village, the first respondent from Lumingu village and the second respondent from Makungu village.
  2. The court accepted that the appellant was given a piece of land in 1980 by Chief Kapijimpanga and that in 2006 the appellant converted the land from customary to leasehold, obtaining certificate of title number 264709.
  3. A land inspection report was prepared by the Solwezi Municipal Council. The court further found that the respondents were in occupation of their respective villages.
  4. The appellant commenced an action in the Subordinate Court to evict the respondents from their respective farms. However, the Judgment obtained in the Subordinate Court was set aside by the High Court for want of jurisdiction.
  5. The High Court in determining the matter found that Lumingu village was already in existence by the time the

Solwezi Municipal Council converted the appellant's land from customary to lease hold.

10. The court rejected the appellant's averments that the respondents occupied the land out of the appellant's kindness. It further found that the land inspection report that was issued by Solwezi Municipal Council was wrongly issued as the said land was not free of early settlers. The court concluded that part of the land for which the appellant has title infact belongs to the respondents as their villages are on the said land. It stated that the issuance of certificate of title number 264709 was null and void as it relates to Makungu and Lumingu villages whose residents were not consulted prior to the conversion of the land from customary to leasehold tenure.
11. The court found that the appellant was entitled to the land that was allocated to him with the exception of the land comprising of the two villagers, Lumingu and Makungu. The court entered Judgment for the respondents as it found that the appellant had failed to prove his case on a balance of probabilities and awarded the respondents costs.

12. Dissatisfied with the decision of the court, the appellant lodged this appeal advancing five grounds couched as follows-

1. *The learned High Court Judge erred in law and fact when she rejected the land inspection report by Solwezi Municipal Council when there was evidence that the defendants were consulted before the conversion of land was done.*
2. *The Learned Trial Judge erred in law and in fact when she based her conclusion as to whether or not the Defendants families' settlements were not within the Plaintiffs land prior to the conversion, on the testimony of DW3 whose evidence was purely hearsay.*
3. *The Learned Trial Judge erred in law and in fact when she held that the Defendant was aware that he was not free from blame to the extent and manner in which the acquisition of the land was done, based on a speculative question.*
4. *The Learned Trial Judge erred in law and in fact when she held that the Plaintiff is only entitled to the rest of the farm 31140 Solwezi with the exception of portion of land covered by Makungu and Lumingu villages without determining the full extent of the said purported villages.*
5. *The Learned Trial Judge erred in law and in fact when she ordered rectification of the certificate of title number 264704 for stand 31140 Solwezi without specifying the exact form the said rectification would be.*
6. *Further grounds to be advanced at the hearing.*



## **SUBMISSIONS BY THE APPELLANT**

13. At the hearing of the appeal, Mr Kaela, learned counsel for the appellant entirely relied on the appellant's heads of argument filed on 6<sup>th</sup> December, 2019 and the record of appeal. Submitting in support of the first ground of appeal, he argued that the Land Inspection Report was not disputed and traversed by the respondents and their witness. Counsel contended that the report states that the land in issue was free from earlier settlers and that as such, displacement would not arise. The court was referred to the approvals of the survey diagram from the engineering department of the Solwezi Municipal Council and the Ministry of Agriculture. It was contended that after the officials from the Council and the Ministry of Agriculture considered the land in dispute, there were no objections and this resulted in the approval of the survey diagram. Counsel argued that on the facts highlighted above, the inspection report must be upheld.
14. Turning to ground two, it was submitted that the evidence of DW3 in cross-examination was contrary to the trial Judge's finding. According to Counsel, DW3 was not there when the

appellant's family settled on the land in dispute in 1953 nor was he there in 1980 when Chief Kapijimpanga approved the extension of the appellant's land. Counsel further argued that DW3 was not privy to how the appellant went about the conversion of the land in dispute from customary to statutory land and that most of DW3's evidence was hearsay. It was argued that the learned trial Judge fell in grave error when she based her findings on the evidence of DW3.

15. In arguing ground three, it was contended that the learned trial Judge relied upon the question that the appellant more or less dubiously acquired the land. However, the learned trial Judge rejected the allegation of fraud in the acquisition of the certificate of title and that the learned trial Judge therefore contradicted herself and made findings of fact that were not supported by the evidence.
16. In arguing ground four and five, Counsel referred to **section 13 of the High Court Act<sup>1</sup>** which provides that-

***“In every civil cause or matter which shall come in dependence in the Court, law and equity shall be administered concurrently, and the Court, in the exercise of the jurisdiction vested in it, shall have the power to***

*grant, and shall grant, either absolutely or on such reasonable terms and conditions as shall seem just, all such remedies or reliefs whatsoever, interlocutory or final, to which any of the parties thereto may appear to be entitled in respect of any and every legal or equitable claim or defence properly brought forward by them respectively or which shall appear in such cause or matter, so that, as far as possible, all matters in controversy between the said parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided; and in all matters in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail.” (emphasis is ours)*

17. According to Counsel, the learned trial Judge made a finding that the appellant was the owner of the land known as Stand Number 31140, with the exception of portions of land covered by Makungu and Lumingu villages. The court then ordered rectification of the certificate of title of the land in dispute.
18. Counsel contended that the lower court's Judgment was hanging as it was not clear who was supposed to determine the extent of Makungu and Lumingu villages so as to determine the exact extent of Stand Number 31140, Solwezi. Counsel further

contended that the court did not specify what form of rectification needed to be done to certificate of title number 264709, of Stand Number 31140, Solwezi. Counsel submitted that the Judgment ought to have been specific in order to resolve all matters in controversy among the parties as provided for in **section 13 of the High Court Act**. We were urged to allow the appeal for the foregoing reasons.

### **RESPONDENTS' SUBMISSIONS**

19. On behalf of the respondent, Mr Mataliro submitted, in respect of ground one that the ground of appeal seeks to set aside a finding of fact made by a trial court and that the arguments submitted do not meet the threshold given by the Supreme Court regarding when a finding of fact made by a trial court may be set aside. The court was referred to the case of ***Nkhata and others vs Attorney- General***<sup>1</sup> where the Supreme Court stated that-

***“A trial Judge sitting alone without a jury can only be reversed on questions of fact if-***

***(a) The Judge erred in accepting evidence;***

***(b) The Judge erred in assessing and evaluating the evidence by taking into account some matter which***

*he should have ignored or failing to take into account something which he should have considered or;*

*(c) The Judge did not take proper advantage of having seen and heard the witnesses;*

*(d) External evidence demonstrates that the Judge erred in assessing manner and demeanor of witnesses.*

20. We were further referred to the case of *Nkongolo Farms Limited vs Zambia National Commercial Bank and others*<sup>2</sup> where the Supreme Court guided that:

*“ . . . as a general rule that this court rarely interferes with the findings 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 the matters which ought to have been taken into account or failed to take into account some matters which ought to have been taken into account or mistakenly, which appear from the evidence the lower court failed to take advantage of having seen and heard the established evidence demonstrates that the lower court erred in assessing the evidence.”*

21. According to the respondents' counsel, ground one is self-defeating and contradictory. He argued that the question that begs an answer is, if this court upholds the land inspection

report, then who did the appellant consult before converting the land in issue since the land report states that there were no other developers on the land, contrary to the appellant's pleadings in the lower court. We were urged to dismiss ground one for lack of merit.

22. On ground two, it was submitted that the issue of DW3's evidence was not raised in the lower court and that it cannot therefore be raised on appeal. We were referred to the case of ***Mususu Kalenga Building Limited and another vs Richman's Money Lenders Enterprises***<sup>3</sup> where the court found that a matter that was not raised in a court below cannot be raised on appeal as a ground of appeal. According to Counsel, the appellant's advocates should have objected to DW3's evidence being admitted into evidence at the trial and not on appeal. The court was referred to ***Order 5 Rule 21 of the High Court Rules***, on the aspect of a party affected objecting to the reception of evidence at the time the evidence is offered.
23. According to Counsel, DW3 testified in his capacity as sub chief Ng'ombe and also represented Chief Kapijimpanga and spoke about things that he had perceived and information that he had

by virtue of his office as the area in issue falls under his jurisdiction.

24. It was contended that the evidence of DW1 and DW2 went without any cross examination from the appellant and that the facts deposed by DW1 and DW2 are sufficient to support the findings of the court that the respondents were in occupation of the land well before the conversion. We were urged to dismiss ground two.
25. On ground three, it was submitted that the lower court was entitled to make findings of fact to the effect that the appellant did not disclose sufficient information to the officers who conducted the inspection. According to Counsel, the appellant in the statement of claim pleaded that in 2008, he had attempted to displace the respondents but did not succeed. Subsequently, the appellant produced evidence in the form of a report which showed that in 2009, there were no adverse claims to the land and that no displacements would occur if the land was converted. Counsel submitted that this piece of evidence is contradictory and resulted in the production of an inspection report which was not factual.

26. Responding to grounds four and five, it was submitted that the issue regarding the exact extent of the respondents' land was not raised in the lower court and cannot be made a subject of the appeal. Mr Mataliro submitted that parties know the extent of their land which they have occupied for a very long time.
27. It was argued that the appellant processed title which included the respondents' land which should be removed from the appellant's portion by way of sub-division or re-surveying the property so that the correct extent is put on the appellant's certificate of title. We were urged to dismiss the appeal for lack of merit, with costs to the respondents.

### **DECISION OF THIS COURT**

28. We note that the appellant has since passed on and that the lower court ordered the substitution of PW1 as the appellant since she was the administrator of the estate of her father. We have considered the evidence on record, the submissions of counsel and the issues raised by the parties. We will address the five grounds of appeal as one as the entire appeal hinges on the question whether or not the land inspection report that was



prepared by the Solwezi Municipal Council was issued after the respondents were consulted prior to the conversion of the land from customary to leasehold. In the first ground of appeal, the appellant's contention is that the court below erred in law and fact when it rejected the land inspection report by the Solwezi Municipal Council when there was evidence that the respondents were consulted before the conversion of land was effected.

29. From the documents on record, the land inspection report that was issued by the Solwezi Municipal Council on 4<sup>th</sup> February, 2009 shows that the appellant applied for the land in dispute which resulted in the Council conducting an inspection. The same revealed that the land was free from early settlers and that no displacements would arise. The report further indicates that there were no other developers on title in the area and that no encroachments would arise from the alienation of the said land. The council then went on to recommend the said land for alienation to the applicant, the appellant herein.
30. Ground one, which in our view encompasses all the other grounds of appeal is that-

***“The learned High Court Judge erred in law and in fact when she rejected the land inspection report by Solwezi Municipal Council when there was evidence that the Defendants were consulted before the conversion of the land was done.”***

31. The evidence of PW1, was that after Chief Kapijimpanga gave her father a letter to the effect that he could have his farm demarcated, they proceeded to Solwezi Municipal Council where the council approved the demarcation of the said farm. Subsequently, a certificate of title was issued.
32. According to PW1, the first respondent was given permission to live on a portion of her father's farm as her brother Charles Numa was her late father's driver. There were disputes between the appellant and the respondents which were resolved by Chief Kapijimpanga who eventually decided that the respondents be allowed to live on the part of the land where they had built houses. When PW1 took the surveyors to the farm, the first and second respondent were hostile and as such, nothing was done. Eventually, her father commenced a matter in the Subordinate Court seeking the eviction of the respondents from the farm.

33. The testimony of the first respondent was that the village that she lives in was allocated to her brother Charles Amon Numa by Sub Chief Ng'ombe and that she remained at the village when her brother relocated to work in Kitwe in 2012, where he died in March, that year. After her brother's death, there was confusion at the village as PW1 wanted to evict her from the village where she had lived and farmed for over 35 years. When they went to Chief Kapijimpanga, he was told that the respondents' names appeared in the village register at the palace. DW1 stated that she did not know how the appellant obtained the certificate of title for the said land.
34. DW2, Maggie Luyako's testimony was that Sub Chief Ng'ombe allocated land to her mother in 1992 which was claimed by the appellant as his farm land. Attempts to evict the respondent from the land failed as the appellant's certificate of title was found to have been erroneously issued.
35. DW3, Allan Kabwita's testimony was that Lumingu Village had been in existence since 1972 while Makungu Village had been in existence since 1992. The Lumingu Village was founded by Charles Numa, DW1's brother.

36. It is not in dispute that the appellant's father was allocated thirty-two hectares of farm land and was subsequently issued with a certificate of title for the said land after it was converted from customary land to statutory land at a Solwezi Municipal Council meeting held on 27<sup>th</sup> March, 2006.
37. The lower court referred to **Statutory Instrument Number 89, the Land (Customary Tenure) (Conversion) Regulations 1996<sup>2</sup>** which at Regulation 2(4) (c) provides that-

***“A Chief is not empowered to give land to an applicant without confirming that giving it away will not infringe on the rights of people.”***

38. Having considered the record from the lower court, we are of the view that the respondents were not consulted prior to the appellant's process leading to the issuance of the title deeds. **Regulation 4(2) of Statutory Instrument Number 89 of 1996** provides that-

***“4(1) Where a council considers that it will be in the interests of the community to convert a particular piece of land held under customary tenure into a leasehold tenure, the council shall, in consultation with the chief in whose area the land to be converted is situated, apply to the commissioner of lands for conversion.***

**(2) The council shall before making the application, referred to in sub regulation (1)**

**(a) ascertain any family of communal interests or rights relating to the parcel of land to be converted; and**

**(b) specify any interests or rights subject to which a grant of leasehold tenure will be made.**

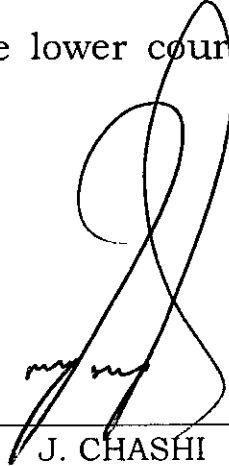
39. A perusal of the land inspection report on page 51 of the record of appeal indicates that the land that was inspected by the council which the appellant applied for was free of early settlers and hence no displacement will arise. The town clerk then recommended that the land be alienated to the appellant. However, this is surprising as the first and second respondents testified that the appellant was in the process of displacing them from their villages after he obtained a certificate of title for his farm land.

40. Further, the evidence of sub chief Ng'ombe was that the Hangili Village which belongs to the appellant and the Lumingu and Makungu villages are distinct from each other and it was therefore erroneous for the Council to have recommended the alienation of the farm land to the appellant when there were two

independent villages on it, Lumingu and Makungu and the appellant sought to displace the villagers who lived in these villages.

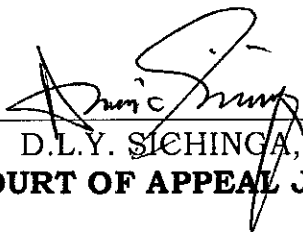
41. We are of the view that the interests of the respondents cannot be disregarded by the chiefs or headmen and they should have been given an opportunity to be heard prior to the alienation of the land to the appellant.
42. We do not hesitate to come to the conclusion that the correct procedure was not complied with when the land was allocated to the appellant. PW1's testimony in the lower court was that the survey of the land in issue was not properly done as the respondents and other villagers became hostile when they saw the appellant with the surveyor arrive at the village and they were then forced to leave the area. The evidence from the lower court illustrates that the correct procedure was not followed prior to the alienation of the land.
43. This appeal is dismissed and we order the Commissioner of Lands to cancel Certificate of Title Number 264709 in respect of Farm Number 264709 issued to the appellant. The matter is remitted back to the High Court at Kitwe for hearing and we

order that a survey of the land be conducted as well as a site visit by the court, to ascertain the position of the villages and the appellant's farm. Costs are awarded to the respondents in this Court and in the lower court, to be taxed in default of agreement.



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J. CHASHI  
**COURT OF APPEAL JUDGE**



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D.L.Y. SICHINGA, SC  
**COURT OF APPEAL JUDGE**



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P.C.M. NGULUBE  
**COURT OF APPEAL JUDGE**