

IT

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

**2017/HP/2087**

**IN THE MATTER OF: THE PROTECTION OF FUNDAMENTAL  
RIGHTS REGULATIONS, 1969**

**AND**

**IN THE MATTER OF: ARTICLE 86, 121, 154, 16, 17, 21, 22, 23, 256  
AND 266 OF THE CONSTITUTION OF  
ZAMBIA**

**AND**

**IN THE MATTER OF: THE LANDS ACT, CHAPTER 184 OF  
THE LAWS OF ZAMBIA**

**AND**

**IN THE MATTER OF: THE LANDS AND DEEDS REGISTRY  
ACT, CHAPTER 185 OF THE LAWS OF  
ZAMBIA**

**AND**

**IN THE MATTER OF: THE LANDS ACQUISITION ACT, CHAPTER  
189 OF THE LAWS OF ZAMBIA**

**IN THE MATTER BETWEEN:  
ASA LATO AND 30 OTHER VILLAGE OWNERS PETITIONERS  
(As specified in the Schedule attached hereto)**

**AND**

**DAVISON CHIBALE  
JEREMY BADCOCK  
SERENJE DISTRICT COUNCIL  
ATTORNEY GENERAL  
THE COMMISSIONER GENERAL  
ALEXANDER BADCOCK**



**1<sup>ST</sup> RESPONDENT  
2<sup>ND</sup> RESPONDENT  
3<sup>RD</sup> RESPONDENT  
4<sup>TH</sup> RESPONDENT  
5<sup>TH</sup> RESPONDENT  
6<sup>TH</sup> RESPONDENT**

**Before Mr. Justice M.D Bowa on 3rd of February, 2026.**

*For the Petitioners: Mr. C Sianondo and Mrs. M.S. Tembo of Malambo & Company with  
Mr. B Siachitema of Lisutu Chambers*

*For the 1<sup>st</sup> 2<sup>nd</sup> & 6<sup>th</sup> Respondent Mr. H Siamanda and S Phiri of Moshia and Company*

*For the 3<sup>rd</sup>. Respondent Mrs. B Bulaya and M Sholomo in house*

*For the 4<sup>th</sup> and 5<sup>th</sup> Respondents Miss D Mulondiwa State Advocate*

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**JUDGMENT**

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### **Cases referred to:**

1. *Anderson Kambela Mazoka and 2 others vs Levy Patrick Mwanawasa and two others* (2005) ZR 138
2. *Sailas Ngowani and 6 others Vs Flamingo Farms Limited SCZ selected Judgment No 5 of 2019*
3. *Siwale and others Vs Siwale* (1999) ZR 84
4. *Village Headman Mupwaya and Another vs Mbambi SCZ Appeal No. 4 of 1999*
5. *Still Waters Limited Vs Mpangwe District Council and Others SCZ Appeal No 90 of 2001*
6. *Patel vs Attorney General* (1968) ZR 99
7. *William David Cerlisle Wise Vs Attorney General* 7 (1990-1992) ZR
8. *Wilson Masauso Zulu Vs Avondale Housing Project* (1982) ZR 172
9. *Kahlid Muhammed Vs the Attorney General* 9 (1982) ZR 49.
10. *Janathan Van Blerk vs Attorney general & others SCZ/8/03/2020*

### **Legislation referred to:**

1. *The Constitution of Zambia Act No. 1 of 2016*
2. *The Lands Acquisitions Act, Cap 189*
3. *The Lands and Deeds Registry Act, Cap 185*
4. *The Landa Act, Cap 184*

### **Other materials referred to:**

1. *Phipson on Evidence, 17th Edition (Thomson Reuters) (legal) Limited 2010*

The considerable delay in the delivery of this judgment is regretted.

## **1. Background**

1.1 The Petitioners commenced this action by Petition on 10<sup>th</sup> September, 2021 pursuant to articles 8, 12, 13, 15, 16, 17, 21, 22, 23, 256 and 266 of the Constitution of Zambia claiming alleged violation of their human rights. The Petitioners contend to be long term rural residents of Munte area in Bwande section in Senior Chief Muchinda's area in the Serenje District of the Central Province of the Republic of Zambia.

1.2 They aver that the 1<sup>st</sup> Respondent is a businessman and previous registered proprietor of Farm 10906 Central Province which included the entire land that the Petitioners reside, whilst the 2<sup>nd</sup> Respondent is the commercial farmer that purchased the said farm. It is the Petitioner's contention that the Respondents have taken steps to deprive them of their land without consulting them and obtaining their consent.

1.3 They further assert that the 4<sup>th</sup> and 5<sup>th</sup> Respondents being Serenje District Council and the Commissioner of Lands did not follow the mandatory procedure laid down for what they argue was the compulsory acquisition of their land and that this was done without adequately compensating them. It is also contended that the allocation of the land to the 1<sup>st</sup> Respondent was done by fraud, mistake and misrepresentation and was thus null and void.

1.4 The Petitioners therefore commenced this action seeking reliefs couched in the following terms.

1. *For a declaration that the taking over of the Petitioner's customary land without following the required procedure is unconstitutional and therefore null and void.*
2. *For a declaration that the entitled Petitioners continue enjoying their land in accordance with the customary law of the area and its attendant rights.*

3. *An order directed at the 3<sup>rd</sup> and 5<sup>th</sup> Respondents to cancel any allocation, assignment or title issued to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, which covers the land occupied, used and enjoyed by the Petitioners under customary tenure.*
4. *A declaration that the ordering of the Petitioners to vacate their land without compensation and the subsequent creation of a large boundary using bulldozers accompanied by police officers with guns violates their rights to: dignity, life with dignity' personal liberty; protection from torture, inhuman or degrading punishment or treatment; property; not to be subjected to entry by others on their premises; freedom of association; freedom of movement and residence; and not be treated in a discriminatory manner.*
5. *A declaration that section 33 of the Lands and Deeds Registry Act is unconstitutional as it results in the diminishment or termination of customary land rights without the provision of adequate compensation.*
6. *A declaration that the sections 33, 34 and 35 of the Lands and Deeds Registry Act are unconstitutional as they discriminate against rural communities occupying, using and enjoying customary land rights and interest.*
7. *A declaration that sections 33, 34 and 35 of the Lands and Deeds Registry Act are incompatible with section 7 of the Lands Act and are, therefore, invalid.*

8. *A declaration that intended damming over the Munte River upstream will violate the Petitioners right to live with dignity, and their rights to a clean, safe and healthy environment.*
9. *An order for damages and compensation for all the suffering that the Petitioners have been unlawfully and unjustifiably subjected to pursuant to articles 8,12,13,15,17,22,23 and 28 of the Constitution of Zambia and section 7 of the Lands Act.*
10. *In the alternative, a declaration that sections 33, 34 and 35 of the Lands and Deeds Registry Act have been tacitly repealed by the Lands Act.*
11. *Costs.*
12. *Further and other relief the court may deem fit.*

1.5 The Respondents filed in answers on various dates disputing the Petitioners' claims. The 1<sup>st</sup> Respondent asserts that he followed procedure in applying for and was allocated some customary land which he converted in leasehold tenure. He subsequently sold the property to the 2<sup>nd</sup> and 6<sup>th</sup> Respondents.

1.6 The 2<sup>nd</sup> and 6<sup>th</sup> Respondents assert that they are Bonafide purchasers for value that acquired the property without any notice of defect in title. That they conducted their due diligence on the land through their lawyers and the property was not encumbered.

Further that only 5 families were settled on the farm and had agreed to be relocated.

1.7 Serenje District Council, Commissioner of Lands and the Attorney General, being the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents respectively, align their answers to the position advanced by the 1<sup>st</sup> Respondent. Notably, that procedure was followed to the letter in assigning the property to the 1<sup>st</sup> Respondent.

1.8 In other words none of the Respondents accept that the Petitioners are entitled to any of the reliefs set out in the originating process.

1.9 The trial was a long one and the court was at some point moved to view the land in dispute in the Serenje District and Central Province of the Republic of Zambia. The Court heard a total of 9 witnesses.

## **2.0 The Petitioner's case**

2.1 PW1 was Steven Laba a farmer resident in Chief Muchinda's Chiefdom in Serenje District. He testified that he is the principal adviser to the Chief, a role he started performing in 1988. He would assist the Chief to among other roles, preside over matters in the chiefdom. He recalled that in the year 2009, Mr. Davison Chibale the 1<sup>st</sup> Respondent, came through to see the Chief and asked for some land. He said he had orphans he was looking after in town

and was failing to cope. He therefore requested for a piece of land to do some farming and look after the orphans.

2.2 The Chief asked him to look for land he would want to settle. Mr. Chibale responded that he had already found some land at his sister's place which the Chief thought was a good idea. He proceeded to start to build a village with the Chief's blessings. He stressed that from the year 1999 to 2010, he as adviser to the Chief did not hear that the Chief had given any land to Mr. Chibale.

2.3 He knew the 1<sup>st</sup> Plaintiff Mrs. Asa Lato and had done so from a while back. This was from even before the Chief was installed. He added that in the olden days, there only used to be one big village with different people living there. This was around 1961.

2.4 Once the Chief was installed, he decreed that people must not live in the same area but needed to scatter. He thought it wise to do this as he believed the land could be taken away from them. He testified further that advisers would go round the village to communicate the decision of the Chief. He thus personally did hear the notice from the advisers in the year 1985.

2.5 He testified that the Mr. Chibale was not a known person in the area at that time. It was PW1's further evidence that the

1st Petitioner Mrs. Asa Lato was on the land earlier than Mr. Chibale. In the year 2010, the Chief died. PW1 therefore acted as Chief for 3 years and up to 2012.

2.6 Mr. Chibale approached him and asked for a letter as he had apparently been told his land would be repossessed and title was not to be renewed at the Ministry of Lands. PW1 refused to give him the requested letter. He was not the one who gave Mr. Chibale the land and it was the first he was hearing about a title having being earlier issued. Further, he did not have the authority to give out such a letter as he was only a caretaker. This is the position he communicated to Mr. Chibale. When referred to exhibit "**D2a**" in the 3<sup>rd</sup> Respondent's affidavit in opposition being a letter that he purportedly wrote, PW1 declined having authored the letter. According to him, he did not know how to write in English and the signature on the document was not his whereas exhibit "**AMLBMLD 27**" did have his signature.

2.7 Further that a comparison of the 2 documents also confirms that the signatures are not the same. He asserted that the letter on "**DS2a**" had a stamp and the stamp was with him. However that on 10<sup>th</sup> May, 2013 there was a group or association called Isaka Yelala Association that got the date stamp. It was his evidence that the Mr. Chibale is a member of

that association and its treasurer. Advisors were sent to see PW1 by the Association and asked for the date stamp. He tried to refuse but was forced to give them the date stamp.

2.8 It was his further evidence that permits are issued to villagers to confirm the recognition that they are in the Chiefdom. Individual families are given such permits and passed on to an appointed surviving family member in the event of death.

2.9 He testified further that there is no Chief that has the authority to remove a subject from land he/she has settled and on which he has caused no controversy. PW1 testified further that according to Lala custom and tradition, a man moves from his home and follows the woman at her homestead after marriage. He confirmed that he knew all the Petitioners in this matter that were both male and female.

2.10 He testified that the men married the women and found themselves in this group. He was referred to exhibit "**AL3**" in the affidavit in support of Petition showing details of birth for 3 of the female Petitioners. All had moved briefly at some point but remained in occupation of the land left for them by their uncle.

2.11 When cross examined, he confirmed his name does appear on exhibit "**DS2a**." He insisted there is a marked difference in signatures between that on "**DS2a**" and "**AMLBDMLDC27**."

He thus insisted he is not the author of the letter. He acknowledged that the stamp on the letter was similar to the one he had in his possession but refused that he is the one that stamped the letter.

2.12 Cross examined further, he did not agree that Mr. Chibale was allowed to settle on the land in 1999 in spite of the content of exhibit **"AL86"** in the Petitioners' affidavit in support of Petition. He further testified that he declined to give Mr. Chibale the letter he had requested for as the Senior Chiefs had advised him not to deal with such issues. Pressed further, PW1 contended that he first discovered the letter **"DS2a"** when Mrs. Asa Lato told him about the matter being in the High Court. He did not report the issue to anyone or the police as he was unwell.

2.13 Cross examined further, it was PW1's testimony that if the late Chief had met with the 1<sup>st</sup> Respondent he would have told him and the other advisers about it. He agreed that he would not know if the 1<sup>st</sup> Respondent saw or met with the Chief on a Friday a day typically reserved for the traditional court sittings.

2.14 In further cross examination by counsel for the 4<sup>th</sup> and 5<sup>th</sup> Respondents, the witness disagreed that the presence of a stamp on a document necessarily signifies that it was from the Chief. Asked to compare the stamp in the affidavit in reply

dated 24<sup>th</sup> July 2018 at page 1 and “**DS2a**”, PW1 maintained that the stamps were different. He expressed surprise that the exhibit presented “**AMLBDMLDCI**” showed that the Chief whom he had stated had died in 2010 is purported to have authored the letter dated 2012. It was thus his position that the Chief could not have written this letter.

2.15 In re-examination, PW1 testified that when he had the stamp he did not use a pen to correct the date. The date would be changed on the stamp itself. He did not know how the stamp was used when the association members got it.

2.16 He testified further that the Chief never told him anything about Mr. Chibale being given a commercial farm. He asserted that he did not know who put the date stamp on the letter at **exhibit 1** in the affidavit in reply. He maintained that he was the only one who could give evidence and not any of the other advisors as he used to spend a lot of time with the Chief.

2.17 PW2 was Elijah Nyendwa a farmer in Chief Muchinda’s Chiefdom in Serenje district. He testified that he had come to give evidence about how land was taken away from him and others by the 1<sup>st</sup> Respondent Mr. Chibale, without their knowledge. He informed the Court that he had lived on his land from 1978 some 41 odd years at date of his testimony.

2.18 That he and others lived well without any notice that their land had been sold. Before then in the year 2014, they heard that they were to be moved from the land when Mr. Chibale claimed to have bought it. He testified that the District Commissioner (DC) Mr. Charles Mwelwa and the District Agriculture Coordinating Officer (DACO) Mr. George Chisebeka, called for a meeting at the local school named Mutale Primary School to talk about the issue.

2.19 They stated that the issue for discussion related to people staying in Nansenga area and those in the core venture farms. The Petitioners were asked about the land they were staying which is the same land in issue in this case. The DC and DACO categorically told the Petitioners that they did not agree that the land had been sold to the Mr. Chibale as it belonged to the Chief. The Petitioners were happy to hear this.

2.20 Later word kept on reaching the Petitioners that Mr. Chibale had bought the land. The Petitioners complained about this bitterly. The DC called for another meeting for parents, and a third to meet with the villagers. Mr. Chibale was present at that meeting. The DACO Mr. Chisebeka, was also present. Others in attendance were workers from the Department of Agriculture, and the headman Mr. Herald Mwape.

- 2.21 In addressing the meeting, the DC stated that he was speaking on behalf of the Republican President and no other person would come to say anything different. He told the meeting that the land was going to be subdivided so that the Petitioners could continue living in the way that they had before. The Petitioners were told to wait for surveyors to come through to do the subdivisions.
- 2.22 Following that meeting, officers from the Department of Agriculture came through and subdivided the land stretching about 1.8 km. The people were happy with this. However, they were surprised to see machines brought in and enter upon the land that they had been given. He testified that the people who brought these machines were the 2<sup>nd</sup> Respondent's workers. He explained that the 2<sup>nd</sup> Respondent was the Caucasian gentleman that Mr. Chibale had sold the land to.
- 2.23 He testified that the Petitioners stopped the driver who was operating the earth moving equipment. Shortly after, they saw a car with the 2<sup>nd</sup> Respondent arrive with armed police officers. The police disembarked from the vehicle whilst coking their firearms and started threatening the Petitioners. When the police questioned the Petitioners what they were doing on the land, the Petitioners responded that the land was theirs and

refused to be intimidated by the threats. Further that the police could go ahead and kill them if they pleased.

2.24 It was PW2's evidence that the police then got a hold of one Davies Chibuye and started squeezing his neck. PW2 intervened to stop them from doing this insisting that Mr. Chibuye was only trying to protect his land. The Police released their hold on Mr. Chibuye's neck but remained at the scene.

2.25 PW1 then approached the 2<sup>nd</sup> Respondent to show him where the Petitioners boundary was. He further told him that he could call the DC, DACO and surveyors from the Department of Agriculture to verify their position. The 2<sup>nd</sup> Respondent would not have any of this. His response was they were going to destroy any properly for people who were present there and his only interest was to get a road to reach the Munte stream.

2.26 The 2<sup>nd</sup> Respondent then proceeded to get onto the earth moving equipment and started to operate it himself continuing to grade up to Munte stream the water body that the locals drew their water from. The Petitioners just looked on and decided they were going to take up the matter with the DC and the Chief. A Mr. Cephus Kunda was picked to make representation on their behalf to the Chief.

2.27 It was PW2's further evidence that according to their custom, when a man marries he is the one that follows the woman. That

he married into his wife's family in 1978 in a village called Sialande saula. He married one Dorothy Wale whose mother was Miss Mandalesa Wanza. He explained that this was how he found himself on that land. He prayed that the court repossesses the land from Mr Chibale so that they could continue to live the way that they did before.

2.28 When cross examined by Mr. Chibale's advocates, he testified that he did settle on the land in 1978 and that confirmation of this fact is in the village register which was not before the court. He testified that all his 8 children were born on that land and he has 22 grandchildren. He confirmed that he did not have any document to confirm that the 2014 meeting with the DACO and DC that he referred to in his evidence in Chief took place.

2.29 He asserted that he was not aware of any inspection of the land having been undertaken in 2001 nor did he ever see anyone doing so. When referred to exhibit **"DC5"** in the 1<sup>st</sup> Respondent's affidavit in opposition filed on 11<sup>th</sup> June he asserted that he could not read. He testified that the names read out by counsel contained in that document are not in the area where the Petitioners are. That the land was totally different from where they are staying. He contended that the place that they were living is not in the 1<sup>st</sup> Respondent's land.

- 2.30 Questioned further, PW2 testified that he was not aware that the Mr. Chibale obtained a certificate of title. He further testified that he was not aware that Mr. Chibale was given some land by the Chief in 1999. He only came to learn about this in 2014.
- 2.31 He agreed that he was aware that to get title for customary land, one has to obtain the consent from the Chief and the Council in the area. When shown the letter marked "**AL86**" in the affidavit in support of the Petition, the witness asserted he could not read. However from what was read out to him in court, he agreed that the consent from the Chief was granted to 1<sup>st</sup> Respondent.
- 2.32 He agreed that in the letter shown to him marked "**DC5**" in the 1<sup>st</sup> Respondent affidavit in opposition and also "**AL14**" in the affidavit in support, the Council recommended that the lease be granted to the 1<sup>st</sup> Respondent. He however insisted this did not involve them as they were not in Mr. Chibale's land.
- 2.33 In further cross examination by the 3<sup>rd</sup> Respondent, PW2 testified that he attended all the 3 meetings called by the DC. Further, that it was at the first meeting where the DC told the Petitioners he did not agree the land had been sold to Mr. Chibale. He agreed that para 34, 35 and 36 of the Petition avers that there are 2 different pieces of land. Asked then why the

matter was in court, the witness testified that this was because of the road that was created leading to the stream and the threat that they were to be removed from their land. He maintained that the dispute is really about the road.

2.34 He agreed that the Petition does indicate that the Petitioners became aware that the 1<sup>st</sup> Respondent was in possession of a certificate of title in spite his earlier response in cross examination of being devoid of such knowledge.

2.35 There was no cross examination by the 4<sup>th</sup> and 5<sup>th</sup> Respondent or re-examination by the Petitioner's advocate.

2.36 PW3 was Cephus Kunda, a farmer of Muchinda village in Serenje District. His evidence was that it was in the year 2013 when Mr. Chibale the 1<sup>st</sup> Respondent went to his house and found him alone. Mr. Chibale was in the company of 2 women and asked where a Mr. Bwalya's house. PW3 showed them the house as per request. They then asked where the boundary for his homestead was. He questioned what their interest was in making such an inquiry. In his response, Mr. Chibale stated that was a pity that PW3 had not been shown his boundary by the persons that subdivided the land.

2.37 PW3 later shared his experience about his encounter with the 1<sup>st</sup> Respondent with other villagers. In April 2014, Mr. Chibale returned for the second time and told PW3 that the Chief had

sold him land. He testified that he was with the 1<sup>st</sup> Petitioner Ms. Asa Lato at the time when this was disclosed. Both PW3 and the 1<sup>st</sup> Petitioner disputed this assertion stating that if this were true, the Chief would have informed the villagers about the sale. He asserted that this was a Chief that had sank bore holes for the villagers and had encouraged people to do farming. He could therefore not fail to tell the people an issue relating to the possible movement from their land.

2.38 It was his evidence that the villagers were disturbed with this news. Therefore in September 2014, the DC called for a meeting with all the villagers. All attended the meeting that took place at Mutale school. He repeated the evidence of PW2 about the happenings at the meeting and who addressed it. That the DC told the gathering that the people who were living in Nansanga that had 50,100 and 500 hectares needed to leave the land. He also said that there were other people who had stayed in Nansanga in areas marked 20 and 30 hectares that would not leave.

2.39 Whilst the meeting was progressing, PW3's late parents raised their hands. His father, Mr. K. Mwelwa in particular, asked whether the DC was aware that the 1<sup>st</sup> Respondent Mr. Davies Chibale had claimed to have bought the land and that he was to occupy it. The DC in response said he had been approached

by Mr. Chibale at some point over the land but that he had refused to accept the request because the people would have nowhere to stay.

2.40 Everyone was happy to hear these words as it signaled the end of the conflict. In October 2014, the DC and Mr. Mwelwa called Asa Lato the 1<sup>st</sup> Petitioner, PW3 Edness Mambwe, Beatrice Mambwe and Mandalena Wanga to his office. Also present at the office was the DACO Mr. Chisebuka. The DC excused himself explaining that he had been summoned by the Minister.

2.41 The DACO then asked them if they wouldn't like to see development brought to the area. All refused that the development could not take place. The DACO also asked if they would mind having the land subdivided. It was PW3 evidence that all the summoned Petitioners refused to accept this proposal. They told the DACO to return to the village and call for another meeting to obtain consensus from the rest of the villagers as they could not commit the others. The DACO stated they would do as advised.

2.42 At the village, the DC asked who the owner of the village was. He was advised it was the 1<sup>st</sup> Petitioners place. The DC told the people that he had come because they were his children and he wanted them to stay in peace. Further, that he wanted to

share the land properly so that Mr. Chibale would follow the boundaries of his land and the Petitioners keep to theirs. Anyone that was found to be in Mr. Chibale's land were advised to go to see the DC at his office.

2.43 It was PW3's further evidence that in the year 2016, the 2<sup>nd</sup> Respondent went to see him at his house and told him that he had come to learn the boundaries of his land. The 2<sup>nd</sup> Respondent produced a map showing the extent of the land he claimed. He further disclosed that the agreement he had made with Mr. Chibale was that the land was supposed to reach Munte stream. PW3 and the 2<sup>nd</sup> Respondent then went to see the Chief who stated that he was going to visit the village to address the villagers.

2.44 On 8<sup>th</sup> November 2016, a letter was received from the DC calling for a meeting at Mutale primary school. The letter advised that 2 Chiefs were to be in attendance with Government officials and the 2<sup>nd</sup> Defendant. At the meeting, the DC did not give anyone a chance to speak and rather commandingly told the people that everyone should leave the land in issue and that the 2<sup>nd</sup> Respondent would be the one on the land.

2.45 PW3 raised his hand to speak. He said the land was already demarcated therefore the insistence that they should leave the

village was a new issue to the people. He further questioned whether the President whom the DC claimed to represent could chase people from the village. The DC was quizzed further on how they could sell land without the villagers knowledge. According to the witness, no response was offered and the meeting ended in confusion.

2.46 In December 2016, the 2<sup>nd</sup> Respondent turned up at the village with earth moving equipment and bulldozers. The entire village was upset when they saw this and started fretting about where they were going to go. That they all resolved that it was best to confront the white man so that he could kill them all.

2.47 According to PW3, the 2<sup>nd</sup> Respondent was shown where the demarcation between his land and theirs was. The 2<sup>nd</sup> Respondent did not accept this. As far as he was concerned, his land was supposed to go up to Munte stream. The 2<sup>nd</sup> Respondent proceeded to get onto his bulldozer and graded the road up to the stream. He also informed the locals he was giving them 2 weeks to harvest their crop and leave the land.

2.48 The Petitioners then decided to bring the matter to court. He referred to exhibit **"59"** in the affidavit in reply. This, he stated, was a picture of the boundary separating the 2<sup>nd</sup> Respondents

land from theirs. He testified that their land fell inside the 1<sup>st</sup> Respondent's land.

2.49 When referred to the map of Zambia marked "**AL2**", the witness testified that the 1<sup>st</sup> Petitioner Asa Lato comes from a village called Sianlande Saula village which appears on the document and also confirmed by her NRC marked "**AL2**." He testified that it was a 1982 map. He testified further that he does know one of the Petitioner's named Abyness Mambwe that comes from Wilika Chisonga village. It was his evidence that that village also appears on the map earlier referred to. That exhibit "**AL15**" is her NRC and shows that she comes from Nsanje and the card was issued on 6<sup>th</sup> November 1982.

2.50 He testified that after the demarcation was done, a lot of villagers found themselves inside the disputed land. That only 4 of the villagers were outside the area. He referred to exhibit **60** in the affidavit in reply dated 24<sup>th</sup> July 2018 being a letter from the surveyors confirming the finding of the four outside the boundary.

2.51 It was on account of the changing developments as averred in paragraph 45 of the Petition that the Petitioner's started investigating how the title deed was issued to Mr. Chibale. They went to see the Chief who referred them to the Secretary to check what was on the file. PW3 in the company of others

found 4 letters on the file that were availed by the Secretary. The first showed the title deed in issue. The second was a letter which came from the Chief allowing Mr. Chibale to be assigned 2885 hectares of land.

2.52 The third letter was written in Lala under Chief Muchinda's hand. That the letter was stating that he had disagreed with the hectares he had earlier given Mr. Chibale. In its place, that he was only assigning 1000 hectares. The fourth letter was written by the District Council addressed to the Ministry of Lands.

2.53 The letter was informing the Minister that Mr. Chibale was allocated 1000 hectares. That the letter also stated that Mr. Chibale had been informed about this development and that the Chief his aware. He referred the court to exhibit "**AL86**" a letter confirming Mr. Chibale had been allocated 2885 hectares which the Chief later reduced to 1000 hectares instead. It was PW3's evidence that no one consulted them when the land was given to the 1<sup>st</sup> Respondent.

2.54 When cross examined by counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondent, the witness testified that he does have a permit from the Chief allowing him to reside near Munte river which he did not have before court. He further did not have any documents before court to confirm the several meetings and

deliberations that he had alluded to in his evidence in Chief. He brought the action against the 2<sup>nd</sup> Respondent because he bought the land from the 1<sup>st</sup> Respondent without notifying them.

2.55 When cross examined by counsel for the 3<sup>rd</sup> Respondent, the witness acknowledged that for one to settle on customary land, the consent of the Chief is required. He agreed that he did not have any evidence before the court that he had the Chief's consent to be on the land. He agreed that he did testify that he approached the 2<sup>nd</sup> Respondent to show him where the boundaries of his land was.

2.56 He agreed that after Mr. Chibale had sent people to come and demarcate the land and that there was a boundary between their land and his . He therefore agreed that the 1<sup>st</sup> Respondent has his own piece of land. He stated that the Petitioners are presently in what is the 2<sup>nd</sup> Respondent's land because of the demarcation that the 2<sup>nd</sup> Respondent extended into their land. He agreed that the issue that he had was not on whether or not the 1st Respondent had land but about the boundary.

2.57 He did not agree that exhibit **"AMLBDMLDC 60"** in the Petitioner's affidavit in reply was produced after the matter was brought to court. He confirmed that this was a report by the surveyors engaged by them. He agreed that he did state that

they received correspondence from the DC advising them about a meeting that was to be held at Mutale School at which 2 Chiefs were to be present. He confirmed that the Chiefs were present at the meeting. That it was at that meeting where the gathering was told that the villagers in the 1<sup>st</sup> Respondents land should leave. That this was said in the presence of the 2 Chiefs. He agreed that Chiefs are in charge of the subjects welfare. He further agreed that they were in charge or oversee the giving out of land.

2.58 When cross examined by counsel for the 4<sup>th</sup> and 5<sup>th</sup> Respondents he testified that he is married but still lives with his mother Asa lato (The 1<sup>st</sup> Petitioner) in Asa area. When referred to the Petitioner's affidavit in reply dated 24<sup>th</sup> July, 2018, he agreed that in it, the Petitioners' aver that under the Lala custom the man moves to the wife's land. That in spite of this he maintained that he was not supposed to move from his mother's home. Therefore that what was sworn in the affidavit was false.

2.59 When re-examined, he testified that according to their custom, his mother in law is his mother. That Asa lato (The 1<sup>st</sup> Petitioner) is his wife's mother.

2.60 PW4 was Loveness Lundu a 50 year old farmer resident in Serenje Kenita Kumbashi village. She testified that she was

born in the said village which falls under Chief Muchinda. She testified that she and other Petitioners commenced this action because the 1<sup>st</sup> Respondent Mr. Chibale, had obtained their land where they reside. The community first knew him when he came to Mr. Kelita Kumbashi's home. He stated that the Chief had given him a place to stay where he could keep orphans. Mr. Chibale was asked where he had been allocated the land. He said it was a small piece of land near where they were. He would be bringing the orphans because he could not manage to keep them at Serenje Boma was what he stated to them.

2.61 Not long thereafter, he bought 2 orphans whom the community lived with very well. Later, he brought in cattle on the land. 9 animals were brought and were grazing on the Petitioner's land.

2.62 Displeased with this development, PW4 engaged her neighbour Selita Kaunda and 2 Others and together they went to see the Chief to complain about the cattle grazing on their land and destroying their crop. The Chief told them he was not going to give Mr. Chibale the land if he had known he had cattle. They were instructed to inform Mr. Chibale to go to meet with the Chief on a Friday that week.

- 2.63 Mr. Chibale was then ordered to move his cattle which he did and the orphans remained on the land. One died and the other later moved to where the cattle was taken. She testified that she is married and her late mother is Kenita Kumbashi who was buried in the same village where she is presently staying.
- 2.64 When shown exhibit "**AL94**", she testified that the document suggests that her mother had agreed to move from the village by 2004. Her reaction to this was that nobody came over to the village to consult her mother. Further, that her mother did not leave the village in 2004. It was her further evidence that the villagers draw water from the Bwande river. They also get water from Munte river. That there is nowhere else they get water.
- 2.65 When cross examined by counsel for the 1st, 2nd and 6th Respondent, she testified that she could not recall the year that the Mr. Chibale came to visit her mother's village. She did not know the hectarage that he had been given by the Chief. She further agreed that she did not have any proof to show that the Mr. Chibale was asked to move from the area but insisted that her testimony was not a lie in this regard. She agreed that he did have authority to stay on the piece of land.
- 2.66 When shown exhibit "**AL94**" in the Petitioner's affidavit in support, she agreed that according to the report, Mr. Chibale

found her mother when he came to the area. She nonetheless insisted that no-one else came to inquire or engage her mother.

2.67 When cross examined by the 3<sup>rd</sup> Respondent, she confirmed that it was her evidence that she had gone to complain about the cattle causing destruction to their crop to the Chief. She insisted that in spite of the fact that they had a big farm and took part in farming activities she would always be at home and therefore would know who had been to visit.

2.68 She further maintained that the Council officials never came through to the farm. She confirmed that she did go to see the Chief with Miss Ebines Mambwe. She did not agree that the Council officials came to the area in spite of Ebiness Mambwe appearing in exhibit **“AL94”**. That she is still staying in the area. She further insisted that the officials never came to the village in spite of the fact that the Council report indicates that her mother was a headwoman and bears her other details. She insisted that no one from the Council came through.

2.69 PW5 was Ebines Mambwe a resident of Wechi Kalisanse Village under Chief Muchinda. She testified that she was born in Wechi Kelisone village. When referred to exhibit **“AL94”** the Serenje District council inspection report and bullet 3 she disagreed with what was stated in the cited paragraph suggesting that she had left her village. She denied that she

had ever left her village to join her husband. That according to their custom, it is the man who leaves his home to join the wife. That her husband was actually as at date of her testimony, staying with her at the same village.

2.70 It was her evidence that the villages draw water from Bwande and Munte stream. Further that there is a hand pump at Asa Lato's village but the water there had dried up. She did not know who sank the bore hole. She confirmed that in the Petitioner's notice to produce dated 28<sup>th</sup> of August, 2023 were photographs of a hand pump. That there are also photos of trees. It was her evidence that the community uses the trees for a lot of things.

2.71 Cross examined by counsel for the 3<sup>rd</sup> Respondent she testified that her husband was from Nobowa village. She confirmed that this is the village reflected in the report at bullet 3. To that extent that she agreed that the information given in the report is correct.

2.72 That was the case for the Petitioner

### **3.0 The 1<sup>st</sup> Respondent's case**

3.1 R1W1 was Davison Chibale the 1st Respondent resident in Chief Kabamba's area Serenje. It was his evidence that he applied for some land from the Council. He was advised to wait and that he was to be informed what would follow. The Council

and department of Agriculture took him to go and view land. He was advised to request for more land from the Chief.

3.2 When they arrived at the Chief's Palace, the Council and Ministry officials had a meeting with the Chief. Mr. Chibale did not attend that meeting . When they were done he was told that the Chief had agreed to give him some land. This was in 1999. He confirmed exhibit "**DC1**" in the 1st Respondent's affidavit in opposition as a letter authored by the Chief to the Council.

3.3 That this letter was issued after the meeting. Afterward the Council asked him to pay some money for maps to be drawn up. 6 months passed thereafter and the maps were produced and taken to the Chief for signing. He confirmed that map to be exhibit "**DC2**" in his affidavit in opposition.

3.4 It was his evidence that the Chief signed the map in his presence. Further that the Agriculture officer and Council officers were also present. The Council then took up the issue. Mr. Chibale was informed that he would be notified what would follow. He sought authority to start working on the land and was told that he could go ahead. He clarified that the land was 2885 hectares.

3.5 Later, he was visited by people from the department of Agriculture who found that he had cleared an 8km stretch of

road within the farm. It was then that the boundary line that was endorsed by the Chief on the map was created to separate his land from the settlers. Thereafter he started preparing fields.

3.6 In 2001, the Council informed him that it had received a letter from Lusaka to inspect the land to see if there were people living there. He accompanied the Council officials when they embarked on this inspection exercise. The Council started their inspection from the point that he had constructed some houses. They proceeded through to Selita Kumbashi's village and another village he could not recall. He returned to the farm and the Council officials proceeded with the exercise on their own.

3.7 He had paddocks for cattle made and started taking his cattle to the farm. He then started pushing for his title deed. The Council asked him to wait for officials from Lusaka to arrive who would create small holdings and define boundaries. The officials came after sometime had passed and cut his land to 2571 hectares. He was told they had to cut the land because a part of it was the burial site for the Chieftdom.

3.8 The officials took a break and travelled back to Lusaka and on their return created some small holdings and further cut his farm. He was left with 2200 hectares. He was advised to await

what would follow. He was also told to stop the developments he was undertaking until he was advised when to proceed.

3.9 After being informed that the Chief had stated that he was also going to further cut his land, he went to complain to the DC. The DC called the Chief to attend the meeting called for at his office to resolve the issue. Present was the DC, the Chief, the Chief's adviser, Chief's retainers and the 1<sup>st</sup> Respondent. This was in September 2009.

3.10 The Chief said Mr. Chibale could continue having the land as he was both farming and ranching. The meeting ended and the Chief went back to his Palace. He later learnt that Council officials had gone to pick up the Chief from his Palace as he was not well. He was taken to the hospital and subsequently to Mansa where he passed on.

3.11 Then came the wait for another Chief to be installed. He was advised by the Council to see the acting Chief to make some progress over his issue. That the acting Chief was expected to educate people about the difference between customary land and State land. He testified further, that he met the acting Chief at Mutale school. The Chief's retainer's and advisers were present. He went to request for the letter he was to take to the Commissioner of Lands. The letter was written by Stephen

Laba (PW1), and is exhibited “**DCa**” in the 1<sup>st</sup> Respondent’s amended affidavit in opposition.

3.12 After he received the letter, he sent it to the Commissioner of Lands by post. In 2013 he received an offer letter from Ministry of Lands exhibited “**DC8**” in the amended affidavit. He paid the money as stipulated in the offer letter. After sometime, he was called and told the title deed was out a copy of which he exhibited “**DC9.**” He testified further that the land measured 2202 hectares. After he collected the title deed, he started seeking help from people to supply him with cattle and farming inputs.

3.13 In 2014 his farm manager died. With his death the persons who had agreed to supply him with cattle and farming inputs declined to do so. Managing the farm became a problem. He testified that the whole of 2014 thus passed with no activity at the farm. He decided to sell the farm as it became difficult for him to do anything with it. He advertised the farm. He obtained State’s consent to assign after he found a buyer he named as Jerremy Badcock the 2<sup>nd</sup> Respondent.

3.14 He showed Mr. Badcock the title Deed and told him to verify the property with the Ministry of Lands. Mr. Badcock did his search and confirmed that he liked the property and was ready to transact. He paid the property transfer tax. He confirmed

the receipt for the payment to ZRA to be the document exhibited **"DC10"** in his affidavit and **"MW10"** in the 4<sup>th</sup> 5<sup>th</sup> Respondents affidavit in opposition dated 25<sup>th</sup> June 2018.

3.15 The application for consent that was done on his behalf and the consent to assign itself is exhibited **"MW11"** in the said affidavit. After all this was done, he exchanged documents with the purchaser. He testified further that the 3<sup>rd</sup> Respondent Council availed a copy of a report in which they conclude that their inspection revealed that there were only 5 villagers found on the ground. That exhibited **"DC5"** is a copy of that report.

3.16 It was his evidence that he had no knowledge of the 31 Petitioners referred to in the Petition. He only knew of the 5 that were within his farm. He clarified that the farm was reduced from 2885 hectares to 2200 because the Chief initially cut off some land where people had settled. Secondly, the department of Agriculture cut and demarcated the land upon discovery that part of it fell in the Chiefdoms burial site. He testified that he had also agreed that the land be subdivided.

3.17 When cross examined by the 3<sup>rd</sup> Respondent, he testified that the 5 villagers found are still on the farm. He was aware that the Chief wrote to the Council advising that he was only to be given 1000 hectares as per exhibit **"AL92"** in the affidavit in

support of the Petition. He testified that it was this letter that he had referred to when he said he went to complain to the DC. He explained that it was the Chief that wrote this and both he and the Chief were called to a meeting as a consequence of his complaint. It was disclosed that the size had been reduced to 2200 hectares which the Chief said was fine since the Ministry of Agriculture had reduced the size.

3.18 When cross examined by the Petitioner's advocates, he testified that he applied for land in 1995. He confirmed that exhibited "**AL88**" is his application and that the date stamp indicates the year 2000. He testified that the farm that he sold to the 6<sup>th</sup> Defendant is in Nansanga farm block. Further, that at "**AL84**" of the affidavit in support are Council minutes for a meeting held on 25<sup>th</sup> January, 1995 considering Serenje Co-operative union land and not Nansanga.

3.19 He did not know if there are any minutes evidencing the change from customary tenure to statutory lease. He confirmed the letter dated 3<sup>rd</sup> May, 2000, to be from Serenje Council to Commissioner of Lands. That this letter supported his application for the land in issue. He agreed that the letter does not talk about customary land. He further confirmed that he had not seen any letter supporting the conversion of the land to leasehold tenure.

3.20 He further testified that he had not produced any letter to show the approval of 1885 hectares from the Minister. He insisted that he followed the proper procedure in the process of the conversion.

3.21 He was aware that he was expected to obtain a form from the Chief when getting land. He is also aware that to do that, he must have been in occupation for over 5 years. He was further aware of the requirement that no one should be affected by his acquisition of the land. He was also aware that there is supposed to be a diagram of the land that should be taken to the Council for deliberation. In addition, that the Council have an obligation to visit the land. He was also aware that the Council is expected to call an Applicant for interviews.

3.22 Further that it is after this is done that the Council will send its recommendation to the Ministry of Lands for processing of title. He stated that he went to the area in 1999. Further that the Chief wrote his letter in 1999. He agreed that by then he had not been in the area for 5 years. He did not know if the Council deliberated over the issue. He had not included any Council minutes that show the approval of the conversion. When referred to a map with ref number 1230-C2-C3 exhibited **“AL2”** in the affidavit in support, he agreed that according to the map drawn in 1982, there were some villagers in the area

represented by anthill symbols and in particular that there was a village named Sialande Sula that existed in 1982.

3.23 He was referred to exhibit **“AL1”** in the affidavit in support being a National registration card for one Asa Lato the 1<sup>st</sup> Petitioner. The date of registration is 23<sup>rd</sup> November 1965 and that the village indicated was Sailande. He testified however, that the documents that he had presented before the court did not show any occupation by the said Asa Lato family.

3.24 Questioned further, he testified that he was aware that the area he got the title for is called Bwande. He was shown exhibit **“A25”** in the affidavit in support that he confirmed was a UNIP card for one Nagalema Bwanga. He testified that according to this card, the address given is Bwande village. The year indicated on the card is 1984. He agreed that going by the card, this person had been residing at this village since 1984. That on page 31 is another UNIP card for Mr. Mwelwa. That the card also indicates Bwande Village. The date of the card is the year 1990. Further, that exhibit **“AL32”** is a voters card in the name of Kalunga James Mwelwa. He agreed that the residential address is also indicated to be Bwande. He agreed that there is nowhere in the reports he produced as **“DC5”** and **“DC7”** in the affidavit in opposition, where it is stated the named card holders were engaged.

- 3.25 He testified further, that according to the report on **“DC5”** he was present with the inspection team during the inspection. He testified that he is not the one that is responsible for ensuring all names were included in the report. That this was the Council’s responsibility.
- 3.26 Cross examined further, the 1<sup>st</sup> Respondent testified that Chief Muchinda gave him the land in 1999. He had not produced an application for conversion of the land after 1999. He agreed that he had not produced minutes to show that exhibits **“DC5”** and **“DC7”** reports attributed to the Council, were considered by the Council.
- 3.27 When referred to exhibits **“AL87”** and **“AL88,”** he agreed that the Council minutes appear to have been prepared earlier than the submission of the drawing. He was not aware if there was a settlement pattern that would show how people had settled on the land that had been provided by the 29<sup>th</sup> October, 2010. This according to exhibit **“AL95”** this was the date the Commissioner of Lands requested for the settlement pattern before that office could process his application.
- 3.28 When re-examined, Mr. Chibale testified that, the land the Petitioners were occupying was not the land he had applied for. Further that the application he made in 1995 was for farm land and ranching. He was not given this land and the Council

asked him to wait. While waiting he was taken to Senior Chief Muchinda to request for land.

3.29 He clarified that exhibit **“AL86”** is a letter of consent that the Chief wrote to the Council dated 2<sup>nd</sup> December 1999. In addition that the Chief stamped his approval in 1999 and the director of works placed his stamp in 2000 hence the 6 months that he had earlier referred to.

#### **4.0 2<sup>nd</sup> Respondent’s case**

4.1 RW2 was (M) Jeremy William Badcock, a South African national and businessman resident in Lusaka. He testified that he is the 2<sup>nd</sup> Respondent in this matter. He met Davies Chibale the 1<sup>st</sup> Respondent in 2014 in Serenje through a mutual friend he named only as John. They travelled to his farm using his vehicle. He referred to the farm as the North farm of Fairfield’s as what they called it.

4.2 He testified that exhibited as **“DC9”** was the title deed for the farm that he and his father eventually purchased from Mr. Chibale. Upon arrival at the farm they found some people living in the area. There were 5 families at the time in 2014 when he first visited. A number of meetings were held in Lusaka and in Serenje as the parties engaged in negotiations for the sale of the farm.

4.3 He met a surveyor in Serenje he named as a Mr. Chembe who showed him satellite points marked A-H which were the boundary points of the North farm. Mr. Chibale was informed they wanted vacant possession of the farm. He assured them that this was possible because the 5 families that lived on the farm were squatters. The Baddock's did not believe this was going to cause any delay in their planned production and development of the farm. The agreement reached therefore was that Mr. Chibale was going to compensate the squatters and help them to find a new area to live through the Serenje District Council.

4.4 Mr. Badcock personally did not mind if they stayed or left so long as they were prepared to move to the area that they were to develop as a village inside the farm. Further, that there was a high chance they were not going to be affected by the development as it was a big area. The agreement was being overseen by Sharpe and Howard, their lawyers at the time.

4.5 Their lawyers confirmed to them that the title Mr. Chibale was holding was legal and hence the Badcocks agreed to proceed with the purchase. This was to be the East Wing of Nansenga block. Once the paper work had been signed, he proceeded to the North farm to demarcate the boundary. He, and Mr.

- Chembe used the GP of the satellite co-ordinates and beacons that were on the ground and the title deeds to do this.
- 4.6 The Badcocks decided to place poles but with no wire fencing as there were still people living in the area. In addition to Mr. Chembe, the Badcock's also had their own surveyor present as they were doing the boundaries.
- 4.7 As they were approaching the west end of the North Farm on the northern boundary, they met with groups of people that kept pulling down their poles and asserted that they did not belong there. After the fourth attempt to get the poles in, the site manager Mr. Benjamin Banda was attacked and chased.
- 4.8 It was his evidence that it was not true that he and his father had forced people off the north farm. That they had in fact attempted to negotiate with the families to get them alternative land through the Chief. It was his evidence that there are now 22 families on the farm in the west area close to the river and dambo. That this is the area they had initially found them. He testified further that he had met 5 families. He explained that the farm was 2200 hectares of largely forest. He did not walk the full stretch of the farm and hence was unable to say there were actually 30 families as claimed by the Petitioners.
- 4.9 He testified further that he and his father did inquire into the question of the rights of the locals. They approached the

Council to see if there was a way in which they did not have to displace people and be compensated in some way. He attended a number of meetings in this regard.

4.10 One such meeting had a big gathering at which it became unsafe to be around and he had to drive with Mr. Chibale out of the venue at high speed whilst being chased. That the vehicle was being hit with sticks in the process. He explained that they had been trying to negotiate the way forward. He reiterated that his intention was to develop or at least assist with the development of a strong community.

4.11 When cross examined by the 3<sup>rd</sup> Respondent, he testified that the 5 families that they found on the farm were somewhere around point A in exhibit “**DC9**” and 500 meters towards point **B** near a dambo. He testified that he did personally engage them to find out how long they had been there. They met with the families a number of times to see what could be agreed on for their relocation. He stated that some of them claimed to have been on the property since 1975 which was at variance with what the Ministry of Lands had told them about Mr. Chibale being owner.

4.12 He testified that over a period of 2 to 3 years, more and more people started settling on the farm. The Badcocks wrote down the names of the 22 families. When referred to the schedule of

Petitioners in the affidavit in reply, the witness testified that he was able to recognize just a few of the names. He did not have the list with him in court.

4.13 Questioned further he testified that the settlers were involved in subsistence farming and kept a few goats, chickens and pigs but nothing on a commercial scale. Others were burning charcoal. He testified that he did go to the land with a surveyor from Serenje District Council. He estimated that about 40 hectares of their land had been used.

4.14 He confirmed that the boundaries that they had created left some families inside the farm. He testified that they had not yet started doing anything on the north farm. That they had only claimed about 150 hectares of bush and planted some maize. That the clearing did not affect any of the families on the farm as it was virgin land with no houses or huts.

4.15 He explained that nothing had been resolved with the Chief regarding the people living on the farm. The proposal was that land would be found for them in the nearby villagers or they were to be compensated. That the Chief was aware that they had title but died 6 months after he was appointed Chief.

4.16 When cross examined by the Petitioner's advocate, he testified that his father the 6<sup>th</sup> Respondent had been involved in the negotiations to acquire the land although it was chiefly he (the

- 2<sup>nd</sup> Respondent), that was doing so. It was further only he that visited Serenje during that process. He testified that the property is in his father's name as he is the one who purchased it. He testified that he did visit the area a number of times before the sale. He did not walk every square meter of the farm.
- 4.17 He did not personally go to the Ministry of Lands during the purchase of the land. It was their lawyers that did so. He did not know what a settlement pattern is but gathered it had to do with how people are settled on land. He did not see any settlement pattern for the area before the court. He had not produced any settlement plan.
- 4.18 He further had not produced any satellite images of the farm. If he had come across the document **"AL95"** being a letter addressed to the Serenje Council Secretary, he would have asked for the settlement plan from Mr. Chibale. He agreed that he did want to compensate about 22 families in their quest to find a solution.
- 4.19 He agreed that despite of the knowledge that there were people on the farm, they proceeded to buy the land. He did not come to know anybody by the name of Asa lato. He had not seen any report of the number of people that had settled on the farm.
- 4.20 In further cross examination, he was referred to exhibit **"DC9"** in the affidavit in 1<sup>st</sup> Respondent's affidavit in opposition that

he confirmed was a diagram attached to their title deed. He stated he did know the beacons of the land. It took about 8-9 hours by motor bike to cover the stretch of the farm. That points **A, G, H** of the diagram is where the Munte river is. Points **B** to **E** represents the main road and the one used to visit the people. The vehicle they used could not reach point **A**. The 5 families that he met were between **A** and **D**. That there is no road near point **H**. That what is there is a path.

4.21 In re-examination, the witness testified that “**AL94**” does not show the co-ordinates where the families were found.

## **5.0 The Third Respondent’s case .**

5.1 Serenje District Council called 1 witness in aid of its defence. RW3 was Soft Tembo a Town planner in the Serenje District Council. He testified that his duties involve land administration and management within the district. He testified that the matter before court related to farm 10906 Serenje. That according to the Council’s records, in 1995 Serenje Town Council had received an application from Davison Chibale who wanted to convert land.

5.2 He added that the Chief has given his consent to the Council to process the application for Mr. Chibale. Upon receipt of the application, it passed through the plans committee and the

- application was forwarded to the full Council. He confirmed the document marked **“AL88”** in the Petitioner’s affidavit in support to be the application that is sent to the Commissioner of lands after the Council goes through together with recommendation of the Council. That this is the application that he was referring to that came from Mr. Chibale.
- 5.3 He confirmed that exhibit **“AML13DMLDC 28”** in the Petitioner’s affidavit in reply also exhibit **“AL84”** in the affidavit in support, is a record from the Plan’s committee. That there is a notice of the meeting and item that was being considered at the meeting held on 25<sup>th</sup> January 1995.
- 5.4 He testified that **“AL85”** are extracts of the full Council meeting that was held on 30<sup>th</sup> March 1995. He explained that the significance of the 2 documents is that they show that the Applicant had followed the process in terms of applying for land acquisition and this is a record of what the Council resolved.
- 5.5 He explained that at committee stage, the initial application is received, debated on and either neglected or accepted. Depending on the resolution of the committee, the application is then forwarded to the full Council. It is at the full Council

that the matter is finally considered based on the recommendation of the respective committee.

5.6 That the Council can either accept the recommendation as it is or it can reject it. In this particular case, that the recommendation was accepted. That the committee recommended 1000 hectares that was approved as per **"AL84"** . He added that there was a recommendation that had come through the Chief that the Council should consider the 1000 hectares from the total which was applied for.

5.7 The full Council considered that the 1000 could be offered but the remainder referred to the Commissioner of Lands for approval. He testified that as a local authority the mandated threshold and maximum land the Council can offer is 250 hectares. Anything above that is for consideration by the Commissioner of Lands. That in this case the Council approved 1000 hectares and left the difference to be considered by the Commissioner of Lands.

5.8 It was his further evidence that after the full Council meeting, the next stage was to forward the recommendation and application to the Commissioner of Lands. That **"AL88"** in the Petitioner's affidavit in support is one of the documents that are used when making such recommendations to the

Commissioner of Lands. That the recommendations in this case was done on 3<sup>rd</sup> May, 2000. The recommendation stated that the Council had approved 1000 hectares and left the excess for the Ministers approval as it was State land.

5.9 He testified that exhibit “**AL91**” is the response that came through from the Commissioner of Lands. The Commissioner of Lands guided that the application exceeded the 250 hectare limit. The Council was further asked to submit a farm development plan based on the entire 2885 hectares. The letter also indicated that Mr. Chibale was to submit the farm development plan and to confirm that the land is free from settlers.

5.10 He explained that in an instance where a recommendation is forwarded to the Commissioner of Lands before the issuance of an offer, the Commissioner will ordinarily request that an inspection report should be done by the Council to help the Commissioner make an informed decision.

5.11 At this point since the National Remote Census Center had not been established, the request had to come directly to the Council to conduct a physical inspection of the land in question and to prepare a report to the Commission of Lands stating the findings on the ground. The Council did a physical

inspection as the center was not established. **“AL 94”** is an inspection report which contains the actual findings based on the physical inspection conducted. He testified that based on the report, the findings were that there were 5 settlements found on the farm and one of Mr. Chibale’s workers.

5.12 He explained that because of the vastness of the farm block in question, there were instances in which a Chief gives letters of consent to a resident within a farm block without realizing that the individual is in a farm block. Further that in an instance where there is no consent from the Chief, the settler in the block will not be known and one would be in essence squatting in that area. As a consequence, emphasis was placed on the need for Chiefs to educate their subjects to avoid subjects settling in areas awaiting approval by the Commissioner of Lands.

5.13 He testified that the land in issue had close proximity to a farm block which is State land. That people would ordinarily settle where there are water sources. That they as such end up settling in areas which are not within customary land.

5.14 He testified that after a final inspection is done by the Council, a report is submitted to the Commissioner of Lands for an informed decision. The Council’s role is explained as above

and it remains entirely up to the Ministry of Lands to make a decision on the question of conversion through Commissioner of Lands.

5.15 He testified that in this case, the Council did what it was supposed to do and made its recommendation upon which the Commissioner of Lands was able to make a decision. He confirmed exhibit **"AL86"** in the Petitioner's affidavit in support to be the recommendation letter from the Chief. In it, the Chief stated he had authorized Mr. Chibale to settle in his area Munte Nasanga farm block.

5.16 He added that **"AL87"** is a site plan which shows the proposed creation and land in question. That it stretches to Munte river and shows there were some settlements in the North Western side. He explained that site plans are generally done by a surveyor from the department of Agriculture, the Council or a private surveyor. That when a site plan is generated it serves one purpose-the determination of the actual extent of the land and also shows the location of the land. This plan accompanies the application made for the land in question to be converted to leasehold.

5.17 Also submitted with an application are extracts of Council minutes, the recommendation letter and annexure forms.

These are forwarded to the Commissioner of lands. They also pass through the office of the provincial planner. In this case, he confirmed that the site plan did pass through the office of the provincial planner as per stamp.

5.18 Further that this is the document that is used when numbering the property and carrying out the cadastral survey. He testified that exhibit **"DC9"** in the amended affidavit in opposition and **"AL87"** of the Petitioner's affidavit in the cadastral survey diagram confirming that the survey was done, and picked the actual shape and extent of the land.

5.19 When cross examined by counsel for 1<sup>st</sup>, 2<sup>nd</sup> and 6<sup>th</sup> Respondents, he testified that exhibit **"AL97"** was the Council's response to the letter from Commissioner of Lands indicating it had no objection to an offer being made to Mr. Chibale. Further that after the issue of the report at **"A94"** there was no need for any other inspection report to be submitted.

5.20 He testified that at **"AL 95"** of the affidavit in support of the Petition was a letter from the Commissioner of Lands authored in 2010 making a request that the Council provide the latest settlement pattern of the application that had been submitted

to his office in 2004 in light of the passage of time. He testified that he was sure the information sought was provided.

5.21 That the fact that the title was issued was the basis of his conclusion that there were no significant issues that came up. He added that the inspection report at exhibit “**AL94**” indicates that the information was obtained from the settlers themselves. That according to the report only 2 of the settlers had the Chief’s consent and indicated willingness to leave. The others stated they would leave by 2002. He agreed that anyone else found there after that period were illegal squatters.

5.22 Questioned further, he confirmed that he did state in his evidence in chief that a settler that did not have a letter was essentially a squatter or is unknown. Such person does not have any rights to the land that they have settled. When referred to the schedule of Petitioners in the affidavit in reply, he testified that the names of the 2 persons that had consent letters as per inspection report are not appearing on the list of Petitioners.

5.23 He testified further that the schedule of Petitioners have never been presented with any letter of consent from the Chief. That the Council did not have any record or letter of consent from the Chiefs to the Petitioners. He stated that there are instances

where the Chief will grant consent for a local to settle on State land. Records indicated that 2 people were given consent within the farm block.

5.24 In further cross examination by the 4<sup>th</sup> and 5<sup>th</sup> Respondents, he confirmed that the Council does act as an agent of the Ministry of Lands in land administration. He agreed that the Commissioner of Lands does rely on the accuracy of the reports that the Council present in making its decisions. He reiterated that the correct procedure was followed in the conversation of the Land from customary to leasehold tenure.

5.25 That an Applicant is not required to have any consent from settlers. He confirmed that **"AL87"** was the site plan that was submitted and approved by the Chief as per Chiefs stamp.

5.26 When cross examined by the Petitioner's lawyers he testified as accurate that an Applicant for conversion of land to leasehold has to fill in an application form. That this is a standard form. He agreed that the application form that was done by Mr. Chibale was not before the court. He further agreed that the Chief was also expected to fill in form 2 in which he signals his consent for the conversion. He agreed that no such form had been exhibited before the court.

- 5.27 He further agreed that the local authority is supposed to fill in a form 3 for the conversion that was not before the court. He maintained that the Council did carry out an inspection and made its recommendation. That recommendation was that 1000 hectares which fell in State land be approved but 1885 was to be by the Minister.
- 5.28 He agreed that the letter of recommendation was issued before the inspection was done. Further that the extracts of the minutes of the plans and works committee do not show that the committee approved the conversion from customary to State land.
- 5.29 He was not aware that for purposes of form 2, the person applying needs to have been in the area for 5 years. He was aware that a Chief is supposed to indicate that the conversion will not affect any person's rights. He was not sure if form 3 requires the Council to confirm that neither personal nor communal rights are affected.
- 5.30 He agreed that according to the 4<sup>th</sup> and 5<sup>th</sup> Respondent, the land was being converted from customary to leasehold tenure. Further that there were documents or minutes that speak to the conversion from customary to leasehold tenure. He confirmed that in the 1<sup>st</sup> Respondent's answer to the Petition

and paragraph 9 in particular, the 1<sup>st</sup> Respondent does indicate he was given consent by the Chief in 1999. He stated that the extract of the Council minutes was done in 1995. That going by the dates this was therefore before he was given the land in 1999. That there were no minutes showing a conversion after 1999.

5.31 Questioned further, he testified he did not notice that there is a village inside the disputed land called Sialande. When referred to the inspection report at **"AL94"**, the witness stated there was a revelation that the area called Bwande is in a plain. He confirmed that **"AL25"** is a card for Magelema Bwanga of Bwande village and the card was issued in 1984. **"AL32"** is a card for Kalunga James Mwelwa issued in June 1996.

5.32 The residential address is also indicated to be Bwande. Another, card **"AL35"** he confirmed to be in the names of Membwe Maggie issued in June 1996 whose address is indicated to be Bwande Chief Muchinda. That these 3 documents were dated before 1999 and hence earlier than 2001 when **"AL94"** was issued.

5.33 Questioned further, the witness testified that he joined the Council in 2015. He was therefore not personally involved in

this matter. He was as such not there when the title was issued in 2013. He further confirmed that the names of the 3 card holders that he was referred to do not appear in the report. He agreed that based on the cards, as late as 1996 they were in Bwande.

5.34 He agreed that he had become accustomed to the Lala custom. He was aware that according to the Lala culture, a man goes to join the wife when married. He was not aware that Belita Kunda was the mother to PW5.

5.35 Cross examined further he confirmed that in terms of exhibit "**AL2**" and diagram "**DC9**" there was as far as 1982 a hut or a village in existence in the area. According to map 1230C3 the village was Sialande Sula. That this is the same village written on the card "**AL1**" an NRC for one Asa Lato the 1<sup>st</sup> Petitioner. He testified that her name does not appear in the report as having been talked to.

5.36. He confirmed that the report prepared by the Council is exhibit "**AL96**" for stand 10906. The letter was to confirm that Mr. Chibale is the owner of the farm. He agreed that the letter did not indicate where Selita is settled. He was not aware that by date of letter he had not been offered the land. He agreed that the offer letter "**DC8**" was issued on Friday April 13<sup>th</sup> 2012.

However “**AL96**” the report, is dated 4<sup>th</sup> November 2011. He thus agreed that Mr. Chibale was referred to as owner before the offer letter was issued. He stated there was a recommendation letter **AL93** and another dated 6<sup>th</sup> February 2012 at **AL97**. He agreed that according to **AL93**, the Chief had reduced the land to 1000 ha. However Mr. Chibale got more than 1000 hectares.

5.37 When referred to exhibit “**AL115**,” he confirmed that this was correspondence from the Minister of Lands addressed to Chief Muchinda and Chieftainess Serenje. He agreed that according to the notes the Minister did state that no single indigenous local person would be displaced wherever they were located in the farm block.

5.38 Questioned further, he stated it is the full Council that makes the final decision based on the recommendation forms from the committees. However that the only minutes before the court from the Council are the 1995 minutes. He testified that the Council does not keep the consent granted by the Chief to people. He confirmed that based on the Petitioner’s affidavit in reply at pages 38 and 39 relating to Abby Mambwe and Lundu Loveness, the 2 named are from Bwande area. However that the 2 names do not appear in the inspection report.

- 5.39 When re-examined, he testified that “**AL84**” specifically states the land in issue was State Land and a former farm within the farm block. That “**AL88**” referred to a minute that considered the allocation that had nothing to do with conversion. That this extends to **AL96** in the first paragraph shows 2 farm numbers suggesting it is within state land.
- 5.40 He clarified that in the year 1995, an application was received by the Council which was approved. That the Council obtained consent from the Chiefs side in 1999. At that time, the Council had already resolved in favour of Mr. Davies Chibale.
- 5.41 Further that exhibit “**AL86**” shows there was consent that obtained from the Chief was in an area already in a farm block. Further that the stamp on “**AL88**” was dated 2<sup>nd</sup> June 2000 that suggested to him that this was after the recommendation had already been done. To clarify this, he stated that the recommendation goes together with the annexure. The Council approved in 1995 and the Council secretary completed the filling in June 2000. That the recommendation itself was done on 3<sup>rd</sup> of May. Further, that the Chief wrote, but the matter was never tabled for a new resolution to change the hectarage hence the recommendation stood. He offered this as an explanation over the questions raised on “**AL93**”.

- 5.42 In specific response in clarification to questions raised about a settlement pattern in relation to “**AL95**” and “**AL96**”, he stated that the Council had provided the latest settlement plan. That the report referred to in “**AL96**” is what was at “**AL98**”.
- 5.43 He testified further that the place called Bwande is still there but does not mean it is within the farm in question. The report confirmed the persons were not within the farm. He clarified that “**AL84**” does not talk about conversion. It indicates that this was never an application for conversion. The Council had sat and approved an application in 1995. That in 1999 a recommendation was done by the Chief in relation to the land approved in 1995 that there was therefore no conflict. He testified further that form 3 applies in an area which is solely in the Chief’s jurisdiction.
- 5.44 As at 1995 when the initial application was brought forward, the only form which was considered was annexure C which applies to State land. Therefore that there was no need for consideration of forms 1-3 at the time of the application. Further, that an inspection is done at different instances. The Commissioner can request for an inspection to be done after a recommendation and this is what transpired in this case.

## 6.0 **The 4<sup>h</sup> and 5<sup>th</sup> Respondent's case.**

6.1 The State called 2 witnesses in aid on its case. DW4 was Musamva Wanki a Senior Lands officer under the office of the Commissioner of Lands, Lands Department. He had worked in the Ministry of Lands for 19 years as at date of his testimony. His duties include the scrutiny of applications from the Councils in order to ensure that laid down procedures were followed before the Commissioner of Lands can approve applications. He also issued offer letters to successful applicants. He further prepares lease agreements and examines the agreements. He added that his duties also extended to preparation of notices of intention to re-enter and consents to assign.

6.2 He testified that in the matter before court, the Commissioner of Lands received a recommendation from Serenje District Council in favour of one Davison Chibale. Mr. Chibale was applying for conversion of land from customary to State land. He testified that "**AL88**" is an annexure C form which he explained was an application form which captures the details of the Applicant for land. That this is a form given out by the Council.

- 6.3 According to the form, Mr. Davision Chibale was applying for land in Nansanga farm or small holding. That Mr. Chibale had applied for a lot No. 25 Nasanga farm block in Serenje District. He testified that on page 5 of the same document is a portion for approval by the full Council meeting under PWDSS/78/25/01/95. This was approved on 30<sup>th</sup> March 1995. He testified that after the approval, the Ministry of Lands received the application from the Council. The Commissioner of Lands then wrote a letter to the Council requesting for an inspection report so that it could confirm whether or not there were some settlers on this particular parcel of land. The Council responded and attached an inspection report.
- 6.4 He explained that Mr. Chibale was applying for farm land and the tenure was customary land. He clarified that there are 2 types of tenure under Serenje Council. One customary the other State land. He testified that Serenje Council administers State land. When the Ministry received the inspection report, the report **“AL94”** indicated that there were 5 families in this particular parcel of land.
- 6.5 He testified that according to the report, of the 5 one Mrs. Selita Kunda accepted to leave the area by 2002 after harvesting her cassava field. Also reportedly found was Kenita Kumbashi who

accepted to leave by 2004. None of the families had refused to leave the land. When referred to **“AMLBD38”** and **“39”** of the affidavit in reply, he confirmed that this was a permit of a Chief that allows the addressees to settle in Bwande area.

6.6 He testified that after the inspection of the land was done and because time had passed before the Ministry could process the application, the office of Commissioner of Lands wrote another letter to the Council asking for the latest inspection report. The Commissioner wanted to know if Mr. Chibale was the one who was occupying this particular parcel of land. The Council responded with an inspection report that indicated that Mr. Chibale was fully utilizing this land and indicated the developments he had made. Further that he had some cattle on the farm.

6.7 He stated that the procedure for applying for State land starts with an Applicant applying to the Council and filling in some forms. Under customary tenure that the process starts with the Applicant going to the Chief and after obtaining the Chiefs approval can seek for conversion of the land to leasehold tenure. That to facilitate such conversion the Chief will write a letter to the Council advising that he has approved the allocation of the land to that particular person.

- 6.8 He added that the Council and officers from Agriculture Department will then be required to go and map out that parcel of land and then produce a site plan. That site plan will be endorsed by the Chief and taken to the Council where the Applicant will be required to fill in annexure C form and complete form 3. The Applicant is also interviewed.
- 6.9 If successful, he is then recommended to the Commissioner of Lands. Upon receipt of the application, the Commissioner of Lands will request for an inspection report from the Council. This ordinarily applies for land that is above 250 hectares. The purpose of that inspection is to verify whether or not there are some settlements or settlers on the land. If the report indicates there are no settlers, then the Commissioner of lands will request from the Surveyor General for the numbering of that parcel of land. If there are settlers, the Commissioner writes back to the Council that he cannot approve the application for conversion unless the Applicant comes up with a resettlement plan for the settlers affected.
- 6.10 As far as State land is concerned, the first stage is that the Applicant needs to apply directly to the Council and also depending on whether or not a particular parcel of land a person is applying for is numbered. If it is numbered then they

will indicate a number in the application form which the Applicant fills in at the Council and are called for interviews. If they are successful, the Applicant will then be recommended to the Commissioner of Lands. If the application is in order, the Commissioner of Lands will proceed to offer the property. Again depending on the hectarage of the land, the same procedure of requesting for an inspection report will apply.

6.11 If the report confirms there are no settlers, he will proceed to generate an offer letter in favour of the recommended Applicant. He testified further that under statutory tenure, a site plan is issued at the stage when the person or the Applicant is applying to the Council.

6.12 He testified that in terms of the land in dispute, when the Commissioner of Lands received the application and requested for an inspection report from the Council, the Council responded with a report in question. The report indicated that there were some settlers on the land who were willing to be relocated. He testified that exhibit **"AL94"** page 3 has recommendations the first of which was that Mr. Chibale who obtained a letter of consent from the Chief be recommended for an offer from Ministry of Lands. Before the Ministry could proceed with the numbering, it requested for another

inspection report and this was conducted by the Council in conjunction with the officers from Agriculture. The report indicated that Mr. Chibale was fully utilizing the land in question.

6.13 He testified that exhibited “**AL96**” was a letter from Ministry of Agriculture to the Commissioner of Lands. The letter was a result of a complainant from Mr. Chibale to Ministry of Agriculture. What came out of this was that Mr. Chibale was one of the Pioneer farmers in Nansanga farm block and his farm was numbered 10302 and renumbered 10906 under the new developed Nansanga block. The Council were further confirming that Mr. Chibale was indeed the owner of this farm.

6.14 He explained that after the Commissioner of Lands received the inspection report from the Council and later a letter from Ministry of Agriculture that indicated that the land was already numbered 10906, the Commissioner could not proceed to have the site plan numbered. That this was because the parcel of land was already sitting in the farm block. Therefore, the Ministry went ahead to issue an offer letter based on this number which was revealed to the Ministry.

6.15 He explained that it was the Ministry of Agriculture that were involved in the demarcation of Nansanga farm block. This was

how the discovery was made that the land was falling in a farm block. Invited for his reaction to the Petitioner's suggestion that their right to the property had been infringed, Mr. Wanki stated that there was no such infringement. That this was because this land was rightfully given to Mr. Chibale who followed the procedure when acquiring it.

6.16 He testified that when the land was being given out there were only 5 settlers on the farm. These settlers were willing to be relocated. Based on this he concluded that the State had not infringed on any persons rights. Regarding the averment or suggestion that Mr. Chibale obtained the land fraudulently, he responded that from the documentation which the Commissioner of Lands received from the Council in favour of Davison Chibale when processing the application, no complaint was made or investigation undertaken to reveal a fraud having taken place. In light of this that the office of Commissioner of Lands office did not agree with the assertion that there was fraud as no evidence of such fraud was received by that office.

6.17 When cross examined by counsel for the 3<sup>rd</sup> Respondent, Mr. Wanki testified that Serenje District Council like any other Council in the country are agents for the Ministry of Lands.

That the final decision in terms of offers comes from the Ministry of lands. He agreed that Councils merely make recommendations which can either be accepted or rejected by the Commissioner of Lands.

6.18 Part of his job was in scrutinizing applications before approvals. He agreed that if something amiss was noted from the Councils role, the Ministry would not approve the application. That the fact that the Commissioner of Lands proceeded to offer the land in this case meant that his office was satisfied with what was presented to him. He testified that the land in question is located in Nansanga farm block.

6.19 He was referred to the letter dated 2<sup>nd</sup> December 1999 being exhibit "**AL86**". He agreed from a read of the letter, that the Chief was aware that the land he was allocating was in a farm block. He testified that a farm block is an area which has been designated by the Government for farms. This therefore means that the area is State land. He testified that the Chief does not have authority to allow anyone to settle on a farm block. The person with authority to do so is the Commissioner of Lands in conjunction with the Councils.

6.20 He testified that "**AL88**" is annexure C an application form used to get land in a farm block. He disagreed that it can only

be used for applying for land in a farm block. It is used for applying for State land and not necessarily blocks alone. He testified that according to the application referred to him, Mr. Chibale was applying for land in Nansanga farm block which is State land. He was aware that the Council committee goes through an application before referring it to a full Council.

6.21 He testified that **"AL84"** referred to him were minutes of a meeting held on 24<sup>th</sup> January 1995. He agreed based on the document that even as far back as 1995 the area in question was a farm block. That the minute also shows that the farm was previously owned by another company before 1995. Further that the farm was in Munte as confirmed by **"AL86"** as well.

6.22 He testified that the Council did approve **"AL88"**. That **"AL85"** are minutes of the Council meeting held on 30<sup>th</sup> March 1995. That the Council resolved that the minutes be adopted as part of the proceedings of the Council. At that point, he agreed that the Council was adopting the decision to allocate Mr. Chibale the land. He testified that exhibit **"AL88"** in the affidavit in support of the Petition , is the letter recommending Mr. Chibale for a farm in Nansanga farm block dated 3<sup>rd</sup> May 2000. That letter informed the Commissioner of Lands of its decision.

- 6.23 On further cross examination he confirmed that the Council had approved 1000 hectares which was falling in State land. That the letter said nothing about the Council approving the conversion. He testified that according to their internal processes, the Commissioner of Lands can only approve 1000 hectares of land. Anything above that goes to the Minister of Lands.
- 6.24 He confirmed a letter shown to him as exhibit **"A91"** to be one authored by the Chief lands officer in the Lands department dated 7<sup>th</sup> May 2001. That this letter was a response to the recommendation from the Council. 2885 hectares of land was being considered. He testified that the Council did an inspection in 2001 and according to the findings on the farm the people found on the farm were willing to leave.
- 6.25 He testified as true that the Commissioner proceeded to accept the recommendation and report from the Council. He indicated that where settlers are on State land, the Commissioner on humanitarian grounds can look for alternative land for the squatters in one farm block, or they can be evicted. That the fact that there are settlers on State land cannot stop the Commissioner of Lands from issuing the land.

- 6.26 He testified that “**AL95**” is a letter from the Commissioner of Lands to the Council Secretary Serenje Council. The Commissioner was requesting for an inspection report for the latest settlement patterns in the area.
- 6.27 When cross examined by counsel for the Petitioners, Mr. Wanki testified that he recalled swearing on affidavit dated 26<sup>th</sup> June 2018 in which he states Chief Muchinda granted the 1<sup>st</sup> Respondent land. He agreed that in terms of land alienation the Chief only gets involved in customary land. He agreed that in terms of paragraph 6 of the affidavit, the Respondent was converting land from customary to statutory land.
- 6.28 He further agreed that the 3<sup>rd</sup> Respondent’s answer to the Petition also made reference to conversion of land to statutory tenure. He further confirmed that in paragraph 5 of the 1<sup>st</sup> Respondent’s answer Mr. Chibale is also saying that he got the land from customary tenure. In that sense he agreed that all the parties contend the land was being converted from customary to statutory tenure.
- 6.29 He confirmed that he did testify that the Chief has to sign a form called land conversion No. 2 and in doing so has to state that no individual right is being infringed. Further that the consent of the party to be affected must be obtained. That the

form should also state how long the Applicant has been on the land. He was not sure if he had seen the Council minutes on the conversion of the land from customary to statutory tenure.

6.30 Questioned further he testified that it is a procedural requirement that there should be minutes from the Council to the Ministry of Lands. He maintained that procedure was followed.

6.31 He agreed that the form for conversion was part of the procedure and that he did not have it. That the consent of the Chief is also part of the procedure and this is what is received and not consent from the settlers. He confirmed that the 3 forms that have to be filled were not before the court. He confirmed that there were no Council minutes before the court.

6.32 In further cross examination, he testified that the offer for the land in Nansanga was done by the Ministry of Lands and not by the Council. He confirmed that he had not produced the application received from Mr. Chibale in court. He was not aware if a settlement pattern was submitted. He stated that according to the letter from Serenje Council dated 20<sup>th</sup> August, 2002, exhibited in the affidavit in reply, the land in issue was reduced to 1000 hectares by the Chief. He was however aware

Mr. Chibale received more than 1000 hectares. He had not seen any letter changing the hectarage.

6.33 When re-examined, Mr. Wanki stated that the form signaling the consent of the Chief has no provision for the settler to signal his/her/their consent. It is the Chief who fills it in. According to map on page 7 the land on 10906 is a commercial farm.

6.34 RW5 was Nelson Chembo a Technical Assistant under the Technical Services Branch in the Ministry of Agriculture. He had worked for the Ministry for 23 years at date of his testimony. He testified that his evidence related to the dispute involving the 1<sup>st</sup> Respondent's farm. He explained that the farm had been in existence even before the Nansanga farm block was created or actualized. He testified that the dispute started upon the discovery that the farm fell in the Government projected area.

6.35 He explained that he works in on engineering department which involves the planning of farm blocks and any other farms that may be created. The department is also involved in land management, watershed management and collection of data pertaining to areas of development.

- 6.36 He testified that when the department went on the ground to the farm in question, they established that Mr. Chibale had been making frantic efforts to apply for the land through the Council as early as the 90's. He was however, unsuccessful in most of the applications that he had been making. He testified that it was later discovered that he made an effort to approach the chief for land for farming sometime in the mid-nineties.
- 6.37 He testified that Mr. Chibale was given land by Chief Muchinda. From the record that his office examined when they went on the ground, they found a letter and a map that Mr. Chibale showed them. The letter was a letter of consent from the Chief exhibited "**AL86**" in the affidavit in support of the Petition. He also showed them a site plan exhibited "**AL87.**"
- 6.38 When they examined the map, the offices found that there were still some settlements along Bwande stream. His team advised for an extension of the line to cut off the settlements along Bwande stream. This meant that the farm size was to be reduced further from what was initially offered. A report of the findings was made to the core team and eventually to the District screening committee.
- 6.39 The Secretariat of the Committee was tasked to write a report and a recommendation to the Commissioner of Lands as well

as to the Local authority so that they could take it up. He did not know what subsequently followed aside from the actualization of the farm block and the recommendations made being followed.

6.40 The lines were redone and the extension cut off the settlements. This was around 2003 to 2010. Mr. Chibale informed RW5 and his department that the persons that they had found at the foot of Munte were his relatives. He explained that the recommendation to reduce the size was with a view of avoiding as many settlers as possible and only those who claimed to be Mr. Chibale's relatives remained on the land.

6.41 He testified that there are 2 surveys that are carried out. There is what he explained to be firstly, a preliminary survey which produces a site plan like "**AL87**". That this site plan gives an approximation of the area in question which means it can either reduce or appreciate in size. The final survey is the one that produces a diagram. This is the cadastral survey.

6.42 The court was then moved to the site for a scene visit. In continued examination in chief from the site, RW5 testified that "**AL96**" in the affidavit in support is a letter written by the DACO to the Commissioner of Lands recommending Mr. Chibale's application. He testified that the land was

demarcated by the DACO's office as per paragraph 22 of the affidavit in reply dated 24<sup>th</sup> July, 2018.

6.43 He testified further that the genesis of the Nansangu farm block was traced to a government policy to set up Agricultural productive farm blocks in the whole country. That apart from Nansanga farm blocks others like Luwena, Kanakantapa and Luamba to mention but a few were also set up. He stated that all the protocols were fully followed during the acquisition and fruition of a farm block through their Royal highnesses with full consent of all the settlers.

6.44 He explained that a number of initial surveys carried out found that there was a marked existing farm in the projected area at the boarder of the Kasanka farm block that had already been established. With this finding, the team which was at the time under the direct supervision of the National steering committee dealing with Nansanga farm block was headed by the Commissioner of Lands through the Province and the District.

6.45 The ground team had to report to the core team. The Secretariat receiving the report was the DACO. The team was also tasked to determine the level of development on the farm

bearing in mind there were other inspections that were done by the Council.

6.46 The witness was referred back to exhibit **“AL96”** in the Petitioners’ affidavit in support of the Petition. He testified that this is a letter in which the DACO was communicating that there was a complaint from the farm owner Mr. Chibale about the delayed processing of title. That the letter further explained that the settlements had been cut off. Further that there was a reduction of 314 hectares that was cut off from the main farm to accommodate the settlers.

6.47 He testified further that he personally prepared the report exhibited **“AL98”** in the affidavit in support of the Petition which was a development report he was giving of the farm. In his recommendation, he states that having followed all the documentation presented the farm belonged to Mr. Davison Chibale Malilo the 1<sup>st</sup> Respondent.

6.48 He added that the neighboring farmers were engaged and informed that Mr. Chibale was the owner of the land. He added that no disputes were encountered by his office when they were trying to establish the ownership. That his team worked in harmony with the settlers. The emergence of the dispute therefore came as a surprise to him. This he estimated, started

around the year 2012. As far as he was aware, the only complaint lodged came from the Asa Lato family. This is how they learnt about the dispute.

6.49 His office did not do anything about that complaint as it did not fall under their jurisdiction. However in their advisory capacity, his office advised that the DC convene a meeting with the complainant family. A date for the meeting was set by the DC sometime in 2012.

6.50 The first meeting arranged was at Mutale School. In attendance was Chief Kabamba, the DC and his district team. RW5 was also present. That meeting was characterized by a lot of confusion. That instead of concentrating on the complaint brought by Asa Lato, there were other people who were not concerned with the case at hand that brought up other issues. The resolution reached was that the meeting was to be reconvened at the Asa Lato village on a later date. That meeting was held about a week later.

6.51 At the meeting chaired by the DC, the Asa Lato family was met and it was resolved that the village be further cut off from the main farm. 3 days later his office was tasked to carry out the physical demarcation with the help of the Asa Lato family. He and his colleagues did the physical demarcation and as per

procedure after the demarcation, requested a representative of the family to go round the demarcated area which had encompassed all the working fields within the area. He testified that there was also a further extension of about 300-500 meters into the forest or uncleared area which was the cassava field that he mentioned earlier.

6.52 After walking through the physical boundary, the family was asked if they were happy with what the department of Agriculture had done. The family stated they were content. RW5 and his colleague then bade them farewell and left. Afterward, the office received a complaint that they were still regarded as being within the main farm. As far as he was aware, this only came about after the people learnt that the farm was changing ownership.

6.53 He testified further that the consent of the Chief is required to obtain land and to allow any government worker to carry out any survey in the chieftdom. That the Chief's representative who could either be a retainer or counselor ought to be present to guide the government worker which way to go. That they have their own way of marking out the land. It is on this basis that a site plan is developed which is produced by their office. This is surrendered to the prospective owner who takes it back

to the Chief for endorsement to re-affirm that this was done with his blessings.

6.54 After this is done, the owner can apply to the Council for change of tenure from customary to leasehold. When shown **“AL87,”** RW5 testified that he was in a position to confirm that the procedure he alluded to was followed. That the document bears the signature and stamp of the Chief.

6.55 When cross examined by counsel for the 1<sup>st</sup> Respondent he testified that it was during the reconnaissance survey for Nanganga farm block that he learnt that Mr. Chibale had been making applications for land. It was when he was questioned that Chibale gave the history.. The letter exhibited **“AL89”** shows that Mr. Chibale had applied for land as early as 1995. He confirmed that he did state Mr. Chibale was given consent letter by the Chief and got a site plan. He agreed that Mr. Chibale met all the requirements for obtaining the land under customary law.

6.56 He testified that they did interview the few persons they met when they carried out reconnaissance survey. That the Asa Lato family were considered to be relatives of the owner of the farm and no complaints were raised at the time of the survey.

6.57 He stated that he did see some settlements when the Court went for the scene visit that he could not recognize as the ones he found when they visited in 2003. He agreed that the dispute in this matter has been about the boundary. That the Asa Lato's did not at any point claim ownership of the entire farm.

6.58 Questioned further he testified that there was confirmation that the farm was down sized by 314 hectares. There was a further cut off after the second complaint. He testified further that when the line cutting of settlers was done, apart from the Asa lato family there were about 3 other families around and along the source of Bwande who at the time confirmed to him that they were aware of Mr. Chibale's presence and ownership of the said farm and were willing to relocate. Further, that there were another 2 families off the Bwande stream bringing the total to 5 that were willing to relocate.

6.59 He testified that based on what he had seen during the scene visit, there are some new settlements in the area that were not there at the time they did the inspection. He added that the farms that were in Nanganga were supposed to be harmonized and planned together since they were falling within a Government project area. He confirmed that his team did have

a representative from the Chief at the time they carried out the survey.

6.60 When cross examined by new counsel for the 2<sup>nd</sup> and 6<sup>th</sup> Respondent, RW5 testified that it was his evidence that the farm in issue existed before the Nansanga farm block was actualized. One of the agreements of the projected Nansanga farm blocks was that as much as possible settlements within the catchment area of the Nansanga farm block should not be disturbed but planned around. The cut off was therefore meant to leave the settlements as they were. He agreed that the moment the Government pronounced the creation of the Nansanga farm block, it ceased to be customary land with support of all the recommendations made before the final actualization.

6.61 He further confirmed that the Asa Lato family renewed their complainant with the knowledge that the farm in question was changing hands. Before then there was harmony. He further agreed that by “**AL87**” the Chief gave his consent to convey the land from customary to leasehold tenure.

6.62 In cross examination by counsel for the 3<sup>rd</sup> Respondent, the witness testified that Mr. Chibale’s farm was included in the Nansanga farm block. That the farm happened to be within the

projected farm block area. That the reconnaissance survey was carried out in 2003. He confirmed that at that time Mr. Chibale had started the process to try to convert the land. That there was already a map showing the extent of the land, which is exhibited “**AL87**” in the affidavit in support of the Petition. He testified that the map was stamped by the Chief in 1999 and another dated 29<sup>th</sup> May 2000. It was approximately 2885 hectares. He clarified that at the time of inclusion in the block, it maintained its size. The number for the farm did not change.

6.63 He confirmed that the letter exhibited “**AL96**” was from his office. He explained that the letter was done after the farm was incorporated into Nansanga farm block. The new number was reflected in the letter. He confirmed that it was his evidence that the Council had also done a survey. Further that 5 families were found near Bwande stream. He testified that his survey was done in 2003.

6.64 He clarified that the 2885 hectares referred to was before any cuts were done. He testified that from the findings of the survey done by the Council he was in a position to see that the similarity with the Department of Agriculture’s survey related to the settlements found and caretakers homesteads. He confirmed that he did find some settlers that had no papers,

as shown in bullet No 2. Further, that at the time they did the inspection the lady named in item 3 had moved to the husband's village but left her relatives. He stated further that they did find some settlers as indicated in the report that were in agreement to leave. He stated further that there is similarity with the survey that they did on the number of settlements that they encountered. He agreed that there was consistency in the findings for the survey done by the Council in 2001 to the one by the department of Agriculture did in 2003.

6.65 He testified that he did take Asa Lato and family following their complaint to the physical boundaries of the farm. He said this is consistent with what the Petitioners aver in paragraph 34-40 of the affidavit in support of the Petition. He saw the Petitioners land after the demarcation and they did state that they were happy. This is as per title deed exhibited "DC9" in the 1st Respondent's affidavit in opposition that shows the land is now 2202. 264 hectares showing that another 300 hectares or so was cut off.

6.66 In cross examination by the Petitioner's counsel, the witness testified that they did the survey over a number of days. He testified that he did not see any burial ground for each family. He agreed that people in the area collect mushrooms from the

surrounding area. He agreed that they also collect caterpillars. That they also practice the Chitemene system of agriculture denoting the shifting of farming from one area to another. He agreed that the meetings in the villages were held in 2015. He did not know when the title was given. He confirmed that according to **“DC9”** the title was issued in July 2013. He thus agreed that according to the record at the time the meeting was being held, the title had already been issued.

6.67 He agreed that he had not seen a sub division of the land in accordance with the cut off recommended. He testified that the area that he pointed out during the site visit was the burial site for the royal highnesses. He was not sure if it included the locals. He recalled that he testified that the department had allocated some land to cater for the settlers. However that there was no diagram before the court to show the land that was demarcated for settlers.

6.68 He confirmed that he did state he had left 250 meters for the farm to access the stream. He did not have any diagram to support his assertion that 250 meters had been demarcated. He agreed that it is true that for one to convert land from customary to leasehold the consent of the people resident on the land is required. Further, that there are forms that need to

be filed to carry on with the process of conversion. He agreed that the Council has to sit to consider an application for conversion.

6.69 He confirmed that the 4<sup>th</sup> and 5<sup>th</sup> Respondents Answer to the Petition includes an averment that the land in issue was being converted from customary to leasehold tenure. That the affidavit in support of the Answer also confirms that position. He had not seen any document or minute from the Council confirming the conversion.

6.70 He was not aware that the Chief had reduced the size of the property. He confirmed that the exhibit **"AL86"** and in affidavit **"AML139MLDC1"** in the affidavit in reply shown to him is a letter in which the Chief writes to the Council stating he had given the 1<sup>st</sup> Respondent over 2000 hectares. In the second letter, that the Chief wrote indicating he had reduced the acreage to 1000 hectares.

6.71 **"AL88"** in the affidavit in support is correspondence generated by Serenje District Council addressed to the Ministry of Lands. That it indicates in part that 1000 hectares was given out which fell under State land . This is the one that the Chief approved. He testified that the certificate for Mr. Chibale did not conform to the 1000 hectares. It went beyond what the

Council granted. In that sense that it would also be correct to say it went beyond the 1000 hectares approved by the Chief.

6.72 He testified that **“AL93”** in the affidavit in support of the Petition dated 20<sup>th</sup> August 2002 was correspondence shown to him from Serenje Council addressed to the Commissioner of Lands. That it confirms the Chief’s instruction for only 1000 hectares in the 1<sup>st</sup> Respondent’s favour. He stated that it would appear the Commissioner of Lands and Mr. Chibale did not abide by this direction.

6.73 When referred to the affidavit in reply and exhibit **“AMLBDMIDC42”** he agreed that the document shows who inspected the land. These include the Council chair, Councilor, water and sanitation coordinator and director of works. He testified that this was not the core team.

6.74 He stated that the owner is not a part of the team and is ordinarily not included so that the team remains independent. He testified that **“AL94”** shows the team comprised of the Director of Works, the Acting Building Foremen and the Applicant. He did see the inspection report that he stated should not have included the Applicant. He further noted that the Ministry of Agriculture was missing in the report.

6.75 When referred to **“AL95”** he testified that this is a letter from the Ministry of Lands dated 29<sup>th</sup> October, 2010, addressed to the Council Secretary requesting for a settlement plan. He testified that a settlement plan shows how people are settled on a land and their activities. He had not seen the latest settlement plan sent to the Commissioner of Lands beyond 2010.

6.76 Questioned further, he testified that he did generate the report on **“AL98”** and was able to confirm that this was not a settlement pattern report. He therefore agreed that the title for Mr. Chibale was issued without a settlement plan. He confirmed that at page **“AL115”** was a document from the Minister of Lands dated 6<sup>th</sup> May 2004 in which he stated that no indigenous local person would be removed from the land. That the letter was addressed to Chief Muchinda and Chief Serenje. He agreed that the eviction of settlers was therefore not in conformity with the Government position.

6.77 He agreed that the whole area had been established as an agricultural farm block. He further agreed that there is no other land to settle the settlers in view of the farm block status of the land. Questioned further he agreed that it was normally the Council that is mandated to make recommendations to the

Commissioner of Lands. He agreed that the letter shown to him at **"AL96"** was from the Ministry of Livestock. It was a correct observation that this letter contradicts what the Council and Chief said about the acreage.

6.78 He testified that based on what he had been made to go through and documents he had been shown, he agreed procedure was not followed. That there was no document that shows indigenous persons were consulted. He further agreed that the documents from the Chief and the Council show that the land had been reduced from the initial 2000 plus hectares to 1000 hectares.

6.79 When re-examined, the witness testified he did not indicate the hectarage of the whole farm in his report because the report was a farm development verification report. He testified further, that **"AL96"** is a letter from the Ministry of Agriculture to the Commissioner of Lands. That in exceptional cases the DACO was the Secretariat to the National Steering Committee for Nansanga Farm block under which this farm fell. He testified that there was no plan for evictions as there were no evictions that took place.

6.80 As far as he was aware, there were no evictions done to any indigenous persons in the farm block. The Commissioner had

requested the Council to come up with a report on the settlement pattern. His report as “AL98” was not a settlement report.

- 6.81 He clarified that the Commissioner of Lands was requesting for a settlement pattern. He confirmed that he did state that he had not seen any minutes relating to the conversion of land. He did not see any minutes because his department’s role ends at a particular point and the Council takes over. No copies of minutes were sent to his department by the Council.

That was the case for the State.

## **7.0 The 6<sup>th</sup> Respondent’s case**

- 7.1 The matter was adjourned to permit the advocate for the 6<sup>th</sup> Respondent to call his witness. The matter was adjourned to 20<sup>th</sup> August, 2021, he did not turn up for the hearing. I closed the Respondent’s case and issued directions for filing of final submissions and reserved the judgment.

## **8.0 Submissions.**

### **8.1 The Petitioner’s submissions**

The Petitioners filed into court what I must put on record were rather voluminous submissions in support of the Petition. It was submitted that the Respondents did not follow the

mandatory procedure for alteration and conversion of land in a customary area. Further that the Respondents failed to give notice, to obtain consent or provide compensation to the Petitioners when they took the Petitioners land which amounted to a compulsory acquisition of land contrary to **article 16 of the Constitution of Zambia** and **sections 3,5,6,7** and **25** of the **Lands Acquisitions Act**.

8.2 Further, that the Respondents action and omissions had violated the Petitioners' Constitutional rights in general and in particular, that:

- The Respondent's subjected the Petitioners to immense physical and psychological trauma that has harmed the self-worth and dignity of the Petitioners in violation of article 8 of the 2016 Constitution of Zambia.
- That the 2<sup>nd</sup> and 6<sup>th</sup> Respondents subjected the Petitioner to watching their land get dehydrated through large scale cutting down of trees and fencing off part of the land thereby restricting their ability to freely associate with their relatives and friends across the fence contrary to articles 21 and 22 of the Constitution.
- That the Respondents denied the Petitioners as rural residents on customary land, the legal protections and

privileges that were offered to those on State land, contrary to articles 23 and 266 of the Constitution.

8.3 It was submitted that the allocation of the disputed land to the 1<sup>st</sup> Respondent was done by fraud and misrepresentation. Further that in any event, the 2<sup>nd</sup> and 6<sup>th</sup> Respondents had notice of the Petitioners presence on the land and interest before purchasing it from the 1<sup>st</sup> Respondent.

8.4 Regarding the argument on the failure to follow mandatory procedure, the Petitioners placed reliance on **section 3(4) of the Lands Act** that provides:

*“Notwithstanding subsection (3), the President shall not alienate any land situated in a district or an area where land is held under customary tenure –*

- (a) Without taking into consideration the local customary law on land tenure which is not in conflict with this Act;*
- (b) Without consulting the Chief and the local authority in the area in which the land to be alienated is situated, and in the case of a game management area, and the Director of National Parks and Wildlife Service, who shall identify the piece of land to be alienated;*
- (c) Without consulting any other person or body whose interest might be affected by the grant; and*

**(d) If an applicant for a leasehold title had not obtained the prior approval of the chief and the local authority within whose area the land is situated.”**

8.5 It was argued that the unchallenged evidence on record established that the land in dispute was held under customary tenure before the issuance of title to the 1<sup>st</sup> Respondent in 2013. It was argued as trite that chiefs can only exercise authority on and allocate land held under customary tenure and do not exercise authority over State land. That the pleadings by the Respondents speak to allocation and application for conversion of the customary land assigned to Mr. Chibale to State land. That this therefore entails that the status of the land in dispute was at all material times customary land.

8.6 It was submitted that the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents at trial attempted to abandon their positions that the disputed land was held under customary tenure and the 1<sup>st</sup> Respondent applied to have it converted into State land as they realized that the procedures adopted for the conversion process was irregular.

8.7 That instead, they attempted to change their position by insisting that the land in question had always been State land

in a bid to cover up the consequences of failure to follow the mandatory procedure under section 3(4) and 8 of the Lands Act.

8.8 It was argued that having not amended the pleadings, the 3rd, 4th and 5th Respondents are bound by their position in the pleadings that the Land in dispute was customary land which was converted from customary tenure to State land upon the 1<sup>st</sup> Respondent's application. **Anderson Kambela Mazoka and 2 others vs Levy Patrick Mwanawasa and two others**<sup>1</sup> was cited in aid in which the Supreme Court gave direction on the functions of pleadings in the following terms:

*“the functions of pleadings is to give fair notice of the case which has to be met and to define the issues on which the Court will have to adjudicate in order to determine the matters in dispute between the parties. Once the pleadings have been closed, the parties are bound by their pleadings and Courts have to take them as such.*

*(ii) in case where any matter not pleaded is set in evidence and not objected to by the other side, the Court is not and should not be precluded from considering it. The resolution of the issue will depend on the weight the Court will attach to the evidence of unpleaded issues”.*

8.9 It was argued that the Court is precluded from considering the un-pleaded issues as stated above as it was only raised for the

first time towards the end of the trial after the Petitioners and 1<sup>st</sup> and 2<sup>nd</sup> Respondents had already closed their cases. Further that the Petitioners objected to the 3<sup>rd</sup> and 5<sup>th</sup> Respondent's attempt to depart from their pleadings.

- 8.10 That in any event the evidence on record contradicts this position. Further, that exhibit “**DC1**” of the 1<sup>st</sup> Respondent's amended affidavit in opposition clearly show that the allocation of 2885 hectares to the 1<sup>st</sup> Respondent was made by Chief Muchinda on 2<sup>nd</sup> December, 1999. That the 3<sup>rd</sup> to 5<sup>th</sup> Respondents had not adduced any evidence to show that the disputed land was at the time Senior Chief Muchinda allocated it to the 1<sup>st</sup> Respondent, already State land.
- 8.11 It was submitted that the land therefore being customary land, the procedure under section 3(4) and (8) of the Lands Act ought to have been strictly followed before the disputed land was allocated to the 1<sup>st</sup> Respondent or converted to State land.
- 8.12 Reference was made to the case of **Sailas Ngowani and 6 others Vs Flamingo Farms Limited**<sup>2</sup> in which the Supreme Court pronounced itself on the effect of circumventing the procedure for allocation of land under customary tenure. That the Supreme Court stated the following:

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

- (a) Without taking consideration the local customary law on land tenure which is not in conflict with this Act;*
- (b) Without consulting the Chief and the local authority in the area in which the land to be alienated is situated, and in the case of a game management area, and Director of National Parks and Wildlife Service, who shall identify the piece of land to be alienated;*
- (c) If an applicant for a leasehold title has not obtained the prior approval of the Chief and the local authority whose area the land is situated.*

*The real question we ask is what the limitation of power of the President to alienate land in customary area entails in practice. In other words, what is the situation where, despite these prescriptions, a certificate of title is obtained in such area, anyway? We do not think the situation in section 3(4) contemplated fraud...*

*We agree therefore with counsel for the appellant that fraud as specified in section 33 of the lands Deeds Registry Act does not provide the only pathway of the law such as circumvented of the procedure prescribed in law which would render null and void the allocation of land, would be just as fatal”.*

8.13 It was argued that the failure to follow the mandatory procedure under the cited section 4(4) and (8) of the Lands Act rendered the allocation and conversion null and void and that

certificate of title No 226256 relating to Farm No. 10906 Central Province registered in favour of the 1<sup>st</sup> Respondent in 2013 should be cancelled.

8.14 It was submitted that no consent or prior approval of Senior Chief Muchinda was obtained before allocating the disputed land to the 1<sup>st</sup> Respondent and converting it to State land. The Petitioners pointed to several exhibits and evidence which in their estimation established that point.

8.15 It was further contended that the Petitioners as persons whose interest were going to be affected were never consulted before the grant of the disputed land to the 1<sup>st</sup> Respondent contrary to section 3(4) (c) of the Lands Act. Reference was made to the case of **Siwale and others Vs Siwale**<sup>3</sup> in which the Supreme Court held that the failure to consult anybody whose interest might be affected before allocating the land situated in a customary area can be fatal to subsequent title granted.

8.16 Further that in the case of **Village Headman Mupwaya and Another vs Mbambi**<sup>4</sup>, the Supreme Court held that failure to consult any person whose interest may be affected by the grant required under sections 3(4) (c) of the Act was fatal.

8.17 It was argued further that the authority of **Still Waters Limited Vs Mpongwe District Council and Others**<sup>5</sup>

specifically established that the Traditional Chief must consult and obtain consent from those that may be affected by the grant of land. That the Court held:

*“Although we agree with Dr. Sakala’s forceful argument that Chiefs enjoy autochthonic powers over land held under customary tenure and especially undeveloped land, nonetheless section 3(4) of the Lands Act is couched in such a way that it is mandatory for the 3<sup>rd</sup> and 4<sup>th</sup> Respondents to have been consulted before allocating the land to the appellant company. Failure to do so results in the purported allocation to be null and void....in the Siwale V. Siwale case, the deceased who had been given land by the colonial authorities with the approval of the local chief sometime in 1929 died intestate. The appellants who were his siblings objected to their late brother obtaining ‘title deeds’ to the land without their consent. This court agreed with them that under section 3(4) it was obligatory on the part of the traditional chief to seek their consent, as according to that section, their interest would have been affected by one of their brothers, obtaining title deeds of the land. This Court pointed out to the fact that land held under customary tenure can only be alienated if consent is obtained by the traditional chief from those whose interest may be affected by such allocation. In the Siwale case, the core contention was exactly the same contention as in the case before us. In this case before us, the core question is whether or not the procedure adopted by the current chief in allocating to the appellant company without consulting the 3<sup>rd</sup> and 4<sup>th</sup> Respondents was a proper procedure. Our view is that the*

***procedure adopted by the current chief was wrong and as such the allocation of the land to the appellant is null and void.”***

8.18 It was argued that in the present case, the Petitioners were never consulted before the alteration or allocation of the disputed land to the 1<sup>st</sup> Respondent. That neither the traditional chief, the local authorities, nor indeed the Respondent obtained the Petitioners consent before the alteration or allocation of the disputed land to the 1<sup>st</sup> Respondent as reflected under paragraph 69 of the Petitioners affidavit in support of Petition.

8.19 It was submitted that the overwhelming evidence on record establishes that the Petitioners were occupying and using the disputed land at the time of the allocation to the 1<sup>st</sup> Respondent or conversion of the land to leasehold. That the evidence of PW2, PW4 and PW5 point to that fact.

8.20 It was suggested that there was a clear dereliction of duties on the part of the 3<sup>rd</sup> , 4<sup>th</sup> and 5<sup>th</sup> Respondents by not consulting the several parties with interest in the land. It was submitted that the failure by the Republican President, Serenje District Council and the traditional Chief to consult and obtain consent from the Petitioners before the alteration or allocation of the land renders the allocation null and void and that the

certificate of title No. 226256 relating to Farm No. 10906 Central Province registered in favour of the 1<sup>st</sup> Respondent should be cancelled.

8.21 It was argued further that on the strength of **section 7 of the Lands Act** and **article 16 of the Constitution**, that the Petitioners customary land is recognized and guaranteed to continue.

8.22 Further arguments advanced was that the uncompensated taking over of the Petitioners' customary land without notice and consent amounted to an unlawful compulsory acquisition hence contrary to **article 16 of the Constitution** and to **sections 3,4,6,7 and 25 of the Lands Acquisition of titles Act**.

8.23 It was argued that by virtue of the 5<sup>th</sup> Defendant issuing a certificate of title over the disputed land, the State arbitrarily took away the Petitioners' rights over the customary land. It was argued that this amounted to an unlawful compulsory acquisition. The case of **Patel vs Attorney General**<sup>6</sup> a High Court decision was cited in aid in which Magnus J stated as follows:

***“although we have not yet reached the stage of where any property of the appellant has been compulsorily acquired, I am satisfied on***

*the evidence that property belongs to the appellant has been taken possession of and that this was done without his consent. It is therefore taken possession of compulsorily”.*

8.24 It was argued that the 2<sup>nd</sup> and 6<sup>th</sup> Respondents have taken over possession of the disputed land which belongs to the Petitioners and in constant clashes with them in their quest to evict the Petitioners from the land. That the evidence therefore supports the invitation to the Court to find the land was compulsorily acquired and should be reverted to the Petitioners.

8.25 That to be legitimate, compulsorily acquisition must follow the conditions presented in **section 3 and 5 of the Lands Acquisition of titles Act Cap 189 of the Laws of Zambia** that that provide:

*“(3) Subject to the provisions of this Act, the President, whenever he is of the opinion that it is desirable or expedient in the interest of the Republic so to so, compulsorily acquire any property of any description”.*

8.26 In addition, section 5 of the Lands Acquisition Act provides that:

**“5(1)** *if the President resolves that it is desirable or expedient in the interest of the Republic to acquire any property, the Minister shall give notice in the prescribed form to the persons interested in such*

*property and to the persons entitled to transfer the same or to such of them as shall be after reasonable inquiry be known to him.*

(2) *every such notice shall in addition, invite any person claiming to be interested in such property to submit such claim to the Minister within four weeks of the publication of the Gazette notice in terms of section seven”.*

8.27 It was submitted that the State cannot compulsorily acquire without giving notice of its intention to do so and of further notice to yield up possession. Further that **section 7(1) of the Lands Acquisition Act** expressed in mandatory terms states that before publication in the Gazette, the notice must be served either personally on the interested person or left at his usual place of residence or business or with the occupier of the residence in his absence. Further, that adequate compensation must be paid for the property.

8.28 Further, that the case of **William David Cerlisle Wise Vs Attorney General**<sup>7</sup> speaks to legitimize acquisition being based on public interest which was not the case in the present matter.

8.29 It was submitted that none of the requirements were satisfied in the present case. Further arguments advanced in support of the Petitioner’s claim that their rights had been violated as

well as other consequential infringement were made on pages 90-97 of the submissions that I shall not repeat here but to be the subject of consideration in my analysis segment of the judgment.

8.30 Other arguments advanced was the Petitioner's call challenging sections 33,34 and 35 of Lands and Deeds Registry Act as being unconstitutional and what they argued to have been fraudulent allocation of the land on pages 97 through to 113 of their submissions. The Petitioners prayed for the grant of their sought reliefs accordingly.

8.31 *The 1<sup>st</sup> Respondent's submissions*

8.32 The submissions were filed on 14<sup>th</sup> October 2021. It was argued that the question before Court remains whether or not the 1<sup>st</sup> Respondent was rightfully assigned the land in dispute and involved in actions of fraud with the 3<sup>rd</sup> and 5<sup>th</sup> Respondents.

8.33 Reliance was placed on the learned authors of **Phipson on Evidence, 17<sup>th</sup> Edition (Thomson Reuters) (legal) Limited 2010** who at paragraph 6.06 at page 151 state:

*"So far as the persuasive burden is concerned, the burden of proof lies upon the party which substantially asserts the affirmative of the issues. If when all the evidence is adduced by the parties, the party who has this burden has not discharged it, the decision must*

*be against him. It is an ancient rule founded on considerations of good sense and should not be departed from without strong reasons”.*

8.34 That the authors go further to state at paragraph 606 at P151 that:

*“This rule is adopted principally because it is just that he who invokes the aid of the law should be first to prove his case; and partly because, in the nature of things, a negative is more difficult to establish than an affirmative. The burden of proof is fixed at the beginning of the trial by the state of the pleadings, and it is settled as a question of law, remaining unchanged throughout the trial exactly where the pleading place it, and never shifting in deciding which party asserts the affirmative, regard must be had to be substance of the issue and not merely to its grammatical form; the latter the pleader can frequently vary at will”.*

8.35 Also relied upon for the proposition of a Claimant bearing the burden of proof were the cases of **Wilson Masauso Zulu Vs Avondale Housing Project**<sup>8</sup> and **Kahlid Muhammed Vs the Attorney General**<sup>9</sup>.

8.36 The Respondents went on to set out the evidence adduced by the witnesses in its quest to show that procedure was in fact followed and that there was no fraud, misrepresentation or mistake in the allocation and conversion of the land in the 1<sup>st</sup> Respondent’s favour.

8.37 The Respondent also relied on the provisions of section 3(4) of the Lands Act and the earlier cited decisions of Siwale and Others Vs Siwale, Still Waters Firm Limited Vs Mpongwe District Council and others and Silas Ngowani & Others Vs Flamingo Farm Limited (supra) and submitted that the 1<sup>st</sup> Respondent did in fact abide by the mandatory procedures applying to the alteration of the land in dispute. That he obtained consent and approval from Senior Chief Muchinda and subsequently of the 3<sup>rd</sup> Respondent being the concerned Local Authority.

8.38 Relying on the decision in Siwale and Others Vs the People (Supra), it was argued that a Chief cannot obtain consent from those who do not have an interest in the land. It was argued in casu, that the Chief did not need to obtain consent from settlers who at the time had not accrued any interest in the land in dispute as they were not in possession of individual permits permitting them to be on the land.

8.39 That in the case of PW5 the Chief could not obtain consent from her as at the time of granting approval to the 1<sup>st</sup> Respondent she had migrated to her husband's village in Nasowa. That RW2 and RW3 confirmed in cross examination that the settlers had no permits. Also relied upon was Exhibit **"AL94"**, and RW3's testimony on the findings of the

reconnaissance survey and the failure by all by all the 31 Petitioners to exhibit their respective individual permits in support of their interest in the land in dispute.

8.40 That PW1's testimony relative to the individual permit or consent of the Chief as per Lala customary tenure, did not include voters cards, particular party cards or NRC as being part of the documents that go to accruing an interest in any land under the Muchinda Chiefdom.

8.41 As regards the issue of the Petitioners customary land holding rights being recognized and guaranteed by the Lands Act and Republican Constitution, the Respondent acknowledges the application of the law recognizing customary tenure and prohibiting compulsory acquisition of land without compensation . It was argued that this can only be claimed by a person who is in conformity with lawful authority to occupy and or confirmed occupation of the land.

8.42 In casu, that none of the 31 Petitioners adduced any evidence in the form of individual permits granted by the Chief to demonstrate that they were lawfully allowed to occupy the land in dispute as per section 9 of the Lands Act. Reliance was placed on section 33 of the Lands and Deeds Registry Act that provides that:

*“A certificate of title shall be conclusive as from the date of its issue and upon and after the issue thereof, notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the President or otherwise, which but for part 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 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”.*

*Silas Ngowani* (supra) was cited for the proposition that where fraud is pleaded it must be specifically alleged in the pleadings and proved at trial”.

8.43 It was submitted that no evidence was submitted before the Court by the Petitioners to prove that the 1<sup>st</sup> Respondent misrepresented the truth when applying for land from the Chief. The Petitioners’ witnesses in PW1, PW2, PW3 and PW4 did actually confirm that the 1<sup>st</sup> Respondent was lawfully occupying the land in dispute. Therefore that the allegation of fraud hinging on misrepresentation of truth cannot stand. The 1<sup>st</sup> Respondent prayed that the reliefs sought in paragraph 1,2,9, 11 and 12 of the Petition be dismissed with costs.

8.44 2<sup>nd</sup> to 6<sup>th</sup> Respondent's submissions

8.45 The rest of the Respondents did not file in any submissions by date of preparation of the Judgment.

## **9.0 Court's consideration**

### **A. Jurisdictional question**

9.1 I have carefully considered the evidence before me and the filed submissions on record. This case hinges on a claim by the Petitioners of a breach of their rights pursuant to articles 8,12,13,15,16,17,21,22,23,256 and 266 of the Republican Constitution. Articles 13,15,16,17,21,22 and 23 fall under the Bill of Rights in part 3 of the Constitution making provision for:

- ✓ Protection to right of personal liberty
- ✓ Protection from inhuman treatment
- ✓ Protection from deprivation of property
- ✓ Protection for privacy of home and other property
- ✓ Protection of freedom of assembly and association
- ✓ Protection of freedom of movement
- ✓ Protection from discrimination on the grounds of race etc respectively.

9.2 The Petitioners also seek to have declared as unconstitutional sections 33,34 and 35 of the Lands and Deeds Registry Act

and further that the said sections are incompatible with section 7 of the Lands Act and therefore invalid.

9.3 Notwithstanding the jurisdiction conferred on the now established Constitutional Court to hear and determine questions relating to interpretation and construction of the Constitution in article 128(1) of the Constitution of Zambia, The High Court retains the exclusive jurisdiction under article 28 to consider any claims of breaches under the Bill of Rights. The article provides:

***28(1) subject to clause (5), if any person alleges that any of the provisions of articles 11 to 26 inclusive has been, is being or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court which shall:***

- (a) Hear and determine such application.***
- (b) Determine any question arising in the case of any person which is referred to it in pursuance of clause (2); and which may, make such order, issue such rights and give directions as it may consider appropriate for the purpose of enforcing, or serving the enforcement of, any of the provisions of articles 11 and 26 inclusive.”***

9.4 Quite clearly therefore as the cited articles fall under the Bill of Rights, this matter is, so far as it relates to the claims of breaches of fundamental rights and includes a prayer to cancel a certificate of title, competently before this Court.

9.5 However, the inclusion of reliefs challenging the Constitutionality of provisions of the Lands and Deeds Registry Act settled in paragraphs 5 and 6 of the Petitioner's prayers is under the jurisdiction of the Constitutional Court.

9.6 For ease of reference article 128 (1) and (3) of the Constitution provides inter-alia that:

***“128(1) subject to article 28, the Constitutional Court has original and final jurisdiction to hear***

***(a) matters relating to the interpretation of this Constitution,***

***(b) a matter relating to a violation or contravention of this Constitution;***

***....***

***(3) Subject to article 28, a person who alleges that:***

***(a) An act of Parliament or Statutory Instrument;***

***(b) An action measure or decision taken under law; or***

***(c) An act, omission, measure or decision by a person or an authority;***

***Contravenes this Constitution may petition the Constitutional Court for redress:*** (emphasis added)

9.7 To the extent that is not suggested the sections the Petitioner's take issue with infringe or violates the cited rights falling under part 3 of the Constitution, the prayers referred to above should be pursued by Petition in the Constitutional Court and will thus not be the subject of consideration in the Petition before this court for want of jurisdiction.

B. **Issues for consideration**

- 9.8 That said, what are the issues for determination as I see it? The Petitioners' case is anchored on their claim that they are the rightful occupants of a portion of the land in dispute that they have held under customary tenure. They further contend that the 1<sup>st</sup> Respondent's acquisition of the land and subject claimed conversion from customary tenure to State land was illegal, marred by misrepresentation and fraud.
- 9.9 They contend that procedure for the conversion was not followed and point to several flaws that extend to the lack of the Chief's consent; absence of council resolutions and minutes supporting a conversion; absence of a settlement pattern, discrepancies between what was applied for, when it was applied for and the hectarage ultimately granted. Importantly, the Petitioners also point out that they as legitimate occupants and owners of the property were neither consulted nor did they consent to the alienation of their land.
- 9.10 They contend that the State's involvement in alienating the land to the 1<sup>st</sup> Respondent and eventually to the 2<sup>nd</sup> and 6<sup>th</sup> Respondents amounted to compulsory acquisition of their property without compensation. The manner of their engagement by the 2<sup>nd</sup> Respondent with the aid of State police to redefine the boundaries and subsequent uncompromising threat of eviction was a breach of the several rights claimed.

The Petitioner's ultimate prayer therefore was for the cancellation of the title deeds issued and declaration that they are duly entitled to be on the land, for damages and costs.

- 9.11 The Respondents' positions were to a large extent all aligned. The 1<sup>st</sup> Respondent contends he followed procedure to the letter in the acquisition of the land. He engaged Serenje District Council for land and through it was introduced to the Chief who allocated him the additional land he was seeking. He obtained the requisite consent of the Chief, had Council officials and others from the Department of Agriculture conduct an inspection of the land and engaged the only 5 families that were on the property who agreed to be relocated.
- 9.12 He proceeded to obtain the Council's recommendation and minutes which he submitted to the Commissioner of Lands who upon being satisfied all was well issued him with a letter of offer and subsequently title deeds. He later sold the property to the Badcocks being the 2<sup>nd</sup> and 6<sup>th</sup> Respondent.
- 9.13 The 2<sup>nd</sup> Respondent gave evidence of how he and his father the 6<sup>th</sup> Respondent engaged the 1<sup>st</sup> Respondent Mr Chibale for the possible sale of his land to them. They conducted their due diligence through their lawyers at the requisite registries and upon being satisfied the land was free of encumbrances duly

proceeded to acquire the land as bonafide purchasers for value without any notice of defect in title.

9.14 Serenje District Council and The Commissioner of Lands support the position given by the 1<sup>st</sup> Respondent that procedure was followed in the acquisition of the land. Controversy during the trial turned on what the Petitioner's advocates asserted was a shift of position from the pleadings by the Attorney General and Commissioner of Lands (4<sup>th</sup> and 5<sup>th</sup> Respondent's) that appeared to suggest that the property in issue was always in any event, State land and not under customary tenure.

9.15 The questions for my determination as I see it, simply comes down to this-have the Petitioners being the parties asserting the claims established on the evidence that there was a failure in procedure, misrepresentation and fraud that resulted in an illegal alienation of the land and further amounted to the breaches of the fundamental Constitutional rights claimed in this case?.

9.16 The issue of whether or not the land was initially customary land being converted to leasehold or always was State land is not insignificant and will also be explored mindful of the sentiments expressed by the Petitioners on the need for parties on authority of the Anderson Kambela Mazoka case (supra)

among a plethora of others, to stick to and to be bound by their pleadings.

9.17 The next segment of any judgment explores these questions

C. **Have the Petitioners discharged their burden of proof?**

Khalid Muhammed vs Attorney General and Masauso vs Avondale Housing Complex (supra) are the go-to cases that set out what the burden and standard of proof are in civil matters and the passages settled therein often reproduced as a matter of anthem in this jurisdiction.

9.18 In Khalid Muhammed vs Attorney General, (supra) Justice Ngulube CJ as he was then, summed up the settled principle of the law in the following terms:

***“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 inanity or for some reason or other, judgment should nevertheless be given to him on the ground that defence set up by the opponent has also collapsed. Quite clearly a defendant in such circumstances would not even need defence.”***

9.19 In Zulu vs Avondale Housing Project (supra) Ngulube DCJ stated the following:

*“I think it is acceptable that where a Plaintiff alleges that he has been wrongfully or unfairly dismissed as indeed in any other case where he makes any allegations, it is generally for him to prove these allegations. a Plaintiff who has failed to prove his case cannot be entitled to judgment whatever may be said of the opponent’s case.”*

9.20 As stated earlier, the Petitioners case as led by its witnesses rests on their contention that they were the rightful occupants and owners on what was customary land. They refer to the Lala custom in the area that sees a man marrying a woman leaving his home and following his wife. That this would explain the presence of some of the Petitioners in the area that the land is located.

9.21 They present maps suggesting the existence before the alienation of the land of Salande Sula village and a number of voters cards indicating Bwande village as the holders residential address. In essence they seek to establish through this evidence that this was and remains their permanent address. Importantly, that they had occupancy long before the 1<sup>st</sup> Respondent came into the picture and acquired the Land.

9.22 PW1 Steven Laba the person that was acting Chief following the death of Chief Muchinda and alleged author of document (exhibited **“DS2a”** in the 3<sup>rd</sup> Respondent’s affidavit in opposition and **“DC3”** in the 1<sup>st</sup> Respondent’s affidavit in

opposition) bearing the Chief's date stamp and signalling the Chief's consent for the conversion of land in Mr Chibale's favour, disputes having signed the document. He asserts that although the date stamp was always in his possession, it was picked up by a group he named Insaka Yelala Association who by implication are the ones that placed the stamp.

9.23 The Petitioner's point to irregularity in the conversion process and specifically stress among other things, the absence of a settlement pattern requested for by the Commissioner of Lands; the fact that the application for conversion was not before the Court; that the extracts of the council minutes of the Plans Working Committee do not show that the Committee approved the conversion from customary to State land.

9.24 The cross-examination by the Petitioners was also able to establish the fact that the 1<sup>st</sup> Respondent's application was in 1999 whereas the Town Planner said consideration of his application was in 1995.

9.25 All of the Petitioners insisted that they were never consulted nor did they consent to have their land given away. They portray the Council officials and Ministry of Lands officers that dealt with the matter to have been unreliable witnesses characterised by inaccuracy in testimonies presented

specifically on the procedure adopted and presence of persons during the inspections.

9.26 However, after a thorough review of the evidence I am quite prepared to conclude that I find no evidence to suggest there was a fraud, misrepresentation or motive by the officials that were involved in this matter to generate false or misleading reports on the status of the land in issue in favour of the 1st Respondent.

9.27 I had the opportunity to closely observe the demeanour of all the witness in this matter as they gave their testimonies. I found in RW1, a person that was truthful in his assertion that he followed procedure to the letter in acquiring the land. He explained that he made an initial application in 1995 that he followed through with the 1999 one. I accepted the evidence of the Ministry of Agriculture official RW5 about the inspection that he took part in in 2003 and what he found on the ground culminating into the report he produced at **"AL 98"**. This was materially similar to the earlier inspection conducted by the Council in 2001 as per subsequent report produced **"AL 94"** that the Council witness RW3 gave evidence on. I accepted the credible evidence of the Ministry of Lands official RW4 on the role of the Commissioner of Lands and how the matter was dealt with.

9.28 PW1 rather conveniently for the Petitioner's position, stated he could not read English and in essence disowned a damning document that shows that he not only approved the Land earlier assigned by the late Chief Muchinda but also placed the Chief's stamp on the document in his capacity as acting Chief. I do not accept his evidence about the named grouping getting the stamp from him. How would anybody manage to do this under his watch as an acting Chief?. In what circumstances was he "forced" to release the stamp? These are the eyebrow raising unanswered questions arising. I find as more probable that he is the one with full knowledge of the assignment of the land by his predecessor the late Chief Muchinda that signed and stamped the letter.

9.30 No debate arises on what the effect of failure to obtain the consent of subjects occupying traditional land is by the Chief. The cases cited by the parties of Siwale and Others Vs Siwale, Still Waters Firm Limited Vs Mpongwe District Council and others and Silas Ngowani & Others Vs Flamingo Farm Limited (supra) make this abundantly clear. Any alienation of land by a Chief in the absence of such consultation and consent is null and void.

8.30 Customary tenure is given statutory recognition and protection in section 7(1) of the Lands Act which provides.

***(1) Notwithstanding sub section (2) of section thirty-two but subject to section nine, every piece of land in a customary area which immediately before the commencement of this Act was vested in or held by any person under customary tenure shall continue to be so held and recognized and any provision of this Act or any other law shall not be so construed as to infringe any customary right enjoyed by that person before the commencement of this Act.”***

8.31 However in the present case notwithstanding the voters cards produced and appeal to Lala custom seemingly justifying the claim of presence on the property by some of the Petitioners, I find that this does not suggest they were actually on the land. The reports and credible testimonies on record as confirmed by RW1, RW3 and RW5 states that there were only 5 families that were on the land at the time of inspection that expressed a willingness to be relocated. It was on the basis of the reports and the Commissioner of Lands being satisfied that there were no settlers that would be inconvenienced by the application being approved that the offer to Mr Chibale, the 1<sup>st</sup> Respondent, was made.

9.31 RW5 the officer from the Department of Agriculture that was a part of the 2003 inspection and demarcation of the land testified that the Asa Lato family was shown the portion of their land after the lines were drawn being the only ones that raised

issue and they stated that they were content and quite happy with what had been done. He also told the court that the land was further reduced in size to take into account settlers, and the grave where royalty were buried as confirmed by exhibit **“AL96”** and there were no issues as all the locals accepted the land belonged to the 1<sup>st</sup> Respondent.

9.32 He concluded that trouble only started when they locals realised that ownership was changing hands to the Badcocks. During the scene visit of the land in dispute by the Court, he testified that there were new structures and settlements on the land that were not there at the time when the inspection was done. I accept his evidence as the truth of what he observed. None of the Petitioners presented any evidence of their possessions of permits from the Chief allowing their stay on their claimed portions of the land.

9.32 I conclude that there was a feeling of entitlement to the land by the Petitioners who took advantage when they learnt that the 1<sup>st</sup> Respondent had sold the land to make a claim that they had been repossessed of it without consultation or compensation.

9.33 I am satisfied that there were only 5 families on the farm at inspection by the Council in 2001 and later by the Department of Agriculture in 2003 and the locals have since progressively

invaded the farm to occupy portions of what is rightfully private property. I am satisfied that the detail in the Council report was given by the settlers themselves that were found at the farm. For instance PW5 confirmed that her husband was from the village named in the report which is where she told the team she would moving to at inspection.

9.34 I am satisfied that procedure for conversion of what was believed to be customary land was followed. It is important to point out that what came out in cross-examination of RW4 Mr Wanki by the other Respondent's lawyers though objected to when he was led in chief, was evidence to the effect that most of the farm in issue is in Nansanga farm block which is essentially State land. No inhibition arises to consider evidence that comes out in cross-examination as long as it is relevant.

9.35 It is also apparent and worthy of mention that documents contained in the affidavits in support of the Petition tend to support the suggestion that the land was in fact State land in spite of the approach for land made to the Chief. These include **"AL84", "AL85", "AL86" "AL88", "AL89" "AL96", "AL97," "AL115"** to mention but a few. It becomes literally impractical for the court to disregard and not consider the evidence that has been laid before it in the circumstances of this case. Quite clearly, the Petitioners would have a tall order to establish a

claimable interest to what portion of the land is technically State land which perhaps logically explains their discomfort with this evidence.

9.34 The policy of the Government of the day at the time was not to dislodge settlers found to be in farm blocks being set up as communicated in the minute from the Minister to Chiefs Muchinda and Serenje at **“AL115.”** There is no evidence of such displacement in this case. To the contrary, the evidence suggests the originally allocated 2885 hectares granted to the 1<sup>st</sup> Respondent was subjected to significant reduction and realignment initially on account of the Chief’s instruction who withdrew his earlier offer from the original 2885 to only 1000 hectares, and the subsequent cutting that took into account settlements and the burial sites for the royal Highnesses and settlers on the farm as confirmed by exhibit **“AL 96”** in the affidavit in support of the Petition that would be in line with such policy.

9.34 This case also turns on the rights of a third party in the Badcocks who assert that they acquired the property as bona fide purchases for value without notice of defect in title. RW2, testified that he and his father are South African Nationals that came into the country and carrying on business in Zambia.

9.35 After learning about the opportunity to acquire land that the 1st Respondent was selling they conducted their due diligence through their lawyers, found no encumbrances and proceeded to purchase the land. RW2 gave evidence about the Badcocks intention to settle the persons who subsequently moved to their land to a village they were to create within the farm and try to resolve the impasse amicably. However, that this has been met with resistance.

9.36 I consider the representation made by the 2<sup>nd</sup> Respondent to be a show of their sincerity in their intentions and dealings as investors whose interests must not be disregarded and should be subject to equal protection of the law regardless of status. I am mindful of the Supreme Court decision in **Janathan Van Blerk vs Attorney general & others**<sup>10</sup> on the position of a Bonafide purchaser where a fraud or illegality is unearthed. The Supreme Court observed inter alia:

*“We must say at once however, that where a transaction is mired in provable vitiating factors the consideration paid by a party matters not and it does not make a transaction irreversible. We say so because we held in the cases of Trevor Limpic v Rachel Mawere and Others and Hildah Ngosi suing as Administrator of the Estate of Washington Ngosi) vs Attorney General and Lutheran Mission(Zambia) Registered Trustees that it is irrelevant that a third party has spent considerable sums of money on a property which*

***does not belong to it. One can no longer argue that possession in 9 tenths of the law and hope to maintain ownership on the basis of possession if that property was not properly acquired”***

9.37 The claims to being bonafide purchasers, any expenses incurred and the fact of possession of the property would therefore amount to nothing if impropriety in the manner of acquisition is established. However, as I have been unable to make any finding of illegality, or impropriety in the manner of acquisition of the property by the 1<sup>st</sup> Respondent or of the subsequent sale to the 2<sup>nd</sup> and 6<sup>th</sup> Respondents, it follows that all the claims of Constitutional breaches of entrenched rights anchored on the claimed illegality cannot be sustained on account of want of evidence.

9.38 I find nothing illegal about the manner the 1<sup>st</sup> Respondent acquired and disposed of the property to the 2<sup>nd</sup> and 6<sup>th</sup> Respondents. There is further certainly no basis to support the claim that the land was compulsorily acquired without compensation based on the evidence before as assessed above as well. I would accordingly dismiss the Petition in toto and make the following declarations:

1. The 2<sup>nd</sup> and 6<sup>th</sup> Respondents are bonafide purchasers for value and rightful owners of farm No. 10906 Nansanga Farm block Serenje.
2. All the Petitioners that have stretched their occupancy on to the said farm are squatters and are ordered to grant vacant possession of the farm to the 2<sup>nd</sup> and 6<sup>th</sup> Respondents and retreat to their designated boundaries within 90 days from the date of this Judgment.
3. The office of the Surveyor General and Department of Agriculture Serenje District to be engaged at shared expense of the parties to establish the earlier boundaries drawn and taking into account the existing title deed.
4. As this matter hinges on a claim of a breach of Constitutional rights, I order that each party will bear their own costs for this petition.
5. Leave to appeal is granted.

Dated at Lusaka this ..... 3<sup>rd</sup> ..... day of February ..... 2026



.....  
**JUDGE M.D.BOWA**