

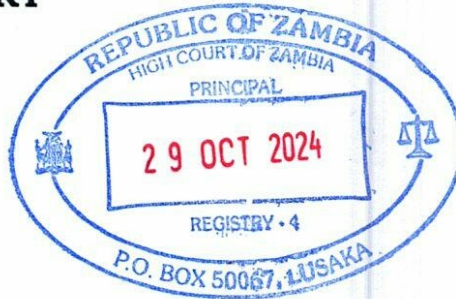
IN THE HIGH COURT FOR ZAMBIA

2023/HP/0908

THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(CIVIL JURISDICTION)



BETWEEN:

MOSES SAKALA

PLAINTIFF

AND

JOYCE SINYIZA

1ST DEFENDANT

MAUREEN CHIBWE

2ND DEFENDANT

BEFORE THE HONOURABLE MR. JUSTICE I. M. MABBOLOBOLO IN CHAMBERS ON THE 29TH DAY OF OCTOBER, 2024.

For the Plaintiff: *Mr. B. C. Mutale and Mrs G.S. Ngoma – Messrs B C M Legal Practitioners.*

For the Defendant: *Mr. M. Silungwe – Friday Besa and Associates.*

JUDGMENT

A. CASES REFERRED TO:

1. *Ackim Namungandu v Lusaka City Council (1978) ZR 358*
2. *Anti-Corruption Commission v Bennet Corporation Limited (2008) ZR 68*
3. *Edith Nawakwi v The Lusaka City Council, SCZ Appeal No. 26 of 2001*
4. *Galaunia Farms Limited v National Milling Company Limited and Another (2004) ZR 1*
5. *Justin Chansa v Lusaka City Council (2007) ZR 256.*
6. *Khalid Mohammed v The Attorney General (1982) ZR 49*
7. *Kapembwa Sinkala v Mwenya Makasa, Appeal No. 147 of 2011*
8. *Mpongwe Development Corporation Limited v Francis Kamanda and 51 others Appeal No. 137 of 2007*
9. *Nkongolo Farms Limited v Zambia National Commercial Bank Limited Kent Choice Limited (In Receivership) Charles Huruperi (2007) ZR 149*
10. *Sablehand Zambia Limited v Zambia Revenue Authority (2005) ZR*
11. *Sithole v State Lotteries Board (1975) ZR 106*
12. *Wilson Masauso Zulu v Avondale Housing Project Limited (1982) ZR 172*
13. *Willmott v Barber (1880) 15 Ch. 96*

14. *Charles Kajimanga v Marmetus Chilenya* (2016) ZR 189
15. *Gondwe v Ngwira – Appeal No. 37/2015*
16. *BJ Poultry Farm Limited v Nutrifeds Zambia Limited Appeal No. 166 of 2015* (2016) ZMSC 43

LEGISLATION REFERRED TO:

17. *Land and Deeds Registry Act, Chapter 185 of the Laws of Zambia.*
18. *The Local Government (Establishment of Councils) Order, 127 Statutory Instrument No. 14 of 2017*
19. *The Urban and Regional Planning Act (General) Regulations, 2020 Statutory Instrument No. 56 of 2020*
20. *The Urban and Regional Planning Act No. 3 of 2020*

OTHER WORKS REFERRED TO:

21. *Beale, H. G. and Chitty, J. (2009) chitty on contracts: vol 1: specific contracts 29th Edition London: Sweet and Maxwell*
22. *Black's Law Dictionary*
23. *Bullen and Leake and Jacobs, precedent of Pleadings 13th Edition at page 427*
24. *Burn, E. H (1986) Cheshire's Modern Law of Real Property 9th Edition London; Butterworths Publishers Limited*
25. *Fredrick Mudenda (2004) Land law in Zambia: Cases and Material, Lusaka: UNZA press*
26. *Phipson on Evidence 17th Edition*

1.0 INTRODUCTION AND BACKGROUND

- 1.1. This is a Judgment on the Plaintiff's action recommenced by way of Writ of Summons and Statement of Claim on 29th August, 2023.
- 1.2. The matter was initially commenced by way of Originating Summons for possession of Land, the same was filed into Court on 29th May, 2023.

- 1.3. When the matter came up for hearing of an Application to Stay Execution of Ruling dated 13th July, 2023, pending determination of the composite Application for an Order to Set Aside Ruling dated 13th July, 2023 and also for an Order for Joinder as Intervener, the Court came to the conclusion that the matter could not be concluded by an Application for Summary Possession and Ordered Parties to file into Court Pleadings and accordingly gave Orders for Directions.
- 1.4. Following the foregoing, the Plaintiff caused to be filed into Court a Writ of Summons and Statement of Claim on 29th August, 2023.
- 1.5. In the Statement of Claim, the Plaintiff stated that he is the beneficial owner and holder of a Certificate of Title for property known as CHONG/LN-79503/4(the property) situate in Chongwe District.
- 1.6. It is averred by the Plaintiff that he made an application to the Chongwe Municipal Council and he was allocated the property in question.
- 1.7. The Plaintiff made an averment that he followed all necessary procedure to be allocated the piece of land. Further, that after following all the necessary procedures, a Certificate of Title was issued to him on or about 18th June, 2021 in his name under Certificate of Title No. 102630.

- 1.8. It was further averred that unknown to the Plaintiff, the Defendants and their agents entered his property and proceeded to erect a two roomed structure without any lawful cause or obtaining any consent to do so from him.
- 1.9. The Plaintiff stated that following the Defendants' entry onto the property, he made several enquiries as to the status or legality of the Defendants' basis of occupation of his property from Chongwe Municipal Council and discovered that there were no records of the Defendants having applied for said property.
- 1.10. The Plaintiff as a result of the Defendants' actions brought the matter before Court and is seeking the following reliefs:
- 1.10.1. A declaration that the Plaintiff is the legal and beneficial owner of Stand No. CHONG/LN-79503/4 situate at Chongwe;*
 - 1.10.2. An Order directing the Defendants to vacate the property known as CHONG/LN-79503/4 Chongwe;*
 - 1.10.3. Damages for trespass;*
 - 1.10.4. Any other reliefs that the Court may deem fit;*
 - 1.10.5. Costs of and incidental to these proceedings.*
- 1.11. The Defendants opposed the Plaintiff's action through the Defence and Counterclaim. In the Defence, the Defendants denied the Plaintiff's claim and averred that the Plaintiff did not follow all necessary procedure when obtaining the Certificate of Title for the property and stated that the

Council Resolution that the Plaintiff refers to was obtained illegally or by way of fraud.

1.12. It was averred that the Plaintiff made a false representation to the Ministry of Lands to enable him obtain the offer letter.

1.13. The 2nd Defendant denies having entered upon the land in question after the plaintiff had obtained a Certificate of Title as alleged by the Plaintiff.

1.14. The 2nd Defendant contended that she did make an application to the Chongwe Municipal Council together with other members of the community around the land in question for the land to be offered to them.

1.15. The 2nd Defendant further averred that she has a legitimate claim over the land in issue and that having been first in occupation of the property, it ought to have been offered to her first by the Council.

1.16. In the Counterclaim, the Defence claim that the 2nd Defendant together with members of the community called "Tigwirizane Settlers Community" engaged the relevant authorities to legitimize their stay in the area and wrote to the Council after being on the land since 2013.

1.17. The Defendants averred that all necessary procedures were followed to legitimize their stay on the property and after that, some members of the community have been able to

obtain Certificate of Title, however despite the Council resolving that the land be given to the 2nd Defendant, she was shocked to find out that the land had been offered to the Plaintiff herein who was issued with a Certificate of Title.

1.18. The 2nd Defendant contended that she discovered that the Plaintiff was working with the then Councillor for the Airport area in Chongwe District and had used fraudulent means to obtain a Certificate of Title from the Ministry of Lands. That on several occasions the Plaintiff made illegal attempts to evict her from the property thereby causing damage to the developments she has made on the said land.

1.19. The 2nd Defendant Counterclaimed the following;

1.19.1. *An Order cancelling the Certificate of Title issued in respect to Stand No. CHONG/LN-79503/4 issued to the Plaintiff;*

1.19.2. *A declaration that the 2nd Defendant is legitimately in occupation of stand No. CHONG/LN-79503/4;*

1.19.3. *An Order that Stand No. CHONG/LN-79503/4 be offered to the 2nd Defendant by the Ministry of Lands, and that a Certificate of Title be subsequently issued to the 2nd Defendant in respect of the said land.*

1.19.4. *Damages for the vandalism of the 2nd Defendant's property and plants on Stand No. CHONG/LN-79503/4*

1.19.5. *Costs.*

1.20. In Reply the Plaintiff reiterated that he is the beneficial owner of the property having followed all legal procedures and processes in obtaining the Certificate of Title and denies the Defendants' allegation of illegality and fraud.

1.21. In the Defence to Counterclaim, the Plaintiff averred that as far as he is aware no specific recommendation were given to either the 1st or 2nd Defendant by the Council or Offer Letter by the Commissioner of Lands.

1.22. Further, that the Plaintiff has no connection with the Councillor for the Airport area.

1.23. The Plaintiff averred that the Defendants are not entitled to any of the reliefs being sought or at all and that their claims are frivolous and vexatious having no chances of success.

2.0. THE HEARING

2.1. At trial the Plaintiff in addition to his evidence called four (4) witnesses.

2.2. The Plaintiff, Moses Sakala in testifying placed reliance on his Witness Statement filed on 20th February, 2024. He is, aged 43 years, a teacher and resident of House No. 96/17 Kaunda Square Stage 1 Lusaka (hereinafter referred to as **PW1**).

- 2.3. **PW1** stated that he followed all necessary procedures for one to be allocated a piece of land, that is to say, he submitted minutes of the Council and a letter of recommendation to the Ministry of Lands for the Processing of a Certificate of Title for the subject property.
- 2.4. That following all the necessary procedures, the Plaintiff was offered the parcel of land by the Ministry of Lands and that on 18th June, 2021 a Certificate of Title was duly issued to him. Reference was made to pages 12 to 20 of the Plaintiffs Bundle of documents.
- 2.5. The Plaintiff also stated that to the best of his knowledge, the only Certificate of Title that has ever been issued in respect of the subject property, is the one he possesses.
- 2.6. The Plaintiff also stated that the Defendants and their agents entered upon the property in issue and proceeded to erect a two roomed structure without any lawful cause or obtaining consent from him.
- 2.7. The Plaintiff averred that he made several inquiries as to the status or legality of the Defendants' actions from the Council and that there are no records of the Defendants having applied for the said piece of land.

- 2.8. Further, that the Defendants have no legitimate or lawful claim to the said parcel of land and the allegations of illegality and fraud are misplaced and false as the Plaintiff applied for the piece of land in good faith.
- 2.9. Lastly that Tigwirizane Settlers Community is an illegal entity consisting of cadres and as such have no power to alienate land and that the Defendants' continued occupation and development without any consent from the Plaintiff has obstructed him from entering and gaining access to the site to have quiet enjoyment of the land nor to develop the said piece of land.
- 2.10. It was also averred by the Plaintiff that he made further enquires at the Council and discovered that the Defendants did not obtain building permission for the development that they have put up.
- 2.11. During Cross-Examination the Plaintiff when asked about how he knew about the land, testified that he found out about the land in question through his sister and obtained the property by making an application to the Council in 2020 and was responded to in 2021.
- 2.12. Further, during Cross-Examination the Plaintiff alluded to the fact that he made all necessary payments to the Council and Ministry of Lands and built on it to secure it. He also stated when referred to the Plaintiff's Bundle of Document at page 6 that he was one of the Applicants

referred to in the document that was supposed to go through the regularisation process.

2.13. In Re-Examination, the Plaintiff stated that he is the owner of the property and that there is another person who is also claiming that the land is hers.

2.14. The Plaintiff subpoenaed Steven Sakala, aged 39 years, Clerical Officer at Chongwe Municipal Council and resident in Ibex, Flat 8 Chongwe in Chongwe District (hereinafter referred to as **PW2**).

2.15. Testifying on behalf of the Plaintiff, **PW2** gave evidence to the effect that his duties are to keep records and to file documents for properties from individual clients. He also stated that he knew the process for obtaining land and went through the process of how one identifies and comes to own land.

2.16. Speaking in respect of the property in issue, **PW2** stated that according to the information that is available at the Council, the property belongs to the Plaintiff who was recommended for the same.

2.17. When **PW2** was referred to page 1 to 9 of the Plaintiff's Bundle of Documents and asked to explain the discrepancy in dates, he stated that the item was approved in 2018, replanned in 2019 then actualised in 2020.

2.18. When referred to page 11 to 13 and page 15 to 19 and asked to speak to allegations that the documents that bear the date of November, 2018 are forged documents, stated that the documents are not forged, but they are genuine because he had the original of the documents which the Court had an opportunity to look at, being Minutes Number: **PIMSEID/103/11/18**.

2.19. In the aforementioned minutes it was stated that the Council received application letters to regularise the occupation and development of plots in various areas of Chongwe District and that the Council resolved that it should undertake regularisation.

2.20. **PW2** when referred to the Plaintiff's Bundle of Documents at page 9, and asked if according to the records they have any other recommendation for plot No. CHONG/LN-79503/4, the witness answered in the negative.

2.21. During Cross-Examination **PW2** gave evidence of how one can identify land and make payments and come to own the land in question. He was further asked if he sits on any Committee and answered in the negative.

2.22. When the witness was asked if he had come with Council Minutes C/5/11/18 (page 8 of the Plaintiff's Bundle of

Documents) answered in the affirmative and stated that they were not with him on the stand.

2.23. When asked why he did not share the aforementioned minutes, he stated that he thought that the ones he brought were sufficient because they were adopted in the Planning Committee and approved by the full Council.

2.24. The Plaintiff also subpoenaed Christopher Musonda, aged 28 years old, Assistant Lands Surveyor for Chongwe Municipal Council and resident at Plot number: CHONG 409 in Chongwe District (hereinafter referred to as **PW3**).

2.25. In testifying **PW3** stated that his duties included boundary verification, beacon replacements, road marking, site Planning and other geographical systems related work. The witness also stated that his role in regularisation process was to ensure that the properties liable for regularisation are inspected so as to affirm the level of development on ground and also affirm the boundaries according to the submitted site plan.

2.26. **PW3**, testified that Chongwe Municipal Council became a Municipality in 2017 and when referred to the property in issue stated that his role when the property was submitted for regularisation and planning, was to conduct the Inspection. He further, testified that there was no development at that time. When referred to page 6 and 10

of the Defendants Bundle of Documents, the witness was asked if the Council had power to submit plans to which he answered in the negative. He further, stated that the Authority that had power to submit plans to Ministry of Lands at the time was Lusaka Planning Authority and that the Council only obtained this power in 2017.

2.27. During Cross-Examination, **PW3** explained what regularisation means, that is obtaining legal documents for the land that has no government planning permits from the Council. The witness also stated that the property in issue, was inspected together with other properties in 2019.

2.28. The Plaintiff further subpoenaed Ernest Kayando Mukanda, aged 45 years old, a Business Man and resident in Quarantine, Silverest off Great East Road, Chongwe District. (hereinafter referred to as **PW4**).

2.29. **PW4**, in Examination-In-Chief stated that he had no knowledge of the property in issue and also stated that he had no knowledge of the allegations of false representation made by the Defendant.

2.30. When asked if he was Councillor for Tandabale, he answered in the negative. He further stated that he was a Community Teacher and that he used to help people with different issues in the community. He also testified that he

was engaged by a community member called Innocent Chama as a community member to help people to have documents for the area where the Land in issue is located.

2.31. He also stated that following the foregoing, he engaged Eddy Namayala a surveyor, whom he introduced to the community leader who used to be Innocent Chama. He testified that, that was the only role he played.

2.32. There was no Cross-Examination.

2.33. The last witness the Plaintiff subpoenaed was Namayala Eden Muchindu, aged 48 years old, a private Land Surveyor but affiliated to the Ministry of Lands, and resident in Meanwood Mutumbi, House Number: 5427, Mpudu Road, Lusaka (hereinafter referred to as **PW5**).

2.34. **PW5** in testifying stated that he was the person who surveyed and came up with the site Plan and survey diagrams for the area. That he was engaged by the community having been told that the Council wanted to replan the area. He also stated that he was specifically engaged by Ernest Kayando who was spearheading the team.

2.35. When explaining on procedure, **PW5** stated that each member of the community paid something towards the survey work. Each member of the community was charged

Two Thousand Five Hundred Kwacha (K 2,500) and receipts were duly issued.

2.36. The witness also stated that as far as procedure goes, after the approval of the site plan there is numbering of the properties by the Ministry of Lands. He also stated that he was given another task of preparing the survey diagrams and according to him, by law once the survey diagrams have been approved, they become properties of the Ministry of Lands and a person is only allowed to collect them with a recommendation letter from the Council.

2.37. Further, that he only gave out diagrams to those who came with recommendation letters from the Council and for everything else after that, he has no control.

2.38. In Cross-Examination when asked if he engaged the Community personally, **PW5** stated that there was a community member who was responsible for collecting the money and giving it to him. He further stated that they started planning in late 2018 and winding up with the same in 2019.

2.39. This marked the end of the Plaintiff's case.

2.40. The Defendants called two witnesses, the first of whom is the 2nd Defendant in the matter, Maureen Chibwe, aged 48 years old, a Teacher and resident at 110 Ferngrove Zambia Airforce, Airport Road, Lusaka (hereinafter called **DW1**).

2.41. In Examination-In-Chief **DW1** relied on her Witness Statement filed into Court on 30th October, 2023.

2.42. In the aforementioned Witness Statement, **DW1** testified that she has been in occupation of the land in question since 2013 and that she together with other members of the community called “Tigwirizane Settlers Community” around 2016, decided to engage the relevant authorities to legitimize their stay. As a result of the foregoing, they wrote to the Council as shown on page 3 of the Defendants’ Bundle of Documents.

2.43. It was the witness’s testimony that they were advised by the Council to obtain approval from the Zambia Environmental Management Agency (ZEMA) and ZEMA accordingly advised as to the parameters acceptable for occupation within the settlement. Reference was made to pages 4-5 of the Defendants’ Bundle of Documents.

2.44. Following the above stated advice, the Community proceeded to have the settlement surveyed, a site plan was drawn and the same was presented to the Council for approval. Reference was made to page 6-8 of the Defendants Bundle of Documents.

2.45. **DW1**, testified that after the site plan was drawn, Stand No. CHONG/LN-79503/4 was allocated to her as she was

in occupation of the Land in issue. According to the witness, the Council approved their site plan and diagram as shown on page 10 of the Defendants' Bundle of Documents.

2.46. Further, that in 2020 the Council at a full meeting, resolved to regularise their settlement and proceeded to recommend that the land be offered by the Ministry of Lands to the members of Tigwirizane settlement.

2.47. That as a result of the foregoing, some members of the community have since been offered the land and were able to obtain Certificate of Title, however **DW1** was shocked to find that the property had been offered to the Plaintiff herein and he was issued with a Certificate of Title.

2.48. **DW1** in her Witness Statement also stated that she discovered that the Plaintiff had forged a Council resolution to enable him obtain an offer letter for the property in issue from the Ministry of Lands. Reference was made to page 11 to 14 and 15 to 16 of the Defendants' Bundle of Documents.

2.49. When referring the Court to page 17 to 19 of the Defendants' Bundle of Documents, **DW1** testified that the document referred to was not the resolution of the Council as Chongwe Municipal Council only resolved to offer that land in issue in 2020. It was also stated that the said

forged document by the Plaintiff was deliberately vague so as to mislead the Ministry of Lands.

2.50. Further, that she and other members of the Tigwirizane Settlement have been in occupation of the land in dispute since 2013, and for that reason they wrote to the Commissioner of Land to stop the fraudulent activities by persons who were not part of the Tigwirizane settlers. Reference was made to page 20 to 22 of the Defendants' Bundle of Documents.

2.51. Further that **DW1** also wrote to the Commissioner of Lands in her personal capacity complaining about the same fraudulent activities. Reference was made to page 23 to 25 of the Defendants' Bundle of Documents. Additionally, that the Plaintiff has on several occasions made attempts to evict the Defendants from the property in issue.

2.52. During Cross-Examination **DW1** when asked about the allegation that the Plaintiff falsely claimed to have been a member of the community, stated that she had proof that before the community engaged the Surveyor, there were some proceedings which started in 2013. That unfortunately the 1st Surveyor who was engaged died. Further that the first Map had no GPS locations and there was need to find another Surveyor.

- 2.53. **DW1** stated that the people who were spearheading the community contacted Ernest Kayando because he was Patriotic Front Chairperson. Further that, that is how Eddy Namayala was contacted, but he was told to enforce the same diagram which was there and only that he had to include the GPS locations which was required by the Council. That in late 2018 when he did the survey, the community had already fully developed.
- 2.54. When asked if she has any documents for the property in issue to show that the land belongs her, **DW1** answered in the affirmative.
- 2.55. When asked if she was present when **PW2** testified that the Council documents were genuine and as to whether she still stood by her allegation as contained in the Defence and Counterclaim, she stated that she went to the Council and discovered that the name of the Plaintiff was not in the system.
- 2.56. When asked about her allegations of fraud in the Defence and Counterclaim and whether she reported to the police or any agency, she answered in the affirmative.
- 2.57. When asked if anyone has been arrested, she stated that there were investigations going on by the Anti-Corruption Commission (ACC) but they have stopped because the matter is before court.

2.58. When asked if there was any proof that ACC is investigating, **DW1** answered in the negative and when asked if she at any time reported Ernest Kayanda to the police station, the answer was in the negative.

2.59. The last witness the Defence subpoenaed was Stephen Sakala, aged 39 years old, a Clerical Officer Deeds and resident at Flat 8, Ibex, Chongwe (hereinafter referred to as **DW2**).

2.60. **DW2** in his testimony when asked if he knew why he had been called stated that he was called to the Court to show Council Minutes- C/5/11/18 (Min No. C/5/11/18).

2.61. The court was shown:

- i. C/05/11/18 Receipts and Adoption of the Report in standing Committees.
- ii. Finance, Valuation and Commercial undertaking Committee meeting held on 05/11/18
- iii. The planning and Information Management System and Engineering and Infrastructure Committee meetings held on 02/11/18.

2.62. The above document was admitted into evidence by the Defendants as part of their Defence and no further questions were asked.

2.63. This marked the close of the Defendants case.

3. THE PARTIES FINAL SUBMISSIONS

- 3.1. The Plaintiff caused to be filed into Court Final Submissions on 5th July, 2024. In the said submission the Plaintiff relying on the cases of **Khalid Mohummed V Attorney General⁶**, **Wilson Masauso Zulu v Avondale Housing Project Limited¹²** and **Galaunia Farms Limited v National Company Limited and Another⁴** submitted that in a civil matter the Plaintiff has to prove his or her case on a balance of probabilities.
- 3.2. Reference was also made to the learned authors **Phipson on Evidence²⁶** to further buttress the above given position.
- 3.3. It is the belief of the Plaintiff that he is the legal and beneficial owner of the land in issue. It was submitted that the Plaintiff has supported his claim in his pleadings and his documents in the Plaintiff's Bundle of Documents.
- 3.4. Placing reliance on the cases of **Anti-Corruption Commission v Bennett Corporation Limited²** and **Mpongwe Development Corporation v Francis Kamanda and 51 Others⁸**, the Plaintiff submitted that the Certificate of Title issued to the Plaintiff is conclusive evidence that he is the owner of the property.
- 3.5. It was also submitted that the Plaintiff followed the laid down procedure in the acquisition of the property in

contention. Further, that this position was supported and or corroborated by the testimonies of **PW2, PW3** and **PW4**.

- 3.6. The Plaintiff in his submissions averred that **Statutory Instrument No. 14 of 2017¹⁸**, upgraded Chongwe District Council to the status of Chongwe Municipal Council and that since its upgrade acquired Local Planning Authority status.
- 3.7. The Plaintiff contended relying on **Statutory Instrument No.6 of 2020¹⁹** that Chongwe Municipal Council is clothed with Planning Authority and as such it has a Planning Sub-Committee which makes recommendation and reports to the Council.
- 3.8. The Plaintiff made an averment that he obtained the Certificate of Title by following the laid down procedure, reliance was had to the **Urban and Regional Planning Act²⁰** and the case of **Justin Chansa v Lusaka City Council⁵**.
- 3.9. It was submitted that as a result of the foregoing, the Defendants could not have obtained a valid or good Certificate of Title. It is contended that the Defendants do not have any legitimate claim on the said land and that they do not have any documentation either from Chongwe Municipal Council and Ministry of Lands.

3.10. The case of **Ackim Namagandu v Lusaka City Council**¹ was relied on by the Plaintiff to buttress the point that a person who illegally builds on land which he does not own does so at his or her own peril and that a person seeking to assert a right must prove with cogent evidence and not merely speculate as is the case with the Defendants.

3.11. Further, that there was no fraud or any impropriety in the acquisition of the property. It was contended that **PW2's** testimony that the minutes alleged to be forged were genuine and that in the event of an allegation of fraud, the standard of proof is of a higher degree than on a balance of probabilities.

3.12. It was submitted that the standard of proof in fraud is higher but not equated to that of proof beyond reasonable doubt and reliance was placed on the case of **Sithole v State Lotteries Board**¹¹.

3.13. It was argued by the Plaintiff that the Defendants have not adduced sufficient evidence to prove the alleged fraudulent activities that the Plaintiff had engaged himself into to obtain Certificate of Title to the property in issue. The case of **Sablehand Zambia Limited v Zambia Revenue Authority**¹⁰ and **Nkongolo Farms Limited v Zambia National Commercial Bank Limited (In Receivership) Charles Huruperi**⁹ and the learned authors of **Bullen and**

Leake and Jacobs, Precedent of Pleadings²³ was relied on by the Plaintiff.

3.14. The Defendants filed in their final submissions on 23rd July, 2024. Therein, it was submitted that **PW2** was subpoenaed to give evidence on behalf of the Defendants and presented the real minutes, that is Minute No. C/5/11/18 and according to the Defendants an examination of the minutes shows that the true minutes are completely different from the ones produced by the Plaintiff. Further, that the true minutes have nothing to do with CHONG/LN-79503/4 and relate to among other things, Finance, Valuation and Commercial undertaking Committee meetings and Audit Committee meetings. That the forgoing clearly shows that the Plaintiff falsified the documents produced on pages 7 and 8 of the Plaintiff Bundle of Documents. This being a clear case of fraud.

3.15. It was contended by the Defendants that the aforementioned minutes reveal that the person alleged to have moved the Council to adopt the resolution one *Anita Zambara* is not one of the people in attendance at the meeting on the first page of the Council Minutes produced by the Plaintiff.

3.16. It was also submitted by the Defendants that the Plaintiff when asked to run through the procedure for obtaining land, showed lack of knowledge of the most basic steps in procurement of land.

3.17. Further, that the regularisation process was meant for people who were already on the land to legitimize their stay on the Land they already occupy. It is also contended that the Plaintiff admitted not to have occupied the land and heard about the same from his sister.

3.18. The Defendants in their submissions referred this Court to **section 33** and **34** of the **Lands and Deeds Registry Act**¹⁷ and the Case of **Anti-Corruption Commission v Bennett Corporation Limited**², and stated that it was clear that the Certificate of Title can be challenged and cancelled where it is proved that the same was obtained by fraud or through procedural impropriety.

3.19. In relying on the learned Authors of **Black's Law Dictionary**²² in defining Fraud, the Defendants submitted that the Plaintiff forged Council Minutes which he used to obtain the Certificate of Title from the Ministry of Lands. It was also submitted that the original copy of the same Minutes being Minutes No. C/5/11/18 were different from the ones produced by the Plaintiff, showing that the minutes relied on by the Plaintiff were forged and this was proved beyond all reasonable doubt that the Council Minutes used by the Plaintiff were forged.

3.20. It was contended that the minutes relied on by the Plaintiff showed anomalies such as lack of the Municipal Council

emblem, which is symbolic of all official documents from the Council.

3.21. The case of **Kapembwa Sinkala v Mwenya Makasa**⁷ was relied on by the Defendants to contend that where a Certificate of Title was obtained by fraud or tainted by impropriety, the Court cannot be faulted for ordering that the same be cancelled and a fresh one be issued to the person entitled to the land.

3.22. In showing that the 2nd Defendant has interest in the property in issue, the Defendants contended placing reliance on the case of **Justin Chansa v Lusaka City Council**⁵ stated that the 2nd Defendant has been in possession of the Land in question since 2013. Further, that she together with other members of the community met all the conditions imposed by the Council for regularization, the Council proceeded to make a resolution that the regularization exercise be done and made recommendation to the Ministry of Lands to issue the occupants with Offer Letters.

3.23. That however, with regards the 2nd Defendant herein the Council refused to issue the 2nd Defendant with the recommendation for an Offer Letter despite having done the same for the other members and in view of the Plaintiff's fraudulent activities.

3.24. It was submitted by the Defendants that Chongwe Municipal Council should not be allowed to go back on the representations/promises it made to recommend the 2nd Defendant to have the land offered to her. Reliance was placed on **Chitty on Contract**²¹ and the case of **Willmott v Barber**¹³

3.25. It was contended that the 2nd Defendant had an equitable interest in the land, it is the Defendants view that the same was encumbered upon any rights alleged to have been acquired by the Plaintiff. Reliance for this position was placed on the learned authors, **Land Law in Zambia: Cases and Material, Fredrick Mudenda**²⁵, **Cheshire's Modern Law of Real Property**²⁴ and the case of **Edith Nawakwi v Lusaka City Council**³

3.26. The Defendants further, submitted that as a result of the foregoing, the Plaintiff cannot be said to be a bona fide purchaser for the land without notice because he did not purchase the land, therefore his interest in the property is encumbered upon the 2nd Defendant's prior interest.

4.0. CONSIDERATION AND DECISION OF THE COURT

4.1. I have considered the Parties Pleadings, evidence adduced before Court and the Final Submissions for which I am grateful.

4.2. It is an established principal of law that in Civil matters, the standard of proof is on a balance of

probabilities and he who alleges must prove. This was the guidance laid down in **Khalid Mohammed v The Attorney General**⁶ where it was held that:

“A Plaintiff cannot automatically succeed whenever a defence has failed; he must prove his case”

Further that:

“An unqualified proposition that a Plaintiff should succeed automatically whenever a defence has failed is unacceptable to me. A Plaintiff must prove his case and if he fails to do so the mere failure of the opponent’s defence does not entitle him judgment”.

4.3. In another case of **BJ Poultry Farm Limited v Nutrifeeds Zambia Limited**¹⁶ the Supreme Court held that *interalia*, that:

“The standard of proof required in civil matters is one on a balance of probabilities. A Plaintiff cannot rely on a failed defence of the Defendant. He should not automatically succeed whenever a defence fails as the Plaintiff must prove his case and if he fails to do so, the mere failure of the Defendant’s defence does not entitle him to Judgment”.

4.4. The Defendants in their Defence and Counterclaim alleged fraud. It is therefore important to know the standard of proof required for the same. The case of **Sithole v State Lotteries Board**¹¹ guided as follows:

“If a party alleges fraud, the extent of the onus of the party alleging is greater than a simple balance of probabilities”.

4.5. I also find as instructive the case of **Nkongolo Farms Limited v Zambia National Commercial Bank Limited (In Receivership) Charles Huruperi**⁹ where the Court held that:

“Where a party relies on any misrepresentation, fraud, breach of trust, wilful default or undue influence by another party, he must supply the necessary particulars of the allegation in the pleadings. Fraud must be precisely alleged and strictly proved. There is no presumption of fraud.”

4.6. I have considered the Parties Bundle of Pleadings and Documents to satisfy myself about the merit or otherwise of their claims.

4.7. In summary the Plaintiff in his Pleadings as evidenced in paragraph 1.10 herein is praying to this Court for a declaration that he is the legal owner of the property in question and for the Defendant to be Ordered to vacate the same. On the other hand, the Defendants in their

pleadings as evidenced by paragraph 1.19 are praying for the cancellation of the Certificate of Title that the Plaintiff currently has in relation to the property in issue. Further that a declaration that the 2nd Defendant is the legitimate owner of the property in question and as such should be issued with a Certificate of Title for the property in question.

4.8. As evidenced by the Defendants Defence and Counterclaim, the Defendants alleged fraud and procedural impropriety in the manner in which the Plaintiff obtained the Certificate of Title.

4.9. The allegation of fraud herein as I see it goes to the root of the matter in this case. It therefore becomes necessary to deal with this allegation before any other.

4.10. From the evidence on record the Defendants are claiming that the Plaintiff acted fraudulently in the manner he obtained the Certificate of Title for the property in question for the following reasons;

- I. *Falsely claiming to be a member of the community where the land is situate.*
- II. *Conniving with the Councillor Enerst Kayando to make false representation to the Council and Ministry of Lands about being him being a member of the community when it was being regularized.*

III. *Concealing that the 2nd Defendant was in occupation of the Land in question.*

IV. *Forging Council Resolution or disguising a sub-committee resolution as a full Council resolution.*

4.11. During the Hearing **PW1** brought forth evidence that he heard about the land in question from his sister and made the necessary application by following the laid down procedure. He referred this Court to his application letter dated 13th November, 2020, found in the Plaintiff's Bundle of Documents, which document was not disputed by the Defendants herein.

4.12. The Court was also referred in the Plaintiff's Bundle of Documents to a Recommendation letter from the Council to the Commissioner of Lands, the Invitation to Treat from the Ministry of Lands and the Certificate of Title issued in favour of the Plaintiff herein.

4.13. Further the Court was referred to Planning, Information Managements Systems and Engineering and Infrastructure Development Committee minutes for Chongwe Municipal Council dated 2nd November, 2018 and Ordinary Council Meetings for Chongwe Municipal Council dated 9th November, 2018.

4.14. **PW2** gave evidence that according to the records that are available at the Council, the Plaintiff is the only known owner of the Land in question who was recommended for the same by the Council. Further that both the extracts of the minutes as exhibited by the Plaintiff were genuine. This witness was called again by the Defendants and also bears the title **DW2** herein. He was called for the purpose of producing before this Court original minutes of the Ordinary Council meeting dated 9th November, 2018 of which he did.

4.15. In particular the Minutes No. C/05/11/18 (B), which the Defendants claim was forged to enable the Plaintiff obtain the Certificate of Title relating to the property in issue.

4.16. I have had occasion to look at the original minutes in question and they provide as follows:

C/05/11/18

**B. PLANNING AND INFORMATION
MANAGEMENT SYSTEMS AND ENGINEERING
AND INFRASTRUCTURE COMMITTEE
MEETINGS HELD ON 2ND NOVEMBER, 2018.**

Councillor A. Zambara moved the motion and duly seconded by Councillor J. Mulimbika that the Minutes of Planning and Information Management Systems and Engineering and Infrastructure

Committee Meetings held on 2nd November, 2018 be received by the Council for Consideration.

The Council therefore proceeded to consider the said minutes and after due consideration, the original mover moved and duly seconded by the original Secunder, it was

RESOLVED THAT

*The minutes of Planning and Information Management Systems and Engineering and Infrastructure Committee Meetings held 2nd November, 2018 be **ADOPTED** by the Council.*

4.17. Whilst the minutes of 2nd November, 2018 being Sub-Committee Resolution of the Planning, Information Management System and Engineering and Infrastructure Development Committee that was adopted by the full Council provide as follows:

MIN NO. PIMSEID/103/11/18

REGULARISATION AND REPLANNING OF PLOTS AND SETTLEMENT IN VARIOUS AREAS OF CHONGWE

The members were informed that the Council was in receipt of application letters from several applicants who wanted to regularise their occupation and or/development of plots in various areas of the District on state land and some areas included Silverest, Waterfalls, Mikango and Mwanawasa.

After due consideration on the matter on a proposal by the Councillor C. Moyo, which was duly seconded by Councillor J. Mulimbika it was

RESOLVED THAT

The Council should undertake regularisation exercise in these, areas so that all illegal subdivisions, replanning and settlements could be captured and regularised, subject to payment of applicable fees and penalties.

4.18. As correctly observed by the Defendants in the extracts of minutes dated 9th November, 2018 as produced in the Plaintiff's Bundle of Documents, Councillor A. Zambara was omitted from those in attendance, additionally the original Minutes do not have the words "with an inclusion"

4.19. However, I also observed that both the minutes dated 2nd November, 2018 and the minutes dated 9th November, 2018 were both certified to be true copies by the Town Clerk who at the time was Mulowa Sishumba and there has been no evidence led by the Defence herein to show that the signature of the Town Clerk was forged in the extract of the minutes and **PW2** who is an employee of the Council and in charge of keeping records, gave evidence before this Court that the minutes in question are genuine.

4.20. The contents of the original minutes as produced by **PW2** who is also **DW2** and those exhibited in the

Plaintiff's Bundle of Documents on page 7 and 8 fundamentally contains the same information, and that is, that the Sub-Committee resolution regularising and replanning of plots and settlement in various areas of Chongwe was adopted by the full Council in an Ordinary meeting on 9th November, 2018 as can be seen above in the extracts that have been reproduced on paragraph 4.16 and 4.17 herein.

4.21. Further it was observed that the Original Council Minutes 9th November, 2018 being MIN NO. C/05/11/18 as admitted into evidence by **DW2** actually include Councillor A. Zambara as being in attendance on that day at the meeting. In my estimation, the omission on the extracts that were certified to be true by the Town Clerk can be attributed to inadvertent omission when the minutes were retyped and certified.

4.22. Therefore, the assertion by the Defendants that these minutes are forged cannot stand for the above stated reasons.

4.23. It was also alleged by Defendants that the Plaintiff connived with Mr. Enerst Kayando to make a misrepresentation to the Council and Ministry of Lands herein aforementioned. The said Mr. Enerst Kayando Mukanda was called in this matter, as **PW4**.

4.24. **PW4** in giving his evidence denied being a Councillor for Tandabale and stated that he only helped people in the area where the land in issue is located to have documents for the land. In helping with the same he alluded to the fact of how he engaged **PW5** a Surveyor and that fundamentally that was his only role in the case.

4.25. When **PW4** was called as a witness, the Defendants opted not to Cross-Examine and as a result failed to show this Court **PW4's** involvement in the alleged fraudulent activities by the Plaintiff as alleged by themselves in their pleadings.

4.26. Following the guidance of the case of **Sithole v State Lotteries Board**¹¹, **Nkongolo Farm Limited v Zambia National Commercial Bank Limited**⁹ and **Gondwe v Ngwira**¹⁵, it is clear that fraud must be specifically pleaded and strictly proved on a standard higher than a balance of probabilities. There is no presumption of fraud.

4.27. From the forgoing it becomes clear that the Defendants have failed to meet this standard as established by the law and they have also failed to show procedural impropriety in this matter which they claim is the basis upon which the Plaintiff should be

deprived of the land to which he holds a Certificate of Title.

4.28. Having failed to prove fraud and procedural impropriety as alleged, the Plaintiff cannot be deprived of the Land and have the Certificate of Title relating to the land in question cancelled as pleaded by the Defendants without factual and legal basis.

4.29. From the evidence on record, it is clear that the Plaintiff followed laid down procedure to acquire the land in issue. The evidence on record shows that the Plaintiff made an application, was recommended for the Land and was duly given an Invitation to Treat by the Ministry of Lands and is now the owner of the Land in question and possess a Certificate of Title for the same. Further, **PW2** testified that according to the records at the Council, the Land belongs to the Plaintiff after he was recommended for the same by the Council.

4.30. It is trite law that a Certificate of Title is conclusive proof of ownership. In the absence of fraud or any form of impropriety in its acquisition, it cannot be challenged or cancelled. **Sections 33 and 34 of the Lands and Deeds Registry Act¹⁷** and the cases of **Anti-Corruption Commission v Barnet Development Corporation Limited²** and **Charles Kajimanga v Marmetus Chilemya¹⁴** support this position.

4.31. Following the forgoing, the Certificate of Title held by the Plaintiff in relation to Plot No. CHONG/LN_79503/4 cannot be cancelled and the Defendants herein cannot obtain better Title to the Land in question.

5.0. **CONCLUSION**

5.1. Having established that the Plaintiff has proved his case on a balance of probabilities and the Defendant having failed to prove the alleged fraud and procedural impropriety to the required standard on the totality of the evidence before me, I make the following Orders.

5.1.1. I declare that the Plaintiff is the Legal and beneficial owner of Stand No. CHONG/LN_79503/4 situate at Chongwe.

5.1.2. The Defendants shall vacate the Property known as CHONG/LN_79503/4 Chongwe forthwith.

5.1.3. Costs to the Plaintiff to be taxed in default of agreement.

Leave to Appeal is granted.

**SIGNED, SEALED AND DELIVERED AT LUSAKA THIS 29TH
DAY OF OCTOBER, 2024.**



A handwritten signature in black ink, appearing to read 'I. M. Mabbolobolo', is written over a solid black horizontal line.

I. M. MABBOLOBOLO

HIGH COURT JUDGE