IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 153/2016
HOLDEN AT NDOLA & SCZ/8/111/2016
LUSAKA

(Civil Jurisdiction)

BETWEEN:

JULIUS CHILIPAMWAWO SINKALA APPELLANT

AND

BORNFACE SIMBULE	**1ST RESPONDENT**
CONTRACT HAULAGE LIMITED	**2ND RESPONDENT**
NAKONDE DISTRICT COUNCIL	**3RD RESPONDENT**
COMMISSIONER OF LANDS	**4TH RESPONDENT**

CORAM: Musonda, DCJ, Kaoma and Kajimanga, JJS
on 4th June, 2019 and 15th May, 2020

For the Appellant:	Dr. J. M. Mulwila, SC, of Ituna Partners appearing with Mr. T. T. Shamakamba of Shamakamba & Associates
For the 1st & 2nd Respondents:	Mr. J. Muloongo and Mr. A. Kalikiti of Messrs MSK Advocates
For the 3rd Respondent:	N/A
For the 4th Respondent:	N/A (Filed a Notice of Non-Appearance)

JUDGMENT

MUSONDA, DCJ, delivered the Judgment of the Court

Cases referred to:

1. **Kayope v Attorney General (2011) Vol. 2 Z.R. 424**

2. **Bramwell v Bramwell (1982) 1 All ER 137**
3. **G.F. Construction (1976) Ltd v Rudnap (Zambia) Limited and Another (1999) Z.R. 134**
4. **Zambia Telecommunications Company Limited -v- Valson Pharma Zambia Limited (SCZ Judgment No. 3 of 2010)**
5. **Zambia Telecommunications Company Limited -v- Ian Mwansa Chiyambi, Appeal No. 196 of 2007 (Unreported)**
6. **Anti-Corruption Commission v Barnnet Development Corporation Limited: (2008) 1 Z.R. 69**
7. **Barclays Bank Zambia Plc -v- Zambia Union of Financial Institution and Allied Workers (2007) Z.R. 106**
8. **Attorney-General -v- Marcus Kampumba Achiume (1983) Z.R.1**
9. **Wilson Masauso Zulu -v- Avondale Housing Project Limited (1982) Z.R. 172**

Legislation referred to:

(a) The Lands Act, Chapter 184 of the Laws of Zambia (Customary Tenure) (Conversion) Regulations, Statutory Instrument No. 89 of 1996

(b) The Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia

(c) The Limitation of Actions Act 1939 of the United Kingdom

(d) British Acts extension Act, chapter 11 of the Laws of Zambia.

(e) Regulations 2, 3 and 4 of the Lands (Customary Tenure) (Conversion) Regulations, of the Lands Act Cap 184 of the Laws of Zambia

Other Works referred to:

1. ***Halsbury's Laws of England*, 4th Edition Vol. 36 at paragraph 36.**

1.0 INTRODUCTION

1.1 The disputes which triggered the litigation which has now been escalated to this Court (from the judgment of

Mchenga, J, as his Lordship then was) revolve around two neighbouring pieces of land located in the Republic of Zambia's border town of Nakonde.

1.2 The two pieces of land are presently identifiable as Stand Nos. 211 and 218, Nakonde.

1.3 The primary or main protagonists in the disputes in question have been Bornface Simbule (the 1st respondent) and Contract Haulage Limited (the 2nd respondent) on the one hand and Julius Chilipamwawo Sinkala, the appellant, on the other.

1.4 The kernel of the disputes is that while the 1st and 2nd respondents have been claiming to be the *bona fide* and legal owners of the above-mentioned Stands 211 and 218 respectively, the appellant has been contesting the respondents' claims and maintaining that he is, in fact and in law, the owner of the pieces of land in question.

2.0 HISTORY AND BACKGROUND FACTS

2.1 In so far as the disputes in question relate to or touch upon stand No. 218, the story starts in 1968. Sometime in that year, Duncan Simbule, the 1st respondent's late father set out to acquire a piece of land at Nakonde under customary

tenure for the purpose of actualizing some business venture. This piece of land is now what is identifiable as Stand No. 218, Nakonde.

2.2 With the help of Headman Mwenetindi of Nindi Village as his intermediary, late Simbule was allocated a piece of land (under customary tenure) by Chieftainess Nawaitwika close to the border between the Republics of Zambia and Tanzania.

2.3 Following the successful acquisition of the piece of land in question, late Simbule constructed an office block on the land.

2.4 Sometime in 1970, late Simbule entered into a business arrangement with Mobil Oil Zambia Limited **("Mobil Oil")** in terms of which the latter agreed and proceeded to install underground fuel tanks and pumps on Simbule's piece of land. The company thereafter started supplying fuel and related products to Simbule who operated a service station on the piece of land in question until he was called to higher life sometime in 1980.

2.5 Following Simbule Senior's death, his son, now the 1st respondent, was appointed as the administrator of his estate.

2.6 Initially, the 1st respondent and some of his family members were desirous of continuing to run the filling station as successors to late Simbule until they ran into financial difficulties which culminated in the closure of the facility. For completeness, the financial woes which had afflicted the 1st respondent and his family included their failure to settle debts which had accrued in favour of Mobil Oil on account of fuel and related supplies to the filling station.

2.7 Following its closure, the filling station remained dormant for a number of years. However, the 1st respondent and some of his family members raised and paid off the money which the filling station had been owing Mobil Oil.

2.8 Inspite of the hope which was briefly generated by reason of the matters alluded to in 2.7 above, the 1st respondent's inability to run the service station in question compelled him to enter into an arrangement to have Mobil Oil temporarily operate the facility.

2.9 At some point after the events in 2.8, the 1st respondent noticed that the appellant was operating from the filling station in question. The 1st respondent, however, took no action as he assumed that the appellant had entered into some arrangement with Mobil Oil on a temporary basis.

2.10 The 1st respondent subsequently relocated to Lusaka where he lived for some time.

2.11 While the 1st respondent was away to Lusaka, his relatives in Nakonde noticed some changes at the filling station. This prompted the 1st respondent's relatives to telephone him (the 1st respondent) for the purpose of establishing whether or not he had sold the filling station to the appellant.

2.12 The 1st respondent subsequently travelled to Nakonde after establishing that, indeed, the appellant had not only been claiming to be the owner of the piece of land and filling station in question but had even procured title deeds to the same. Not only did the appellant procure title deeds to the piece of land in question in his favour, he even proceeded to lease or purportedly lease out the land in question to a company called SGC Investments Limited.

2.13 As will become clear later in this judgment, the 1st respondent confronted the appellant who, however, could not compromise with the 1st respondent even after Mobil Oil (which had sold its tanks and pumps to the appellant) confirmed that they never sold the land in question to him as the company (Mobil Oil) had never owned the same. As earlier intimated, the duo's failure to compromise culminated in the present litigation.

2.14 Turning to the dispute involving Stand No. 211, the relevant story started in 1970.

2.15 In that year, Headman Ntindi facilitated the allocation of this commercial stand, then under customary tenure, by Chieftainess Nawaitwika, to the 2nd respondent.

2.16 Following its acquisition of this piece of land, the 2nd respondent proceeded to install an 80,000 litre capacity fuel tank on the piece of land for its refueling purposes.

2.17 As things turned out, Stand No. 211 was and remains sandwiched between late Simbule's Stand 218 and another commercial stand which was previously owned by a company called Zambia Tanzania Road Services Limited ("Zamtan").

2.18 Following the dissolution of Zamtan, the 2nd respondent purchased its (Zamtan's) Stand and shifted its operations to the newly-acquired Stand. However, the 2nd respondent's 80,000 litre capacity tank remained at Stand No. 211. This meant that the 2nd respondent now had two stands.

2.19 From 1995, the 2nd respondent was placed under receivership.

2.20 Following the lifting of the receivership exercise relating to the 2nd respondent sometime in 2001, the 2nd respondent started taking stock of its assets.

2.21 During the course of that stock take exercise in 2002, the 2nd respondent discovered that the appellant was claiming ownership of Stand 211.

2.22 According to the record, the appellant's evidence was that it had purchased both the tank which we earlier referred to in this judgment as well as the piece of land on which the same had been mounted from Mobil Oil.

2.23 In the meantime, a further complication had arisen in relation to the same piece of land (namely, stand No. 211, Nakonde) in that another party, namely, SDV Zambia

Limited, was not only claiming to be the lawful owner of the land in question but had even procured title deeds in respect of the same.

3.0 THE COURT ACTION AND THE PARTIES' RESPECTIVE PLEADINGS

3.1 On 18th February, 2011 the 1st and 2nd respondents, then plaintiffs, instituted a joint action through the issuance of a writ of summons in the court below. However, beyond sharing a common writ of summons, the two parties settled their pleadings separately.

3.2 We pause here to indicate that, although the writ of summons and subsequent pleadings in the court action below were cause-numbered 2009/HP/1973 (thereby suggesting that the action in question was instituted in the year 2009), it is quite evident from the record that the action was instituted on 18th February, 2011.

3.3 In his statement of claim, the 1st respondent essentially highlighted the matters which we have already adverted to in the history and background facts above save to add that the 1st respondent asserted, as illegal, the appellant's actions in the way of taking possession of Stand No. 128,

leasing out the same to Messrs SGC Investments Limited and securing the issuance of a certificate of title in respect of that real property in his name.

3.4 Arising from the matters in 3.3, the 1st respondent sought the following reliefs:

> *"3.4.1 An order that the [appellant] yields vacant possession of the land held under customary tenure given to the late Simbule by Chieftainess Nawaitwika, which said land is next to Plot 211 Nakonde, and office belonging to the 1st [respondent] and that the 1st [respondent] is the rightful owner of the land in dispute.*
>
> *3.4.2 An order that the [appellant] immediately excavates and removes his fuel tanks from the 1st respondent's [land].*
>
> *3.4.3 An order that the [appellant] accounts for and pays to the 1st [respondent] all rental income on the said land paid by SGC Investments Limited from 2004 to the date of full and final settlement.*
>
> *3.4.4 An order that the [appellant] pays mesne profits to the 1st [respondent] as from 1991 to date of yielding vacant possession of the land.*
>
> *3.4.5 An interlocutory injunction restraining the [appellant] from getting rentals from the land described above"*

3.5 For its part, the 2nd respondent highlighted the matters which we have highlighted in the background facts in its statement of claim and made it very clear that at no time did it ever relinquish its interest in the two properties, namely, stand No. 211, Nakonde and the commercial stand which it had purchased from Zamtan.

3.6 The full extent of the 2nd respondent's search for relief (against the Appellant) in the court below was expressed in the following terms:-

> ***"3.6.1 That the Certificate of Title relating to Stand No. 211 Nakonde be cancelled as it was erroneously obtained and that the 2nd [respondent] is the rightful owner of the land.***
>
> ***3.6.2 That the [appellant] yields vacant possession of the property referred to as Stand No. 211 and that the 2nd [respondent] are the rightful owners of Stand No. 211.***
>
> ***3.6.3 An order that the ... [appellant] account to the 2nd [respondent] for all rentals received from the lease of the 2nd [respondent]'s 80,000 litre fuel tank to Sable Transport Limited from 2002 to the date of yielding vacant possession of the tank.***
>
> ***3.6.4 ...***
>
> ***3.6.5 Further and other reliefs***
>
> ***3.6.6 Costs."***

3.7 Upon being confronted with the respondents' court process, the appellant reacted by filing two defences, one against each of the respondents concerned.

3.8 In relation to the 1st respondent, the appellant claimed that the property now known as Stand 218, Nakonde did not exist under customary land tenure, as the 1st respondent had alleged because the State acquired it in or around 1970.

3.9 The appellant further alleged that he subsequently purchased the said property from Mobil Oil in 1991 and legally obtained title to the same.

3.10 The appellant also averred, in the alternative, that the 1st respondent's action against him was time-barred, having been commenced outside the period allowed by statute.

4.0 TRIAL – THE EVIDENCE BEFORE THE COURT BELOW

4.1 Following the commencement of trial, one Alex Makapa, who, once-upon-a time, had served as the 2nd respondent's Human Resources Officer, testified on behalf of the 2nd respondent as the first witness **("PW1").**

4.2 PW1 opened his evidence -in-chief by telling the trial Court that, in the early 1970s, his company, the 2nd respondent, had been involved in the transportation business, that is to say, haulage of goods from the Republic of Tanzania's port of Dar es salaam into Zambia. The witness further informed the Court below that, given the nature of its business, the 2nd respondent, acting by its representatives, sought to secure a piece of traditional land from Chieftainess Nawaitwika of Nakonde for the purpose of its business.

4.3 According to PW1, sometime in early 1970, the 2nd respondent was allocated a piece of land measuring 100m x 80m at Nakonde town, close to the Zambia and Tanzania border by Chieftainess Nawaitwika, with the help of Headman Mwinetindi.

4.4 Following the acquisition of the above piece of land, the 2nd respondent proceeded to install an 80,000 litre capacity overhead fuel tank. This was in 1975. The 2nd respondent thereafter started using the facility for its refueling purposes.

4.5 PW1 also confirmed that the traditional piece of land in question was sandwiched between a plot which was owned

by a company known as Zambia Tanzania Road Services Limited (**ZamTan**) on the southern side and a filling station on the northern side which was being operated by late Simbule (Snr), the 1st respondent's father.

4.6 This witness further testified that, in 1985, ZamTan was liquidated and that, following its dissolution, the 2nd respondent purchased its piece of land which was located next to its own.

4.7 Following the purchase, by the 2nd respondent, of the piece of land referred to in the preceding paragraph, the 2nd respondent's management decided to erect two 80,000 litre capacity storage tanks at the newly acquired piece of land to which the 2nd respondent's operations relocated leaving the old piece of land dormant. The witness further confirmed that the 2nd respondent's old 80,000m^3 capacity tank remained at its old piece of land, that is, stand No. 211, Nakonde.

4.8 According to PW1's further testimony, in 1985, the 2nd respondent was placed under receivership which lasted until about 2001 when this exercise was terminated.

4.9 Following the cessation of the receivership exercise which we momentarily alluded to, the 2nd respondent's management team embarked upon the exercise of auditing the company's assets and liabilities.

4.10 According to PW1, it was during the exercise we have alluded to in 4.9 above that the 2nd respondent's management discovered that the land which their company had been allocated by Chieftainess Nawaitwika was being used by the appellant and that he had even leased the same to Sable Transport Limited. The 2nd respondent's staff also established that their company's old fuel tank had been leased out by the appellant and that the appellant had even procured title deeds to the piece of land which the 2nd respondent had owned under customary land tenure. For completeness, the piece of land in question had even been numbered as plot 218, Nakonde.

4.11 PW1's further evidence-in-chief also established that, when the appellant was confronted by the 2nd respondent's representatives over the piece of land in question, he informed the latter that he had purchased both the land and the tank from Mobil Oil. According to this witness, Mobil oil repudiated the appellant's claims on the basis

that they could never have sold the piece of land in question because they never owned it.

4.12 Borniface Simbule, the 1st respondent, was the second witness to testify on his own behalf as PW2.

4.13 This witness opened his testimony by telling the trial court that, following his father's (Duncan Simbule)'s death in 1980, he was appointed to serve as administrator of his estate.

4.14 The witness went on to tell the trial court that, prior to his death, his father had been operating a filling station at a piece of land now known as Stand No. 218, Nakonde and that Mobil Oil Zambia Limited had installed its tanks and fuel pumps on his father's land. We confirm that, the gist of PW2's testimony was a reaffirmation of what we recounted early on in this judgment in the nature of background facts save to confirm that when he discovered that the appellant had secured title to his late father's land he took steps to secure the cancellation of the illicitly acquired certificate of title.

4.15 The respondent's third witness was Dickson Singoyi who testified as PW3. This witness recounted that, in 1968, late

Duncan Simbule acquired a piece of customary land from Chieftainess Nawaitwika with the help of Headman Mwenetindi. The witness went on to testify that, following the acquisition of this piece of land, Simbule proceeded to construct an office block on that land. This witness also testified that he assisted Simbule in ferrying sand and burnt bricks to the latter's construction site.

4.16 It was PW3's further evidence that, in 1970, Mobil Oil Zambia Limited, at Simbule's request, installed tanks and pumps on Simbule's land. Subsequently, Mobil Oil started supplying Simbule with fuel. This development made it possible for Simbule to start operating his site as an owner operated filling station until his death in 1980.

4.17 The respondent's 4th witness (PW4) was Darlington Mwaba Chalikosa whose testimony before the trial Court was that he was employed by Mobil Oil as a Sales Agent in 1979. This witness further testified that when he learnt that Simbule was buying kerosene, petrol and diesel, he approached him and that this interaction resulted in Mobil Oil providing Simbule with two fuel pumps and five underground tanks. According to PW4, Simbule provided the land and labour, while Mobil Oil only provided the five

tanks and the pumps. As dealer, Simbule was purchasing fuel and other products from Mobil Oil for the purpose of operating his filling station.

4.18 Under cross-examination, PW4 revealed that he left Mobil Oil in 1982 and conceded that he did not witness the transactions between Mobil Oil and the Appellant, nor did he know when the Appellant started operating the filling station on Stand 218.

4.19 The next witness for the respondents (plaintiffs in the court below) was Headman Ntindi whose real name was Enos Sichinga. This witness (PW5) told the court below that he became Headman Ntindi in 2002. According to PW5, his late father gave Simbule some land on which Simbule built and operated a filling station until his death in 1980.

4.20 It was PW5's further evidence that in 2004, a group of people approached him, seeking to know how the appellant had acquired title to the land on which the filling station stood. His answer was that, apart from the 1st respondent's father, no one else had requested for or been allocated that piece of land.

4.21 In cross-examination, PW5 told the court below that the structures at the filling station in question were constructed by the late Simbule. The witness, however, conceded that there was no documentary evidence to prove that his father (Headman Ntindi Snr) had allocated the land in issue to Simbule because, according to the witness, no documents were being signed when allocating land in those days.

4.22 Turning to the appellant's case (the 1st defendant below), his case revolved around the evidence of three witnesses (including his own). In opening his evidence, the appellant (as DW1) told the court below that between 1981 and 1983, he identified an intact but non-functional filling station in Nakonde and that this prompted him to approach Mobil Oil Limited with which he agreed to operate the filling station upon the understanding that he was to be procuring fuel from Mobil Oil.

4.23 DW1 went on to testify that, in 1985 he started running the filling station on Stand 218. According to him, Mobil Oil subsequently sold the filling station to him in 1991 at the price of K1,200,000.00. He further testified that although he and Mobil Oil did not execute a contract of

sale, the latter gave him a letter confirming the transaction. The letter in question was written by Mobil Oil Zambia Limited and was addressed to the Commissioner of Lands. The letter read:-

> *"Dear Sir,*
>
> ***Re: <u>Transfer of Nakonde Filling Station – Mr. JMCC Sinkala</u>***
>
> ***We wish to confirm the transfer of the filling station, plant and facilities situated on Plot No.... Nakonde to Mr. J M C C Sinkala with effect from 25th September, 1991. This is following the purchase of the storage tanks by Mr. Sinkala from Mobil Oil.***
>
> ***The property consists of the following:***
>
> ***(a) administration office***
> ***(b) 5 storage tanks and ancillary***
> ***(c) forecourt and adjoining parts.***
>
> ***We would be grateful for any assistance rendered to Mr. Sinkala in the transfer of the said property.***
>
> ***Yours truly***
>
> ***(Signed)***
> ***Mobil Oil Zambia Limited"***

4.24 It was the appellant's further evidence that, subsequent to his receipt of the letter we have reproduced above, he

secured another letter from Isoka District Council and an advertisement from the *Times of Zambia* of 3rd March, 1970, which, together, he used to approach the 4th respondent for the purpose of securing the issuance of a certificate of title in respect of the plot in question in his names.

4.25 The second witness to testify on the appellant's behalf was Webster Nonde who testified as DW2. DW2 told the trial court that he once served as a manager for Mobil Oil. This witness further testified that, following an advertisement which Mobil Oil had placed in the *Times of Zambia* of 3rd March, 1970, Mobil Oil proceeded to lease Stand No. 218 Nakonde from the 4th respondent. It was also DW2's evidence that Stands 211 and "1236M" are one and the same piece of land.

4.26 According to DW2, Mobil Oil constructed a filling station on Stand 211, but subsequently sold it to the appellant.

4.27 Having regard to the fact that the 3rd and the 4th respondents to this appeal were the 2nd and 4th defendants respectively in the court below, one Paul Kachimba, a Legal Officer in the office of the 4th respondent, testified (as DW3). According to DW3, on the basis of documents which he

examined, both Stands 218 and 211 Nakonde existed under customary tenure.

4.28 It was DW3's further testimony that the appellant was issued with a certificate of title to Stand 218 after he submitted the required documents, which included a letter of recommendation from the council. He added, however, that the correct procedure was not followed in processing the appellant's title because the prior consent of the chief was not sought.

4.29 The witness went on to point out that it was the responsibility of the applicant to obtain such consent.

4.30 DW3 further explained that in processing the appellant's certificate of title, the 4th respondent relied entirely on the council's recommendation, and wrongly assumed that the land involved was State land. The witness also confirmed that it was only some years later that the Survey Department in the Ministry of Lands confirmed that the two pieces of land had existed under customary tenure.

4.31 DW3 also disclosed that in 2005, it was brought to the 4th respondent's attention that Stand 218 was encroaching on Stand 211, and that three other properties existed within it.

The witness further testified that it was only then that the 4th respondent cancelled the appellant's title, although it later reinstated it, albeit in the mistaken belief that the matter had been resolved.

5.0 TRIAL COURT'S FINDINGS AND DECISION

5.1 So far as is relevant to the appeal before us, the trial judge identified the following as the questions which called for his determination:-

5.1.1 whether Stand 218 and Stand 211 fell under customary tenure immediately prior to the appellant's acquisition of a certificate of title in respect thereof;

5.1.2 whether Stand 218 was the same land that the 4th respondent advertised as "1236M" in 1970;

5.1.3 whether, following the advertisement earlier mentioned, Mobil Oil applied for and was allocated the land referred to in (5.12) above;

5.1.4 whether Mobil Oil Zambia Limited built the filling station on Stand 218;

5.1.5 whether Mobil Oil sold the filling station on Stand 218 to the appellant and, if so, when.

5.2 After considering the facts and evidence which had been laid before him, together with counsel's relative submissions , the learned trial judge found that Stand 218 and Stand 1236M, which was advertised by the 4th respondent in 1970, were not one and the same property. He also established, as false and baseless, DW2's claim

that Mobil Oil had leased Stand 218, Nakonde and built the developments which sit on that piece of land.

5.3 With regard to the letter referred to at paragraph 4.23, above it was the trial judge's finding that the same revealed that what the appellant bought from Mobil Oil were its fuel tanks and pumps

5.4 With regard to the structures or improvements on Stand No. 218, the learned trial judge found that Mobil Oil was not the owner of the said structures or improvements and, consequently, had no right to sell them. In like manner, the court below opined that the appellant had no right to register them in his own name or to lease out the same. Arising from the foregoing, the appellant was ordered to account for and pay the 1st respondent on account of all the rentals which the former had received from SGC Investments Limited from 2004 up to the date of judgment.

5.5 The learned trial judge also determined that, both Stands 211 and 218 Nakonde had existed under customary land tenure immediately prior to the appellant acquiring title thereto.

5.6 The judge also noted that although there was no evidence to suggest that the process which had culminated in the appellant acquiring a certificate of title in respect of Stand 218 had been tainted with fraud, impropriety had been established in that the appellant did not comply with the stringent requirements, under Regulations 2, 3 and 4 of the Land (Customary Tenure) (Conversion) Regulations, of the Lands Act, Chapter, 185 of the Laws of Zambia to obtain the Chief's consent. The judge accordingly ordered that the certificate of title which had been issued in the appellant's name be cancelled on account of the said impropriety.

5.7 In deciding whether the 1st respondent's claims against the appellant were time-barred, the learned trial judge considered Section 4(3) of the Limitation Act, 1939, UK which provides that:-

> ***"No action shall be bought by any other person to recover land after the expiration of 12 years from the date on which the right of action accrued to him..."***

5.8 In applying the above provision to the situation which had confronted him, the trial judge reasoned that, on the evidence before him, the cause of action accrued on 10th

June, 2002 when the appellant secured his 14-year lease in respect of Stand 218. The judge accordingly came to the conclusion that the 1st respondent's right of action was not time-barred as its writ was filed within 12 years from June, 2002.

5.9 The trial judge also had no difficulty in coming to the conclusion that the appellant had no right to occupy Stand 218 after he purportedly bought it from Mobil Oil in 1991 because Mobil Oil did not own it and that, in line with the judgment of this court in **Kayope v Attorney General**[1], the appellant was obliged to pay mesne profits to the 1st respondent.

5.10 However, the learned trial judge recognized that as a claim for mesne profits is founded on the law of torts, the relevant action must be filed within six years in keeping with Section 2(1) (a) of the Limitation Act, 1939, of the United Kingdom. The judge accordingly determined that the appellant must pay mesne profits for the period 1996 to 2003, but agreed with the appellant that mesne profits for the period 1991 to 1995 were time-barred.

5.11 The learned trial judge also reasoned that the order relating to mesne profits could not extend beyond 2003 because the appellant had already been ordered to account to the 1st respondent for the rentals received from 2004 to the date of judgment.

6.0 THE APPEAL AND GROUNDS THEREOF

6.1 The determinations and conclusions by the learned trial judge unsettled the appellant so much that he felt impelled to mount the present appeal which was inspired by the following grounds:

6.1.1 ***The learned Judge in the court below erred both in law and fact when he held that the 1st and 2nd respondents' claim for possession of the land in dispute was not statute-barred;***

6.1.2 ***The learned Judge in the court below erred in law and fact when he held that the 1st respondent's claim against the appellant for mesne profits was not statute-barred and/or ordered the appellant to pay mesne profits for the period 1996 to 2003;***

6.1.3 ***The learned Judge in the court below erred in law and fact when he held that the appellant accounts for and pays to the 1st respondent rentals he received from SGC Investments Limited from 2004 to date;***

6.1.4 ***The learned Judge in the court below erred in law and fact when he held that there was impropriety in the manner the appellant obtained Certificate of***

Title to Stand No. 218 Nakonde and the same should be cancelled;

6.1.5 The learned Judge in the court below erred in law and fact when he held that the appellant bought fuel tanks and fuel pumps from Mobil Oil Zambia Limited, and not the land on which the filling station is.

7.0 THE PARTIES' RESPECTIVE ARGUMENTS ON APPEAL

7.1 At the hearing of the appeal, counsel for the appellant, on the one hand, and counsel for the 1st and 2nd respondents, on the other, confirmed having filed their respective Heads of Argument to support their respective positions in relation to the appeal. The two sides proposed to argue the grounds of appeal as embedded in their respective Heads of Argument in the same order they appear in their respective Heads of Argument.

7.2 Dr. John M. Mulwila, SC, the learned lead counsel for the appellant, opened his arguments by indicating to us that he was going to argue the first three of the five grounds which had been filed to support the appeal while his junior counsel, Mr. T.T. Shamakamba, was going to argue the last two grounds. State Counsel Dr. Mulwila then went on to contend, in relation to the first strand of the first ground

of appeal, that, as the 1st respondent's claim for possession of the land in dispute had been premised on the notion that the same existed under customary tenure, the 1st respondent could not avail himself of the protection which the Lands and Deeds Registry Act, Chapter 185 of the laws of Zambia affords on account of adverse possession.

7.3 Dr. Mulwila, SC, then went on to advance the second strand of the appellant's first ground of appeal by contending that, contrary to the lower court's finding, the appellant took possession of Stand 218 in 1985 or, at the very latest, in 1991, when the Appellant bought the pumps and the tanks from Mobil Oil adding that this was the time from which the lower Court ought to have reckoned the relevant time. According to counsel, the action from which this appeal arose was commenced outside the 12-year limitation period prescribed in Section 4 (3) of the Limitation Act, 1939, and, consequently, the same was stale and statute-barred.

7.4 With respect to the second ground, Dr. Mulwila, SC, contended that although he agreed in principle that redress in the form of mesne profits would have been available to the 1st Respondent, counsel attacked the lower court's

pronouncement of this relief in favour of the 1st respondent on the basis that, mesne profits were of the nature of damages for trespass which sounded in tort and that, this having been the case, the trial Judge ought to have found that the claim for mesne profits was statute-barred because it had fallen outside the statutory six-year limitation period for actions founded in tort. Counsel referred us to Section 2 (1) (a) of the Limitation Act, 1939 (UK) to back this contention and added that, the awarding of mesne profits for the period 1993 to 2003 for an action which was commenced in 2009 (sic) constituted an error on the part of the lower court.

7.5 The appellant's counsel then went on to argue that, in point of fact, there was no landlord and tenant relationship between the appellant and the 1st respondent and that, consequently, the trial court's order directing payment of mesne profits to the 1st respondent could not be justified in the absence of some proven holding over of leased premises by a tenant after the expiry of the relevant term. To support this proposition, counsel referred us to the cases of **Bramwell v Bramwell**[2] and **G.F. Construction**

(1976) Ltd v Rudnap (Zambia) Limited[3] . In ***Bramwell[2]*** , the English court noted that,

> **".. a claim for mesne profits is only another term for damages for trespass, damages which arise from the particular relationship of landlord and tenant",**

while in ***G.F. Construction (1976) Ltd[3]*** , this Court had occasion to state the following:

> **"On mesne profits, these are damages awarded to a landlord for holding over a tenancy by a tenant. In this case, there was no relationship of landlord and tenant between the appellant and the 1st respondent..."**

7.6 With respect to the third ground, the short argument which counsel for the appellant advanced was that the appellant held title to Stand 218, Nakonde and that this state of affairs arose after the appellant had satisfied the 4th respondent as regards his entitlement to hold the same. According to Dr. Mulwila, SC, since the Appellant bought the tanks and the pumps from Mobil Oil before subsequently leasing the same to SGC Investments Limited it was a grave error for the trial Judge to have ordered the appellant to account for the rentals which had been accruing from his own tanks and pumps.

7.7 Dr. Mulwila, SC, then went on to contend that, from a practical as opposed to a theoretical standpoint, when the Appellant bought the pumps and the tanks on Stand 218 from Mobil Oil, he had, by the same token, bought the land to which the pumps and tanks had been affixed.

7.8 According to State Counsel's further exertions, Stand 218, Nakonde, had been advertised in 1970 inviting interested persons to bid for the purposes of operating the facility as a filling station, adding that, had the piece of land in question been truly owned by the 1st Respondent Chieftainess Nawaitwika would not have agreed to have it advertised.

7.9 We were, accordingly, invited to disturb the trial judge's conclusions.

7.10 Mr. Shamakamba then rose to argue the fourth and fifth grounds of the appeal. With respect to ground four, it was Counsel's contention that the appellant should not have been mulcted merely on account of the 3rd respondent's failure to ascertain whether or not the Chief's consent had been obtained prior to the certificate of title being issued in the appellant's favour in respect of Stand 218.

7.11 Learned counsel then went on to contend that, in point of fact, the challenge of the appellant's certificate of title and the lower Court's consequential order directing the cancellation of the same had been misconceived in that a certificate of title can only be challenged on account of fraud or similar ills and that, in the context of the certificate of title in issue in this matter, fraud was neither alleged nor proved as required. Counsel referred us to section 34 of the Lands and Deeds Registry Act, Chapter 184 of the Laws of Zambia and ***Halsbury's Laws of England*, 4th Edition Vol. 36 at paragraph 36** to support the foregoing contention. According to the appellant's counsel, the 1st and 2nd respondents failed to properly plead fraud in the court below adding that, in the light of this, the lower Court grossly erred when it decided as it did.

7.12 In relation to the fifth ground of appeal, counsel for the appellant used this ground to fault the trial Court's finding that the appellant only bought fuel tanks and pumps from Mobil Oil. According to counsel, this particular finding was flawed as it was not supported by the evidence before the trial judge. The Latin maxim *"quicquid plantatur solo solo*

cedit" was adverted to to project the notion that since the said tanks and pumps had been affixed to the land in dispute, namely, Stand 218, their sale (i.e, the tanks and pumps), in effect, constituted a sale of the land to which they had been affixed. We were accordingly urged to allow the appeal, with costs.

7.13 In his reaction to counsel for the appellant's exertions, Mr. J. Muloongo, learned counsel for the 1st and 2nd respondents' point of departure was that, in the trial Court, the position of the 1st respondent, as borne out by his pleadings, was that the land which his late father procured from the traditional authorities around 1968 in Nakonde was and had continued to be held under customary tenure.

7.14 The appellant's position and contention, on the other hand, is that the land in question was acquired by the State around 1970 and that the same was not held under customary tenure. Counsel also reminded us that, according the appellant's pleadings in the lower court, the appellant legally *"bought, leased out and obtained title to the [stand 218, Nakonde]"* from the State. According to the respondents' counsel, the appellant did not, in the lower

Court, plead that he had acquired title to the land in question by adverse possession.

7.15 As for counsel for the appellant's contention suggesting what was packaged as *"protection against adverse possession"*, learned counsel for the respondents invited us to examine the pleadings of the 1st and the 2nd respondents relative to those of the appellant in the court below. In particular, our attention was drawn to the 1st respondent's claim for vacant possession in respect of Stand 218.

7.16 The respondent's Counsel then went on to remind us that, in the court below, the 1st respondent claimed ownership of the land in question under customary tenure, while the appellant, in his defence, asserted that the land in question was acquired by the State in 1970, and that, for his part, he had bought, secured title and leased out the service station lawfully.

7.17 According to the respondents' counsel, the appellant did not plead anywhere in his defence (in the Court below) that title to Stand 218, Nakonde, had been acquired by adverse possession from 1985 or at all.

7.18 Counsel then proceeded to point at the appellant's own evidence, occurring at page 378 lines 20 to 22 of the record of appeal, to the effect that he found the filling station on Stand 218 "*intact but not functional*". According to counsel for the 1st and the 2nd respondents, once the appellant found this "*intact*" but "*non-functional*" filling station, he ought to have been put on inquiry and should have proceeded to make appropriate inquiries with the 4th respondent (the Commissioner of Lands) as regards the circumstances of the filling station. Counsel criticized the appellant for not having proceeded in the aforesaid manner and that the appellant's conduct simply reinforced the correctness of the trial court's order directing the cancellation of the certificate of title which had been issued in the appellant's favour and ordering the appellant to yield vacant possession of the land in question in favour of the 1st respondent.

7.19 To support his further exertions, counsel drew our attention to our decision in **Zambia Telecommuniations co. Limited v Valson Pharma Zambia Limited**[4] where we said:

"In the circumstances of this case, we agree with the defendant's counsel that the relevant period to consider is the period prior to the acquisition of the certificate of title by the plaintiff. As soon as the plaintiff was aware that the land was encumbered with solid and immovable improvements, it should have raised an issue with the Commissioner of Lands."

7.20 Learned counsel accordingly urged us to uphold the correctness of the lower Court's decision ordering the cancellation of the certificate of title which, counsel opined, had improperly been issued in favour of the appellant in respect of Stand 218, Nakonde and its twin decision directing the appellant to yield vacant possession of that land to the 1st respondent.

7.21 In concluding their arguments contesting the first ground of appeal, the respondents' counsel noted that, nowhere in his Defence did the appellant raise the defence of the 2nd respondent's action having been stale or statute barred adding that the fact that this statutory defence was mounted in relation to the 1st respondent could not have stood in the way of the 2nd respondent's unchallenged claims.

7.22 Turning to the second ground of appeal, counsel for the 1st and the 2nd respondents noted that the appellant had pleaded the defence of statute bar in the alternative while his primary defence lay in a general denial that the 1st respondent (1st defendant below) had suffered any loss or damage and challenging the 1st respondent to strictly prove the nature and extent of any damage or loss claimed to have been suffered by him. Having regard to the foregoing, counsel posited that it would have been a plain contradiction for the trial judge to have held that the 1st respondent was entitled to relief while pronouncing the same relief as being time-barred. To support the above contention, counsel drew our attention to our decision in **Zambia Telecommunication Co. Limited v Ian Mwansa Chiyambi**[5] where we said:

> ***"To grant awards pleaded in the alternative, when awards in the main action have already been made, is a contradiction and a misdirection. Accordingly, we set aside all the awards made as pleaded in the alternative."***

7.23 The respondents' counsel accordingly submitted that the lower Court scarcely misdirected itself when it found for the 1st respondent and pronounced mesne profits in his favour.

7.24 Reinforcing his arguments around the same ground, Counsel for the respondents drew our attention to the appellant's acknowledgment in his arguments in support of his second ground of appeal that the expression "*mesne profits*" meant the same thing as "*damages for trespass*". Having regard to the foregoing, the respondents' counsel accordingly submitted that the court below rightly treated the appellant as a trespasser on account of his act of leasing out a filling station which he never owned.

7.25 As to the appellant's contention that the 1st respondent's claim for mesne profits was statute-barred, the respondents' counsel argued that this contention by the appellant was patently misconceived in the light of the fact that the respondents' action in the Court below was neither founded in tort nor simple contract but rather, the same sought to have the appellant yield vacant possession of the 1st respondent's piece of land as specified. In this regard, counsel reminded us that while the limitation period for actions in tort or simple contracts was six years, the applicable limitation period for actions involving the recovery of land is 12 years (section 4(3) of the Limitation Act, 1939, UK).

7.26 Turning to the third ground of appeal, the respondents' counsel sought to exploit the appellant's testimony to the effect that he found the filling station on Stand 218 *"intact though not operational"* [and that he] *"was shown documents as to who built it"*.

7.27 The long and short of counsel's argument around the third ground was that our holding in **Zambia Telecommunications Company Limited v Valson Pharma (Z) Ltd.**[4], which we quoted early on at paragraph 7.19, resolves the question whether or not the appellant, having acquired title to land on which there were already improvements made by someone else, should account to the 1st respondent for the rentals received from SGC Investments Limited.

7.28 Learned counsel further contended that, since the appellant had leased the filling station in question without the authority or consent of its owner, namely the 1st respondent, the trial judge rightly ordered the appellant to account for the rentals which the former had been receiving on account of such leasing.

7.29 In opposing the fourth ground of the appeal, counsel for the 1st and the 2nd respondents pointed out that, in the judgment now being assailed, the learned trial judge made reference to the case of **Anti-Corruption Commission v Barnnet Development Corporation Limited**[6], in which we held that:-

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

7.30 The gist of counsel's contention founded on our decision in the **Anti-Corruption Commission v Barnnet Development Corporation Limited**[6] case was that the appellant's purported acquisition of title to land held under customary tenure without complying with the statutory imperative of securing consent from the Chief concerned was improper and served to discount the appellant's contention that the lower court erred when it ordered the cancellation of the certificate of title which had been improperly issued to him.

7.31 With respect to ground five of the appeal, counsel for the 1st and the 2nd respondents countered this ground by submitting that the question whether or not the appellant only bought fuel tanks and pumps from Mobil Oil is one of fact. We were referred to the evidence of the 1st respondent, at page 360 lines 5 to 6 of the record of appeal, to the effect that Mobil Oil denied having sold the land known as Stand 218, Nakonde to the appellant because they never owned it. Learned counsel argued that this evidence was never challenged by the appellant.

7.32. When we sought to have counsel for the appellant clarify the identity of the land to which their client was laying claim, Mr. Muloongo's response was that the 1st Respondent owned "*the land on which the filling station is, together with... the office block*" adding that, although the land had no stand number, it was common knowledge in the Court below as to which piece of land was the subject of the dispute.

8.0 CONSIDERATION OF THE APPEAL AND DECISION

8.1 We have examined the judgment appealed against in the context of the evidence on record, the grounds of appeal and counsel's arguments relative to the same.

8.2 At the outset, we propose to address the grounds of appeal in the same order in which they were presented or argued before us.

8.3 The first ground of appeal, as we see it, raises the question as to when the 1st respondent's cause of action, as prosecuted in the Court below, arose. It was contended, on behalf of the appellant, that, because he- the appellant- took possession of Stand 218 in 1985, the 12-year limitation period which is prescribed by the Limitation Act, 1939, of the United Kingdom, started running then. Counsel then went on to argue that, in terms of Section 4 (3) of the statute which we momentarily referred to, the action in the Court below was time-barred because it was commenced more than 23 years after 1985.

8.4 The second strand of the first ground of appeal, as argued, is that, as the 1st respondent's claim for possession of the land in dispute had been premised on the notion that the same existed under customary tenure, the 1st respondent could not avail himself of the protection which the Lands and Deeds Registry Act, Chapter 185 of the laws of Zambia affords on account of adverse possession.

8.5 Reacting to the above contentions, learned counsel for the 1st and the 2nd respondents defended the trial judge's finding that the cause of action accrued in 2002 when the appellant obtained his 14-year lease and not in 1985 and that, consequently, the question of the action having been time-barred in the manner alleged by the appellant was flawed.

8.6 We pause here for a moment or so and call to mind that, according to the record which was the subject of the rehearing in this Court, DW3's testimony to the effect that the 4th respondent issued the certificate of title to Stand 218 in favour of the appellant under the mistaken assumption that the land in question was State land went unchallenged.

8.7 We also take this opportunity to remind ourselves that, so far as the law governing limitation of actions is concerned, a plea of mistake, if appropriately pleaded and proven, can serve or operate to postpone the limitation period which would otherwise be applicable to the action concerned. For the removal of any doubt, section 26 (c) of the Limitation Act of the United Kingdom, enacts as follows:

"26. Postponement of limitation period in case of fraud or mistake

Where, in the case of any action for which a period of limitation is prescribed by this Act, either –

(a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent, or

(b) ...

(c) the action is for relief from the consequences of a mistake,

the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it".

8.8 According to the 1st respondent's evidence at page 364, lines 13 to 17 of the record of appeal, he, the 1st respondent, only came to learn of the appellant's presence on Stand 218 in 2004.

8.9 Although the 1st respondent's evidence referred to in the preceding paragraph was never challenged, the learned trial Judge noted, and we are inclined to agree with him, that the first entry in the print-out from the Lands Register at page 178 of the record of appeal shows that the appellant obtained his 14-year lease in respect of Stand

218 on 10th June, 2002. In line with **section 26** of the **Limitation Act**, which we momentarily quoted, we join the lower Court in affirming that 10th June, 2002 was the date on which the 1st respondent had constructive notice of the appellant's ill-conceived presence on the land in dispute. Having so held, we would refrain from faulting the learned trial Judge for having found that the reckoning of the 12-year limitation period begun on 10th June, 2002.

8.10 The second strand of the appellant's argument under the first ground of appeal, is simply that since the 1st respondent claims ownership of the land in question under customary tenure, he does not enjoy the protection of the Lands and Deeds Registry Act against adverse possession.

8.11 Speaking for ourselves, we really are in serious difficulty appreciating the relevance of this submission to the first ground of the appeal, which really revolves around the question of whether or not the action in the court below was time-barred. While we acknowledge that counsel for the 1st and the 2nd respondents did not raise any objection to the same, we take the liberty to make a comment or so around it.

8.12 We have examined the appellant's pleadings as filed in the court below (as 1st defendant) and are in agreement with counsel for the 1st and the 2nd respondents' position that no such thing as "adverse possession" was pleaded by the appellant in his defence. In taking the above position, we affirm the stand which we took in **Barclays Bank Zambia Plc-v- Zambia Union of Financial institutions and Allied workers**[7] and countless other decisions which espouse the settled principle that an issue which was not pleaded or raised in the court below cannot competently to be raised by any party in the appellate court.

8.13 Be that as it may, and in case we be wrong in taking the position we have momentarily referred to, we did take the liberty to examine Section 35 of the Lands and Deeds Registry Act, which provides that:-

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

8.14 Having regard to the issues in contention in this appeal, the key words which immediately caught our attention in the statutory provision we have just cited above are the words:

> **"After land has become the subject of a certificate of title...".**

8.15 In the context of the matter at hand, the raising of the issue of "adverse possession" in relation to the 1st respondent is utterly misconceived as the same cannot be raised in relation to stand 218 by reason of the fact that the 1st respondent is not claiming ownership of the land in question on the basis of being a holder of a prior certificate of title relative to the subject piece of land.

8.16 We also agree with counsel for the 1st and the 2nd respondents' contention that the appellant's averments against the 2nd respondent in the court below contained nothing in the nature of the statutory defence of statute bar. Under these circumstances, we cannot possibly fault the learned trial judge for having concluded that the 2nd respondent's action against the appellant was neither stale nor time-barred.

8.17 In reaching the conclusion we have reached in the preceding paragraph above, we have been buoyed by our earlier affirmation that the action to which this appeal is owed was commenced in 2011, that is to say, within the 12-year limitation period allowed by the Limitation Act 1939, UK, which applies in this country by virtue of the provisions contained in the British Acts Extension Act, chapter 11 of the Laws of Zambia. Ground one fails.

8.18 The second ground of the appeal contests the learned trial judge's finding that the 1st respondent's claim for mesne profits was not statute-barred and ordering the appellant to pay the same for the period 1996 to 2003. Counsel maintains that the said claim fell beyond the six-year limitation period for actions founded in tort.

8.19 In countering this ground, counsel for the respondents contended that since the appellant pleaded statute bar in the alternative, it would have been a misdirection for the trial judge to grant the 1st respondent a relief which was statute-barred. In making this submission, the respondents' counsel were relying on our holding in **Zambia Telecommunications Company Limited -v- Ian Mwansa Chiyambi[5].**

8.20 In addition, counsel argued that the 1st respondent's action in the lower court was not founded on a simple contract nor can it be said to have been founded in tort (on account of breach of duty or negligence).

8.21 In our considered view and, with due respect to counsel concerned, our holding in ***Zambia Telecommunications Company Limited -v- Ian Mwansa Chiyambi[5],*** has been understood out of context by counsel for the 1st and the 2nd respondents.

8.22 We pause here to remind ourselves about what we said in that case:-

"To grant awards pleaded in the alternative, when awards in the main action have already been made, is a contradiction and misdirection. Accordingly, we set aside all the awards made as pleaded in the alternative." .....

8.23 We also recall, as we observed at paragraph 5.10 above, that the learned trial judge agreed with the appellant that a claim for mesne profits is based on the law of torts. This position, as taken by the court below, has not been contested. Arising from the foregoing, counsel for the 1st and the 2nd respondents cannot now be heard to assail it.

8.24 Early on in this judgment, we established that the action to which the present appeal is owed was commenced in 2011. We also upheld the learned trial judge's finding that the relevant cause of action arose in 2002. Simple arithmetic resolves the argument in ground two in favour of the appellant, namely, that at the time of the commencement of the matter in the court below, the claim for mesne profits, which are of the nature of damages for trespass which, in the context of this appeal, is a tortious wrong, was already statute-barred. Even assuming, as did the learned trial judge, that the matter was commenced in 2009, the result would be no different.

8.25 While we are on this point, we wish to observe that the learned trial judge, after finding that the 1st respondent's cause of action arose in 2002 and that the relevant court action ought (in so far as it had incorporated a claim for mesne profits) to have been launched within six years from the relevant date of that year, he appears to have gotten himself entangled with figures. At page 69 lines 8 to 10, he came to the conclusion that *"it follows that only claims for the period before 1996 are time-barred. Mesne profits for the period 1996 to date can be claimed."* [emphasis ours]

8.26 As we see it, to the extent that the learned judge had held that mesne profits were payable by the appellant, one would have expected his lordship to invoke logic which would have led him to the conclusion that only such mesne profits as had arisen after 2008 were time-barred.

8.27 On the basis of the reasoning in 8.26, we find merit in ground two of the appeal and, accordingly, set aside the decision of the court below ordering the appellant to pay the 1st respondent mesne profits for the period 1996 to 2003.

8.28 Turning to the third ground of appeal, we are of the considered view that this ground has a close nexus with the fourth ground in the sense that the fate of the latter will, inexorably, determine the fate of the former. Having regard to the foregoing, we propose to begin by giving our reflections around the fourth ground before returning to the third ground

8.29 Ground four of the appeal calls into question the learned trial judge's finding that there was impropriety in the manner the appellant acquired his title to Stand 218 and

that Court's consequential order directing cancellation of the certificate which had evidenced the illicit title.

8.30 In countering this ground, learned counsel for the respondents argued that, on the basis of what we said in **Anti-Corruption Commission v Barnnet Development Corporation**[6], the trial Judge was on firm ground and could not be faulted. In that case, we said:

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

8.31 It is plainly self-evident from the above passage that, fraud is not the only ground on which a certificate of title may be cancelled and that any form of impropriety in the acquisition of a certificate of title can warrant its challenge or cancellation.

8.32 In the context of the dispute at hand, the learned trial judge observed that although there was no evidence to suggest that the process which had culminated in the appellant acquiring a certificate of title in respect of Stand 218 had been tainted with fraud, impropriety had been established

in that the appellant did not comply with the stringent requirements, under Regulations 2, 3 and 4 of the Land (Customary Tenure) (Conversion) Regulations, of the Lands Act, Chapter, 184 of the Laws of Zambia, to seek the Chief's consent before securing the conversion of hitherto customary land (stand 218) into statutory leasehold tenure and the consequential acquisition of title deeds in respect thereof. The judge accordingly ordered the cancellation of certificate of title number 9047 which had been issued in the appellant's name on account of the said impropriety.

8.33 Speaking for ourselves, we really consider that the trial judge was spot on. In point of fact, it is the criticism of the learned Judge as borne out in the fourth ground which we find distinctly misplaced. This ground fails.

8.34 Given the position which we have taken in relation to ground four of the appeal, and, as earlier intimated, it should inevitably follow that whatever income the appellant may have received on account of his illicit claim to Stand 218 remains for the benefit of the rightful owner of the property, namely the 1st respondent. Accordingly, we have no difficulty in affirming the position taken by the learned trial judge that the appellant must account to the

1st respondent for the rentals received from SGC Investments Limited from 2004 to the date of judgment. We dismiss ground three.

8.35 In regard to the fifth and last ground of the appeal, the appellant's simple argument around this ground was that he- the appellant- bought, from Mobil Oil, both the equipment and the land known as Stand 218, Nakonde, on which the tanks and pumps were sitting.

8.36 This contention, in our view, was not only glaringly inconsistent with the evidence which was laid before the trial Court but flew in the teeth of that court's findings of fact. There is abundant evidence on record that Mobil oil, which had sold its tanks and pumps to the appellant, did not, in fact, own the land on which the pumps and tanks were sitting. In this regard, we cannot agree more with learned counsel for the 1st and the 2nd respondents' argument that, in fact, the finding which the appellant is attacking in the context of this ground is a finding of fact with which, as we have indicated in the ensuing paragraphs, we cannot lightly interfere.

8.37 This Court has consistently taken the position that it *"will not reverse findings of fact made by a trial judge unless it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts, or that they were findings which, on a proper view of the evidence, no trial court acting correctly, can reasonably make"* **(See for example, Attorney-General -v- Marcus Kampumba Achiume[8]** and **Wilson Masauso Zulu v Avondale Housing Project Limited[9]).**

8.38 In our view, the appellant failed to demonstrate that circumstances or factors which we identified in ***Wilson Masauso Zulu***[9] and which would have entitled us to disturb the trial Court's findings were present in relation to the lower Court's findings of fact.

8.39 For the avoidance of doubt, we are also of the clear view that not only did counsel for the appellant misapprehend the meaning and effect of the principle which is encapsulated in the legal maxim *quicquid plantatur solo solo cedit* (which, loosely translated, expresses the legal principle that "*whatever is affixed to the soil belongs to the soil"),* they also failed to illustrate, with any meaningful

degree of clarity or conviction, how this principle fitted into the factual and evidential matrix of this dispute. We dismiss ground five as being bereft of any merit.

9.0 CONCLUSION

9.1 By way of concluding, we have found no merit in grounds one, three, four and five of the appeal, and have accordingly dismissed them. However, the second ground is meritorious, and it succeeds. The success of only one out of the five grounds of appeal means that, overall, the appeal fails.

9.2 The 1st and the 2nd respondents will have their costs to be taxed in default of agreement.

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M. MUSONDA
DEPUTY CHIEF JUSTICE

.....

R.M.C KAOMA
SUPREME COURT JUDGE

.....

C. KAJIMANGA
SUPREME COURT JUDGE