

**IN THE SUPREME COURT OF ZAMBIA  
HOLDEN AT LUSAKA**

**APPEAL NO. 119/2016**

*(Civil Jurisdiction)*

**BETWEEN:**

**MA'HAD KHARMAIN ALI-SLAMIYA**

**APPELLANT**

**AND**

**SKYSON BANDA**

**RESPONDENT**



**CORAM: Musonda, DCJ, Hamaundu and Kabuka JJS  
on 7<sup>th</sup> May 2019 and 9<sup>th</sup> June 2020**

For the Appellant: N/A

For the Respondent: Mr. H.A CHIZU, Messrs Chanda, Chizu &  
Associates

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

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**MUSONDA, DCJ, delivered the Judgment of the Court.**

**Cases referred to:**

1. *Attorney General v Marcus K Achiume: (1983) ZR 1*
2. *Anti-Corruption Commission -v- Barnet Development Corporation Ltd (2008) 1ZR 69*

**Legislation referred to:**

1. *Lands and Deeds Registry Act, Chapter 185 of the laws of Zambia.*
2. *The Land (Perpetual Succession) Act, Chapter 186 of the Laws of Zambia*

## **1.0 INTRODUCTION**

1.1 This appeal contests the granting of declaratory and other relief which the respondent, then plaintiff, had sought in the court below (Siavwapa J, as his lordship then was) the gist of which entailed annulling the appellant (then 1<sup>st</sup> defendant)'s illicitly procured ownership of leasehold property being stand No. 146, Matero compound, Lusaka and directing the cancellation of the certificate of title which had been issued in the appellant's favour and the concomittant issuance of a fresh deed of title in respect of the subject piece of land in favour of the Matero Islamic society which had sought relief through the respondent. The lower court also pronounced further incidental relief in favour of the respondent.

## **2.0 HISTORY AND BACKGROUND TO COURT ACTION**

2.1 The history and background circumstances to which the present appeal can be traced revolve around a fairly narrow campus.

2.2 On 9<sup>th</sup> September, 1984 a male Malawian national and resident of Matero township by the name of Amazi Chithawale Banda authored a letter on behalf of the 'Matero Islamic Centre' which was addressed to Lusaka City Council's 'City Engineering Department seeking to have the Lusaka City Council grant persons of the Moslem faith a 'site' in Matero township for the purpose of constructing a mosque for use by about 500 Moslems who resided in Matero township. In the same letter, Banda indicated that the Matero Moslem community had identified a site at Nilanga tavern as being ideal for the council to consider allocating to this religious community.

2.3 By a letter dated 4<sup>th</sup> February, 1985 which was addressed to the 'Muslim Church of Matero', the Lusaka City Council advised the addressee that the council had held a meeting on 4<sup>th</sup> January, 1985 at which, among other things, the council resolved to consider allocating one of two identified church sites to the Muslim Church of Matero.



- 2.4 On 18<sup>th</sup> March, 1986, the Plans, Works and Development Committee of the Lusaka City Council resolved to recommend an identified church site for the Matero Islamic Church.
- 2.5 By a letter dated 2<sup>nd</sup> May, 1986 the Lusaka City Council advised Amazi C. Banda of the Matero Islamic Centre that the Council had allocated stand No. 146, Matero, to the Muslim Church of Matero.
- 2.6 By a letter dated 28<sup>th</sup> January, 1987 which was addressed to Mr. Amazi C. Banda of the Matero Muslim Church, Mr. Banda was informed about the provisional service charges which the council had determined in the sum of K6,400.00 in respect of stand No. 146 of 4803, Matero Township, Lusaka. The church was further advised to settle the said amount within 30 days.
- 2.7 Between 6<sup>th</sup> and 25<sup>th</sup> March, 1987, the Matero Muslim Church settled the total service charges alluded to in 2.6 above in respect of stand 146 of 4803, Matero Township, Lusaka.



- 2.8 On 25<sup>th</sup> March, 1987, Lusaka City Council wrote to the Commissioner of Lands advising that the Matero Muslim Church had fully settled the provisional development costs which the Council had quoted in respect of stand No. 146 of 4803.
- 2.9 On 15<sup>th</sup> April, 1987, a Mr. Sheikh Idrisa Hashimi, acting in his capacity as Chairman of Desai Ma'ahad Al-Islamiya wrote to the Lusaka City Council seeking to have the registered owner of stand No. 146, Matero, Lusaka changed from Muslim Church of Matero to Desai Ma'ahad Al-Islamiya, a registered organization under the provisions of the Land (Perpetual Succession) Act, Chapter 186 of the Laws of Zambia.
- 2.10 On 25<sup>th</sup> February, 1994 Messrs Desai Ma'ahad Al-Islamiya (Desai Islamic Institute) successfully applied to the Registrar of Societies to change its name to Ma'ahad Khramain Al-Islamiya (To Holy Islamic Institute) the appellant in this appeal.
- 2.11 On 26<sup>th</sup> March, 2001 the Commissioner of Lands of the Republic of Zambia wrote to Messrs Ma'ahad Khramain

Al-Islamiya advising that this organisation's application for stand No. 146 Matero had been approved. In the same letter, the Commissioner of Lands advised the organization to settle a total sum of K113,661.00 on account of ground rent, consideration as well as lease preparation and registration fees which Messrs Ma'ahad Khramain Al-Islamiya settled on 2<sup>nd</sup> May, 2001.

2.12 On 12<sup>th</sup> November, 2001 the Registrar of Lands and Deeds issued certificate of title No. 2464 in respect of stand No. 146, Matero, in favour of Ma'ahad Khramain Al-Islamiya Registered Trustees following the execution of a 99 year lease Agreement bearing the aforementioned date between the President of the Republic of Zambia of the one part and the registered Trustees of the said Ma'ahad Khramain Al-Islamiya of the other.

2.13 On 14<sup>th</sup> May, 2002 Amazi Chithawale Banda, in his capacity as Vice Chairman of the Matero Islamic society, wrote to the Commissioner of Lands of the

Republic of Zambia seeking to have the Commissioner cancel the certificate of title which had been issued in favour of Messrs Ma'ahad Khramain Al-Islamiya in respect of stand No. 146 Matero Township, Lusaka.

2.14 According to Amazi Banda's letter, the issuance of the certificate of title earlier referred to in this judgment in favour of Ma'ahad Khramain Al-islamiya had been illicitly procured through fraud and without the consent and approval of the Matero Islamic society. Banda accordingly sought to have the Commissioner restore title to stand No. 146 Matero to Matero Islamic Society.

2.15 On 26<sup>th</sup> June, 2002, the Chairman of the Matero Islamic Society wrote to Ma'ahad Khramain to advise this organization that the Matero Islamic Society had instructed its lawyers to institute legal proceedings against Ma'ahad Khramain in relation to the ownership of stand 146, Matero Township.



### 3.0 THE COURT ACTION

3.1 On 23<sup>rd</sup> February, 2009, the respondent instituted the court action in the Lusaka High Court whose outcome is now being contested in this court.

3.2 In terms of the Amended Writ of Summons and Statement of claim which were taken out in the action on 18<sup>th</sup> November, 2009, the respondent sought the following relief:

3.2.1 *A declaration that the Plaintiff is the legitimate owner of stand No. 146, Matero and entitled to possession of same.*

3.2.2 *An order declaring the Lease Agreement entered into between the Commissioner of Lands on behalf of the President and the 1<sup>st</sup> Defendant null and void*

3.2.3 *As against the 2<sup>nd</sup> Defendant, an Order compelling the 2<sup>nd</sup> Defendant to cancel the Certificate of Title No. 2464 fraudulently obtained by the 1<sup>st</sup> Defendant*

3.2.4 *An Order compelling the 2<sup>nd</sup> Defendant to issue a Certificate of Title to the Plaintiff*

3.2.5 *Damages*

3.2.6 *Costs of the Proceedings*

3.2.7 *Further or other relief the Court may deem just and equitable to grant.*

3.3 The gist of the respondent's averments in his statement of claim was that his church was allocated

the piece of land in issue and that it duly settled the relevant charges but was surprised that the Commissioner of Lands had facilitated the issuance of a certificate of title in respect of the subject piece of land in favour of the appellant in circumstances which pointed to fraud. In this regard, the respondent further averred that an agent or servant of the appellant had been behind the fraud which had formed the basis of the Commissioner of Lands' unlawful action of issuing of the certificate of title alluded to above in the appellant's favour.

- 3.4 The gist of the appellant's brief defence as filed in the court below was that the certificate of title relating to the piece of land in question was properly issued in favour of the appellant which had previously existed under the name and style of Muslim Church of Matero which was the pursuer of the court action in the court below.

#### **4.0 THE TRIAL AND EVIDENCE MARSHALLED**

4.1 The matter was tried in the usual way with the respondent (Plaintiff below) and the appellant (1<sup>st</sup> Defendant below) calling two witnesses apiece. We pause to observe here that out of the three defendants who participated in the matter in the court below, the present appeal is only being pursued by the appellant which was the 1<sup>st</sup> defendant below. We would also confirm that no witnesses were called to testify on behalf of either the 2<sup>nd</sup> or the 3<sup>rd</sup> defendant in the court below and neither participated in the trial below.

4.2 The first witness to testify on behalf of the respondent was Amazi Chithawale Banda ("PW1").

4.3 PW1 opened his evidence in chief by telling the trial court that the Matero Islamic Society was a well-known organization in Lusaka's Matero suburb which had been in existence since its registration with the Registrar of societies in 1994.

4.4 The witness went on to testify that, in September, 1984 he made an application to the Lusaka City Council



seeking to be allocated a piece of land for the purpose of building a mosque in Matero township.

- 4.5 PW1 went on to recount the matters which we adverted to in the background narrative of this judgment the gist of which was that, after successfully securing a church plot from the Lusaka City Council, he proceeded to settle all the necessary payments which were demanded by the Lusaka City Council in respect of the same.
- 4.6 The witness further testified that after fulfilling the Lusaka City Council's financial demands relating to the church plot in question which had since been numbered as stand No. 146, Matero Township, Lusaka, he was surprised to learn that a certificate of title had been issued in respect of the same plot in the name of Ma'ahad Khramain Al-Islamiya.
- 4.7 By reason of the matters in the preceding paragraph, PW1 informed the court below that, in his capacity as Vice Chairperson of the Matero Islamic society, he launched a protest against what he termed as the

fraudulent and corrupt issuance of title deeds in respect of stand No 146 in favour of the entity mentioned in 4.6 above.

4.8 Bashiri Phiri (PW2) was the second witness to testify on behalf of the respondent and his testimony was no more than a mere rehashing of PW1's evidence.

4.9 Following the closure of the respondent (Plaintiff)'s case, the 1<sup>st</sup> defendant presented its two witnesses. As we noted early on in this judgment, the other two defendants did not participate in the trial nor call any witnesses.

4.10 The first witness to testify on behalf of the 1<sup>st</sup> defendant was Idrissa Hashima ("DW1").

4.11 DW1 opened his evidence by telling the court below that the certificate of title which he obtained in respect of stand No. 146, Matero Township was secured after following all the correct procedures as he was advised by the officials.

4.12 The witness denied having ever engaged in fraud for the purpose of securing the certificate of title in question

4.13 According to DW1's further testimony, his decision to register the piece of land in question in the name of the Church was founded on the advice which he was given by officials at the Ministry of Lands of the Republic of Zambia.

4.14 DW1 further informed the trial court that the submitted the name Desai Islamic Institute to the Ministry of Lands which subsequently changed its name to the appellant's name adding that the respondent's name was not a registered name.

4.15 It was DW1's further evidence that he complied with all the legal formalities relating to the incorporation of a trust under the provisions of the Land (Perpetual Succession) Act, Chapter 186 of the Laws of Zambia adding that the appellant was subsequently issued with a certificate of incorporation by Hon. Lupunga who was the Minister of Lands at the time.

4.16 According to DW1, stand No. 146, Matero, was available to all Muslim churches provided they co-operated with him.



4.17 Under cross-examination, DW1 admitted that all the service and other charges relating to the acquisition of stand No. 146 were paid by the respondent. The witness also admitted that the entity which had applied for the piece of land in question was the respondent.

4.18 DW1 however claimed in cross examination that he was the one who had identified the land which was subsequently numbered as 146, Matero, for the purpose of setting up a mosque.

4.19 The witness, however, contradicted himself when he conceded under cross examination that the only application letter which existed for the plot in question was the one which PW1 had authored. The witness also admitted that the application letter which PW1 had authored did not mention Desai Institute or, indeed, the appellant. The witness also admitted that at the time when PW1 was dealing with the Lusaka City Council in connection with the plot in question

there were no parallel dealings involving the appellant or Desai institute in relation to the same plot.

4.20 DW1 also admitted under cross examination that at the time when the appellant secured the certificate of title in question in its name, the Commissioner of Lands was aware about the existence of the Matero Muslim Church.

4.21 DW1 also admitted under cross-examination that all the exchanged correspondence between the Lusaka City Council and the Matero Muslim Church attested to the fact that only the latter was the interested party in the church plot in question.

4.22 The appellant's second witness in the court below was Haji Ndile ("DW2").

4.23 This witness' brief testimony was that he knew the real property which was known as stand No. 146 Matero, the Matero Islamic Centre and the appellant.

4.24 According to DW2, a decision was made to have Desai Institute change its name to the appellant's name.

4.25 The closure of DW2's testimony marked the closure of the parties' respective cases.

4.26 Following the closure of the parties' respective cases, learned Counsel for the appellant and the respondent proceeded to file their respective submissions. It is not, however, evident from the judgment now the subject of this appeal that those submissions were considered or taken into account as the trial court undertook its solemn undertaking of preparing the judgment now under attack. Be that as it may, what is clear from the present appeal is that, in arguing its fifth ground of appeal, the appellant did so by merely referring to and adopting its submissions in the court below.

4.27 We pause here for a moment or so to make the observation that, although the lower court's judgment is not being attacked on account of any matter relating to the parties' submissions in that court, the requirement for a court to confirm or to reveal its mind as to whether or not Counsel's submissions or



arguments had been filed and considered by the court is not just a mere formality but an important aspect of proper adjudication.

## **5.0 CONSIDERATION OF MATTER BY TRIAL COURT AND DECISION**

5.1 The learned trial judge considered the evidence which was laid before him in the context of the parties' respective pleadings and identified the central issue which fell to be decided by him as being whether or not the 1<sup>st</sup> defendant, now appellant, had acquired the certificate of title relating to plot 146, Matero Township, Lusaka fraudulently.

5.2 The learned judge then went on to observe that a common and critical element which ran through the evidence of PW1 and DW1, the two protagonists' key witnesses, was that it was the plaintiff (now respondent) who first applied for a church plot on 9<sup>th</sup> September, 1984. This evidence, the judge noted, was confirmed or fortified by correspondence which had

passed between the plaintiff and the Lusaka City Council.

5.3 The trial judge further observed that there was documentary evidence which also supported the fact that the Lusaka City Council had approved the plaintiff's application in January, 1985 and that this position was officially communicated to the plaintiff in May, 1986.

5.4 The court below also noted that the fact of the Matero Islamic Society having settled the service charges which the Council had demanded in respect of the Church plot had also not been disputed.

5.5 In the light of the observations we have alluded to above, the learned trial judge was left to wonder as to how the appellant (1<sup>st</sup> defendant) had managed to secure the certificate of title in question in its name in respect of stand 146, Matero, at the expense of the Matero Islamic Society.

5.6 In seeking to resolve the puzzle with which he had been confronted, the trial judge noted that in all the

dealings which had culminated in the offering of the church plot in question to the Matero Islamic Church, PW1 had been in the picture.

- 5.7 The trial judge also noted that, as PW1 had credibly disassociated himself from documents which had purported to change ownership of the subject plot to the appellant, his, that is, the trial judge's inclination was to embrace PW1's assertion that the purported ownership change alluded to above was anything but genuine.
- 5.8 On the totality of the evidence which had been laid before him, the trial judge accordingly concluded that DW1 had purported to dispossess the Matero Islamic Society of the plot in question in a dishonest and fraudulent manner and in clear contravention of section 34 (1)(c) of the Lands and Deeds Registry Act, Chapter 185 of the laws of Zambia.
- 5.9 The learned judge was also in no difficulty to discount the appellant's reliance on section 33 of the Lands and Deeds Registry Act, Chapter 185 on the basis that



such reliance stood imperiled by DW1's fraud which the proper operation of section 33 excepts.

5.10 The judge accordingly upheld the plaintiff (respondent)'s claims which included an order directing the cancellation of the certificate of title which had been fraudulently issued in the name of the appellant's trustees and the issuance of a fresh certificate of title in respect of plot 146 in favour of Matero Islamic Society .

5.11 The lower court also directed that all the costs that were to be associated with the carrying into effect the court's twin orders in 5.10 were to be borne by the 1<sup>st</sup> defendant together with the legal costs.

## **6.0 THE APPEAL AND THE GROUNDS THEREOF**

6.1 The appellant was not satisfied with the pronouncements of the court below as embodied in its judgment and has now appealed to this court on five (05) grounds as follows:

**6.1.1 GROUND 1**

*That the court below, misdirected itself and erred in holding that there was fraud on the part of the Appellant in obtaining Certificate of Title No 2464 in respect to plot 146, Matero for a critical and proper analysis of the evidence on record does not permit that finding.*

**6.1.2 GROUND 2**

*That the lower court erred and misdirected itself in not properly and judiciously balancing the Appellant's evidence on record with that of the Respondent vis-à-vis document No. 2 the affidavit in the Appellant's bundle of documents and document No. 6 also an affidavit in the Respondent's Bundle of document but just came to accept document No. 6 in the Respondent's bundle of document and held that Appellant's document No. 2 was a reaction to the Respondent's when on a proper analysis it is the Respondent's document No. 6 in the Respondent's bundle that has, at law reason to be doubted and which could have been a reaction to the Appellant's Bundle of documents.*

**6.1.3 GROUND 3**

*The lower court misdirected itself in finding at page J12, 3<sup>rd</sup> paragraph that the Respondent dealt with both the Lusaka Urban District Council and the Ministry of Lands in applying for Title when the key Respondent's witness "PW1" was very categorical that he dealt on behalf of the Respondent in this matter only with the Lusaka Urban District Council and not the Ministry of Lands and it is the Ministry of Lands that issued Title to the Appellant after the Appellant complied with all the requirements so the Ministry of Lands could not have issued Title to an organization they never dealt with.*

**6.1.4 GROUND 4**

*The lower court misdirected itself in ignoring completely the Appellant's evidence to the effect that the Muslim Cabinet sat and decided that plot 146 be in the name of the Appellant the reason, much as the service charges were paid to the 3<sup>rd</sup> Defendant, the Lusaka City Council by the Respondent, Title was in the Appellant's name and there was no fraud.*

**6.1.5 GROUND 5**

*That the lower Court misdirected itself in making a number of findings of fact which on a close analysis of the evidence cannot*



***reasonably be made and based on those findings found in favour of the Respondent”***

## **7.0 ARGUMENTS ON APPEAL**

7.1 Both the appellant and the respondent filed their respective Heads of Argument to support the respective positions which they had taken in the appeal. At the hearing of the appeal, learned Counsel for the appellant was absent while his opposite number was in attendance and confirmed his reliance upon his filed Arguments. We confirm that we felt inclined to proceed after satisfying ourselves as to service of court process.

7.2 The basic argument which the appellant advanced in arguing the first two grounds was that the trial court misapprehended the signature on the document which the lower court treated as having formed the genesis of the fraudulent change of ownership that had resulted in having the appellant become the owner of plot 146 Matero thereby coming to a conclusion which was perverse and unsupported by the evidence on record.

7.3 To support the above contention, Counsel for the appellant relied upon some well-known passages from our decision in **Attorney General v Marcus K Achiume**<sup>1</sup> where we said:

**“The appeal court 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”**

7.4 The respondent's Counsel's reaction to the appellant's exertions around the 1<sup>st</sup> and 2<sup>nd</sup> grounds of appeal was that, contrary to the position which the appellant took via the first two grounds, the lower court properly and correctly directed itself both as to the evidence in question and the relevant law and that there was no question of the judge having misapprehended any facts or evidence.

7.5 According to the learned Counsel for the respondent,

there was no doubt that the appellant had deceived the Commissioner of Lands by purporting that it had the authority of the respondent to have a certificate of title in respect of stand 146, Matero, issued in its (the appellant's) name and that what the appellant had done constituted fraud within the contemplation of section 33 of the Lands and Deeds Registry Act, Chapter 185 of the laws of Zambia

7.6 The respondent's Counsel further argued that the appellant, and its key witness (DW1) was made aware (by PW1) from the moment that the certificate of title in question was issued in the appellant's name that this should not have been done.

7.7 According to the respondent's counsel, there had been undoubted fraud or impropriety in the manner the appellant had secured the registration of the piece of land in question in its name given that the appellant neither applied for the same nor did it even pay the requisite service charges to the Lusaka City Council for the same. To support his exertions, the respondent's



Counsel cited our decision in **Anti-Corruption Commission -v- Barnet Development Corporation Ltd<sup>2</sup>** and specifically drew our attention to the passage which we referred to early on in this judgment. We were, accordingly, urged to adopt the same approach which we adopted in the **Anti-Corruption Commission Case<sup>2</sup>** and uphold the correctness of the lower court's decision by dismissing the first and second grounds of appeal.

7.8 Turning to the third ground of appeal, the appellant employed this ground to advance the simple contention that, according to the evidence of PW1, the respondent's key witness only dealt with the Lusaka City Council, while its application for the piece of land in question was only directed to the City Council and yet the position which the 2<sup>nd</sup> defendant (Commissioner of Lands) pleaded in his defence in the lower Court was that he only received the 1<sup>st</sup> defendant (appellant)'s application for the church plot in issue.

7.9 In his reaction to the third ground of appeal, learned counsel for the respondent proposed to argue this ground simultaneously with the appellant's fifth ground of appeal. In this regard, we can confirm that the appellant did not present any specific arguments in its Heads of Argument to buttress its fifth ground of appeal but merely placed reliance upon the submissions which were filed on its behalf in the court below.

7.10 In dealing with the two grounds (i.e, three and five), learned Counsel for the respondent's point of departure was to insist that the lower court did not err when it found and determined that the respondent dealt with both the Lusaka City Council and the Ministry of Lands when he applied for a deed of title for the church plot in question.

7.11 To reinforce his point in 7.10, counsel drew our attention to the following portion of PW1's testimony which occurs at P. 257 of the record:

**“We applied to the Council and they offered us plot 146. The letters we wrote to the council were also copied to the Ministry of Lands. I dealt with the council which, in turn, dealt with the Ministry of Lands.”**

7.12 Learned Counsel for the respondent then went on to draw our attention to the manner in which the trial court dealt with the issue which the appellant raised via ground three when the learned judge said, at page J12 of the judgment now appealed against (P. 19 of the Record):

**“[There] is uncontroverted evidence that both the Lusaka City Council and the Ministry of Lands dealt with the representative of the organization in the plaintiff”**

7.13 In winding up his arguments around the third and fifth grounds of appeal, the respondent's counsel informed us that the overarching feature around grounds one, two, three and five was that they revolved around findings of fact and were thus caught up by the legal principles which we alluded to when



we set out the parties' arguments' around the first and second grounds of appeal. We were accordingly entreated to treat the third and fifth grounds of appeal in the same manner as the first and second grounds and dismiss them.

7.14 The fourth ground was the last ground that the two opposing counsel debated before us.

7.15 The simple and brief argument which learned counsel for the appellant laid before us in seeking to lend credence to the fourth ground was that none of the other protagonists involved in this dispute controverted the evidence which the 1<sup>st</sup> defendant (now appellant) marshalled in the court below in regard to the manner in which it had secured the certificate of title relating to stand 146, Matero, in its name adding that even the Attorney General outrightly denied in his defence that any fraud had tainted or soiled the manner in which the appellant had procured that deed of title.

7.16 In his reaction to the appellant's arguments around ground four, learned counsel for the respondent contended that, contrary to the appellant's misleading assertions, it was the appellant itself which claimed in its defence that its entitlement to the church plot in question was predicated on the fact that it-the appellant-had previously existed under the name and style of Matero Islamic Church which was originally offered the plot in the said name.

7.17 To fortify the foregoing contention in 7.16, Counsel for the respondent quoted the second paragraph of the first defendant (appellant)'s defence wherein the appellant averred as follows:

**"2. As to paragraph 4 of the statement of claims, the 1<sup>st</sup> defendant avers that the Lusaka City Council allocated Plot No. 146 Matero to [Matero] Islamic Church on 18<sup>th</sup> March, 1986 and that the Islamic Church changed its name to Ma'ahad Kharmain Al-Slamiya [the appellant]"**

7.18 According to the respondent's Counsel, the meaning and effect of the averment in paragraph 2 of the appellant's defence was that the Lusaka City Council actually offered the Church plot in question to the same entity namely, Matero Islamic Society (Matero Mosque) which subsequently changed its name to Ma'ahad Kharmain Al-Islamiya.

7.19 Counsel for the respondent then went on to say that what the appellant pleaded in paragraph 2 of its defence constituted fraud or impropriety within the meaning of section 34 of the Lands and Deeds Act, Chapter 185 of the Laws of Zambia given that at no time did the Matero Islamic Church change its name to the one suggested.

7.20 Counsel accordingly urged us to dismiss the appeal with costs.

## **8.0 CONSIDERATION OF APPEAL AND DECISION**

8.1 We have considered the grounds of appeal and the relative Heads of Argument on either side of the contest



in the context of the judgment under attack and express our gratitude to Counsel involved for their respective perspectives. We propose to address the issues which this appeal raises holistically and will not deal with the individual grounds which, in any event, revolved around impregnable findings of fact.

8.2 In our estimation, the only key and decisive issue which this appeal raises and upon which the resolution of this entire appeal must turn, is whether or not the appellant properly/legitimately/lawfully acquired the church plot which was the subject of the legal contest in the court below. As we see it, once the issue we have identified above is resolved, this will automatically define the fate of this appeal in totality and obviate the need to examine the individual grounds of appeal.

8.3 In our view, the witnesses who resolved the simple issue we have identified in 8.2 above were "PW1" and "DW1", the two protagonists' respective key witnesses.

8.4 In his evidence, PW1 told the lower court that he was the one who applied to the Lusaka City Council for a plot in

Matero Township for the purpose of constructing a Mosque for use by the over 500 Moslems who resided in that township. PW1 identified his application letter dated 9<sup>th</sup> September, 1984 which occurs at page 131 of the Record of Appeal.

8.5 PW1 went on to confirm that the Lusaka City Council had favourably considered his application and had proceeded to offer him plot 146, Matero, via a letter which was dated 2<sup>nd</sup> May, 1986.

8.6 PW1 further confirmed that, by a letter dated 28<sup>th</sup> January, 1987, the Lusaka City Council, acting on behalf of the Commissioner of Lands, sought to have PW1 settle a sum of K6,400.00 representing the provisional service charges which were payable in respect of stand No. 146 of 4803 Matero, Lusaka. PW1 identified the letter in question in his evidence. It is at page 134 of the Record.

8.7 The Record also revealed that between 12<sup>th</sup> and 25<sup>th</sup> March, 1987, the Muslim Church of Matero settled the service charges which have been identified at 8.6 above.

8.8 DW1, for his part, told the trial court that he played the role of preparing and submitting the documents which had formed the basis of preparing the certificate of title relating to plot 146 Matero in the appellant's name.

8.9 In his further evidence, DW1 told the court below that:

*"Desai Islamic was the first organization by which all Muslims resident in Matero were registered. The organization changed its name to [the appellant] ... Matero Muslim Church is the entity which applied for land to the council ... The Muslims Church of Matero paid the [service charges]"*

8.10 In his further evidence, DW1 informed the trial court that:

*"The letters [for the plot] do not mention Desai Islamiya church... The letters were addressed to [PW1] of Matero Islamic church... The K6,410.00 [service charges] was paid by the Muslim Church of Matero in respect of stand No. 146."*

8.11 According to the judgment now sought to be assailed, it was the Matero Muslim Church which was "in the picture" during all the processes pertaining to the acquisition of the plot in question.



8.12 A review of the evidence of PW1 and DW1 also reveals that while PW1 and the Matero Muslim Church were involved from the time the Church plot was identified right up to the time when this church was asked to settle the service charges involved and actually proceeded to settle the same, DW1, rather curiously, only "appeared" at the time when he was acquiring the certificate of title in favour of the appellant whose validity was successfully challenged in the court below.

8.13 It is also clear from a careful review of the evidence which was laid before the court below that DW1 acted dishonestly and fraudulently when he represented, to the Commissioner of Lands, that the appellant was entitled to have the subject plot registered in its name.

8.14 Overall, we find ourselves in no difficulty to agree with the trial court's impregnable evaluation of the evidence which was laid before him and his unimpeachable conclusion that DW1 had been engaged in a deliberate and fraudulent scheme to annihilate the Matero Muslim Church's legitimate and lawful entitlement to the

Church plot in question. In this regard, we must dismiss, as wholly mischievous, Counsel for the appellant's porous and fictitious suggestion that the respondent ever changed its name by way of assuming the appellant's name. Indeed, the overwhelming evidence below pointed to Desai Institute changing its name by assuming the appellant's name.

8.15 In reaching the conclusion we have reached in 8.14, we also endorse, in totality, the learned trial judge's conclusions around the meaning and effect of sections 33 and 34(1) (c) of the Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia.

## **9.0 CONCLUSION**

9.1 We conclude by observing that this was a distinctly hopeless appeal which was hopelessly and half-heartedly prosecuted by its pursuer without even the barest verve or conviction. The same stands dismissed with costs. In the meantime, we direct that, for the purpose of securing the registration of the property in the names of the

legitimate and lawful owner of stand No. 146, Matero Township, Lusaka, the Matero Islamic Church or society must follow the provisions contained in the Land (Perpetual Succession) Act, Chapter 186 of the Laws of Zambia and proceed to create a body of trustees (a body corporate) which will hold the land in question in trust for the church.

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**M. MUSONDA**  
**DEPUTY CHIEF JUSTICE**



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**E.M. HAMAUNDU**  
**SUPREME COURT JUDGE**



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**J.K. KABUKA**  
**SUPREME COURT JUDGE**