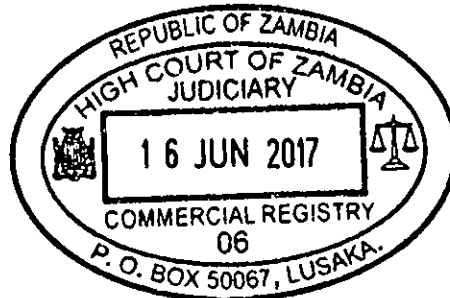


**IN THE HIGH COURT FOR ZAMBIA
AT THE DISTRICT REGISTRY
HOLDEN AT MONGU
(Civil Jurisdiction)**

2015/HT/10



BETWEEN:

AKATAMA NYAMBE & 163 OTHERS	1 ST PLAINTIFF
AND	
STEVEN LUNETA	1 ST DEFENDANT
MARTIN KAPELWA	2 ND DEFENDANT
KABANGO MUKECHO	3 RD DEFENDANT
NAMUSHI YAMBAYAMBA	4 TH DEFENDANT
PATRICK KAYELU KAYELU	5 TH DEFENDANT

Before the Hon Lady Justice Irene Zeko Mbewe

For the Plaintiffs : *Mr. Akatama Nyambe*

For the Defendants : *Mr. Yambwa of Legal Aid Board*

JUDGMENT

Cases Referred To:

1. *Justin Chansa v Lusaka City Council (2007) ZR 2562.*

2. *Katongo v. Attorney General* [1975] ZR 148
3. *Communications Authority v. Vodacom Zambia Limited* SCZ Judgment No 21 of 2009
4. *Raphael Ackim Namung'andu v Lusaka City Council* [1978] ZR 358
5. *Fabiano Humane v D.P. Chinkuli* [1971/HP/407 Unreported

Legislation Referred To:

1. *Urban and Regional Planning Act No 3 of 2015*

Other Works Referred To:

1. *Phipson On Evidence, 8th Edition*

The Plaintiffs commenced this action against the Defendants by way of Writ of Summons on 24th August, 2015 issued out of the District Civil Registry. According to the endorsement on the writ of summons, the Plaintiff claims for the following relief:

1. *A declaration that the 168 households representing a population of 938 inhabitants including the defendants, save for the 5th Defendant, form part of an unplanned settlement sitting on traditional piece of land ordinarily under village headman Induna Akashi are legitimate inhabitants of "Weignberg-ya-bucwani" earmarked for imminent upgrading*
2. *An order of injunction to restrain the defendants either by themselves, their agents, servant or whomsoever from interfering with plaintiffs*

and/or the 168 households representing a population of 938 inhabitants pending final determination of the main matter.

3. *Costs*

4. *Any other relief as to the court may deem just and equitable.*

The facts of this case as they are revealed in the pleadings and evidence are as follows: The Plaintiffs are part of a population of 936 representing 168 households in a catchment area sitting on customary land within the radius of Mulambwa Ward in the Mongu District of Western Province known as Weignberg-ya-bucwani. The Defendants save for the 5th Defendant are part of the unplanned settlement. The Defendants engaged the 5th Defendant to carry out demarcation at the unplanned settlement particularly in the catchment area of Mushi-Mutata village for purposes of taking cadastral surveys. According to the Plaintiffs' the 5th Defendant is an unqualified person. That the Defendants actions are provocative and designed to instill alarm and apprehension contrary to Government's systematic approach of upgrading unplanned settlements. Arising from the foregoing facts, the Plaintiffs' seek a declaration that the 168 households with a population of 938

community members sitting on traditional land are legitimate inhabitants of Weignberg-ya-bucwani earmarked for imminent upgrading. The Plaintiffs seek an order of injunction to restrain the Defendants from interfering with the Plaintiffs pending final determination of the main matter.

The Defendants settled their defence and counterclaim on 11th September 2015 where it is admitted that the Plaintiffs are a part of the 168 households falling within Weignberg-ya-bucwani which falls within Mulambwa ward in Mongu. The Defendants contend that they engaged a surveyor with the approval of the local authority and did not intend to demolish any structures but to carry out a survey. The Defendants contend that the Plaintiffs are not entitled to any of the claims and relief sought by the Plaintiffs. The Defendants counterclaim is for a declaration that the offer letters generated by the Commissioner of Lands to the Defendants are valid.

When the matter came up for trial, the parties called witnesses.

At the hearing of the matter, the Plaintiff gave evidence and called two witnesses.

It was the 1st Plaintiff's testimony Akatama Nyambe PW1 that he sued the Defendants as the Defendants claim they were allocated the land in dispute by the Mongu Municipal Council. According to PW1, he and the other Plaintiffs all reside at a place known as "Weignberg-ya-bucwani", the subject land in dispute, and that this land belongs to the Royal Barotse Establishment. PW1 testified that the Court should make a determination as to whether the land in dispute belongs to the Barotse Royal Establishment or the Mongu Municipal Council.

In cross-examination by Counsel for the Defendants, PW1 when asked as to whether he had proof of ownership to the land in question answered in the negative. PW1 conceded that there is a Site Plan in respect to the land in question. As to whether PW1 was aware of the eviction notices issued by the Mongu Municipal Council, it was PW1's assertion that when he met with the Mongu Municipal Council officials, they denied ever issuing eviction notices to any squatters.

In further cross-examination, when referred to page 64 of the Plaintiff's Bundle of Documents which was an eviction notice dated

20th May 1992, it was PW1's assertion that it was an eviction notice to squatters which included Weignberg and further conceded that he was aware that the Council had invited people at different times to apply for plots at Weignberg Compound. It was PW1's assertion that the offer letters did not necessarily mean that those with offer letters had been granted the piece of land as it was more of an advertisement. PW1 conceded that offer letters were given to the Defendants herein.

In further cross-examination, when asked as to whether he was aware that offer letters were issued in 1992 and 2003, it was PW1's assertion that he heard that offer letters were issued in 2003 and that they were site plans from the Ministry of Lands. According to PW1, the surveyor that went to the land in dispute was prevented from working in Weignberg as the Municipal Council had not engaged him and therefore had no authority to be in Weignberg Compound. When referred to a letter from the Municipal Council advising those with offer letters to engage a surveyor to subdivide the plots on the land in dispute, it was PW1's assertion that the Council was not the author of the said letter and that is the reason

why the Plaintiffs wanted the Barotse Royal Establishment to come and rectify the issue. According to PW1 the land in dispute is customary land and was allocated by the Barotse Royal Establishment and that there was a need for the Municipal Council to engage the Barotse Royal Establishment in resolving the matter.

In re-examination, PW1 testified that the matter over the land in question had been protracted and gave the example of Kasimu area where the Council had been given land and had demarcated the area without any delay, and that the Council engaged a surveyor. It was PW1's testimony that there are over 1000 residents on the land in dispute whilst only 18 claim to have offer letters. PW1 reiterated that the land in dispute is customary land.

PW2 Kawana Kende Chief Nawasiku, an Induna at Saa Kuta testified that the people who were being misplaced from Weignberg Compound went to report the matter to *Saa Kuta* (Royal Court) and were told to stay as no one had the powers to displace or re-allocate them as the land belonged to the Barotse Royal Establishment. It was PW2's further testimony that the Mongu Municipal Council had

also been given land by the Barotse Royal Establishment and that the land in dispute belongs to the Barotse Royal Establishment.

In cross-examination by Counsel for the Plaintiff, when asked as to why people who lodged a complaint to the Barotse Royal Establishment were being displaced, it was PW2's assertion that it was the Council that requested them to move. According to PW2, he was not aware that the Council had requested people to apply for plots in the land in dispute. It was PW2's further assertion that he was not aware that there was a site plan for the land in dispute as it was never presented at *Saa Kuta*, and that even if the site plan had been presented to the *Saa Kuta* by the complainants, the land in dispute was customary land including where the Court is located in Mongu.

In further cross-examination, as regards the issue as to what transpires once customary land is allocated to the Council, it was PW2's assertion that thereafter such land belongs to the Council. According to PW2 the land in dispute belongs to the Barotse Royal Establishment and cited an example where the Council went to the *Saa Kuta* to lodge a complaint after a person encroached on their

piece of land. That in the present case, the Council never lodged such a complaint to the *Saa Kuta*. It was PW2's assertion that he was not aware that the Council had issued eviction notices in 1992, and reiterated that the land in question is not Council land. When shown the site plan relating to the land in question, it was PW2 asserted that it was a manufactured document, as with customary land, there are no sketch plans or site plans. It was PW2's assertion that the Council had come to the *Kuta* and one site plan was accepted whilst the other site plan was rejected.

In further cross-examination, it was PW2's assertion that in Western Province there is no State land and that everyone who is allocated land is given a certificate as proof of ownership with an emblem of an elephant, and that each *Induna* has their own emblem depending on the location of the land. In further cross-examination, it was PW2's assertion that once the Barotse Royal Establishment allocates land to the Council, the Council is free to deal with the land and that the Council does not inform the Barotse Royal Establishment as to how they will subdivide the land.

PW3, Mumbuna Sikauta an Induna in the Barotse Royal Establishment, testified that the land in dispute was in Weignberg Compound. That his main duty in the Barotse Royal Establishment as an *Induna* was to allocate the land in dispute which is customary land.

In cross-examination, when asked as to whether he was aware that the Council had produced a site plan for Weignberg Compound, PW3 asserted that such a document could not be produced without the knowledge of the Barotse Royal Establishment. It was PW3's assertion that the Council could not build houses on the said land in dispute as the Barotse Royal Establishment is the entity vested with the power to allocate land. In further cross-examination, PW3 when queried as to whether he was aware that the Council had invited people to apply for the remaining part of the land on the site plan where the Council had not built, it was PW3's assertion that it could only happen if those people had documents proving that they had been allocated land by the Barotse Royal Establishment.

In further cross-examination, PW3 disputed the assertion that persons who had applied for land from the Council had received

offer letters from the Ministry of Lands, and asserted that in Western Province the only entity with authority to allocate land is the Barotse Royal Establishment. According to PW3, he was in charge of giving land at the *Kuta*, and that the Plaintiff and his group took the complaint before Court previously although he could not recall the exact date. PW3 reiterated that the Barotse Royal Establishment was the only authority that allocates land in Western Province as all land in that area belongs to the Barotse Royal Establishment and quoted from the Holy Bible in Proverbs Chapter 23 Verse 9 from the Bible which he stated provides that *'thou shall not move the boundaries that are already existing so be it those for the old did so thou shall not move them.* According to PW3, once the Barotse Royal Establishment allocates land, a person cannot move or encroach on another's land. PW3 also questioned which Council officials had launched a complaint about moving the boundaries of land given to them and why the said officials were not before Court. It was PW3's assertion that the Barotse Royal Establishment had authority to prevent the surveyor from doing his work, as the Defendants were building on land that was not given to them by the

Barotse Royal Establishment. Further that had the Barotse Royal Establishment allocated the said piece of land to the Council, any complaint by the Council should have been lodged with the Barotse Royal Establishment, and not by the Defendants herein as third parties.

With those witnesses the Plaintiffs proceeded to close their case.

On the part of the Defendants, three witnesses were called.

DW1 Steven Chipangu Luneta, the 1st Defendant testified that he resides in Weignberg compound, and that sometime in 1992 the council officers visited Weignberg compound and had a meeting with the residents where a document was produced to the effect that people had been living in that compound illegally hence they had to vacate as the Council wanted to sell the land and put up some developmental buildings. DW1 when shown page 64 of the Defendant's Bundle of Documents testified that a second meeting was held in the same year 1992 at which the Council officers went with another notice and informed the people present that they were going to evict them from Weignberg compound. It was DW1's testimony that the residents were invited to apply for plots from the

Council. It was DW1's testimony that he and others applied for the said plots, and in the year 1994 he received an offer letter and the site plan from Ministry of Lands. According to DW1, in 1996 he went to the Council together with the others and received their offer letters. That the Council informed them that it could not proceed to demarcate the subject land as too few plots were allocated with 52 plots remaining. It was DW1's testimony that others then applied for more plots equivalent to the remaining plots and in 2007 the Council advised them to engage a surveyor for purposes of demarcating as at the material time the Council did not have a surveyor. According to DW1, a surveyor was engaged and when he went to Weignberg compound for purposes of demarcating the land in dispute, he was prevented from carrying out the demarcation by those who did not have offer letters. That the same group of persons then proceeded to see the *Indunas* who then went to the site and informed DW1 and others to cease dealing with the land in dispute. It was DW1's further testimony that he and others met the Council officials who made an undertaking to revert to them never got any response.

It was DW1's testimony that he and the Defendants herein sued the Council but that the Council authorities never attended Court proceedings hence a default judgment was entered against the Council. That thereafter the other residents of Weignberg without offer letters sued those with offer letters, the Ministry of Lands, the Attorney General and the Council for encroaching into their land, and that the said action was dismissed in 2014. It was DW1's assertion that in 2015, the surveyor that was engaged was told to re-commence demarcations and that upon commencement of those works, those without offer letters including the Plaintiffs met DW1 and others with offer letters and advised them of the court action. It was DW1's testimony that the Defendants had approval from the Council to engage a surveyor as shown on page 62 of the Defendant's Bundle of Documents and reiterated that the land in question is State land and not customary land as alleged by the Plaintiffs.

In cross-examination, it was DW1's assertion that at the time he went to settle on the said land he was not welcomed by the Council or the Barotse Royal Establishment but by then UNIP section

chairman who told him that it was Council land. It was DW1's assertion that he was not aware that they were *Indunas* who were in charge of land matters. When asked as to whether the illegal squatters in Weignberg compound could acquire title deeds, DW1 answered in the negative. In further cross examination, DW1 was asked whether he inquired from the persons that advertised the piece of land in question whether it was state or customary land, DW1 responded in the negative. DW1 denied being aware of the fact that the Plaintiffs had title deeds to the land in dispute and asserted that as far as he knew, the land on which he had settled belonged to the Council and he could not make any development on it until he was authorized by the Council. In further cross examination, it was DW1's assertion that the offer letters facilitate development of the land in question and that the land application letter was different from the offer letters.

In further cross-examination, it was DW1's assertion that the Council officials were the only ones with the mandate to attest as to whether the land in dispute was given to the Municipal Council by the Barotse Royal Establishment. It was DW1's assertion that he

had been given the land by the Municipal Council and so no need to lodge any claim against the Plaintiffs. It was DW1's assertion that the people who were against them were those without documents and those that settled in that area after the Council had offered plots to residents of the land in question. When further asked as to whether he had a document before Court that showed that the Barotse Royal Establishment together with the Council officers resolved that the land in dispute be given to the Council to develop, it was DW1's assertion that the Council was better placed to answer that question as the documents that the Defendants had were from the Ministry of Lands. It was DW1's assertion that the onus was on the Plaintiffs to produce such documents to prove that the land in dispute belongs to the State. It was DW1's assertion that the Plaintiffs together with others were supposed to go to Mongu Municipal Council to see a person named Imbula who was to direct them to the new area where they were to relocate.

DW2 Muntanga Muyowana, testified that in 2001 Council officials held a meeting in Weignberg compound and told the residents that land was available for allocation and that others had already

applied and obtained offer letters. That in November 2002 a second meeting was held at which Council officials told the residents that those with offer letters intended to sue the Council, and as such the Council was only giving them three months to apply for land and those that failed to do so would be evicted. It was DW2's testimony that another meeting was held in February 2003 at which it was resolved that the residents should apply for the remaining 34 plots so that they could develop the area. It was DW2's testimony that he then applied for land and was issued a letter as shown on page 14 of the Defendants' Bundle of Documents, and that in July 2005 DW2 received his offer letter as shown on page 15 of the Defendants' Bundle of Documents. DW2 testified that in September 2005 those that did not receive offer letters went and called *Indunas* from the Barotse Royal Establishment who told DW2 and his colleagues that they were going to discuss the issue with the Council as to whether the land was State land or customary land. It was DW2's testimony that they waited until 2007 but did not get any response, and consequently went to the Council offices where DW2 and others were told that the Council did not have a surveyor.

It was DW2's testimony that the Council officials advised them to engage a private surveyor and a Mr. Robert Kahelu was subsequently engaged. That the said surveyor was prevented from doing his work by those without offer letters on the premise that they would dialogue with the Council. When the Council delayed the dialogue, DW2 and his colleagues sued the Council in 2008 and in 2011 Judgment in default was entered against the Council. It was DW2's testimony that in April 2011, he received a summons from Mukumbuta Muluwani, the owner of Mushi Mutata village and in July 2011 received a notice of hearing. That the said matter was dismissed in November 2014. It was DW2's testimony that thereafter the Council advised them to proceed with the demarcation of the plots in question, but again the surveyor was prevented by the Plaintiffs who did not have offer letters. It was DW2's testimony that to the best of his knowledge the land in question is State land.

In cross-examination, it was DW2's assertion that when he settled in Weignberg compound he was welcomed by the residents and that as far as he knew, the land in question was State land. It was

DW2's assertion that he never asked as to whether the land was customary or State land as at the material time when the Council advised them to apply for the remaining 34 plots, others already had offer letters. In further cross-examination, DW2 reiterated that the Council was given the land in question by the Barotse Royal Establishment and that the Council was not sued hence the absence of Council officer to prove the fact that the land in dispute was given by the Barotse Royal Establishment.

DW3 Anthony Mwenya, testified that he is the Director of Planning at Mongu Municipal Council and his main roles are coordinating socio-economical planning and coordinating physical planning. In relation to the issue before Court, it was DW3's testimony that in terms of physical planning, the Council is guided by the **Urban and Regional Planning Act No 3 of 2015**. DW3 testified that the said Act was previously known as the **Town and Country Planning Act Cap 283 of the Laws of Zambia**, and that the boundary description for Mongu township was adopted in the **Urban and Regional Planning Act No. 3 of 2015**, and according to that Act, the land in question is within Mongu township boundary. It was

DW3's testimony that the Council has the Mongu township boundary Map Z95 and a layout plan. It was DW3's further testimony that the layout plan was prepared by the Ministry of Local Government and is marked with sites for government pool houses and referred to page 13 of the Defendants' Bundle of Documents. DW3 reiterated that given the township boundary description and the layout plan, the land in question is State land and falls under the jurisdiction of Mongu Municipal Council. DW3 testified that a person who intends to acquire land in that area is required to follow Council procedure for obtaining legal documents for ownership, and that the Council advised people to apply to the Council for plots in the land in question.

DW3 testified that State land is a creation of customary land, hence consultative meetings are held between government and traditional institutions. Thereafter, the Ministry of Lands and the Ministry of Local Government and Housing describes the township boundaries.

In cross-examination, it was DW3's assertion that he was knowledgeable in planning hence his presence before Court on behalf of the Council. As regards the previous meetings between the

Town Clerk and the Plaintiffs, it was DW3's testimony that he was not privy to the meetings that were allegedly held by the Plaintiffs and the Town Clerk hence he could not comment on the same. When asked as to whether he had any document to show the Court that the land in issue was given to the Council, it was DW3's testimony that the only document he had was the **Urban and Planning Act No. 3 of 2015** which gives the description of Mongu District township boundaries which shows that the land in question is State land. As regards the issue of which document is more credible between a title deed and an offer letter, it was DW3's testimony that acquisition of land is a legal process, and that the first document a person receives from the Ministry of Lands is an offer letter for land and that thereafter a title deed is a final document.

It was DW3's further testimony that according to the Constitution of Zambia, all land in the country is vested in the President on behalf of the people, and that there are two systems of land administration namely customary land and State land. DW3 maintained that he knew that the land in question was State land as described in the

Urban and Regional Planning Act No.3 of 2015 and as shown on map Z95.

The Court asked DW3 if to his knowledge he knew of persons who hold title deeds in respect to the land in question. It was DW3's testimony that at this stage most people only had offer letters from the Ministry of Lands.

It was DW3's assertion that there are certain requirements that the Ministry of Lands demands from those with offer letters, and the process of acquiring land in Zambia involves finances, hence that could be the reason why such persons had not proceeded to get title deeds. It was DW3's further assertion that most people are not knowledgeable on the land process as once they obtain offer letters, according to them that completes the process of land acquisition. According to DW3, the Ministry of Lands does not give title to land that is in dispute and before Court, and that the Ministry waits for the Court's determination of the matter before issuing title deeds. When asked as to whether a traditional authority can issue a title deed to an individual in State land, it was DW3's assertion that it was not possible as State land is administered by the Council on

behalf of the Commissioner of Lands. It was DW3's assertion that when a person is in possession of an offer letter, that person can claim ownership of land it being the first symbol of ownership and reiterated that a person still required to obtain title deeds.

The Defendants proceeded to close their case.

At the close of the hearing, the Plaintiffs made oral submissions whilst Counsel for the Defendants opted for written submissions which were filed into Court on 5th August, 2016.

The 1st Plaintiff made oral submissions in which he urged the Court to consider the Plaintiffs' claim as the land in question had more than 1,000 residents on it. PW1 submitted that if these people were to be displaced occasioned by the Defendants' claim, the Plaintiffs' would have nowhere to settle. That the Plaintiffs' had suffered for a long period and had been threatened by revocation of the subject land which according to PW1 was given to the Plaintiffs' by the Barotse Royal Establishment. PW1 submitted that they were welcomed by the traditional leaders on to the said land and their plea was to live in peace. In conclusion, it was submitted that the Court should take into consideration the expenses incurred by the

Plaintiffs in this matter for over a period of twenty-two years (22) years, and the Plaintiffs' wanted freedom from the bondage and slavery that they have undergone during this period.

The Defendants filed written submissions whose gist is that the Plaintiffs have failed to prove their case against the Defendants and cited the **Town and Country Planning Act (Application) Order 1982** which describes the township boundary of Mongu whose descriptions of the boundaries are still valid by virtue of Section 76 (1) of the **Urban and Regional Planning Act No 3 of 2015**, and the map is deposited in the office of the Surveyor-General signed by him and dated 10th February, 1975.

Counsel for the Defendants submitted that the Plaintiffs failed to provide a description of the land in question whilst the Defendants produced a layout plan of the land in question prepared by the Mongu Municipal Council showing that the land in question is part of Mulambwa Compound. It was submitted that the Defendants were able to clearly pinpoint through the evidence of the Council's Director of Planning that the land in dispute falls within the

township boundary as provided by the **Town and Country Planning (Application) Order, 1982.**

Counsel for the Defendants submitted that as far back as 1992, the Council had issued eviction notices to residents as indicated on page 64 of the Defendant's Bundle of Documents, and that there was no objection raised by the Barotse Royal Establishment. That the record shows that disputes only arose when residents who were issued with offer letters by the Commissioner of Lands were allowed by the Mongu Municipal Council to engage a surveyor as shown on page 2 of the Defendant's Bundle of Documents. It was Counsel for the Defendants contention that the lay out plan at page 13 of the Defendant's Bundle of Documents show that the land in dispute has a lay out plan with plot numbers including site plans from the Survey Department and this all goes to prove that the land in question belongs to the Council. It was Counsel for the Defendants submission that the Plaintiff in its Bundle of Documents produced minutes of a meeting between Council officials and local *Indunas* dated 5th May 1995 and that the land in question was not even mentioned. That the Plaintiffs also produced in their Bundle of

Documents a report marked " **Exhibit AN1**" on the squatter upgrading programme and refers to the upgrading of Wijnberg unplanned settlement located in Mulambwa Compound in Mongu located under the jurisdiction of Mongu Municipal Council.

Counsel for the Defendant in support of the acquisition of land in State land in Zambia, cited the case of **Justin Chansa v Lusaka City Council**¹. It was Counsel for the Defendants' submission that the Defendants have shown that the land in dispute belongs to the Council and therefore their offer letters from the Commissioner of Lands are valid as they followed the procedure as laid out in Circular No 1 of 1985 when applying for the said land. Counsel for the Defendants' urged the Court to dismiss the Plaintiffs claim as the Plaintiffs have failed to prove their claim on a balance of probabilities and that the Court makes an order that the offer letters from the Commissioner of Lands to the Defendants and some Plaintiffs are valid.

I have carefully analysed the pleadings in this matter, the bundle of Documents and the Plaintiffs' oral submissions and the written

submissions of Defendants and the authorities drawn to my attention.

The main issue for resolution hinges on the Plaintiffs claim for a declaratory order that they are legitimate inhabitants to the land in question and seek a declaration to that effect. This question is dependent on whether or not the land in question is customary or State land. Once the status of the land is determined, it will address the rest of the Plaintiffs' claims. The other issue for determination is the 1st to 4th Defendant's legal status in relation to the offer letters.

I take note that though the land in question is described as "Wijnberg", "Wijenburg" "Weignberg", I find that it refers to the same land, and for my purposes it will hereinafter be referred to as "Weignberg".

A perusal of the pleadings and the evidence of all the witnesses reveals that the land in question is known as "*Weignberg ya bucwani*". It is not in dispute that both the Plaintiffs and Defendants are residents or inhabitants of the said land in question having occupied the land in question for different periods of time. Both parties admit that the Mongu Municipal Council in 1992

issued eviction notices for squatters to move out of the land known as Weignberg Compound.

It is trite law that he who alleges should prove their case. The learned authors of **Phipson on Evidence 17th Edition** in paragraph 6 – 06 at page 151 state the following regarding the burden of proof in civil cases:

“So far as the persuasive burden is concerned, the burden of proof lies upon the party who substantively asserts the affirmative of the issue. If, when all the evidence is adduced by all parties, the party who has this burden has not discharged it, the decision must be against him. It is an ancient rule founded on considerations of good sense and should not be departed from without strong reasons.”

I agree with this statement and I am further guided by the case of **Zulu v Avondale Housing Project Limited** where, generally, it is for a Plaintiff who alleges to prove the allegations and a Plaintiff who fails to prove his case cannot be entitled to judgment whatever may be said of the opponent's case.

The Plaintiffs argued that the land in question is customary land. To this effect, PW2 and PW3 were categorical that the land in

question is State land. I take judicial notice that the *Litunga* (King of the Lozis) is the overall head of the customary land administration system in Western Province of Zambia and is the final authority in all land matters. Customary land in Western Province is administered by the Barotse Royal Establishment through *Indunas* on behalf of the *Litunga*. In terms of Lozi customary land tenure, it is my view that this was adequately articulated by the two *Indunas* PW2 and PW3 who were called as witnesses to testify on behalf of the Plaintiffs.

The Plaintiffs seeks a declaratory order that they have an interest in the land in question and are legitimate inhabitants through the authority of the Barotse Royal Establishment. It is the Plaintiffs position that the land in question is customary land allocated to them by the Barotse Royal Establishment as the body imbued with power to allocate land in the said area and not Mongu Municipal Council. Conversely, the Defendants argue that the land in question is State land as it within the township boundary as evidenced by the layout plan, and that the township boundary is rightly described in the **Urban and Regional Planning Act No 3 of 2015**

by virtue of Section 76 (1) of the said Act. The Defendants further argue that the land belongs to the Council and responded to the Council's offer to purchase plots on the land in question, and consequently the Council issued offer letters which were exhibited on page 42 in the Defendants' Bundle of Documents.

There are evidently two conflicting positions on the status of the land in question. Is the land in question customary land or State land? Once that is determined, it will answer the legal status of both the Plaintiffs and Defendants.

In determining what the status of the land in question is, and on whether it falls under customary land or State land, I have taken into consideration the documentary evidence on record. From a reading of the *"Report on Wijnberg Informal Settlement Re-development Project Mongu"* by the Ministry of Local Government and Housing dated 18th May, 2009 at page 21 in the Plaintiff's Bundle of Documents, it states the location of the land in question as follows:

" Mulambwa Ward covers areas like Wijnberg yabuchwani and yanasenke"

Further, on page 14 of the Plaintiffs' Bundle of Documents, the relevant part in Clause 1.0 of the *"Report on Wijnberg Informal Settlement Re-development Project Mongu"* states as follows:

"In the case of Mongu, Wijnburg Compounded was selected by the municipality for upgrading under the terms of the Town and Country Planning Act Cap 283 and the Housing (Statutory and Improvement Areas) Act Cap 194 of the Laws of Zambia. The former Act empowers the Government through the Ministry of Local Government and Housing to declare areas within local authority jurisdictions statutory improvement areas."

The aforesaid Report which was prepared following a meeting to discuss the upgrading of the land in question clearly shows that the land in dispute is State land administered by the Mongu Municipal Council. The Plaintiffs did not dispute this evidence and in fact produced the Report in its Bundle of Documents. I find that this Report is not useful to the Plaintiffs case but instead affirms that the land in question is State land as further provided by Section 76 (1) of the **Urban and Regional Planning Act No 3 of 2015** which

repealed and replaced the **Town and Country Planning Act** and the **Housing (Statutory and Improvement Areas) Act Cap 194 of the Laws of Zambia**. The said section, stipulates that any boundaries lawfully done under the repealed Acts remains in force and is deemed to have been lawfully done. I find that this position is supported by DW3 the Director of Planning at Mongu Municipal Council who identified a site plan of the land in dispute at page 13 of the Defendant's Bundle of Documents and confirmed that the land in dispute falls within the jurisdiction of the Mongu Municipal Council hence offer letters were generated from the Commissioner of Lands.

A perusal of the Plaintiffs' Bundle of Documents at page 6 refers to a letter dated 12th October 2005 from *Induna* Namamba addressed to the Officer in Charge Mongu and copied to the Town Clerk and Permanent Secretary, alluding to the fact that Weignberg Shanty Compound does not belong to the Council. PW2 and PW3 from the Barotse Royal Establishment were emphatic in their respective testimony that the land in question belongs to the Barotse Royal Establishment. PW3 further testified that documentation is given to

those allocated land and the emblem is an elephant though each *Induna* has a different emblem. I find that none of the Plaintiffs' provided proof of ownership of the land in dispute.

The position I take that the land in question is State land is further supported by the **Town and Country Planning (Application) Order 1982** showing the Mongu township boundary contained in a map which is a public document deposited at the Surveyor-General's office which includes the land in question. This finding is supported by the Report on Wijnberg Informal Settlement Re-development Project Mongu in the Plaintiff's Bundle of Documents at page 11.

The Defendants in arguing that the land in question is State land, through DW3 produced at page 13 of the Defendants' Bundle of Documents a lay out plan of the land in question showing plot numbers. I find that these plot numbers correspond to the plot numbers stated in the Defendants offer letters. The proper inference to draw is that these are the plots allocated by Mongu Municipal Council which goes to prove that the land in dispute is State land.

Further, in the Defendants Bundle of Documents at page 64 is a notice to illegal squatters including Weignberg compound to vacate

the land in question so as to facilitate development for intended developers and gave a period of 40 days from 20th May, 1992 and vacation was up to 30th June 1992. A subsequent notice dated 28th May 1992 was exhibited in the Defendants' Bundle of Documents at page 65 which shows that following representation to the Permanent Secretary the eviction date was moved to 31st July 1992. This supports my findings that the land in dispute is State land.

A further perusal of the offer letters of the Defendants Bundle of Documents at page 15 for Muyuwano Mutanga, at page 17 for Mr. K Kapalwa, at page 18 for Mr. Kennedy Kakwasha, at page 20 for Mr. Susiku, at page 22 for Mr. Kahalu, at page 24 for Mr. Yambayamba Namushi, at page 28 for Mr. Luneta Chipango, at page 36 for Mr. Kabango Mukecho, at page 42 for Mr. Kashana Sifuniso, at page 46 for Mr. Manyando Mulemwa, at page 50 for Mr. Chikanda Reuben Kachaka, at page 54 for Mr. Hangwina Adrian, at page 58 for Mr. Simushi, give a description of the land which corresponds to the plot numbers in the site plan at page 13 of the Defendants' Bundle of Documents being the proposed residential site. This in my view goes to prove that the land in question falls under the jurisdiction of

the Mongu Municipal Council. The evidence of PW1, DW1, DW2 including DW3 all confirm that there are offer letters in respect to the land in question. I concur with Counsel for the Defendants' submission that the Defendants have demonstrated that the land in question is State land and Mongu Municipal Council has the authority to consider applications from the public for allocation of land.

From the above documentary evidence, all these factors prove that the land in question is unequivocally State land administered by the Mongu Municipal Council and not the Barotse Royal Establishment as argued by the Plaintiffs.

Having found that the land in question is State land, what then is the status of the Plaintiffs in the occupation of the said land? Are the Plaintiffs' squatters at law? A squatter in **Black's Law Dictionary 8th Edition Bryan A Garner 1999 at page 1439** states as follows:

"as a person who settles on property without any legal claim or title."

I am ably guided by the case of **Raphael Ackim Namung'andu v Lusaka City Council**⁴ where the erstwhile Commissioner Mathew Ngulube, (as he then was) stated regarding the status of squatters in law, that:

'Squatters build at their own risk and if the owners of the land withdraw their permission or licence or if they decide to demolish a structure built in the absence of any permission or other lawful relationship, the Squatters' losses though very regrettable are not recoverable in a Court of Law.'

Further that:

'A squatter is a squatter and the Defendants can demolish unauthorized structures build without their permission'.

The view I take is that the Plaintiffs have no legal right of both occupation and possession of the land in question, and this is evident from the eviction notices from the Council advising them to relocate. For reasons stated aforesaid, I find that the Plaintiffs are squatters on the land in question without any legal claim or title.

The Plaintiffs' seek a declaratory order that they are legitimate inhabitants to the land in question wherein the interest emanates from the fact they have occupied the land in question and have been there from time immemorial the land having been occupied by the forefathers. Having found that the land in dispute is State land, the Plaintiffs have no legal standing and are not entitled to any legal remedy at law, and it follows that the claim for a declaratory order is redundant. It is trite law that want of title disentitles the Plaintiffs to any remedy in a Court of law. In light of the preceding paragraphs, I find that the Plaintiffs herein have no legal standing in the eyes of the law.

The 1st, 2nd, 3rd and 4th Defendant made a counterclaim for a declaration that the offer letters which were generated by the Commissioner of Lands to the 1st, 2nd, 3rd and 4th Defendant's are valid. The Court has the power to make a declaratory judgment. This power is discretionary and must be exercised judicially. Declaratory relief cannot be demanded by a party as of right. In the case of **Katongo v. Attorney General**² and in the case of **Communications Authority v Vodacom Zambia Limited**³ the

Supreme Court ably guided that declaratory judgments should be discouraged where a Court is of the opinion that another remedy affords a claimant sufficient redress or that granting declaratory relief will not save any useful purpose particularly in a case where the claimant has an adequate alternative remedy.

In determining the validity of the 1st, 2nd, 3rd and 4th Defendant offer letters, it is imperative to set out the procedure for the allocation of State land in Zambia. I am ably guided by the Supreme Court in the case of **Justin Chansa v Lusaka City Council** ¹ cited by Counsel for the Defendants' where it was stated that:

- “(1) The authority to consider applications for land allocation from members of the public is vested in the President of Zambia who has delegated this authority to the Commissioner of Lands*
- (2) An applicant for land in terms of circular number 1 of 1985, an option either to apply directly to the Commissioner of Lands, or to apply through a Local Authority which has been delegated powers to receive application for land from members of the public*

- (3) *Where a member of the public opts for the second route, a Local Authority is mandated to advertise any land available, receive applications from members of the public and make recommendation to the Commissioner of Lands*
- (4) *The powers to allocate land and make offers to successful applicants is reposed in the Commissioner of Lands.”*

From the foregoing it is an undisputed fact that a local authority has the authority to recommend applicants for land to the Commissioner of Lands. It therefore follows that offer letters effectively constitute a valid contract between the Commissioner of Land or the local authority and the person who accepts the offer letters, and the Plaintiffs are therefore bound to respect the offer letters herein. I find that the process for obtaining title to the land allocated to the 1st, 2nd, 3rd and 4th Defendant is still ongoing and the delay has been occasioned by a number of factors such as the failure of the surveyor engaged by the 1st, 2nd, 3rd and 4th Defendant to survey the land in dispute. The Defendants' counterclaim succeeds and I declare that that the 1st, 2nd, 3rd and 4th Defendant's offer letters are valid and the 1st, 2nd, 3rd and 4th Defendant are

legally in occupation of the land in question whilst waiting for completion of the land acquisition formalities as set out in their respective offer letters.

The 5th Defendant is the surveyor who was engaged by the 1st, 2nd, 3rd and 4th Defendant to survey the land in question. Except for the claim for an order of injunction, the remaining claims by the Plaintiffs endorsed in the Writ of Summons in no way affect the 5th Defendant.

Arising from my finding that the land in question is State land, the interlocutory injunction granted on the 2nd June, 2016 is hereby discharged.

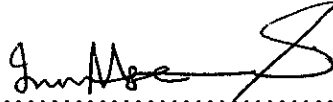
On a preponderance of probabilities which is the standard required in civil matters, I find that the Plaintiffs' have failed to prove their case and the Plaintiffs' claim are dismissed.

For the avoidance of doubt, the Plaintiffs' have no legal claim to the land in dispute situate in Weignberg Compound, Mongu. I further order that the Plaintiffs' be evicted from the land in dispute within one hundred and eighty (180) days from date of this Judgment.

Due to the nature of the case, I order that each party shall meet their own costs.

Leave to appeal granted.

Delivered this 16th day of June, 2017

A handwritten signature in black ink, appearing to read 'Irene Mbeve', written over a horizontal dotted line.

IRENE ZEKO MBEWE
HIGH COURT JUDGE