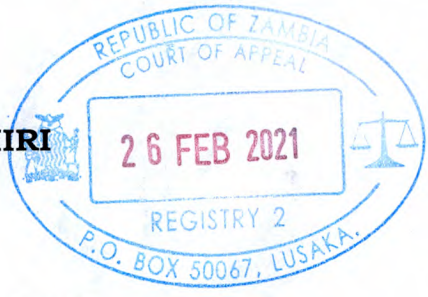
IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO 219/2019**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:



MIKE MSANIDE PHIRI **1ST APPELLANT**
COMFORT LOZILILO PHIRI **2ND APPELLANT**

AND

THE REGISTERED TRUSTEES **RESPONDENT**
OF THE CATHOLIC DIOCESE OF MPIKA

CORAM: CHISANGA JP, MULONGOTI AND SIAVWAPA JJA

On 16th January and 26th February 2021

FOR THE APPELLANTS: MR. A KABASO OF MESSRS K. B. F. AND PARTNERS

FOR THE RESPONDENT: MISS S. NAMUSAMBA OF MESSRS SHAMWANA AND CO.

J U D G M E N T

SIAVWAPA, JA, delivered the Judgment of the Court.

Cases referred to:

1. *Honorius Maurice Chilufya v Crispin Haluwa Kangunda SCZ Judgment No. 29 of 1999.*
2. *Bwalya v Kangunda*
3. *Alex Dingiswayo Banda (suing as administrator of the estate of Courtson Jere) v Edward Kangwa Mumbi Appeal No. 174 of 2010.*

Legislation referred to:

1. *The Lands Act, Chapter 184 of the Laws of Zambia*
2. *The Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia*

Works referred to:

Land Law in Zambia: Cases and Materials: Fredrick S. Mudenda UNZA Press (2006) P. 520

1.0. **INTRODUCTION**

1.1. This appeal is against the Judgment of the Honourable Mrs. Justice M. Mapani-Kawimbe delivered on 13th February 2019 at Lusaka.

1.2. By the said Judgment, the learned Judge ordered the cancellation of Certificate of Title No. 12110 relating to Farm No. 8377, Kanchibiya, Mpika which is in the names of the Appellants.

1.3. The reason for the order to cancel the Certificate of Title was that the Commissioner of Lands had wrongly renewed the 14 year lease and that the Respondents herein were the bonafide offerees of the land in issue.

2.0. **CASE BACKGROUND**

2.1. The deceased father to the Appellants, one Charles David Phiri, was the holder of a 14 year lease to the farm in dispute commencing on 1st December 1993 under Certificate of Title No. 8377/1.

2.2. The said lease was due for renewal on 1st December 2007. However, the lessee, Mr. Charles David Phiri died on 26th February 2013 without having the lease renewed and the Appellants were appointed joint administrators of his estate along with one Rosemary Musa on 15th April, 2013.

2.3. On 23rd April, 2015, the Ministry of Lands issued an invitation to treaty to the Appellants relating to the same property for agricultural purposes as per document exhibited at page 59 in the Record of Appeal.

2.4. On 15th May 2015, the Appellants paid the requisite fees to the Ministry (see page 60 of the Record) and on the same day an offer was made to them via the letter appearing at page 61 of the Record. The Appellants paid the fees on the same date and receipt No. 00998820 was issued as appears at page 62 of the Record.

2.5. On 24th August 2015, Certificate of Title No. 12110 in respect of Farm No. 8377, which is the subject of the lower Court's order of cancellation, was issued to the Appellants.

3.0. **THE RESPONDENTS' INTEREST**

3.1. The Respondents' interest and claim in the land arises from the document at page 76 of the Record which is an offer of a farming plot in the Kanchibiya Resettlement Scheme, to the extent of 30 hectares. The offer letter from the Principal Land Resettlement Officer is dated 17th February 2009.

3.2. The offer letter clearly defines the plot as a farming resettlement and in 2012, the Respondents wrote to the Commissioner of Lands requesting him to consider it for the said farm on account that he had substantially developed it. This letter was written after the Respondents became aware of the history of the land as being on a 14 year lease in the name of Charles David Phiri, who was still alive in 2012 when the letter was written.

3.3. There is no evidence of any reply from the Commissioner of Lands on the Record. We have also combed through the Record and we find no evidence of direct communication between the Respondents and the Commissioner of Lands regarding the said piece of land.

4.0. **THE DISPUTE**

On 14th June 2017, the Appellants commenced an action in the High Court by writ of summons accompanied by a statement of claim.

4.1. The Appellants, as Plaintiffs in the Court below, claimed as follows;

1. *An order that the Plaintiffs are the legal owners and title holders of Farm No. 8377, Mpika, Muchinga Province of the Republic of Zambia by vitae of Certificate of Title No. 12110 issued by the Ministry of Lands.*

2. *An order that the Defendants occupied the Plaintiffs' land without the plaintiffs' consent and the Defendants are neither licensees nor have a claim of right to the said Farm No. 8377, Mpika, but are merely squatters.*
3. *An order of possession.*
4. *Other relief deemed fit by Court and*
5. *Costs.*

5.0. **ARGUMENTS**

5.1. The gist of the Appellants' arguments in the Court below is that, at the time of his death their father had commenced the process of renewing the 14 year lease.

5.2. That upon his death they were appointed administrators and continued the process until they were issued with a Certificate of Title in 2015.

6.0. **DEFENCE AND COUNTERCLAIM**

6.1. The Respondent filed a defence and counterclaim. The main contention in defence is that the 14 year lease expired in 2007 and in the period of the lease the lessee had not undertaken any development on the farm. It was further contended that at the time the Respondent was offered the Farm in 2009, it was without owner.

6.2. In the counterclaim, to which the Commissioner of Lands was made a Defendant, the Respondents assert their interest through the offer for resettlement from the Principal Lands

Resettlement Officer for Northern Province. There is also a plethora of correspondence passing between the Department of Resettlement and the Respondents. The Permanent Secretary in the office of the Vice –President and the Office of the Town-Clerk for Kasama also got involved.

6.3. The Respondent's claims were for;

(i) *An order that the Plaintiff (in counterclaim) is the beneficial owner of the property in issue.*

(ii) *An order that the 1st and 2nd Plaintiff surrender Certificate of Title No. 12110 to the 3rd Respondent for Cancellation.*

(iii) *An order that the 3rd Defendant cancels Certificate of Title No. 12110.*

(iv) *An order that a Certificate of Title for Farm 8377 be issued by the 3rd Respondent in the name of the Plaintiff*

(v) *Costs.*

(vi) *Any other relief*

7.0. **DECISION OF THE COURT BELOW**

7.1. The learned Judge established from the evidence a number of facts namely; that the father to the Appellants was indeed the holder of a 14 year lease on the piece of land in issue; that the Appellants were properly offered the said piece of land by the Ministry of Lands by reason of which they were issued with Certificate of Title No. 12110.

7.2. After settling the above stated facts, the learned Judge then formed the view that the dispute was not whether or not the Plaintiffs had lawfully obtained the Certificate of Title but whether or not the Defendants settled on vacant land by reason of which they obtained a beneficial interest in Farm No. 8377 Kanchibiya, Mpika.

7.3. The learned Judge then went to cite Section 3(1) of the Lands Act which vests all land in the President absolutely on behalf of the citizens.

7.4. She however, also held that the Department of Resettlement, in the office of the Vice President, is also mandated to administer land pursuant to the Statutory Functions Act, Chapter 4 and Gazette Notice No. 42 of 1992.

7.5. Quoting from the learned authors of Land Law in Zambia: Cases and Materials: Fredrick S. Mudenda UNZA Press (2006) P. 520; to the effect that the Department of Resettlement is ill equipped to handle issues of Land alienation; the learned Judge stated;

> ***"However, for the purposes of this case, I find that the inefficiencies of the office of the Vice President have little bearing in that they border on policy and calls for the Government's intervention".*** Then the learned Judge concluded as follows;

"Thus, a person who acts on the belief that the office of the Vice President is mandated to administer land under the Statutory Functions Act cannot be faulted."

7.6. Based on her belief that the expiry of the 14 year lease rendered the land vacant, the learned Judge came to the conclusion that the land had no owner at the time it was allocated to the Respondents by the Department of Resettlement.

7.7. On the argument by the Appellants that they remained in occupation of the land beyond the expiry of the 14 years of the lease as non-re-entry by the Commissioner of Lands had been made, the learned Judge referred to Section 13(1) of the Lands Act which provides the procedure and the circumstances under which re-entry may be made.

7.8. The learned Judge excluded the application of Section 13(1) to an expired lease. She instead cited Section 10(1) of the Act as the one applicable to an expired lease. Section 10 (1) is reproduced hereunder for ease of reference as we shall return to it a little later in our Judgment;

"The President shall renew a lease, upon expiry, for a further term not exceeding ninety-nine years if he is satisfied that the lease has complied with or

observed the terms, conditions or covenants of the lease and the lease is not liable for forfeiture".

7.9. The learned Judge, though acknowledging the mandatory nature of the renewal upon satisfaction of compliance by the President, was of the opinion that the failure by the Commissioner of Lands to inspect the land to ascertain compliance dissatisfied the conditions upon which a renewal should be granted under Section 10(1) of the Act.

7.10. It was on that basis that the learned Judge faulted the Commissioner of Lands for renewing the expired lease and ordered the cancellation of the Certificate of Title issued in the name of the Appellants and to issue a Certificate of Title for the 30 hectares to the Respondents.

8.0. **THE APPEAL**

8.1. The Appellants have approached the Court with 9 grounds of appeal as set out in the Memorandum of Appeal filed on 15th March 2019.

8.2. Having carefully read the 9 grounds it is our view that the same can safely be collapsed as follows;

8.3. Ground 1 is a stand alone as it questions the learned Judge's failure to wait for the filing of submissions as per the consent order.

8.4. Grounds 2, 3, 4 and 5, fault the Judge for elevating an allocation of Land by a Lands Resettlement Officer above an offer by the Commissioner of Lands and a Certificate of Title duly issued.

8.5. Ground 6 also stands alone in that it takes issue with the learned Judge's finding that the Commissioner of Lands was aware of the Respondent's presence on the farm contrary to the evidence on record and the explicit denial of that fact by the Commissioner of Lands by letter dated 23rd February 2016.

8.6. Grounds 7 and 8 both question the propriety of ordering the cancellation of Certificate of Title No. 12110 in the absence of proof of fraud and also in view of the fact that the allocation to the Respondent comprises of only 30 hectares of the 108 hectares represented by the Certificate of Title.

8.7. Ground 9 decries the imposition of costs on the Appellants notwithstanding that it was the duty of the Commissioner of Lands to allocate land.

9.0. **ARGUMENTS BY THE APPELLANTS**

9.1. The Appellants filed their heads of argument on 12th December 2019 together with the authorities relied upon.

9.2. The thrust of the Appellants' arguments is that a 14 year lease does not automatically terminate by effluxion of time. This position is anchored on the Supreme Court decision in the case of *Honorius Maurice Chilufya v Crispin Haluwa Kangunda*[1]. In that case, the Supreme Court stated as follows;

> ***"A state lease which confers ownership and which obliges a lessee to develop the land does not simply expire by effluxion of time".***

9.3. The other limb of the argument is that Section 10 (1) of the Lands Act makes it mandatory for the President to renew an expired lease for a further term not exceeding 99 years.

9.4. Reference was also made to Section 3(2) of the Act which vests power to alienate land in the President by reason of which it is contended that the allocation of 30 hectares to the Respondent by the Department could not defeat the grant of a state lease by the Commissioner of Lands.

9.5. Finally, there is an argument that Section 33 of the Lands and Deeds Registry Act ascribes conclusiveness of a Certificate of Title as to ownership of land which can only be assailed if the circumstances of its issuance fall within the purview of Section 34 of the said Act.

10.0. **ARGUMENTS BY THE RESPONDENTS**

10.1. The Respondents filed their heads of argument on 11th February 2021 largely in response to the grounds of appeal and the arguments in support thereof.

10.2. In a nutshell the arguments by the Respondents are in full support of the learned Judge's findings of fact and interpretation of the law that gave rise to the Judgment favourable to them. We will therefore not reproduce what was said here but we will deal with the issues in our analysis of the grounds and the arguments in relation to the Judgement of the Court below.

11.0. **OUR ANALYSIS AND DECISION**

11.1 The starting point is that the fact that the Appellants were issued with Certificate of Title No. 12110 in respect of Farm 8377, Kanchibiya, in Mpika District is common cause.

11.2 It is also the position at law that the holder of a Certificate of Title is the presumed owner of the land therein pursuant to Order 33 of the Lands and Deeds Registry Act.

11.3. For the presumption of ownership under Section 33 to be impugned, the adverse claimant should prove one or more of the factors prescribed under Section 34 of the said Act.

11.4. The circumstances of this case are however, different in that the Respondents are not relying on any of the factors upon

which a Certificate of Title may be cancelled under Section 34 of the Lands and Deeds Registry Act.

11.5. Their claim to the land, as the basis for an order of cancellation to which the learned Judge acceded, is premised on an allocation to the Respondent by the Northern Province Principal, Resettlement Officer in the office of the Vice President.

11.6. The Respondents have drawn strength for the validity of the allocation on the belief that the land had no owner. This belief arises from the fact that at the time of the allocation in 2009, the land which was under a 14 year lease had been freed following the expiry of the lease in December of 2007.

11.7. Flowing from that belief is the view that the Commissioner of Lands wrongly renewed the lease without satisfying himself that the lessee had complied with the terms and conditions of the lease.

12.0. **THE LAW**

12.1 The Lands Act Chapter 184 of the Laws of Zambia is the principle piece of legislation that makes provision for the administration of land in Zambia. So to the extent that Section 3(1) of the Act vests all land in Zambia absolutely in the President, it follows that only the President holds the mandate to alienate it through the Commissioner of Lands. In

fact, sub-section 2 bestows upon the President the discretion to alienate land to any Zambian.

12.2. We note that the Respondents have argued strongly that because the land was vacant after the expiry of the lease, the Commissioner of Lands ought to have offered the land to them and the learned Judge agreed with that view.

12.3. It would appear to us that the learned Judge was not aware of the decision in the case of *Honorius Chilufya* at the time and either counsel for both parties were equally unaware of the decision because no reference is made to it in the Judgment.

12.4. We have also noted that although the Appellants have referred to the case in their arguments before us the Respondents have conveniently avoided it in their counter arguments.

12.5. It is however, very clear that the *Honorius Chilufya* case, put the matter of an expired lease to rest by stating that it does not simply expire by effluxion of time. The position taken by the Supreme Court in that case is that expiry of the term of the lease is not sufficient to extinguish title.

12.6. When that decision is read together with Section 10(1) of the Act, it becomes clear that unless the President is dissatisfied with compliance issues in the lease by the lessee, he ought to renew the lease and if he does not, then he ought to

compensate the lessee for the improvements made (see sub-section 4).

12.7. In essence therefore, the Certificate of Title remains valid post the life of the lease and the President can renew it anytime thereafter.

12.8. We have taken keen interest in the learned Judge's reasoning in her Judgment in her interpretation of Section 10(1) of the Act. She asserts that because the Commissioner of Lands did not carry out an inspection of the farm upon expiry of the lease, he did not satisfy himself that the lessee had complied with the terms and conditions of the lease hence creating the reason for non-renewal.

12.9. We wish to make two observations with regard to the Judge's held opinion in that regard.

Firstly, the Act does not provide a format by which the Commissioner of Lands can announce to the world at large his satisfaction or otherwise with compliance issues and neither is he under obligation to do so.

Secondly issues of compliance are determined by the Commissioner of Lands and not by third parties who may render unsolicited negative information to the Commissioner of Lands.

12.10. Our understanding of the satisfaction in Section 10 (1) to be had by the Commissioner of Lands is that the same is expressed through the renewal or non-renewal of a lease. The opinion expressed by the learned Judge at page 28 line 16 of the Record of Appeal does not represent the position of the law when she stated as follows:

> ***"In my opinion, before a lease is renewed, the Commissioner of Lands is required to inspect the land in order to ascertain whether the terms, conditions or covenants of the lease have been complied with".***

12.11 After expressing the above opinion, the learned Judge at page 29 line 1 states as follows:

> ***"Applying these principles to the facts of this case, I find that the Commissioner of Lands never inspected the suit land to discover if the Plaintiffs had complied with the lease terms, covenants and conditions".***

12.12 In this regard we are reminded of the part of the evidence in the case of *Honorius Chilufya (supra)* to the effect that an adverse report of non-compliance had been sent to the Commissioner of Lands by an interested party which report was in fact false.

12.13 It is therefore our considered view that the Commissioner of Lands has internal mechanisms by which he satisfies himself as to compliance by a lessee. He is not informed by third parties who are themselves interested in the same land.

12.14 For instance at page 78 of the Record of Appeal is a letter from the Respondents' Treasurer-General addressed to the Commissioner of Lands in which it is alleged that the lessee had never been to the site to develop it but that he only appeared after he saw the development on the land. This clearly was a letter that the Commissioner of Lands would not act upon because; the author was an interested party claiming interest in the same land.

12.15 We are of the opinion that had the Commissioner of Lands detected any major default on the part of the lessee, he would not have granted a 99 year lease. In the words of Ngulube CJ, as he then was in ***Bwalya v Kangunda***[2] *(supra);*

> ***" The lease here did not and could not terminate automatically and it conferred rights at expiry under State's covenants under the lease and above all by Statutes, "to writ the appellant had to get a 99 year lease as of right unless there was major default" (emphasis ours).***

12.16 It was therefore, serious misdirection on the part of the learned Judge to rely on information of alleged default on the part of the lessee given by the Respondents who were trying to oust the legal owner from the land.

13.0 **RESETTLEMENT**

13.1 The Respondents' claim of interest in the land derives from the allocation by the Provincial Resettlement Officer in the Office of the Vice President. According to the document appearing at page 76 of the Record, the Respondents were awarded a farming plot with effect from 16th February, 2009.

13.2 To start with, it is not Government policy to allocate pieces of land for purposes of resettlement on titled land.

13.3 The second point is that had the Department of Resettlement conducted due diligence, it would have known that an expired lease does not render the land vacant.

13.4 The third point is that the Respondent does not fall within the category of those entitled to benefit from Government Resettlement programmes which are intended to benefit internally displaced persons. This is according to the Guidelines for the Compensation and Resettlement of Internally Displaced Persons (IDPs) 2013.

13.5 In her Judgment the learned Judge found in favour of the Respondent because in her view;

"A person who acts on the belief that the office of the Vice-President is mandated to administer land under the Statutory Functions Act cannot be faulted."

13.6 What the above statement means is that ignorance of the law is a defence. In any case the Respondents are enlightened people who could have easily found out what the correct position of the law was.

13.7 The record shows that the Respondents did not approach the Commissioner of Lands to obtain Title to the said land until it was brought to their attention that the legal owners of the land had been granted a 99 year lease.

13.8 What followed thereafter are negotiations among the stakeholders to try and resolve the conflict as the correspondence exhibited will show. At no time did the Commissioner of Lands endorse the claims by the Respondents as beneficial owners following the allocation by the Department of Resettlement.

13.9 Ultimately, we are of the view that in so far as the law is concerned the Department of Resettlement has no power to confer a propriety interest in land to anybody as that is the preserve of the President through the Commissioner of Lands.

13.10 We therefore, view the allocation of 30 hectares of land by the Department of Resettlement to the Respondents on land that was under lease was a trespass on private land and to that extent, null and void.

14.0 **CANCELLATION OF CERTIFICATE OF TITLE**

14.1 The learned Judge, having found that the Commissioner of Lands ought not to have issued a Certificate of Title to the Appellants, ordered its cancellation and the issuance of one to the Respondents in respect of the 30 hectares allocated to them by the Department of Resettlement.

14.2 In view of our position that the offer was null and void, the order for the Cancellation of Certificate of Title No.12110 is hereby set aside and if the order has already been carried out the Commissioner of Lands shall re-issue Certificate No.12110 in the names of the Appellants.

14.3 Consequent upon our orders, hereinbefore made, no Certificate of Title shall be issued to the Respondents in respect of the 30 hectares of land and if already issued, the same shall be cancelled.

15.0 **COSTS**

15.1 At the end of the judgment, the learned Judge made an order for costs in favour of the Defendants. The Appellants have taken issue arguing that the Commissioner of Lands, who

was the 3rd Defendant to the counterclaim, was the one empowered to allocate land.

15.2 We can only say that costs are in the discretion of the court and normally follow the event.

16.0 ASSAILABILITY OF CERTIFICATE OF TITLE

16.1 The provisions of Section 33 of the Lands and Deeds Registry Act are common cause in this regard. It follows therefore, that the possession of a Certificate of Title supersedes any claim in the piece of land represented by the Certificate of Title by any other person against the holder. In the absence of fraud of impropriety in its acquisition pursuant to Section 34, a Certificate of Title is a formidable defence against adverse claims.

16.2 In fact, it is so strong that it overthrows any interest existing prior to its issuance. This was the position taken by the Supreme Court in the case of *Alex Dingiswayo Banda (suing as administrator of the estate of Courtson Jere) v Edward Kangwa Mumbi.*[3]

16.3 We therefore, opine that on that basis alone, the learned Judge should have upheld the claims by the Appellants.

17.0 **CONCLUSION**

17.1 The sum total of this judgment is that the Respondents took the wrong route for acquisition of agricultural land by

approaching the Department of Resettlement when they were not internally displaced persons.

17.2 Further, they were grossly misled by the Provincial Resettlement Officer into believing that the 14 year leasehold which had come to an end had extinguished the proprietary interest of the lease holder thereby rendering the land vacant.

17.3 As for the investment by the Respondents on the 30 hectare piece of land, the respondents are at the mercy of the Appellants and we say nothing more.

17.4 In view of what we have said in this judgment, this appeal is allowed and we award costs to the Appellants in here and below.

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F. M. CHISANGA

JUDGE PRESIDENT COURT OF APPEAL

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J. Z. MULONGOTI

COURT OF APPEAL JUDGE

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M. J. SIAVWAPA

COURT OF APPEAL JUDGE