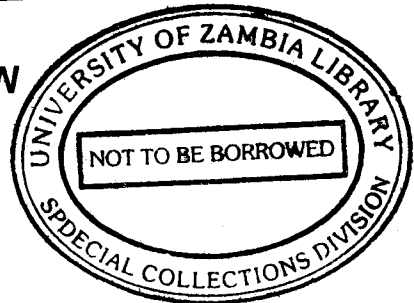




THE UNIVERSITY OF ZAMBIA

SCHOOL OF LAW



**AN EXAMINATION OF THE ADEQUACY OF THE LAW ON
COMMON LEASEHOLD SCHEMES IN ZAMBIA**

By

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An obligatory essay submitted to the University of Zambia in partial fulfillment of the requirement of the Bachelor of Laws (LLB) Degree programme.

University of Zambia,
School of Law,
Lusaka.

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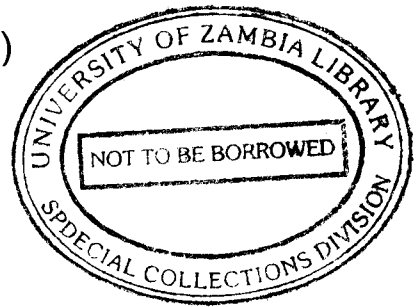
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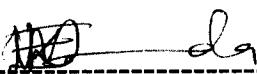
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DECLARATION

I, **Koreen Etambuyu Mwenda**, declare that I am the author of this dissertation which is my own work and where other people's work has been used, due acknowledgements have been made. This research has never been presented before for any academic awards to the best of my knowledge.

I, therefore, take full responsibility for the contents, errors, defects and omissions therein.



Koreen Etambuyu Mwenda

19th Dec, 2005

Date

DEDICATION

I dedicate this work to my late father, **Mr. Elvin Ryan Mwenda**, who should have lived to see me grow up to this stage. *May his soul rest in eternal peace.*

To my mother, **Mrs. Evelyn Chisha Mwenda**, for bringing me into this world and for all the encouragement and support she has given me during my University studies, my brother **Indala** and my young sisters, **Musonda** and **Kunolu** for their support and my nephew **Owen** and niece **Chikwanda**, let this be an inspiration to you for greater academic achievements.

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ABSTRACT

A Common Leasehold Scheme refers to a scheme registered under the Common Leasehold Schemes Act for the division of a parcel of land and its buildings into units.

The law on common leasehold schemes in Zambia is greatly dependant on the common leasehold schemes Act which was enacted in 1994 and has never been amended. Although the idea to introduce Common Leasehold Schemes in Zambia was welcome by most Zambians, the move was done in a hurry without putting in place a proper legal and institutional framework to govern Common Leasehold Schemes in Zambia.

This research examines the adequacy of the law on common leasehold schemes in Zambia. Chapter one introduces the problems and provides a historical background to the common leasehold scheme system. Chapter two critically analyses the Common Leasehold Schemes Act by exploring the provisions of the Act. Chapter three discusses the legal and institutional framework for the administration of common leasehold schemes in Zambia, and examines the effectiveness of the institutions. Chapter four gives the study's conclusions and recommendations.

TABLE OF CONTENTS

| | PAGE |
|------------------------|------|
| Title----- | i |
| Declaration----- | ii |
| Dedication----- | iii |
| Acknowledgements----- | iv |
| Abstract----- | vi |
| Table of contents----- | vii |

CHAPTER ONE: INTRODUCTION AND HISTORICAL BACKGROUND

| | |
|--|---|
| 1.0 Introduction----- | 1 |
| 1.1 Historical Background----- | 2 |
| 1.1.1 Company Title----- | 2 |
| 1.1.2 Leasehold Title----- | 3 |
| 1.1.3 Tenancy in Common Schemes----- | 3 |
| 1.2 Strata legislation begins----- | 4 |
| 1.3 Challenges posed by common leasehold schemes----- | 5 |
| 1.3.1 Failure to form body corporates----- | 5 |
| 1.3.2 Issuing of Title in the name of the Director of Buildings----- | 6 |
| 1.3.3 Preparation of certificates by quantity surveyors----- | 7 |
| 1.3.4 Safety regulations----- | 8 |

CHAPTER TWO: ANALYSIS OF THE COMMON LEASEHOLD SCHEMES ACT

2.0 Introduction----- 10

2.1 Strengths of the common leasehold----- 10

2.2 Weaknesses of the Common Leasehold Schemes Act----- 12

 2.1.1 Lack of Dispute resolution Mechanism----- 12

 2.1.2 No role for land surveyors----- 14

 2.1.3 Transfer of units----- 15

 2.1.4 No penalty for failure to comply with Act ----- 17

 2.1.5 No procedure for the appointment of an agent----- 18

 2.1.6 Act does not address the issue of nuisance----- 18

 2.1.7 No provision relating to Planning Permission----- 19

CHAPTER THREE: LEGAL AND INSTITUTIONAL FRAMEWORK

3.0 Introduction----- 21

3.1 Legal framework----- 22

 3.1.1 The Common Leasehold Schemes Act----- 22

 3.1.2 The Lands and Deeds Registry Act----- 23

 3.1.3 The Lands Act----- 24

3.2 Institutional Framework----- 24

 3.2.1 The Ministry of Lands----- 25

 (a) The Lands Department----- 25

(b) The Lands and Deeds Registry Department----- 26

(c) The Survey Department ----- 27

(d) The Administration Department----- 28

3.2.2 The Ministry of Local Government and Housing----- 29

3.2.3 The Ministry of Works and Supply----- 30

3.3 Effectiveness of the Legal and Institutional Framework----- 30

CHAPTER FOUR: CONCLUSIONS AND RECOMMENDATIONS

4.1 Conclusions----- 37

4.2 Recommendations----- 39

Bibliography----- 42

CHAPTER ONE

1.0 INTRODUCTION

Before the enactment of the common leasehold schemes Act in Zambia, there was no law regulating the sale and purchase of flats or parts of divided buildings. Attempts had been made by legal practitioners to devise a scheme enabling flats to be sold separately, but the complexity of the documents and the arrangements made to protect the respective purchasers of flats, in the enjoyment of their properties had discouraged the making of such attempts.¹ However, after the sale of government houses, flats and other parcels of land and buildings that had a number of units, they arose a need to give the buyers or unit holders separate certificates of title that could have the same effect as any certificate of title issued under the Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia. This was to be done by means of a scheme registered under the Common Leasehold Schemes Act, for the division of a parcel of land and its buildings into units, and it came to be known as a Common Leasehold Scheme. A Common Leasehold Scheme refers to a scheme registered under this Act for the division of a parcel of land and its buildings into units.² A Common leasehold scheme can also include units for which no certificate of title has been issued and this form of a scheme is known as a Phased Development.³

This chapter gives some background information on the Common Leasehold Scheme system, as well as introduces the problem that is to be dealt with in this research.

¹ Land Commission Report, 1967 p.184.

² section 2 of the Common Leasehold Schemes Act.

³ I.b.i.d

1.1 HISTORICAL BACKGROUND

The idea behind the Common Leasehold Scheme system in Zambia was envisaged as far back as 1967, in the Land Commission Report, though the Act to regulate this system was only enacted in 1994. The Commission considered that provision should be made by law under which the sale and purchase of flats could be simplified.⁴ The commission had studied the system introduced in New South Wales by the Conveyancing (Strata Titles) Act of 1961.⁵ Since the idea of the commission to introduce a common leasehold scheme came from the system introduced in New South Wales, it is important for us to consider the history of strata titles in New South Wales.

Before 1961, there were three main schemes in New South Wales of flat or unit ownership.⁶ They were as follows:

- 1.1.1 **COMPANY TITLE:** This was the name given to the most popular form of unit ownership prior to strata legislation. By this method, the land and building (which was usually under Real Property Act 1919 title, commonly called "Torrens title") was owned by a company specially incorporated under a New South Wales Companies Act, which company sells shares to a person who is then entitled to exclusively occupy a specific flat in the building. The articles of Association of the company stated that the common areas of the building

⁴ Land Commission Report, 1967 at p.184

⁵ I.b.i.d

⁶ <http://www.fairtrading.nsw.gov.au/pdfs/corporate/strata03/PDF>

like the footpaths, stairs and gardens were available for common use by all the shareholders of the company.⁷

1.1.2 LEASEHOLD TITLE: This involved the owner of the land and building (again usually under Torrens title) granting a lease of a flat for long periods like 99 or 999 years for a nominal rent payable by the lessee, but upon initial payment by the lessee of a substantial premium, often equivalent to the estimated market value of the leased flat. Each lease usually allowed use of the common areas by the lessee.⁸

1.1.3 TENANCY IN COMMON SCHEMES: This involved several people purchasing land and a building containing flats (again usually under Torrens Title) as tenants in common in agreed shares. Each of the owners would execute a co-ownership or management agreement, simultaneously with the purchase, by which the owner would forego occupational rights in respect of other flats of the building in exchange for the right to exclusively occupy a specific flat in the building. The agreement usually allowed common use of the common areas by the tenants in common.⁹

⁷ I.b.i.d

⁸ <http://www.fairtrading.nsw.gov.au.au/pdfs/corporate/strata03/PDF>

⁹ I.b.i.d

1.2 STRATA LEGISLATION BEGINS

During the Second World War, the construction of new residential buildings in Australia slowed dramatically. Building materials were in short supply as Australia's economy was directed to the supply of materials and equipment for the war. The war also deterred developers from investing in new building construction due to small rental return.¹⁰ After the war, there was a dynamic demand for the erection of multi-storey residential buildings, and residential flats became an accepted form of accommodation, particularly in the urban areas. However, the above three schemes adopted in New South Wales for subdividing a building into separate units, whether for residential, industrial or commercial use, could not provide the individual occupant of a unit with the security of separate title and ownership.¹¹ This led to the passage of the first strata legislation in New South Wales in 1961. Deficiencies in the areas of dispute resolution, internal management and title in the 1961 Act led to the passage of the strata titles Act 1973. The strata schemes management Act 1996 was passed in 1997 to update the provisions of the 1973 Act. New South Wales now has two separate Acts of parliament regulating freehold strata schemes, being; the strata schemes management Act 1996, dealing with management of disputes in strata schemes; and the strata schemes (Freehold Development) Act 1973, dealing with development and subdivision aspects of strata schemes.¹²

The Land Commission Report recommended that legislation should be enacted making available a strata titles scheme similar to that operating under the New

¹⁰ <http://www.fairtrading.nsw.gov.au/pdfs/corporate/strata03/PDF>

¹¹ I.b.i.d

¹² I.b.i.d

SouthWales Strata Titles Act of 1961.¹³ However, even though the Land Commission recommended that a strata titles scheme Act be enacted, the Act regulating common leasehold schemes in Zambia was enacted in 1994 and it has never been amended ever since.

Although the common leasehold schemes system has benefited buyers of units, builders of more than one storey building, as well as those in phased developments,¹⁴ to acquire certificates of title and to derive all the benefits or the incidents of ownership as a result of this, there are a number of challenges posed by this system.

1.3 CHALLENGES POSED BY COMMON LEASEHOLD SCHEMES

1.3.1 FAILURE TO FORM BODY CORPORATES

The Common Leasehold Schemes Act provides that there shall be a body corporate, which shall be formed of unit holders and it shall hold the certificate of title for the whole parcel.¹⁵ In practice, however, most unit holders have failed to form body corporates because some unit holders have either transferred, leased or mortgaged the unit and are not staying in the same units and hence, it is very difficult to bring all the unit holders together to form a body corporate. Interviews carried out with unit holders of property number CHELS/1023/CL in Lusaka, revealed that even in instances where body corporates are formed, the main

¹³ Land Commission Report, 1967, p.185

¹⁴ Common Leasehold Schemes which includes units for which no certificate of title has been issued

¹⁵ Section 2 of the Common Leasehold Act

concern of unit holders is to obtain a certificate of title so that they can lease or mortgage the property. After obtaining the certificate of title, they do not care whether the body corporate is in place or not. The common leasehold scheme, the Common Leasehold Schemes Act and the by-laws of the body corporate govern the operations of the body corporate.¹⁶ It has certain powers and duties laid down in the Act,¹⁷ such as controlling and managing the common property, insure the buildings, enforce the by-laws and so on. Therefore, if unit holders form a body corporate just for the purpose of obtaining certificates of title, who will carry out the duties stated in section 10? No one. Therefore, it is very important for unit holders to have a body corporate in place to deal with issues concerning the unit holders.

1.3.2 THE ISSUING OF CERTIFICATES OF TITLE IN THE NAME OF THE DIRECTOR OF BUILDINGS.

Despite the failure by most unit holders to form body corporates, the Ministry of Lands is pressurised to issue title deeds to unit holders who want to either lease or mortgage the property. Therefore, the Ministry of Lands issues out the title for the whole parcel in the name of the Director of Buildings in instances where unit holders fail to form body corporates. The Common Leasehold Schemes Act does not provide that the Director of Buildings should hold title for the whole parcel. Officials from the Ministry of Lands stated that they issue the title deed in the name of the Director of Buildings for 'administrative reasons,' but they did not

¹⁶ Section 9 of the Common Leasehold Schemes Act
¹⁷ I.bi.d section 10

explain what these reasons are. The Director of Buildings is supposed to hold title for all Government properties only. Therefore, when the Government sold the Government houses, the Director of Buildings seized control of the properties and there is no way the Ministry of Lands can continue to issue the title for the whole property in the name of the Director of Buildings. Since the Act does not provide for the holding of title by the Director of Buildings, this practice is illegal and in the long run their titles are questionable, that is. Their titles are illegal because the main title is held illegally.

1.3.3 PREPARATION OF CERTIFICATES BY QUANTITY SURVEYORS.

The diagrams that are lodged during registration for the issuance of separate certificates of title are those prepared by quantity surveyors. The Lands and Deeds Registry Act provides that “any document relating to land which is lodged for registration shall describe the land by reference to a diagram...”¹⁸ It further provides that diagram means a diagram of a piece of land as defined by the Land Survey Act.¹⁹ The Land Survey Act provides that a diagram means a document containing geometrical, numerical and verbal representations of one or more parcels of land, the boundaries of which have been surveyed by a land surveyor...²⁰ Therefore, we see that a diagram that is to be lodged for registration for the issuance of title deeds is one prepared by a land surveyor. Since the Common Leasehold Schemes Act is being administered by the Ministry of Lands through the Lands and Deeds Registry, it ought to conform to the provisions of

¹⁸ section 12(2) of the Lands and Deeds Registry Act

¹⁹ I.b.i.d section 12(1)

²⁰ section 2 of the Land Survey Act

the Lands and Deeds Registry Act, if the separate certificates of title issued under the Common Leasehold Schemes Act are to have the same force and effect as certificates of title issued under the Lands and Deeds Registry Act. Therefore, the diagrams that are to be lodged for the issuance of title are to be prepared by land surveyors and not quantity surveyors, as the case is at the moment. Quantity surveyors estimate the cost of a building and not preparation of diagrams. However, officers in the Lands and Deeds Registry register diagrams prepared by architects who are supposed to check the soundness of the building.

1.3.4 SAFETY REGULATIONS

There is a growing tendency by unit holders particularly those on the ground floors of multi-storey buildings to build extra rooms attached to the other units. This compromises the safety of other unit holders because, for example, in case of a fire, big vehicles such as fire brigade vehicles cannot find their way to the other units due to the fact that space has been taken up by the extra room(s) built by one unit holder. Most unit holders do not understand that even if they have separate certificates of title, some of the land and buildings subject to a common leasehold scheme, which is not comprised in any one unit is common property. Therefore, a unit holder should not alter part of his unit such that it compromises the safety of other unit holders. Infact, a unit holder intending to re-build is required to obtain planning permission from the authorities.²¹

²¹ Section 22 of the Town and Country Planning Act

CHAPTER TWO

A CRITICAL ANALYSIS OF THE COMMON LEASEHOLD SCHEMES ACT

2.0 INTRODUCTION

The Common Leasehold Schemes Act was enacted in 1994. The report of the Land Commission of 1967 had proposed that there should be a system that would provide for a simple procedure for the sale and purchase of Government flats or parts of divided buildings.¹ This recommendation was made in August 1967, but our Act only came into being in 1994, at a time when the Movement for Multi-party Democracy (MMD) was in power and was selling off Government houses and flats. Although the Act provides for much more than an easy way for the sale of Government houses and flats, it was enacted mainly to serve this purpose at that time. As a result of this, the Act has failed to address a lot of important issues that arise from common leasehold schemes. This chapter will critically analyse the common leasehold schemes Act by discussing its strengths and weaknesses.

2.2 THE STRENGTHS OF THE COMMON LEASEHOLD SCHEMES ACT

The first and most obvious benefit arising from the enactment of the Common Leasehold Schemes Act is that unit holders are able to acquire separate certificates of title thereby enabling them to access loans and other forms of financial assistance as they can use their units as collateral. Interviews carried out with most occupiers of units have revealed that they are not the original

¹ Land Commission Report, 1967 p.178

owners of the units. They are either renting the units or they bought the units from the original buyers of the units. On most of these properties, the occupiers of these units do not even know that there are supposed to belong to a body corporate.

The second one relates to management responsibilities. The owner of a house, flats or other parcels of land and buildings that have a number of units will have the management responsibility for the buildings. However, with the enactment of the common leasehold schemes Act, a registered proprietor of land can acquire separate certificates of title and this provides individual ownership of a flat and shared management rights and responsibilities of the remainder of the property.² This in turn means that there is no third-party landlord; all decisions relating to the building and its costs are made for the general benefit of all the unit holders. All unit holders are supposed to actively participate in the affairs of the property. This makes the management of the Common Leasehold Scheme easy as compared to a situation where only a small number of unit holders participate in the management of the property.

The third benefit arising from the enactment of the common leasehold schemes Act is that since there will be one common lease for all the units under that property, inconsistencies between leases or the problems arising from defective leases will be avoided.

Other benefits arising from the enactment of the Common Leasehold Schemes Act are that unit holders have been able to derive an income from the sale and

² www.landregistry.gov.uk

lease of such units. Others have been able to use them as collateral in the acquisition of mortgages. This is because once a unit holder acquires a Certificate of Title, they can go to a bank or any other financial lending institution and obtain finances or resources for other purposes and improving their lifestyle in the long run.

2.3 WEAKNESSES OF THE COMMON LEASEHOLD SCHEMES ACT

2.1.1 LACK OF A DISPUTE RESOLUTION MECHANISM

The Common Leasehold Schemes Act provides that “ *a unit holder or the lawful occupier of a unit under a common leasehold scheme who is aggrieved by an action, or proposed action, by the body corporate or the unit holder of other units may apply to the tribunal for relief.*” ³This section does not adequately address the issue of dispute resolution between or amongst unit holders. It is not possible that when unit holders disagree or there is a dispute between a unit holder and the body corporate then they have to go to the tribunal or court. This is very costly as well as time consuming. There is need for the Act to provide for a simple form of dispute resolution mechanism between and amongst unit holders. In England, the Commonhold and Leasehold Reform Act provides that “ *there shall be set out procedures for dispute resolution, dealing with disputes both between unit holders and between a unit holder and the Commonhold Association. The Association will have certain powers, provided by the regulations, to issue notices requiring the remedy*

³ Section 15 of The Common Leasehold Schemes Act

of any default by a unit holder. It is intended that unit holders should encourage the use of alternative methods of dispute resolution, which might include mediation and arbitration. The Leasehold Valuation Tribunal has no jurisdiction in the resolution of disputes between a unit holder and the Commonhold Association.”⁴

Dispute resolution and the supportive structure for Strata Titles in New South Wales are governed by the Strata Management Act 1996. This confirms and complements an existing structure and codifies official response to disputes. The Director General of the department of fair-trading holds the position of strata schemes commissioner⁵. He performs the following functions:

- resolution of complaints and disputes about strata schemes;
- investigation of alleged breaches of the management Act;
- taking action, including prosecutions, as appropriate; and
- providing information on strata schemes and the dispute resolution services.

The commissioner has powers of entry to any unit or other parts of a lot, parcel, or scheme and to require information from the owners' corporation (similar to body corporate) and to inspect records. Obstruction of the commissioner is a statutory offence. In all disputes, the state dispute resolution procedure requires that attempts be made to settle the disputes through internal procedures or

⁴ www.landregistry.gov.uk

⁵ <http://www.lease-advice.org/ausmain.htm>

mediation before access can be gained to adjudicators or the Residential Tribunal.

Zambia's Common Leasehold Schemes Act should emulate the system in England and allow for the formation of an Association among unit holders that can settle disputes both between unit holders and between a unit holder and the body corporate. The current provisions that give powers of dispute resolution to the tribunal are costly and time consuming. If such an association cannot be formed, then disputes certain disputes should be resolved through mediation and Arbitration. This is because the resolution of disputes through mediation and arbitration can be faster and cheaper for both parties. For example, a dispute between a unit holder and the occupier of an adjoining unit, whose dogs make lots of noise and move around the common areas anytime. It makes sense for such a dispute to be resolved through Mediation and not the courts. This is because the issue is petty and it would be a waste of time to take the dispute to court or to the Lands Tribunal.

**2.1.2 THE COMMON LEASEHOLD SCHEMES ACT DOES NOT
ACKNOWLEDGE THE ROLE OF LAND SURVEYORS**

The Common Leasehold Schemes Act provides that “ *the Registered Proprietor of a parcel of land on the Lands Register may apply to the Registrar for the registration of a common leasehold scheme in relation to*

the parcel by lodging with him a copy of the proposed scheme in a form approved by the registrar.”⁶ It further provides that “ the application shall be accompanied by a certificate made by a registered quantity surveyor that in the case of a proposed common leasehold scheme other than a phased development, all the buildings and other fixtures marked on the scheme are in place; that the plan shows their position with reasonable accuracy...”⁷

These provisions clearly show that land surveyors have no role to play in the preparation of certificates to be lodged together with a common leasehold scheme. This is despite the fact that the Land Survey Act describes a diagram as a document containing geometrical, numerical and verbal representations of one or more parcels of land, the boundaries of which have been surveyed by a land surveyor.⁸ The general perception by most surveyors is that the Common Leasehold Schemes Act left out the role of land surveyors and only acknowledged the role of architects and quantity surveyors.

2.1.3 TRANSFER OF UNITS

The Common Leasehold Schemes Act provides that *“ a unit may devolve or be transferred, leased, mortgaged or otherwise dealt with, and shall be subject to taxation relating to land, in the same manner and form as if it were a piece of land registered in the Lands Register.”*⁹ The Act clearly provides for transfer but it did not address the issues that arise from the transfer, lease or

⁶ Section 4(1) of the Common Leasehold Schemes Act

⁷ Section 4(2) of the Common Leasehold Schemes Act

⁸ Section 2 of the Land Survey Act

⁹ Section 3(2) of The Common Leasehold Schemes Act

mortgage of the unit. A unit under a common leasehold scheme is not like any other property under the Lands and Deeds Registry Act. A unit under a common leasehold scheme involves the sharing of common property and common areas such as the footpaths and staircases. It also requires the unit holder to be a member of the body corporate. In Queensland, the body corporate and Community Management Act 1997, contains disclosure requirements for the seller. The seller must give to the buyer before a contract is entered into a statement to a prescribed content, detailing the amount of current annual contributions for the unit, details of any improvements to the common property for which the owner is responsible for issuing the body corporate information certificate.¹⁰ Therefore, when a unit is transferred or leased, the unit holder should be made to understand that some of the areas are common areas and that he or she should be a member of the body corporate and so on. The Act should have gone on to provide further on how this could be done. This is because once a person purchases a unit, all they want is to get a certificate of title. They may even lease the property to someone else who probably has no idea that a body corporate exists and that he or she is required to attend its meetings. The failure by the Act to address this issue has contributed further to the difficulty by most unit holders to form body corporates. This is because most of them buy or rent the units without knowing that they are to belong to a common leasehold scheme. Once they occupy these units, they literally occupy them as stand-alone units.

Another perception by people or owners of the units is the fact that they consider themselves owners of the units, therefore, telling them that they are supposed to

¹⁰ <http://www.lease-advice.org/ausmain.htm>

belong to a Common Leasehold Scheme is like saying that they do not 'own' the property.

2.1.4 NO PENALTY FOR FAILURE BY BODY CORPORATE TO COMPLY WITH THE PROVISIONS OF THE ACT

The Common Leasehold Schemes Act provides that “ *the body corporate shall enforce the by-laws; control and manage the common property; insure and keep insured the buildings to the replacement value of thereof against fire and such other risks as may be prescribed unless the unit holders by unanimous resolution decide otherwise...*”¹¹ In short, the Act lists a number of duties of the body corporate in section ten (10), but does not provide any penalty for failure by the body corporate to perform its functions. The Commission of the land report of 1967 in its general note of the draft Land (Strata Titles) Bill provided that “ *this section makes it an offence for the body corporate or members of the council of the body corporate to fail to comply with the provisions of the Act. The penalty is a sum not exceeding 200 pounds.*”¹² The Act is, therefore, weak in that it does not provide for a penalty for the failure by the body corporate to comply with the provisions of the Act or to perform the duties laid out in the Act.

¹¹ Section 10(2) of the Common Leasehold Schemes Act

¹² Land Commission Report, 1967 p.536

2.1.5 NO PROCEDURE FOR THE APPOINTMENT OF AN AGENT OF THE BODY CORPORATE

The Common Leasehold Schemes Act provides that “ *a phased development may provide that the registered proprietor of the remainder shall be the agent of the body corporate in all or specified aspects of the maintenance of or the provision of services to the common property...*”¹³ The Act does not provide further on how this agent of the body corporate is to be appointed. The Act should have laid out a procedure that is to be followed in the appointing of such an agent. As it is now, there is no clear way on how these agents are appointed.

2.1.6 THE ACT DOES NOT ADDRESS ISSUE OF NUISANCE

The provisions of the Act have not addressed the issue of nuisance which is very cardinal when it comes to people living in an area or place close to each other and sharing certain areas. Nuisance is described as an unlawful interference with another’s use of, enjoyment of, or right over or in relation to land, or damage resulting from such interference.¹⁴ In the United Kingdom, for example, the commonhold and Leasehold Reform Act provides that “*although the unit holder will own a freehold flat, he or she will not have complete freedom to*

¹³ Section 19 of the Common Leasehold Schemes Act
¹⁴ Curzon L.B (1997) Dictionary of Law p.264

do anything he or she wishes in the property. The use and occupation of the flat will be subject to the rules of the Commonhold Community Statement, perhaps relating to letting, alterations and nuisance...”¹⁵

2.1.7 NO PROVISION FOR THE REQUIREMENT TO GET TOWN PLANNING APPROVAL.

Section 4 of the common leasehold schemes Act deals with the method of registration and does not require an application for registration to be accompanied by a certificate of Town and Country Planning approval. The Town and Country Planning Act provides that “ ***subject to the provisions of this section and to the following provisions of this Act, permission shall be required under this part for any development or subdivision of land that is carried out after the appointed day.***”¹⁶ Therefore, since most common leasehold schemes involve subdivisions, there is need to get planning permission and the certificate given must be lodged together with other documents for registration.

The general note of the of the Land (Strata Titles) bill of 1967 provided that “***before registration, a certificate must be supplied to the Registrar of Lands to the effect that the building has been erected within the boundaries of the parcel of land comprised in a folium of the land register, that Town and Country Planning approval has been given to the occupation of the lots as separate units and that the building complies with building***

¹⁵ www.landregistry.gov.uk

¹⁶ Section 22(1) of the Town and Country Planning Act

regulations.”¹⁷ Planning permission is necessary in any development program to prevent unsightly buildings springing up. Therefore, the Common Leasehold Schemes Act is weak in that it does not provide for the requirement of a certificate of planning approval before registration of a common leasehold scheme.

This chapter has discussed some of the issues the Act has failed to address in its implementation. If there had been a follow-up on the Land Commission Report of 1967’s recommendations, I am positive that we would not be discussing the weaknesses of the common leasehold schemes Act today. The Act was enacted mainly to cater for the sale of government houses and flats and enable unit holders acquire separate certificates of title. It is however, sad to note that this was done at the expense of other requirements of the law such as planning permission, lack of simple dispute resolution mechanism and so on. However, the Common Leasehold Schemes Act has enabled unit holders to acquire separate certificates of title and to derive all the benefits or incidents of ownership as a result of this.

¹⁷ Land Commission Report, 1967 p.532

CHAPTER THREE

THE LEGAL AND INSTITUTIONAL FRAMEWORK GOVERNING COMMON LEASEHOLD SCHEMES IN ZAMBIA

3.0 INTRODUCTION

The policy of the Movement for Multi-Party Democracy (MMD) to dispose off all Government houses and flats meant that the Ministry of Works and Supply could no longer be in charge of the flats and houses. The absence of the Common Leasehold scheme system meant that these flats and buildings that had a number of units could not be disposed off separately, but as one unit as registered at the Lands and Deeds Registry at the Ministry of Lands. This issue needed to be addressed in view of the MMD policy of empowering civil servants by allowing them to buy the houses and flats they occupied.

The sale of Government houses and flats and other parcels of land and buildings that had a number of units requires that the buyers or unit holders be given separate certificates of title. People who intend to build flats with common areas as well as those living in phased developments also need to be given separate certificates of title. This can be achieved through effective and responsive laws governing Common Leasehold Schemes in Zambia. Interests and rights in land are constantly changing and so are the legal and institutional frameworks within which these complexities are managed. It is, therefore, in the context of these

problems that¹⁸ at the need to come up with a clear legal machinery and institutional framework is inevitable in order to meet these challenges.

The principal legislation that governs Common Leasehold Schemes in Zambia, is the Common Leasehold Schemes Act enacted in 1994. There are however, other statutes that have a bearing on Common Leasehold Schemes in Zambia. These are the Lands Act ¹ and the Lands and Deeds Registry Act.² At the moment, there is no policy on Common Leasehold Schemes in Zambia.

3.1 LEGAL FRAMEWORK

3.1.1 THE COMMON LEASEHOLD SCHEMES ACT

This Act was enacted to provide for the division of land and buildings into units with separate certificates of title by means of a Common Leasehold Scheme.³ This Act requires that upon registration of a Common Leasehold Scheme, the unit holders shall constitute a body corporate with perpetual succession and a common seal and shall perform various functions set out in the Act.⁴ The Act defines a certificate of title as meaning a certificate of title or Provisional Certificate within the meaning of the Lands and Deeds Registry Act. ⁵ It further defines common property as the land and buildings subject to common leasehold, which is not comprised in any one unit under the scheme. The Ministry of Lands through the Lands and Deeds Registry is administering the Act.

¹ Chapter 184 of the Laws of Zambia
² Chapter 185 of the Laws of Zambia
³ Chapter 208 of the Laws of Zambia
⁴ Section 8 of the Common Leasehold Schemes Act
⁵ Chapter 185 of the Laws of Zambia

3.1.2 THE LANDS AND DEEDS REGISTRY ACT

This Act provides for the registration of documents and provides for the issue of provisional certificates of title and certificates of title.⁶ It also provides for the transfer and transmission of registered land. The Lands and Deeds Registry Act was enacted to ensure that all interests in land and other immovable properties are systematically registered. This Act defines land as land within Zambia, and includes units and remainders under Common Leasehold Schemes, and tenements and hereditaments, but does not include any mining rights as defined in the Mines and Minerals Act Chapter 213 of the Laws of Zambia, in or under or in respect of any land.⁷

The need for registration of land through this Act establishes sufficient records on land so as to simplify the process of transfer of ownership of land. The Act authorizes the Registrar of Lands and Deeds to cause entries in the registers. In order to meet the Ministry's policy objectives and ensure that the issuance of title Deeds is accelerated, it became necessary to amend the Lands and Deeds Registry Act, to introduce a Common Leasehold Register and to allow the registers to be kept electronically.⁸

⁶ Chapter 185 of the Laws of Zambia

⁷ Mulolwa Augustine (2002) Assessment of Cadastral Infrastructure in Zambia p.6

⁸ Zambia Land Policy Document, 1995 p.9

3.1.3 THE LANDS ACT

The Lands Act provides for the granting of land on leaseholds and leasehold tenure and it provides for the vesting of land in the President and alienation of land by him.⁹ The Act further provides for the statutory recognition of customary tenure and it also provides for the conversion of customary tenure into leasehold tenure. In addition to repealing the Land (conversion of Titles) Act, the Lands Act provides for the following:

- (a) repeal of the orders in council as contained in appendix 4 of the Laws of Zambia and section 2 of the Western Province (Land Miscellaneous Provisions) Act, 1970;
- (b) to recognise and provide for continuation of customary tenure;
- (c) to provide for the conversion of customary tenure to leasehold tenure; and
- (d) to establish the Lands Development Fund and a Lands Tribunal.

3.2 INSTITUTIONAL FRAMEWORK

The demand for housing has encouraged people to invest in real estate, particularly flats and other buildings that have common areas. There is therefore, a need to have institutions to deal with matters involving Common Leasehold Schemes in Zambia. These institutions are:

⁹ Chapter 184 of the Laws of Zambia

- (i) The Ministry of Lands;
- (ii) The Ministry of Local Government and Housing; and
- (iii) The Ministry of Works and Supply.

3.2.1 THE MINISTRY OF LANDS

The role of the Ministry of Lands is to formulate policy and ensure the proper administration of Land.¹⁰ Other functions include; the provision of policy guidelines to all institutions involved in land alienation and the general public; the identification and allocation of land; surveying of the identified land; and registration of rights and interests in land in a secure manner. To perform these functions, the Ministry of Lands has four distinct departments that include the following:

3.2.1(a) The Lands Department.

The Commissioner of Lands heads the Lands Department. The President has delegated his powers to the Commissioner of Lands to make and execute grants and dispositions of state land. He administers land throughout the country. The Lands department performs the following functions:¹¹

¹⁰ Zambia Land Policy Document, 1995 p.16

¹¹ Ibid

- (i) to co-ordinate the functions of planning authorities;
- (ii) to advise the Ministry on appropriate fees and ground rent to be fixed and ensure the collection of the same;
- (iii) to advise the Government and prepare documents for the acquisition of land in the public interest; and
- (iv) to advise the Minister of Lands on incorporating charitable and other community based organisations for the purpose of holding land under the Land Perpetual Succession Act and advise the Ministry on land administration, and legal reform.

3.2.1 (b) The Lands and Deeds Registry.

The Chief Registrar of Lands heads the Lands and Deeds Registry. This Department has a Lands and Deeds Registry established under the Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia. The functions of the Lands and Deeds Registry are:¹²

- (i) to register all interests in land exceeding one year;
- (ii) to issue Certificates of Title where interest granted exceeds fourteen years;
- (iii) to make provisions for official searches by professionals and the general public;
- (iv) to register all subsequent dealings in land and property;

¹² Zambia Land Policy Document, 1995 p.17 and 18

- (v) to advise the Ministry on fees to be charged and to ensure that the fees due on registration of documents are paid and endorsed on the document; and
- (vi) to ensure that all duties and taxes due, such as property transfer tax are paid, and if underpaid, cause the property to be valued.

3.2.1 (c) The Survey Department.

The Surveyor General heads the Survey Department. The Department is responsible for the provision of timely, accurate and affordable land information to the general public and to specific sectors. The Department performs the following functions:¹³

- (i) the execution of cadastral field surveys;
- (ii) the production of cadastral plans and diagrams;
- (iii) the examination and approval of cadastral survey records lodged by Government and private surveyors;
- (iv) the collection of statutory fees and charges for cadastral survey services;
- (v) collection of revenue through sale of maps;
- (vi) maintenance and provision of the National Base Mapping for the general public; and
- (vii) the maintenance and development of the technical stores which include survey control technical records, equipment and materials.

¹³ Zambia Land Policy Document, 1995 p.19

3.2.1 (d) The Administration Department

The Administration Department is headed by the Director of Human Resource and has other personnel in charge of Administration. This Department is responsible for the overall provision of the necessary support services for the effective and efficient operations of the Ministry.

Functions of the Department

The Department carries out the following functions: -¹⁴

- (a) facilitates the smooth operations of the Ministry through improved planning and co-ordination of the various ministerial units and ensures easy information flow;
- (b) co-ordinates with various departments, ministries, other organisations and members of the public on matters of administration of the Ministry;
- (c) supervises, organises, plans and manages the institution through provision of goods and services;
- (d) recruits personnel according to the needs of the establishment of the institution;
- (e) allocates financial resources to support personnel in the establishment and implements work programmes performed by the institution;

¹⁴ Zambia Land Policy, 1999. published in the Zambia Daily Mail, 21st November 2002

- (f) attends to matters pertaining to appointments, promotions, confirmations, discipline, dismissals, receptions and ceremonies; this entails looking after staff (office and housing), arranging funerals and other related functions and further entails the overall supervision of all the Departments and operating units in the institution;
- (g) undertakes training, both on the job and at institutions of learning and keeps up to date records of all transactions involving the Ministry; and
- (h) secures transport, office equipment and materials which are needed for the better operation of the Ministry.

3.2.2 THE MINISTRY OF LOCAL GOVERNMENT AND HOUSING

The Department of Town and Country Planning and the larger local authorities are responsible for the preparation of Development Plans.¹⁵ The Town and Country Planning Act govern the functions of this department. District Councils have been administratively appointed as agents to recommend applicants for land in their areas of jurisdiction. Where the land is situated in a customary area, the council consults the chiefs. Consulting the chiefs ensures that land is not only available for allocation, but also that the customary rights of the local people are not infringed.

The Department of Public Health under the Ministry of Local Government ensures that hygiene and issues incidental to, are properly managed. The Department's mission is to understand the health problems of communities in

¹⁵ Zambia Land Policy Document, 1995 p.20

urban and rural areas. It also ensures that all unit holders keep common areas under common leasehold schemes clean.

3.2.3 THE MINISTRY OF WORKS AND SUPPLY

The Government Valuation Department under the Ministry of Works and Supply provides the Ministry of Lands with advice on property valuations and in general matters pertaining to real estate management. In turn, Government Valuation Department utilizes property data from the Lands and Deeds Registry for the preparation of valuation rolls. The office of the Director of Buildings under the Ministry of Works and Supply holds title under Common Leasehold Schemes in instances where unit holders fail to form a body corporate. This was an administrative decision arrived at by the officers in the Ministry of Lands due to pressure from unit holders to issue them with title so that they can lease, mortgage or transfer their units. This is a serious issue that needs to be addressed.

3.3 THE EFFECTIVENESS OF THE LEGAL AND INSTITUTIONAL FRAMEWORK GOVERNING COMMON LEASEHOLD SCHEMES IN ZAMBIA

Most citizens received the MMD's policy of empowering sitting tenants with affordable housing with enthusiasm. Although the policy to sell these houses and flats was good, the institutions and laws were not adequate to ensure the proper

disposal of these houses and flats. For a Government policy to work effectively, there is need to have responsive laws and institutions in place. Therefore, the proper implementation of any policy requires responsive laws and institutions.

The enactment of the Common Leasehold Scheme Act provided for the legal framework to govern Common Leasehold Schemes. There were other Acts in place such as the Lands and Deeds Registry Act that supported the Common Leasehold Schemes Act in the implementation of Common Leasehold Schemes. However, the institutional framework has remained the same even after the sale of the flats. For example, the office of the Director of Buildings in the Ministry of Works and Supply has continued to hold title for the whole parcel of land with various units. This is despite the fact that the office of Director of Buildings is supposed to hold title for Government properties, and not private properties. Builders of flats or buildings that have a number of units may want to sell the units to people. The Director of Buildings cannot hold main title for the parcel. Therefore, the lack of responsive institutions has caused a lot of disparities in the way Common Leasehold Schemes are managed. This is because in a former Government block of flats, the Director of Buildings will hold the main title, while in a newly built block of flats, the builder of those flats will hold the title for the whole parcel. There is, therefore, need for proper institutions to be put in place to ensure that such disparities do not arise.

The Ministry of Lands issues separate certificates of title to unit holders even when they have not formed body corporates. The institutional framework

governing Common Leasehold Schemes is highly inadequate in that there are no institutions that ensure that body corporates are formed and properly managed.

The current Legal and Institutional framework has not addressed the issue of caretakers. People living in the caretakers' quarters on property number CHELS/1023/CL in Lusaka revealed that they were told to buy the quarters at a lower price than that of the flats. The Government did not realise that body corporates have to be formed and one of the duties of the body corporate is to maintain the common property and that calls for the employment of caretakers. The situation in most common leasehold schemes that have formed body corporates is that caretakers live outside the common leasehold scheme. This situation is as result of lack of proper institutions to look at such issues.

The Department of Public Health under the Ministry of Local Government and Housing does not carry out any inspection in Common Leasehold Schemes to ensure that unit holders maintain a certain standard of hygiene. Officers in this Department stated that inspections in Common Leasehold Schemes are not carried out effectively due to poor funding to the Department.

The Ministry of Lands also contributes to the poor management of Common Leasehold Schemes in Zambia, in that they go on to issue separate certificates of title to unit holders who have not formed body corporates. If the Ministry of Lands ensured that unit holders who do not belong to any body corporate are not issued with titles, then people unit holders would be forced to form body corporates.

The proper management of Common Leasehold Schemes largely depends on a responsive Institutional and Legal framework. Therefore, if such institutions are not in place, or are in place but not responsive, then Common Leasehold Schemes will be highly effective.

This chapter has discussed the legal and institutional framework governing Common Leasehold Schemes in Zambia. The effective administration of Common Leasehold Schemes in Zambia can be achieved through coherent and consistent policies and laws as well as appropriate institutional structures.

CHAPTER FOUR

4.0 CONCLUSIONS AND RECOMMENDATIONS

The objective of this study has been to examine the adequacy of the law on common leasehold schemes in Zambia. The sale of public houses to sitting tenants is a policy by Government to encourage ownership of houses by citizens. This policy was implemented in Britain as well as in Netherlands.¹ Privatisation also encouraged the sale of Government houses because the buyers of companies wanted to concentrate on their business and not on maintaining the company's houses. The purpose of selling public houses and flats also stemmed from the need to offer affordable housing to citizens especially the low-income groups.² It was thought that the new owners would be more responsible for the maintenance of and repair of the houses and flats and hence the Government would spend no money towards their maintenance. Because of this policy, the Government was in a hurry to give people separate certificates of title in flats and hence the enactment of the Common Leasehold Schemes Act in 1994. This Act is more or less a reproduction of the Strata Titles Act of 1967 proposed by the Land Commission of 1967. We have seen from the study that the Land Commission of 1967 got the idea of Common leasehold Schemes from New South Wales and the Act in New South Wales has been amended twice since its enactment. The fact that the Act was reproduced almost verbatim from the one proposed by the 1967 Land Commission Report, questions the adequacy of the

¹ Kabuka C. (1998) The Low-Income Home Ownership Affordability in Zambia. A Case of Owners of Former Kitwe City Council's Low-cost Houses.

² Chilembo M (2001) Management of Residential Flats Under the Common Leasehold Scheme in Zambia. A case of Kitwe Town

provisions in it because from 1967 to 1994, is over three decades and a lot of matters would have changed in society.

One problem alluded to in this study, is the failure to form body corporates. The Common Leasehold Schemes Act, provides that there shall be a body corporate, which shall be formed of unit holders and it shall hold the certificate of title for the whole parcel. In practice, unit holders have failed to form body corporates and the Ministry of Lands has contributed to this problem in that they have gone on to issue separate certificates of title to individuals even when they do not belong to any body corporate. This means that all the duties that are to be performed by the body corporate such as insuring the buildings; maintaining the common property; and complying or ensuring complying with any conditions under the parcel of land or building, set out in section 10 of the Common Leasehold Schemes Act will not be carried out by anyone. This therefore goes on to compromise the health and security situation in common leasehold schemes. This study has revealed that people are reluctant to form body corporates because:

- (a) Most unit holders do not understand fully the idea of common leasehold scheme; the scheme was not and is not explained to unit holders;
- (b) Officers interviewed from the Ministry of Lands indicated that many unit holders thought that the formation of a body corporate was a way by which some unit holders would illegally collect money through management levies.

off the flats and giving the unit holders separate certificates of title. This led to the enactment of the Act in a hurry and in the long run, it failed to address issues raised in this research. Most of the problems are as a result of the inadequacies in the Act coupled with its poor implementation.

4.1 CONCLUSIONS

- (a) Most of the officers at the Ministry of Lands in the Lands and Deeds Registry Department do not understand Common Leasehold Schemes.
- (b) The only mode of dispute resolution system are the national courts and the Lands Tribunal which are time consuming and expensive.
- (c) Currently, the Director of Buildings holds title for most parcels of land that have no body corporates.
- (d) The common Leasehold Schemes Act, has no provisions relating to the issue of nuisance such as noise, pets and so on.
- (e) The Land Law syllabus at the University of Zambia does not contain a topic covering Common Leasehold Schemes.
- (f) The Common Leasehold Schemes Act has left out the role of land surveyors.

- (g) Many unit holders do not understand the provisions of the common leasehold schemes Act. This has contributed to the failure by most unit holders to form body corporates.
- (h) Most of what is done in practice in the registration and Administration of common leasehold schemes is not provided for in the Act. For example, the issuance of certificates of title for the whole parcel in the name of the Director of Buildings.
- (i) The functions of the body corporate set out in section 10 of the Common Leasehold Schemes Act, are not performed by anyone because unit holders fail to form body corporates.
- (j) Most builders of flats or buildings that have a number of units do not obtain planning permission, as required by section 22 of the Town and Country Planning Act.
- (k) The enactment of the Common Leasehold Schemes Act of 1994, was done in a hurry in order to enable unit holders acquire separate certificates of title in line with the Government's policy of empowering citizens with ownership of houses.
- (l) Most unit holders are concerned with obtaining title so that they can either lease, mortgage or transfer the property and are not interested whether there is a body corporate in place or not.

(m) In cases where a body corporate is in place, the beneficiaries only use it as a mode of obtaining title.

(n) Most body corporates are not registered and do not perform the functions that they are supposed to perform.

4.2 RECOMMENDATIONS

(a) There is an urgent need to train the staff at the Ministry of Lands in the lands and Deeds Registry Department in the proper administration of the Act. The Common Leasehold Scheme system was introduced in 1994 and there is need to educate the staff or officers in the Ministry of Lands on the proper management and administration of the Act.

(b) There should be provision in the Common Leasehold Schemes Act for a simple dispute resolution mechanism such as the use of Mediation and Arbitration. Currently, the Act only provides for courts of law and the Lands Tribunal. Redress using these forms of dispute resolution system is very expensive and inflexible. Taking disputes that arise in Common Leasehold Schemes to courts contributes to the congestion in courts and this in turn means that disputes will be resolved late and as the saying goes, 'justice delayed is justice denied.'

(c) The Ministry of Lands should not issue title to unit holders who have not formed a body corporate because doing so compromises their peace, health and security. This is because all the management functions that the body corporate is to perform will not be performed by anyone. For example, if there is a fire and the property is not insured, unit holders would have to repair their own separate units because there was no body corporate in place to insure the property. However, if other unit holders do not have resources to repair their units, it would be unfair for the ones with resources as they have to repair the common areas like the stair cases, water circulation system, roof, electricity cables and so on.

(d) The Director of Buildings should have no role in the Administration of Common Leasehold Schemes. He is only supposed to hold title for Government properties, and hence once the buildings or properties are disposed off, the properties thereafter belong to the buyers and not the Government.

(e) Buyers and transferees of units should be made to understand what a Common Leasehold Scheme entails. This will enable them understand that common areas do not belong to any one unit holder but all unit holders.

(f) There should be provision in the Act addressing the issue of nuisance such as bad smells, pets, noise, smoke and so on.

- (g) The Act should expressly provide that builders of units or buildings that have a number of units should obtain Planning permission as provided by the Town and Country Planning Act before they proceed with the *development*.
- (h) The Land Law syllabus at the University of Zambia should contain a topic covering Common Leasehold Schemes. Most lawyers get the knowledge by reading the Act or through cases their encounter while in practice. This has negatively affected the implementation of the Act because some lawyers lodge Common Leasehold Schemes for their clients in ignorance of certain provisions of the Act.
- (i) The Common Leasehold Schemes Act should be amended to incorporate the role of professionals such as Land Surveyors.
- (j) Seminars or workshops should be organised in Common Leasehold Schemes so as to sensitise unit holders on the management of the scheme.

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INTERVIEWS

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