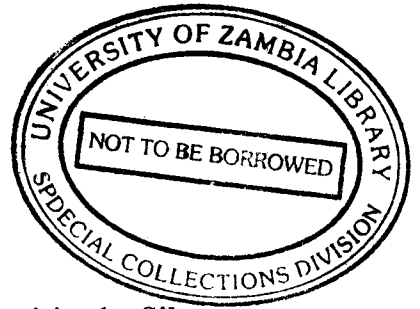


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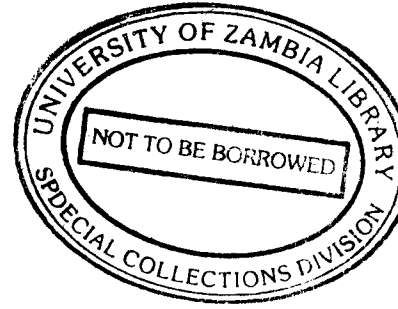
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AN OBLIGATORY ESSAY ON

**LAND ADMINISTRATION IN ZAMBIA: AN APPRAISAL OF THE EFFICACY
OF THE LANDS ACT NO. 20 OF 1995**

BY

SIKAZWE FRANK M.

COMPUTER NUMBER: 20061811

**SUBMITTED TO THE UNIVERSITY OF ZAMBIA IN PARTIAL FULFILMENT OF
THE REQUIREMENTS OF THE BACHELOR OF LAWS (LL.B) DEGREE
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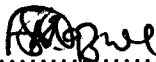
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DECLARATION

I **SIKAZWE FRANK M.** do hereby declare that this obligatory essay is my own work and that to the best of my knowledge, no similar piece of work has been produced at the University of Zambia or any other institution for the award of a degree qualification.

All other people's work consulted has been dully acknowledged.

I therefore, declare that all errors and other shortcomings contained herein are my own.


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28/12/05
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DEDICATION

It is with great love and affection that I dedicate this obligatory essay to my parents Frank M. Sikazwe-Snr and Gift Chansa Sikazwe for your unfailing love and everything that you have done and continue to do for me and to my brothers and sister, Joshua, John, Samuel and Deborah.

ACKNOWLEDGEMENTS

It is a great joy for me to record my indebtedness to many people who contributed generously not only to the production of this work, but gave me unwavering support in all my academic pursuits.

I remain deeply indebted to God for his love, mercy and grace bestowed upon me in accomplishing what I set to do.

I would like to thank Professor Patrick M. Mvunga (SC) my supervisor for the help and guidance rendered to me through out my work. Professor thank you for sparing time from your busy schedule to correct my work and criticize me which criticisms really helped me work on my weaknesses and God Richly Bless you.

I would like to thank the members of my family particularly grandpa and grandma, i.e., Mr. John K. Kaite and Mrs Dorcas S. Kaite for the support and encouraging me throughout the years at University and particularly encouraging me to pursue Law , Mr. Willie Sinyangwe my uncle, Mr and Mrs Sinkolongo, Pastor B. M Katele and Mrs. Irene Katele.

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Lufungulo my sister. Keep working hard guys and I will forever treasure your friendship.

Mum and Dad thanks for everything. My brother Joshua thank you for the support and for your being good and God bless you in all your academic pursuits.

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ABSTRACT

This Essay attempts to look at Land administration in Zambia: An appraisal of the Lands Act No. 20 of 1995. In order to achieve this, the Essay has evaluated the salient provisions of the Act.

Firstly, the Essay traces the development of land administration in Zambia. In this, it traces land administration through the pre-colonial period, colonial period and post independence. During the colonial period, three categories of land were created namely; Native Reserves, Trust Lands and Crown Land. Two different systems of laws applied, that is, customary law to Native reserves and Trust Lands and English law to Crown Lands. These categories of land continued to exist after independence with Crown Land being renamed as State Land and later the two other categories, that is, Native and Trust Land were merged into customary land. The Essay has also discussed the land reforms of 1975 ushered in by The Land (Conversion of Titles) Act, 1975. Some of these reforms are; (a) vesting of land in the President absolutely and was to be held of him in perpetuity for and on behalf of the people (b) the abolishment of all freeholds estates and introduction of statutory leases of 100 years duration (c) abolishing of sale transfer and other alienation for value (d) imposition of restriction on extent of agricultural holdings and making the requirement of the consent of the President mandatory to any transaction.

Secondly, the Essay looks at the land reforms that the government sought to enact through the Lands Act No. 20 of 1995. The Lands Act of 1995 is a good piece of legislation, which has progressive features. The Essay has considered the salient provisions of the Act, which amongst others are; those vesting land in the President, those

conferring value to land, alienation of land to non-Zambians and customary provisions with their advantages and disadvantages.

Thirdly, the essay has also looked at the two institutions that the Lands Act No. 20 of 1995 established, that is, the Lands Tribunal and the Land Development fund. The Lands Tribunal, it has been noted is a good creation of the Act in that it provides speedy justice in land disputes, it is also cheap and in an ideal situation, it is supposed to be readily accessible to the poor. Sadly, it is not accessible to the poor in that it is located in Lusaka and its sittings are restricted to Lusaka and the Copperbelt. The effect of this is that the rural poor who cannot afford transport expenses are unable to benefit from the services of the Tribunal. The tribunal it has been noted suffers some setbacks amongst which is the fact that the Government does not adequately fund it and this has greatly affected its operations. The Lands Tribunal is an important institution and that the government should be adequately funding this institution so that it can effectively discharge its functions. The Land Development Fund is also an important and good creation of the Act in that it encourages opening up of rural areas to development. Local authorities it has been noted should take advantage of this Fund to open up their areas to development.

It has been noted in this study that alienation of land takes long, is expensive and this works against the rural poor, therefore, there is need for reforms to make it expeditious and cheap so that it does not discriminate against the rural poor who are the majority. Ultimately reforms have been suggested to further decentralize the Lands Department to Provincial centers so that the land allocation process is made cheap and expeditious. The vesting of land in the President, it has been noted in this study opens land administration system to abuse by the President as evidenced by the happenings of the run up to the

2001 elections where title deeds were being issued at a political rally on the Copperbelt. Ultimately reform in this area of the Act is desirable so that land administration system is not susceptible to abuse by the President.

It has also been observed that the Office of the Commissioner of Lands is supposed to enjoy independence so as to effectively do away with the political interference, which is the order of the day. This Office should either be created under the Lands Act or be made a constitutional office.

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INTRODUCTION

In its election manifesto, the Movement for Multi-Party Democracy (M.M.D), which came to power in 1991, pledged that the M.M.D will attach economic value to undeveloped land, encourage private real estate agency business, promote regular issuance of title deeds to productive land owners in both rural and urban areas, and clear the backlog of cadastral surveys and mapping.¹

The land reforms introduced by the M.M.D government under the Lands Act No. 20 of 1995 can best be evaluated by an exposition of the scope of its application, the vesting provision, power of alienation, conferment of value, scope of land control, the Development Fund and the machinery for redress of grievances through the Lands Tribunal.

Unlike the repealed Land (conversion of titles) Act, which was preceded by the reforms announced by the President in the ' Watershed Speech' that *inter alia* were that;

'All land held under freehold title was converted into leasehold title for 100 years and unutilized tracts of this category of land were to be taken over by the State.

All vacant plots and undeveloped land in and around Lusaka and all other cities and towns would be taken over by Local Authorities and that Real Estate Agents were to be closed down and banned'

The Land Act of 1995 sought to encourage private Real Estate Agency business and attached economic value to undeveloped land. This saw the mushrooming of real estate agency businesses in the country. The Land (conversion of titles) Act abolished land market in favour of the State market but the Lands Act of 1995 returned the land market as evidenced by the conferment of value on land.

¹ Movement Multi-Party Democracy Party Manifesto, p 7

Although, the freehold system stands abolished and the 99-year leasehold estate in place, the idea behind the Lands Act of 1995 was to push the State out of the land transactions by Western forces which in a way tied the requirement to aid. Hence Hangsungule noted that;

‘ The motives behind the 1995 Land Act must be very clearly understood. This Act was motivated by the World Bank and Western countries. The Bank wanted to push for radical land reforms in Zambia as a condition for Bank support. At one time, the Bank was withholding economic assistance to the tune of millions of Dollars until the new land legislation based on the concept of land market was introduced. One of the radical measures the Bank attempted to introduce but for which there was no political will in the Zambian political establishment was the auctioning of land. In the end the Bank managed to get the Land Act pushed through the Zambian Legislature despite protests from across the country. This is why the Lands Act is very market oriented’²

Objectives of the Lands Act

The Lands Act was assented to on 6th September 2005. The primary objectives of the Act are to provide for the following;

- (a) The continuation of leasehold and leasehold tenures;
- (b) The continuation of vesting land in the President and the alienation of land by the President;
- (c) The Statutory recognition and continuation of customary tenure;
- (d) To provide for the conversion of customary tenure into leasehold;
- (e) To establish a Land Development Fund and a Lands Tribunal; and
- (f) To repeal the following Acts;
 - (i) The Land (conversion of titles) Act

² Hangsungule, M.K ‘ Land Law and Policy in Zambia’ (1998) Lusaka, p.5

- (ii) The Zambia (State lands and Reserves) Orders 1924-1964
- (iii) The Zambia (Trust land) Orders 1947-1964
- (iv) The Zambia (Gwembe District) Order, 1959-1964 and
- (v) The Western Province (Land and Miscellaneous Provisions) Act, 1970.

Application of the Act

Like its predecessor, the repealed Land (conversion of titles) Act, the Land Act is of general application save for the fact that it recognizes the title of those holding under customary tenure and specifically states that nothing in the Act or any other law should be construed to infringe any customary right already existing. In fact, the Act in section 8 provides for the conversion of customary ‘ use and occupation’ rights into leases of ninety-nine years duration upon application in the prescribed manner. This means that customary interests in land with all their variations among different ethnic communities will continue indefinitely as it is entirely at the initiative of the landholder to convert his customary interests into a leasehold interest.

This Essay will be divided into four chapters. In chapter one, the Essay will seek to discuss the historical development of land administration in Zambia. In chapter two the Essay will discuss the alienation of land as an aspect of land administration. In chapter three, the Essay will discuss the two institutions created by the Act, that is, the Lands Tribunal as an institute for land dispute resolution and the Land Development Fund. Chapter four of the Essay will discuss the advantages and disadvantages of the Act and lastly there will be recommendations and conclusions of the Essay.

CHAPTER ONE

DEVELOPMENT OF LAND ADMINISTRATION IN ZAMBIA.

1.0 Introduction

This chapter will be concerned with the historical development of land administration in Zambia. This will be done by giving the historical position of law on land administration before the enactment of the Lands Act No. 20 of 1995.

1.1 Pre-Colonial Period

Prior to the colonial period, the territory was administered by the British South Africa Company which company was granted a Charter by Her Majesty the Queen of the United Kingdom in 1899.¹ Under this Charter, the Queen prescribed the rights and powers of the company and provided the mode by which such rights could be acquired and enjoyed and in this respect the Charter provided,

*"The company is hereby further authorized and empowered subject to the approval of one of Our Principal Secretaries of State,(herein referred to as "Our Secretary of State") from time to time to acquire by concession, agreement, grant or treaty, all or any rights, interests, authorities jurisdictions and powers of any kind or nature whatever, including powers necessary for the purpose of government and the preservation of public order in or for the protection of territories, lands or property, comprised or referred to in the concessions and agreements made as aforesaid, or affecting other territories, lands, or property in Africa, or the inhabitants thereof, and to hold, use and exercise such territories, lands, property rights, interests, authorities, jurisdiction and powers respectively for the purposes of the company and on terms of this Our Charter. "*²

¹ Her Majesty's Charter of the 29th day of October, 1899.(In Statute Law of North Western Rhodesia 1899-1901. Government Printer. Livingstone. North Western Rhodesia, 1910)

² Section 3 of the Charter (Ibid)

From the above provision, it can be construed that the modes by which the company could acquire interests were through concessions, agreements, grants or treaties and it is these modes that the company used to acquire interests in the territory which territory it managed in the best interest of Britain. The company was further granted power to hold and make grants of land that it held. Section 24 of the Charter provided,

*“ The company is hereby further especially authorized and empowered for the purpose of this Our Charter from time to time to grant lands for terms of years or in perpetuity and either absolutely or by way of the mortgage or otherwise.”*³

The territory was administered as two units, that is, the Barotseland-North-Western Rhodesia and North-Eastern Rhodesia. These two territories were created by Orders in Council by Her Majesty by virtue of the authority vested in her by the Foreign Jurisdiction Act, 1890 which in this regard it provided,

*“ It is and shall be lawful for Her majesty the Queen to hold, exercise, and enjoy any jurisdiction which Her Majesty now has or may at anytime hereafter have within a foreign country in the same and as ample a manner as if Her majesty had acquired that jurisdiction by cession or conquest of a territory.”*⁴

The Barotseland-North-Western Rhodesia was created by the Barotseland-North-Western Rhodesia Order in Council, 1899. This territory was administered by an Administrator for Barotseland-North-Western Rhodesia who was appointed by the High Commissioner. This Administrator was accountable to the company for all revenue raised in pursuance of the provisions of the Order (which created the territory) and for all expenditures for the purpose of the administration of Barotseland. The same procedures

³ Section 24 VII. (Ibid)

⁴ Section 1, Foreign Jurisdiction Act, 1890. In Statute Law of North Western Rhodesia, 1910. (Ibid)

were followed when creating the North-Eastern Rhodesia through the North-Eastern Rhodesia Order in Council.

In 1911, the Northern Order in Council was passed which created Northern Rhodesia. The net effect of this Order in Council was the revocation of the Barotseland-North-Western Rhodesia Orders in Council 1899, 1902 and 1909 and the North-Eastern Rhodesia Orders in Council, 1900, 1907, thereby amalgamating these two territories into one territory called Northern Rhodesia.⁵ The company was to continue to administer the territory and this was provided for in the Order in Council in section 7, which read

"The company shall or may exercise the general administration of affairs within the limits of this Order, in accordance with this Order, in accordance with the terms of the Charter and the provisions of this Order. The powers conferred upon the company by this Order are in augmentation of the powers conferred on it by the Charter."

This means that the powers conferred by the Order were an addition to those powers conferred by the Charter. Therefore, the Powers to grant land were continued to be enjoyed by the company as enshrined by the Charter.

During the pre-colonial period and during the colonial period, there were basically two sources of title to land. Firstly, granting of concessions of land. The basis for this was the Charter granted to the company which empowered it to acquire land through *inter alia* concessions. One such territory where this was practiced was in Barotseland-North-Western Rhodesia where Chief Lewanika granted land concessions.⁶ Secondly, through the declaration of a protectorate which was done by Her Majesty through Orders in Council passed by virtue of the authority vested in her by the Foreign Jurisdiction Act,

⁵ Preamble and Section 4 of the Northern Rhodesia Order in Council of the 4th day of May of 1911.

⁶ Section 41(1) of the Northern Rhodesia Order in Council, 1924. In Government Gazette Vols. XIV=XV.1924=25 p 45

1890. It must be noted that there were judicial rulings as to the effect of the above being a source of title and one such ruling was made in the case of *Re southern Rhodesia*⁷. The question which was presented in this case was the meaning or definition of “British Protectorate” and the issue for determination was that who owned the vacant land of Southern Rhodesia? Was it the Crown, the BSA Co. or indeed the indigenous population? The Judicial Committee of the Privy Council held that itself and by itself occupation is not title and most significantly held that the Crown owned dominion and ownership of land by an express indication through an Order in Council. This, it is submitted indicates that the Crown could assert title to land by virtue of an Order in Council that was considered as a source of title.

1.2.0 Colonial Period

In 1923, there was an agreement⁸ between His Majesty’s Principal Secretary of State for Colonies and the British South Africa Company which agreement provided amongst other things that the Crown should as from the 1st day of April 1924 relieve the company of the administration of Northern Rhodesia. By this agreement the company as from 1st day of April, 1924 assigned and transferred to the Crown all such rights, and interests as it claimed to have acquired by virtue of the concessions granted by Lewanika in North-Western Rhodesia as well as elsewhere in Northern Rhodesia. The agreement it is submitted, was triggered by the fact that it was proving to be expensive for the company to manage the affairs of the territory, therefore, it was thought prudent that the Crown takes over the managing of the territory as it had the capacity to administer the territory. This marked the beginning of direct rule by the British Crown, which period is better

⁷ (1911) AC 211

⁸ Appendix 5 of the laws 1965 Ed. Government Printer, Lusaka. p4

referred to as the colonial period. The relieving of the company of the administration of Northern Rhodesia was implemented by an Order of His Majesty in Council of 1924⁹, which Order in Council provided for the administration of Northern Rhodesia by a Governor who was to be appointed by His Majesty.

Under this regime, land was administered by the Governor who was empowered by the Order in Council to make grants of land. The Order in Council expressly stated,

“ The Governor, in His Majesty’s name and in His behalf may make and execute, under public seal grants and disposition of any lands within the territory which may lawfully be granted or disposed of by His Majesty: Provided that every such grant or disposition be made in conformity either with some Order in Council or law for the time being in force in the territory, or with such instruction as may be addressed to the Governor under His Majesty’s sign manual and signet, or through a Secretary of State.”

From the above provision, it can be noted that the Governor exercised delegated authority as regards the grants of land or dispositions made because all was done on behalf of the Crown in whom all lands were vested.

It was during this period that there was created three categories of land in the territory. These categories of land were created by Orders in Council and these categories were, (a) Native Reserves, (b) Crown Land and (c) Native Trust Lands.

1.2.1 Native Reserves and Crown Lands

The Northern Rhodesia Order in Council of 1928 created these two categories of land.¹⁰ The Order in Council mentioned expressly which lands had been set-aside as Native Reserves and the other land that was classified as Crown Land.¹¹ The Native Reserves were specifically provided for the indigenous population who could acquire and

⁹The Northern Rhodesia Order in Council of the 20th day of February 1924.

¹⁰ The Northern Rhodesia (Crown Land and Native Reserves) Order in Council, 1928.

¹¹ Ordinances, Proclamations and Orders in Council of Northern Rhodesia, 1928. Government Printer. Livingstone. 1929.

exercise interests and rights according to customary law and Crown Land was the category of land to which statutory law was applied. It is from this cluster of land that settlers were alienated land either as freehold or leasehold.¹²

1.2.2 Native Trust Land

The Northern Rhodesia Order in Council of 1947¹³ created this category of land. This was in effect the third category of land created during the colonial period. This category of land was also reserved for the native's occupation and the difference with native reserves lay in the duration of alienable interest to non-natives.

All these categories of land created during this period were preceded by the appointment of commissions of inquiry that were charged with the responsibility of inquiring into the feasibilities of creating such categories of land after which they had to submit a report of their findings. An example of such a commission is the Northern Rhodesia Native reserves commission, which after compiling its findings submitted the Northern Rhodesia Native Reserves Commission Report of 1926.¹⁴

1.2.3 Land Board

This was an important board worth noting as regards land administration. A General notice No. 147 of 1946 created the Land board.¹⁵ This used to consider and examine the applications for land from persons and concerns already in possession of large holdings under the terms of reference specified in the notice mentioned above.

¹² Northern Rhodesia Government Gazette.

¹³ Northern Rhodesia (Native Trust Land) Order in Council, 1947.

¹⁴ Northern Rhodesia. Government Gazette, 1927. Government Printer.

¹⁵ Northern Rhodesia. Government Gazette, 1946 Government Printer.

1.3 Barotseland

The concessions granted to the British South Africa Company by Lewanika were the basis upon which the Crown claimed title to land in Barotseland. This is due to the fact that the rights and interests acquired under such concessions were assigned to the Crown in 1924. Under these concessions, the native rights were reserved and this position was retained in 1924 and in this respect the Order in Council provided,

*“ it shall not be lawful for any purpose whatsoever to alienate from the chief and the people of the Barotse, the territory reserved from prospecting by virtue of the concessions from Lewanika to the British South African Company dated the 17th day of October, 1900, and the 11th day of August, 1901 and all rights reserved to or for the benefits of natives by the aforesaid concessions as approved by the Secretary of the State shall continue to have full force and effect.”*¹⁶

The land in Barotseland was not at par with other reserves in the territory during the colonial period and this state of affairs was maintained at independence in 1964. The land was treated differently as evidenced above and that this only changed a few years after independence by an amendment to the Constitution of Zambia.¹⁷ The amendment made way for the enactment of the Western Province (Land and Miscellaneous Provisions) Act that brought the land in western province at par with all the land in the country and in this respect it stated,

*“ All land in Western Province is vested in the President as a reserve within the meaning and under the Zambia (State Lands and Reserves) Order, 1928 to 1964.”*¹⁸

¹⁶ Section 41 of the Northern Rhodesia Order in Council of 1924

¹⁷ Constitution (Amendment) Act, 1970 In Republic of Zambia Bills, 1970. Government Printer. Lusaka.

¹⁸ Section 2 of The Western Province (Land and Miscellaneous Provisions) Act No.47 of 1970. In Republic of Zambia. Government Gazette. Acts. Volume VI. 1970. Government Printer. Lusaka. p 637.

1.4 Post-Independence Period

In 1964, Northern Rhodesia was granted her independence and was called Zambia.¹⁹ After her independence, the three categories of land remained unchanged, that is, Native Reserves, and Native Trust Land and Crown Land. This means that the orders in council that created these categories of land were not revoked and their continued operation was provided for by the Zambia Independence Order, 1964 by stating,

“...the existing laws shall notwithstanding the revocation of the existing orders or the establishment of the a Republic in Zambia, continue in force after the commencement of this order as if they had been made in pursuance of this order and the existing laws and any Act of Parliament of the United Kingdom or order of Her Majesty in Council (other than the Zambia Independence Act, 1964, or this order) having effect as part of the laws of Zambia or any part thereof immediately before the commencement of this order shall be construed with such modifications, adaptations, qualification and exceptions as may be necessary to bring them into conformity with this order.”

By virtue of this provision modifications were made to the orders relating to the three categories of land and in this regard with the intention of retaining the status quo the Zambia (State Lands and Reserves) Order, 1964 coming into force immediately before 24th October 1964, vested what was previously called crown land (now state land) and native reserves in the President, recognizing at the same time that all estates, rights and interests created and disposed of pursuant to the 1928 orders in Council shall continue to have the same validity as they had before.²⁰ Further, the Zambia (Trust Land) Order, 1964 vested the former Native Trust Land in the President and in this respect it provided,

¹⁹ Section 1 of the Zambia Independence Act, 1964. Appendix 3 of the Laws 1965 Ed. p4

²⁰ Mphanza P. Mvunga (1982) 'Land Law and Policy in Zambia' *Zambian Papers* No. 17. Mambo Press. Gweru. P 75

*“ All trust land is hereby vested in the President and shall, subject to the provisions of this Order, be administered and controlled by the President for the use or common benefit, direct or indirect of the natives of Zambia.”*²¹

The Zambia (State Lands and Reserves) Orders 1964 empowered the President to make grants of land and it provided in section 6A,

*“ The President may make grants or dispositions of land in the reserves to any person...”*²²

Nevertheless, power to make grants of land in reserves was delegated to the Public officer for the time being holding the office or executing the duties of the Commissioner of Lands subject to the directions of the Minister responsible for land matters. The office of the Commissioner of Lands was created by the President through a Statutory Instrument No. 7 of 1964²³ and this office performs delegated powers to make grants and dispositions of State Lands, Reserves and Trust Land. This Statutory Instrument was passed in exercise of the powers conferred upon the President by section 10A of the three Orders namely; Zambia (State Lands and Reserves) Order, 1964, the Zambia (Trust Land), Order 1964 and the Zambia (Gwembe District) Order 1964. The Statutory Instrument provides,

“ I hereby authorize the public officer for the time being holding the office or executing the duties of Commissioner of Lands the power subject to the special or general directions of the Minister charged with the responsibility for land matters, to make grants and dispositions of land in reserves, trust land or any other immovable property vested in the President, as I am empowered to make by virtue of Articles 5 and 6A of the Zambia (State Land and Reserves) Orders

²¹ Section 4(1) of Zambia (Trust Land) Orders 1947 to 1964. Appendix 5 of the Laws 1965 Ed. p31

²² Appendix 5 of the laws 1965 Ed.

²³ Republic of Zambia. Government Gazette Statutory Instruments Vol. 1 1966. Government Printer. Lusaka. p19.

in Council 1928 to 1963 as amended by the Zambia(State Land and Reserves) Order, 1964, section 5 of the Zambia(Trust Lands) orders, 1947 to 1963 as amended by the Zambia(Trust Land) Order, 1964 and section 6 of the Zambia(Gwembe District) Order 1964.”²⁴

It can be noted from the above provision that the Commissioner of Lands is an agent of the President where land administration is concerned. This is due to the fact that his powers are exercised subject to the directions of the Minister charged with the land matters. (The President appoints the minister as well)

It is submitted that from the above account, at independence, Zambia had two systems of land tenure, that is, English land tenure system of freeholds and leaseholds that applied to State Land and customary land tenure system that applied to Reserves. The administration system that became the legacy of the independence government heavily relied on the legislation passed during the colonial period. One learned author commented,

“.. major Legislation was enacted which became fundamental to Colonial land Policy in Northern Rhodesia and critical to the land tenure system which emerged in the territory and which in 1964 became the legacy of the Government of the First Zambian Republic”²⁵

With the dual land tenure system in mind, the government of Zambia led by Dr. Kenneth Kaunda sought earnestly for a new land policy that would reflect the aspirations of the new government. In this quest regard needed to be had to the legislation that was passed during the colonial period as it had for a long time been the law for the territory.

The reforms in land that were pronounced by the U.N.I.P government were contained in the Land (Conversion of Titles) Act²⁶, which is the main legislation that attempted to

²⁴ Republic of Zambia, Government Gazette. Statutory Instruments. 1964-65. Government Printer. Lusaka. p 19

²⁵ Mphanza P. Mvunga ‘The Colonial Foundations of Zambia’s Land Tenure System’ Neczam. Lusaka (1980) p 4

bring about the land reforms. The 1975 Act brought about important changes, which in summary are:

- (a) Vested all land in the President absolutely and was held of him in perpetuity for and on behalf of the people (s.4)
- (b) Abolished all freehold estates and introduced statutory leases of 100 years duration
- (c) Abolition of sale transfer and other alienation for value
- (d) Imposition of restriction on the extent of agricultural holdings
- (e) Made the consent of the President mandatory to any transaction

The Act did not mention the consequences of failure to secure the requisite consent. However, the Courts ruled that such default rendered the purported transaction null and void, as can be seen from the ruling in the case of *Hina Furnishing Lusaka Limited V Mwaiseni Properties Limited*.²⁷ In this case the plaintiff sought an injunction to restrain the defendant from interruption of the plaintiff's peaceful and quite enjoyment of its occupation of the demised premises. The premises were demised under a contract to lease, which was neither executed nor entered into with the consent of the President. The action arose out of the defendant's re-entry and possession upon the plaintiff falling into several months rent arrears. In interpreting section 13(1) of the Act, Kakad J, found that the defendant was strictly restricted from subletting the premises to the plaintiffs without consent of the President and observed as follows:

'I therefore consider that in the absence of the written consent of the President, there was no legal estate or interest on the premises conveyed to the plaintiff.'

²⁶ Act No.20 of 1975.

²⁷ (1983) ZR 40.

In this case the application for an injunction was refused since a condition precedent, namely the obtaining of Presidential consent had not been fulfilled.

The introduction of the Act was associated with increased corruption in the administration of land.²⁸ Bruce and Dorner²⁹ said the solution to corruption in land allocation was the introduction of a tax or rent, the increase of which would effectively reduce the demand for land. Anxiety concerning corruption was seen to be partially eliminated by the new procedure for land allocation. The new procedure sought to effect the decentralization of land administration. To this effect, it was directed that;

*'All District Councils will be responsible for land allocation for and on behalf of the Commissioner of Lands, in the processing of applications, selecting of suitable candidates and making recommendations as may be decided upon them. Such recommendations will be invariably accepted unless in cases where it becomes apparent that doing so would cause injustice to others or if a recommendation so made is contrary to national interest or public policy.'*³⁰

It must be noted that if a District Council was dissatisfied with the decision of the Commissioner of Lands, an appeal may be made to the Minister of Lands and Natural Resources within thirty (30) days from the date the decision of the Commissioner of Lands becomes known.³¹ The decision of the Minister is final.

The decision to decentralize land administration was defended on the basis that it expedited the process of allocation of land and this eased the pressure on the

²⁸ p224

²⁹ Bruce J W and Dorner PP 'Agricultural Land Tenure in Zambia: Perspectives.' A research Paper Number 76,(Land Tenure Centre Madison, October 1982) p20

³⁰ Ministry of Lands and Natural Resources, Procedure on Land Alienation, Land Circular No. 1 of 1985 (Government Printer, Lusaka, 1985) p1

³¹ Ibid p2

Commissioner of Lands whose function was to oversee that public policy considerations and national interest were not jeopardized.³²

Subsequently, the Land (Conversion of Titles)(Amendment)(Number2) Number 15 of 1985 amended section 13 by the insertion of section 13(A), which came into effect on 1st April 1985. The amendment related to the grant or alienation of land to non-Zambians. Section 13(A) provided that no land in Zambia effective from 1st April 1985 could be granted, alienated, transferred or leased to a non-Zambian save as provided for in the section. However, the rights and interests acquired by non-Zambians prior to that date were preserved. A non-Zambian after complying with any other provisions and procedures relating to the alienation of land could acquire an interest in land under the following circumstances as provided for by section 13(A)(2) wit;

- (a) If it is a person who has been approved as an investor in accordance with the Industrial Development Act or any other law relating to the promotion of investments in Zambia
- (b) If it is non profit making charitable, religious, educational or philanthropic organization or institution which is registered and is approved by the Minister for the purposes of the section
- (c) If the interest or right in question arises out of a lease, sub-lease or under lease for a period not exceeding five years or a tenancy agreement
- (d) If the interest or right in land is being inherited upon death or is being transferred under a right of survivorship or by other operation of law; or
- (e) If the President has given his consent in writing under his hand.

³² Ibid

Recently, in the decided case of *GF Construction (1976) Limited V Rudnap Zambia Limited and Another*,³³ the Supreme Court considered the effect of the preceding amendment. In this case the trial Judge refused to order specific performance holding that the contract was illegal and void as the appellant held no Investor's licence in terms of section 13(A) subsection (2)(a) of the Land (Conversion of Titles)(Amendment)(Number 2) Act Number 15 of 1985. The Supreme Court affirmed the position that no land should be granted, alienated, transferred or leased to a non Zambian after 2nd April 1985, the date of assent, except, *inter alia* to an approved investor.

³³ SCZ Judgment Number 18 of 1999.

CHAPTER TWO

ALIENATION OF LAND AS AN ASPECT OF LAND ADMINISTRATION

2.0 Introduction

This Chapter seeks to discuss alienation of land as an aspect of land administration. In order to effectively achieve this, the Essay will consider and evaluate the relevant sections of the Lands Act and case law on the subject.

2.1 Vesting of Title

The Land Act has introduced nothing new in this regard. Section 3(1) is a replica of the previous legislation as it vests land in the President to be held by him in perpetuity for and on behalf of the people.

A new development has been the incorporation of the provisions regarding land administration by the President contained in the repealed Orders-in-Council governing Reserves and Trust lands. It is enacted under section 3(5) that land is to be administered and controlled by the President 'for the use, or common benefit, direct or indirect, of the people of Zambia'. This nomenclature, it may be observed, was used in the Orders in Council³⁴ so as to solely safeguard the interests of the natives who were granted pieces of land under customary law. The wording ensured that all the grants that were made to non-Africans in the Native Reserves and Native Trust Lands were in the best interest and common benefit of the natives.

³⁴ Northern Rhodesia (Native Trust Land) Order in Council, 1947 and Northern Rhodesia (Crown and Native Reserves) Order in Council, 1928.

By virtue of the land vesting in the President, he/she is empowered to alienate land vested in him or her to any Zambian.³⁵ The President may alienate land to a non-Zambia under the following circumstances;³⁶

- (a) *Where the non Zambian is a permanent resident in the Republic of Zambia;*
- (b) *Where the non Zambian is an investor within the meaning of the Investment Act or any other law relating to the promotion of investment in Zambia;*
- (c) *Where the non Zambian has obtained the President's consent in writing under his hand;*
- (d) *Where the non Zambian is a company registered under the Companies Act and less than twenty five per centum of the issued shares are owned by non Zambians;*
- (e) *Where the non Zambian is a Statutory Corporation created by an Act of Parliament;*
- (f) *Where the non Zambian is a Cooperative Society registered under the Cooperative Societies Act and less than twenty five per centum of the members are non Zambians;*
- (g) *Where the non Zambian is a body registered under the Land (Perpetual Succession) Act and is a non profit making, charitable, religious, educational or philanthropic organization or institution which is registered and is approved by the Minister for the purposes of this section;*
- (h) *Where the interest or right in question arises out of a lease, sublease, or under lease for a period not exceeding five years or a tenancy agreement;*
- (i) *Where the interest or right in land is being inherited upon death or is being transferred under a right of survivorship or by operation of law;*
- (j) *Where the non-Zambian is a commercial Bank registered under the Companies Act and the Banking and Financial Services Act; or*
- (k) *Where the non-Zambian is granted a concession or a right under the National Parks and Wildlife Act.³⁷*

The current position as regards alienation of land to non-Zambians offers more opportunities to non-Zambians than the repealed Land (Conversion of Titles) Act.

³⁵ Section 3(2) of the Lands Act Cap 184 of the laws of Zambia.

³⁶ Section 3(3) of the Lands Act Cap 184 of the laws of Zambia.

³⁷ Now Zambia Wildlife Act (ZAWA)

The position as regards non-Zambians was more restricted and was as follows; Section 13A provided that no land in Zambia effective from 1st April, 1985 could be granted, alienated, transferred or leased to a non-Zambian. However, rights and interests acquired by non -Zambians prior to that date were preserved. A non-Zambian after complying with any other provisions and procedures relating to alienation of land could acquire an interest in land under the following circumstances as provided by section 13A (2) wit;

- (a) If it is a person who has been approved as an investor in accordance with the Investment Act or any other law relating to the promotion of investment;*
- (b) If it is a non profit making charitable, religious, educational or philanthropic organization or institution which is registered and is approved by the Minister for the purposes of the section;*
- (c) If the interest or right in question arises out of a lease, sublease or under a lease for a period not exceeding five years or a tenancy agreement;*
- (d) If the interest or right is being inherited upon death or is being transferred under a right of survivorship or by operation of law; or*
- (e) If the President has given his consent in writing under his hand.*

Recently, in the decided case of ***G. F Construction (1976) Limited V. Rudnap Zambia Limited and Another***³⁸, the Supreme Court considered the effect of section 13A. In this case, the trial Judge refused to order specific performance holding that the contract was illegal and void as the appellant had no investor's licence in terms of section 13(A),subsection (2)(a) of the Land (Conversion of Titles)(Amendment)(Number2) Act Number15 of 1985. The Supreme Court affirmed the position that no land should be granted, alienated, transferred or leased to a non

³⁸ Supreme Court Judgment Number 18 of 1999

Zambian after 2nd April, 1985, the date of assent, except *inter alia* to an approved investor.

Under the repealed Land (Conversion of Titles) Act, as can be seen from the above, the alienation of land to non-Zambians was more restricted. However, under the Lands Act, the position has been relaxed to a greater extent. More provisions have been made under which a non-Zambian can acquire rights or interests in land in Zambia.

2.2 Office of Commissioner of Lands

Although all land in Zambia is vested in the President, the day-to-day administration of land is delegated to the Commissioner of Lands. This office is a creation of Statutory Instrument No. 7 of 1964 made pursuant to Zambia (State Lands and Reserve) Orders 1964, Zambia (Trust Land) Orders 1964 and Zambia (Gwembe District) Order, 1964 which orders stand repealed by the Lands Act. In this respect the Statutory Instrument provides,

“ I hereby authorize the public officer for the time being holding the office or executing the duties of Commissioner of Lands the power subject to the special or general directions of the Minister charged with the responsibility for land matters, to make grants and dispositions of land in reserves, trust land or any other immovable property vested in the President, as I am empowered to make by virtue of Articles 5 and 6A of the Zambia (State Land and Reserves) Orders in Council 1928 to 1963 as amended by the Zambia(State Land and Reserves) Order, 1964, section 5 of the Zambia(Trust Lands) orders, 1947 to 1963 as amended by the Zambia(Trust Land) Order, 1964 and section 6 of the Zambia(Gwembe District) Order 1964.”³⁹

The Office of the Commissioner of Lands is a key Office in this Country as regards land administration. Land matters in any Country are cardinal to the life of the country.

³⁹ Republic of Zambia Government Gazette. Statutory Instruments. 1964-65. p 19

This Office is supposed to be free from interference by politicians in government so that it can effectively discharge the functions of the Office. This is not the case as it is a subject of political interference and this has adversely affected its operations. This Office being a Presidential appointment has exposed it to abuse by the President. Ultimately, there is need for reform in the law so as to safeguard the tenure of this Office so that it is not a subject of interference both by the President and politicians in government. This can be done by either making the Office a constitutional Office or amending the Lands Act so that this Office is created by the Lands Act and provision made for its functions and terms of tenure of Office.

2.3 Allocation procedure

The current procedure for alienation of land is that all District Councils are responsible for and on behalf of the Commissioner of Lands, in the processing of applications, selecting of suitable candidates and making recommendations as may be decided upon such applications.⁴⁰ Such recommendations will invariably be accepted unless, in cases where it becomes apparent that doing so would cause injustice to others or if a recommendation so made is contrary to national interests or public policy.⁴¹

This procedure sought to effect the decentralization of land administration. The decision to decentralize land administration was defended on the basis that it expedited the process of allocation of land and thus eased the pressure on the Commissioner of Lands whose function was to oversee that public policy considerations and the national

⁴⁰ Ministry of Lands and Natural Resources: Procedure on Land Alienation. Land Circular Number 1 of 1985 (Government Printer, Lusaka, 1985) p1

⁴¹ Ibid

interest were not jeopardized.⁴² This decentralization of land allocation was seen to have partially eliminated corruption in land allocation.

However, it seems as if the situation has changed in that, the Minister of Local Government and Housing was quoted as having said that ‘ *the decentralization in the Local Government has brought about increased levels of corruption.*’⁴³

It is further submitted that if a District Council is dissatisfied with the decision of the Commissioner of Lands, an appeal may be made to the Minister of Lands and Natural Resources within thirty (30) days from the date the decision of the Commissioner of Lands becomes known.⁴⁴ The Minister’s decision is final.

Recent happenings and comments issued in the print media over plot number 4300 in Makeni, Lusaka are of great significance to this study and are worth considering. It is alleged that Lusaka City Council did not follow the procedure of land alienation when alienating the piece of land in question to the public. The Minister of Lands said that ‘ *the recent advertisements on the housing project issued by the Lusaka City Council were prematurely done because the procedures were not followed in line with Circular number 1 of 1985.*’⁴⁵ She further reminded both City and District Councils that her Ministry was responsible for the alienation of land and the Councils were agents of the Commissioner of Lands.⁴⁶

It is submitted that Circular number 1 of 1985 created a principal-agent relationship between the Commissioner of Lands and district Councils where alienation of land is concerned. The President delegated the day-to-day administration of the land to the Commissioner of Lands who was empowered to make grants or dispositions to any

⁴² Ministry of Lands and Natural Resources: Procedure on Land Alienation. Land Circular Number 1 of 1985 (Government Printer, Lusaka, 1985) p1

⁴³ Zambia National Broadcasting Corporation (ZNBC) Main News at 19:00hrs of 6th August 2005.

⁴⁴ Procedure on Land Alienation. Circular No. 1 of 1985 (Op. cit) p 2

⁴⁵ Honorable Rev. Gladys Nyirongo. Zambia Daily Mail, Monday 22nd August 2005.

⁴⁶ ibid

person, subject to the special or general directions of the Minister responsible and that Councils were only engaged as agents.

Commenting on what consequences would be if the land allocation procedure was not followed, the Minister stated, “ *As the Minister responsible for administering and implementing Government policy in land matters, she had the authority to revoke and suspend the agency from any Council that failed to comply with Government policy and land allocation procedures.*” As a consequence of the failure to comply with land allocation procedures the Minister of Lands revoked the agency of Lusaka City Council of allocating plots on the proposed residential scheme on plot 4300, Makeni. She added that City and District Councils had for a long time ignored guidelines applicable to land allocation.⁴⁷ Emphasizing and justifying her action, the Minister added that,

*“This is a lesson to other City and District Councils that non compliance with laid down procedure will lead to revocation of the agency by Government. Ministry of lands is determined to put corrective measures and follow guidelines which will ensure that people put up organized structures”*⁴⁸

In a matter between *Makwati and Senior Chieftainess Nkomeshya*,⁴⁹ the Lands Tribunal upheld the applicant’s claim of title to land because of the absence of any irregularity in the way the land was acquired in the first place and subsequently sold to the appellant. In the course of the judgment, the Lands Tribunal observed that once a certificate of title is issued in respect of customary land, it ceased to be customary land and the Chieftainess ceased to have control over the land. Similarly in the case of *Sweettrade Investments Limited and Chibombo District and Others*,⁵⁰ the Lands Tribunal observed that there is overwhelming evidence that the appellant went through all

⁴⁷ The Post, 22nd August 2005.

⁴⁸ *Ibid*

⁴⁹ LAT/60/97

⁵⁰ LAT/77/99

the procedures in acquiring the land and the Commissioner of Lands was satisfied that the appellant had complied with the procedures and proceeded to offer land in issue. The Lands Tribunal did not see the basis upon which the appeal could be rejected. However, the procedure for alienation of land must be strictly complied with. In the case of *Masendeke and Ndola Rural District Council and Others*,⁵¹ the Lands Tribunal declined to grant an order for compensation against the state, when the appellant effected substantial development without the prior approval of the Commissioner of Lands. The Lands Tribunal instead, ordered compensation to be met by the local authority that had conveyed the erroneous impression that the appellant had authority to effect developments.

Experience has it that the process of land allocation is not expeditious as envisaged. One record⁵² studied revealed that this particular applicant applied for a residential plot in Mbala in 2001. Mbala Municipal Council did interview him and recommended him for title in 2002 to the Lands Department. The letter of offer for this particular stand number was generated in 2005, which offer the applicant did accept by paying a certain amount of money as consideration at the Lands Department. Meanwhile, when the applicant applied for a residential plot, the Council told him to develop the land within 18 months or else they would repossess it.

Having the above experience in mind, the argument that the procedure of land allocation is fast or expeditious cannot be sustained. The delay in generating letters of offer by the Lands Department has led to the congestion or piling up of files and this has in one way encouraged corruption.

⁵¹ LAT/29/98

⁵² Application considered under the Council minute no. PWD/637/11/2001 to PWD/643/11/2001

The delay in disposing of cases or files at the Lands Department can be attributed to many factors which *inter alia* is the fact that officers charged with the responsibility of dealing with files do not work on them with urgency and efficiency required.

A Land officer at the Lands Department observed that this situation could be rectified by putting in place a close monitoring system so as to improve the service delivery or if it is there then it should be strengthened to make the process effective.⁵³

2.4 Administrative flows- Record Keeping

There is poor record keeping both at the Lands Department and at councils. There are instances when a council on one hand, repossess a piece of land that is on title, which is not developed within the specified period of time and the records at the council indicate that the land is vacant and this land is in turn allocated to a new applicant of land who complies with the procedure. Meanwhile, on the other hand, records at the Lands Department indicate that the same piece of land is on title. This confusion in records in effect causes the delay in issuing of title deeds to the new applicant who has been lawfully recommended by the council to the Lands Department for title. This came to light when Mbala Municipal Council repossessed a certain piece of land⁵⁴ because it lay undeveloped for a long time. Title was issued in 1993 by Lands Department to a Mr Kapembwa of Mazabuka but he did not develop the land within the specified period. That being the case Mbala Municipal Council repossessed the land and re-allocated it to a Mr Sikazwe in 2001 whom the council did recommend for title to the Lands Department. The Lands Department could not act on the recommendation because their records did indicate that the piece of land was on title and that they could not issue another title on

⁵³ In Interview with Land Officer(Mr Francis Ngoma) at Mulungushi House, Lusaka, 2005.

⁵⁴ Stand No. 743 Mbala. Lands Dept. records.

the same piece of land. This led to correspondence between the council and the Lands Department that in effect delayed the process. However, in this particular case, it was discovered that the council had repossessed the plot but the records at the Lands Department were not updated. This particular case revealed the fact that the record keeping system at the Lands Department is poor.

Following the above, it is suggested that the record keeping at both the councils and the Lands Department be improved and that constant updating of records be made a routine exercise so as to effect the harmonization of records at both institutions. It is further suggested that there be increased interaction between councils and the Lands Department where record keeping is concerned and that they should take advantage of the technological advancements in this area for instance, the use of advanced computer programmes related to the same. This can in effect improve the expediency of the land allocation process by avoiding delays brought about by poor record keeping.

The vesting of land in the President absolutely has its own bad side in that it opens the land administration system to be abused by the President. A lesson can be drawn from what happened prior to general elections in 2001, the Second Republican President ordered the Commissioner of Lands to give priority in issuance of title deeds to holders of mining houses (potential voters), in effect suspending issuance of title to others. This involved issuing title deeds to sitting tenants at a political rally on the Copperbelt.⁵⁵ What manner of land administration is this where title deeds have to be issued at a political rally? This is gross abuse in that there were numerous other cases of people that had been waiting for title deeds for years from the Commissioner of Lands, who, at the time of issuing title deeds to holders of mining houses, were discriminated against by the

⁵⁵ It is a notorious fact that the MMD did distribute title deeds at the Political Rally in Kitwe.

President because he did not see any political value in them. Surely something needs to be done either by amending the vesting provision or indeed securing the independence of the office of the Commissioner of Lands so that it is free from the whims and caprices of the President that exert political pressure on the operations of the office thereby affecting its effectiveness in administration of land.

2.5 Alienation of land under customary tenure

As previously observed, tenure in Trust Lands and Reserves was governed by Orders-in-Council.⁵⁶ These Orders-in-Council have since been repealed. Customary land is defined as the area described in the schedules to the Zambia (state lands and reserves) orders.⁵⁷ The restrictions in alienation of land held under customary law have been re-enacted in the Lands Act. Thus the President shall not alienate any land situated in a district or an area where land is held under customary tenure;⁵⁸

- (a) Without taking into consideration the local customary law on land tenure which is not in conflict with the Act;*
- (b) Without consulting the chief and the local authority in the area in which the land to be alienated is situated, and in the case of a game management areas and the Director of the National Parks and Wildlife Services who shall identify the piece of land to be alienated.*
- (c) Without consulting any other person or body whose interest might be affected by the grant; and*
- (d) If an applicant for a leasehold title has not obtained the prior approval of the Chief and the local authority within those areas the land is situated.*

It is cardinal to note that these restrictions placed on the alienation of land under customary tenure are intended to protect the people that hold land under customary tenure. Under customary tenure, a Chief has administrative and control functions over

⁵⁶ Northern Rhodesia (Native Trust Land) Orders-in-Council, 1947 to 1963 as amended by the Zambia (Trust Land) Order 1964

⁵⁷ Section 2 of the Lands Act Cap 189 of the laws of Zambia.

⁵⁸ Section 3(4) of the Lands Act

land within his jurisdiction and control functions refer to the regulations in the acquisition or use of land and this does not necessarily entail a beneficial interest in land.⁵⁹ It is by virtue of these control functions that the Chief allocates portions of land to individuals or family heads according to need and these in turn re-allocate among their members. Hence, it is important to pick a leaf from Mvunga's findings on ownership of land under the Luvale people. He observed,

*"Notwithstanding the apparent individual ownership, the Luvale assert that land acquired by an individual is family property belonging not only to the landholder but to the entire range of his relatives resident in the village. What is meant by this is that once an original landholder's interest in land become extinct, commonly on death or abandonment, the land reverts to the lineage from within which an individual lineage member may assume effective occupation and thus owns all the previous rights. The right of dispossession is a power intended to preserve and protect a contingent future interest in a given parcel of land for any relative within the lineage of relatives."*⁶⁰

These restrictions relating to alienation of land under customary tenure have generated litigation. Perhaps it is only befitting that two of the matters that have been litigated before the Lands Tribunal are considered briefly.

The first case is a matter between *Chenda and Another V Phiri and Others*⁶¹. The appellant challenged the acquisition of interests in land by the respondents in total disregard of section 3 (4) of the Lands Act. That is to say, the respondents acquired a certificate of title in respect of land, which the appellant's family had lived on for many years and therefore, had an interest in this land. It was established in evidence that the appellants were not consulted by the respondent prior to the acquisition of the interest in

⁵⁹ Mphanza P. Mvunga(1982) ' Land Law and Policy in Zambia' Zambian Papers No. 17 Mambo Press. Gweru. p20,23

⁶⁰ Mphanza P. Mvunga(1982) ' Land Law and Policy in Zambia' Zambian Papers No. 17. Mambo Press. Gweru p 24

⁶¹ LAT80/98

the land, contrary to section 3(4)(c) of the Lands Act. The Lands Tribunal allowed the appeal and observed that the failure to consult persons who may be affected by the grant offered, contrary to section 3(4)(c) is fatal. The Lands Tribunal went on to observe that, even if Chieftainess Mungule had given her consent, the fact that the Chibombo District Council did not approve the respondent's application meant that section 3(4)(d) was breached.

The second case is a matter between *Still Water Farms and Mpongwe District Council and Others*.⁶² The appellant in this case appealed against the decision by the Commissioner of Lands' refusal not to issue a certificate of title and argued that the decision was discriminatory, unconstitutional and against the rules of natural justice. The refusal by the Commissioner of Lands not to issue the certificate of title arose out of an objection by the 3rd and 4th respondents that the land in dispute had been given to the 3rd and 4th respondents by the late Chief Lesa, the predecessor to the current Chief Lesa who recommended to the council, the allocation of the land to the appellant.

In delivering judgment, the Land Tribunal observed that the success or failure of the appeal hinged on the provisions of section 3(4) of the Lands Act. If any provision under that subsection had been breached, then the appeal must fail, but there would be no basis for dismissing the appeal if that subsection had not been breached. The Lands Tribunal noted that there was no dispute that the land in issue is held under customary tenure under the jurisdiction of Chief Lesa. The Lands Act⁶³ provides that land held under customary tenure can be converted to a leasehold tenure so that if the applicant's appeal was

⁶² LAT/30/2000

⁶³ Section 8 of the Lands Act

successful it would be entitled to obtain a certificate of title, issued by the 2nd respondent, the Commissioner of Lands.

The subsection in contention was subsection 4(c) of the Lands Act, which required consultation to be made with any person or body whose interest might be affected by the grant. The 3rd and 4th respondents claimed to hold land in issue under customary tenure and that the land was given to them in 1979. The Lands Tribunal observed that under customary tenure, one need not show any evidence in writing to prove that you own land but that ownership can be confirmed by the people in the area. The Lands Tribunal went on to conclude that there was need for the Chief to have consulted the 3rd and 4th respondents and other people who were in occupation of the land in question. There was no evidence that the Chief consulted these people. Infact, there was evidence on record and that the appellant admitted the same, that the 4th respondent had informed the appellant as far back as 1995, that the land in issue belonged to the 3rd and 4th respondents.

However, the appellant proceeded to obtain recommendation from Chief Lesa to allocate the appellant the land in dispute. The Lands Tribunal found that the 3rd and 4th respondents had an interest in the land in dispute and therefore, should have been consulted. The Lands Tribunal also found that the 2nd respondent, the Commissioner of Lands, was justified in his refusal to issue a certificate of title to the appellant, after the 3rd and 4th respondents registered objections.

These restrictions on alienation of land under customary tenure are strictly construed all in an effort to protect those holding under customary tenure. This in effect ensures security of tenure for those holding under customary tenure. It is suggested that great

public awareness most especially in rural and remote areas be made concerning these restrictions that are meant to protect those who hold land under customary tenure. It is only when people are aware of these restrictions that they will be able to register objections to recommendations by Chiefs to allocate land to a person over which others have interests or rights.

2.6 Land to be administered for the benefit of Zambians

All land in Zambia is required to be administered and controlled by the President for the use and common benefit, direct or indirect of the people of Zambia.⁶⁴ In achieving this, the Lands Act contains provisions that restrain the President from alienating land in certain circumstances which are not to the benefit of Zambians. Thus, the President is restrained from alienating land for a term exceeding ninety-nine years unless;⁶⁵

(a) The President considers it necessary in the national interest or in the fulfillment of any obligations of the Republic; and

(b) It is approved by a two-thirds majority of the members of the National Assembly.

It can be argued that the inclusion of the approval of the two thirds majority of the members of the National Assembly is a good feature provision worth noting as it can be used to check the powers of alienation of land of the President so that he does it for the use and common benefit of Zambians. Further, it also ensures involvement of the people's representatives in the process.

Further, in alienating land, the President is required to take such measures as are necessary to;⁶⁶

⁶⁴ Section 3(5) of the Lands Act.

⁶⁵ Section 3(6) of the Lands Act

⁶⁶ Section 3(7) of the Lands Act

- (a) Control settlements, methods of cultivation and utilization of land as may be necessary for the preservation of the natural resources on that land; and*
- (b) Set aside land for forest reserves and game management areas and national parks and for the development and control of such reserves, game management areas and national parks.*

2.7 Conditions on alienation of land

The Lands Act provides that land in Zambia shall have value.⁶⁷ This provision has conferred value on the land and because of the conferring of value on land, prohibits the President from alienating land without receiving consideration for such alienation. However, there is an exception as regards the alienation for a public purpose.

However, where a person has the right of use and occupation of land under customary law and wishes to convert such right into leasehold tenure, no consideration is required to be paid for such conversion.⁶⁸

In this context public purpose includes alienation of land for;

- (a) the exclusive of government or for the general benefit of the people of Zambia;*
- (b) in connection with sanitary improvements of any kind including reclamations;*
- (c) in connection with the laying out of any new township or the extension or improvement of any existing township;*
- (d) in connection with aviation;*

⁶⁷ Section 4(1) of the Lands Act

⁶⁸ Proviso to Section 4(1) of the Lands Act

- (e) *the construction of any railway authorized by legislation;*
- (f) *obtaining control over land contiguous to any railway, road or other public works constructed or intended at anytime to be constructed by government;*
- (g) *obtaining control overland required for or in connection with hydro-electric or other electricity generation and supply purposes;*
- (h) *in connection with the preservation, conservation, development or control of forest produce, fauna, flora, soil, water and other natural resources.*

Section 4 clearly recognizes land as a valuable commodity and the former conception of land without value has been discarded. However, one learned scholar observed, *‘what is surprising is that the compensation arising by virtue of non-renewable lease does not include the market value of land. It would appear therefore, that while the state is desirous of reaping the financial rewards of a grant, the same is denied to a leasee whose lease is not renewed’*⁶⁹

The provision conferring value on land (virgin land) does however, have the effect of bringing land into the property market in that it can be used as collateral. Prior to this reform, mortgages were specifically restricted in their operation to ‘unexhausted improvements’ and not bare virgin land. This conferment of value, it is submitted, should enable landholders with title deeds to raise some development finance.

2.8 Consent of the President

The Lands Act⁷⁰ prohibits the sell, transfer or assignment of any land without the consent of the President. Prior to the Lands Act all dealings in land not only required the consent of the President but in the exercise of that power, the President was conferred with additional power to determine the price (in case of sale), the rent (in case of the

⁶⁹ Kenneth K. Mwenda & David A. Ailola, Eds.,(2003) ‘Frontiers of Legal Knowledge: Business and Economic Law in Context’. Carolina Academic Press. North Carolina p 91

⁷⁰ Section 5(1) of the Lands Act

lease), or the premium (in case of mortgage).⁷¹ Such draconian powers thwarted commercial transactions, which would have led to the development of land and rapid growth of real estate.⁷² The Lands Act does impose the requirement that consent be secured for any person to sell, transfer or assign any land. But the Act does not go further with the determination of the price, rent or premium. This is entirely a matter between the parties. However, there are instances in practice when Zambia Revenue Authority (ZRA) intervenes in the fixing of prices. This practice is not provided for in the law. It is submitted that corrective measures are taken in order to avoid or stop this practice by ZRA. In order to avoid delays in processing applications for consent, the Act⁷³ goes further to compel efficiency to the processing of these applications by the provision to the effect that where consent is not granted within forty-five days of filling the applications, consent shall be deemed to have been granted. However, in the event of refusal to grant consent, the President must give reasons and these reasons can form the basis for an aggrieved applicant to appeal to the Lands Tribunal within thirty days for redress.⁷⁴

It must be stated, however, that the requirement of Presidential consent is a re-enactment of section 13 of the Land (Conversion of Titles) Act.⁷⁵ This particular provision generated a great deal of litigation. The earliest case where judicial guidance was provided is the case of *Hina Furnishing Limited and Mwaiseni Properties Limited*⁷⁶ **Kakad J**, held that in the absence of written consent of the President, there was no legal estate or interest on the premises conveyed to the plaintiff. Another often cited

⁷¹ Mphanza P. Mvunga, 'Land Law and Policy in Zambia', Op.Cit p 89

⁷² Ibid

⁷³ Section 5(2) of the Lands Act

⁷⁴ Section 5(4) of the Lands Act

⁷⁵ Act Number 20 of 1975

⁷⁶ 1983 ZR 40

case on this point is the case of *Mutwale and Professional Services Limited*.⁷⁷ The Supreme Court of Zambia held that the purported subletting by the respondent was without prior presidential consent as required by the Act,⁷⁸ and therefore, the whole contract including the provision for payment of rent is unenforceable.

It must be pointed out though that, the requirement of presidential consent does not prohibit the entering into contracts by the purchasers and vendors. In the case of *Mpashi and Avondale Housing Project Limited*,⁷⁹ the Supreme Court of Zambia dispelled the misconception that the requirement of the Presidential consent operates to prohibit absolutely the entering into contracts by purchasers and vendors. The Supreme Court recalled its decision in the case of *Mufalo and Nyanga*⁸⁰ where, it was held that there was nothing to prevent parties entering into contracts for the sale of land conditionally upon obtaining Presidential consent. The Supreme Court of Zambia went on to observe, *'it is therefore not correct to strike down such contracts out of hand not to consider that specific performance must be refused simply for want of Presidential consent at the time when the party obliged to apply for consent has not done so yet.'*

It must be stated without hesitation that the provision of an appeal to the Lands Tribunal by an aggrieved person for redress provides a check on the exercise of that power. In this respect, as Mulimbwa observed;

"For the first time, a power of review of the executive action has been created since the Lands Tribunal will have to be satisfied as to the variety of the reasons. The withholding of consent, under the

⁷⁷ 1984 ZR 72

⁷⁸ Act Number 20 of 1975

⁷⁹ 1988-1989 ZR 140

⁸⁰ 1988-1989 ZR 88

circumstances will, presumably, be rare if the Lands Tribunal acquits itself in the exercise of its jurisdiction."⁸¹

2.9.0 Recognition of Customary Tenure

Every piece of land in a customary area, which was vested in or held by any person under customary tenure, is to continue to be so held and recognized under the Act.⁸² Thus, the rights and privileges of any person to hold land under customary tenure are recognized and the application of customary law to such holding is not construed as an infringement of any of the provisions of the Act.⁸³

2.9.1 Conversion of customary tenure into leasehold tenure

Any person who holds land under customary tenure may convert it into leasehold not exceeding ninety-nine years on application by way of;

- (a) *A grant of leasehold by the President;*
- (b) *Any other title that the President may grant; and*
- (c) *Any other law.*

However, the conversion of rights from a customary tenure to a leasehold tenure shall have effect only after the approval of the Chief and the local authorities in whose area the land to be converted is situated.⁸⁴ It is further provided that no title other than a right to the use and occupation of any land under customary tenure shall be valid unless it has been confirmed by the Chief and a lease granted by the President.⁸⁵

⁸¹ Kenneth K. Mwenda & Ailola, A. David Eds. Frontiers of Legal Knowledge, *op.cit.* at p92

⁸² Section 7(1) of the Lands Act

⁸³ Section 7(2) of the Lands Act

⁸⁴ Section 8(2) of the Land Act

⁸⁵ Section 8(3) of the Lands Act

The provisions of the Lands Act are complimented by the regulations to the Land (Customary Tenure) (Conversion) Regulations,⁸⁶ which outline the procedure of converting customary tenure into leasehold tenure.

Accordingly, a Chief is empowered by the regulations to grant or refuse consent to convert customary tenure into leasehold. Where the Chief refuses the consent, he or she is required to communicate such refusal to the applicant and the Commissioner of Lands stating the reasons for such refusal. Similarly, where a Chief consents to the application for the conversion he or she shall confirm;

(a) That the applicant has a right to use and occupation of the land

(b) The period of time that the applicant has been holding that land; and

(c) That the applicant is not infringing on any other person's rights.⁸⁷

The application for conversion is required to be referred to the council in whose area the land to be converted is situated. Where a council considers that it will be in the interest of the community to convert a particular parcel of land held under customary tenure into leasehold tenure, the council should in consultation with the Chief in whose area the land to be converted is situated apply to the Commissioner of Lands for conversion. The authority to convert the land into leasehold lies with the Commissioner of Lands who can either refuse or accept the recommendation and should inform the applicant accordingly.⁸⁸

It will be noted that, the Chief is a major player in the conversion process and it is submitted that he is the one who is seen as the protector of the interests held under customary land tenure as he is viewed as the custodian of that land and that failure to

⁸⁶ Statutory Instrument Number 89 of 1996

⁸⁷ Section 31(2)(4) of the Statutory Instrument Number 89 of 1996

⁸⁸ SI Number 89 of 1996

consult him renders the application void and that the Commissioner of Lands cannot act on that recommendation.

2.9.2 Effects of customary provisions

2.9.2.0 Advantages

People who convert customary tenure cease to hold land subject to the rights and interests of the community.

The landowner would then have the right to legally sell such land, which is not the case under customary law. This, it is submitted would also allow the rural folk, especially peasant farmers to sell part of their land to raise money to buy agricultural implements instead of waiting for handouts from government or their long lost relatives in urban areas.

This provision would also increase their security of tenure as well as allow them to use such land as collateral security for loan facilities from banks.

2.9.2.1 Disadvantages

Conversion of tenure attracts payment of rates. To this effect, there is also a provision in the Act for the penalty for people who fail to pay these rates.

The opening up of customary land to both Zambians and foreigners, threatens the Zambians in rural areas to be swamped by the more financially sound Zambians and foreigners alike which would end up creating a landless peasantry.

2.10 Prohibition of unauthorized occupation of land

A person shall not without lawful authority occupy or continue to occupy vacant land.⁸⁹ Any person who occupies land without lawful authority is liable to be evicted.⁹⁰ A

⁸⁹ Section 9(1) of the Lands Act

⁹⁰ Section 9(2) of the Lands Act

case in point is the *Roberts and Bandawe and Others case*.⁹¹ The respondents established a village on a farm belonging to the appellant. Despite repeated requests by the appellant that the respondents vacate the said farm, and an offer for an alternative land, the respondents refused to vacate the farm, arguing that Chieftainess Nkomeshya gave the land in dispute to them. The Lands Tribunal wondered how the Chieftainess could have offered the respondents land held on title by the applicant. The Lands Tribunal allowed the appeal and ordered the respondents and their families to vacate the land within a period of three months from the date of the judgment.

This provision protects those who hold land on title from squatters. This is further buttressed by the position that one cannot acquire land in Zambia by prescription or by adverse possession.⁹²

⁹¹ LAT/20/99

⁹² Section 35 of the Lands and Deeds Registry Act Chapter 135 of the Laws of Zambia.

CHAPTER THREE

THE LANDS TRIBUNAL AND LAND DEVELOPMENT FUND

3.1 THE LANDS TRIBUNAL

3.1.0 Composition of The Lands Tribunal

The Lands Act⁹³ establishes a Lands Tribunal. The Lands Tribunal consists of the following members who are appointed by the Minister;⁹⁴

- (a) A chairperson who shall be qualified to be a judge of the High Court;
- (b) A deputy chairperson who shall be qualified to be appointed a judge of the High Court;
- (c) An advocate from the Attorney-General's Chambers;
- (d) A registered town planner;
- (e) A registered land surveyor; and;
- (f) Not more than three persons from the public and private sectors.

It must be pointed out that the chairperson and deputy chairperson are appointed by the Judicial Service Commission⁹⁵ and on such terms and conditions as may be specified in their letters of appointment. In the course of business, the Tribunal may appoint persons who have the ability and experience in land, agriculture, commerce or other relevant professional qualifications as assessors for the purpose of assisting the Tribunal in determining any matter.⁹⁶ It is evident that the Tribunal consists of professionals whose

⁹³ Section 20(1) of the Lands Act

⁹⁴ *ibid*

⁹⁵ Section 20(3) of the Lands Act

⁹⁶ Section 21 of the Lands Act

areas of specialization are relevant to land development. The quorum is five members including the chairman or the deputy chairman.⁹⁷

3.1.1 Jurisdiction of the Lands Tribunal

The Lands Tribunal shall have jurisdiction to-⁹⁸

- (a) Inquire into and make awards and decisions in any dispute relating to land under this Act(Lands Act);
- (b) To inquire into and make awards and decisions relating to any dispute of compensation to be paid;
- (c) Generally to inquire into and adjudicate upon any matter affecting the land rights and obligations of any person or the government; and
- (d) To perform such acts and carryout such duties as may be prescribed by the Lands Act or any written law.

It can be noted from the above that the Tribunal has extensive powers to investigate various issues concerning land in Zambia done under the Lands Act. Thus, any person aggrieved with the direction or decision of any person in authority may apply to the tribunal for a determination.⁹⁹ In this context, 'a person in authority' means the President, Minister or the Registrar. In a decided case of *Mwangela and Nsokoshi and Another*¹⁰⁰, the Lands Tribunal construed section 15 and 22 of the Lands Act, and observed that the jurisdiction of the Lands tribunal is limited to settlement of land disputes under the Lands Act and is therefore, not an alternative forum to the High Court, where parties can go to even for the issuance of prerogative writs such as mandamus (an order directing a public official or body to perform a certain act). In the **Mwangela** case, the appellant sought to

⁹⁷In interview with the Registrar of Lands Tribunal on 4th October 2005.

⁹⁸ Section 22 of the Lands Act

⁹⁹ Section 15 of the Lands Act

¹⁰⁰ SCZ Judgment No. 29 of 2000.

impugn a certificate of title issued to the 1st respondent. The Supreme Court pointed out that the Tribunal had no jurisdiction to entertain such an action.

The Tribunal's jurisdiction is limited for instance, the Tribunal has no jurisdiction to entertain a dispute between parties over the completion or non-completion of a contract of sale of land. This is a matter between two interested parties and the Land Act does not cover such matters. Similarly, the Tribunal has no jurisdiction to entertain a dispute between Government and an individual over the sale of Government pool houses. The right of any civil servant, who is a sitting tenant and who qualifies to own land in Zambia pursuant to section 3 of the Lands Act, to buy the property he occupies is not founded on any provision of the Lands Act. The right to buy stems from Government's decision contained in Cabinet Office Circular No. 12 of 1996. With such restrictions, it is not possible to catalogue the kind of cases, which can be entertained by the Lands Tribunal. The only criterion is that the dispute must involve something done or not done pursuant to the provisions of the Lands Act.

3.1.2 Remedies

It is surprising to note that the Act does not specify the remedies that may be ordered by the Lands Tribunal. However, from the language of section 22, the Tribunal upon hearing a dispute has the power to give such orders or awards as are necessary in the circumstances of the case to give effect to its findings. It is further interesting to note that the Tribunal is, of course, guided in its decisions or awards by the relief sought and by the nature of the dispute.

3.1.3 Proceedings of the Lands Tribunal

The proceedings of the Tribunal are informal. The proceedings are presided over by the Chairman and there must be at least five members including the Chairman or Vice Chairman for the Tribunal to transact its business. The determination of any matter before the Tribunal is according to the opinion of the majority of the members hearing the case. The proceedings of the Tribunal are generally flexible and are adjustable depending on the circumstances of each case. The Tribunal is not bound by the rules of evidence applicable in civil proceedings.¹⁰¹ A case in focus on this point is *Simbondu V Commissioner*¹⁰², where Counsel for the respondent was allowed to cross-examine his own witness, which is contrary to the rules of evidence. Any party to the dispute can either appear in person or through Counsel at his own expense. There is also expediency in the manner in which the Tribunal disposes of cases. The proceedings are not costly as compared with the judicial process. There are no fees payable for filing a complaint although complainants incur other costs such as drawing affidavits, engaging lawyer and so on.¹⁰³

3.1.4 Appeals to the Supreme Court

The Lands Tribunal is the only administrative tribunal whose decisions can be appealed against directly to the Supreme Court.¹⁰⁴ This is unusual and it is difficult to establish the reasons for this position. This has prompted some members of the Lands

¹⁰¹ Section 23(5) of the Lands Act

¹⁰² At Lands Tribunal

¹⁰³ In interview with the Vice Chairperson of the Lands Tribunal on 19th September, 2005.

¹⁰⁴ Section 29 of the Lands Act.

Tribunal to contend that on matters relating to land the Lands Tribunal should share the same jurisdiction as the High Court for Zambia.¹⁰⁵ In support of this position members have contended that decisions of the Lands Tribunal are not amenable to review by the High Court.

3.1.5 Evaluation of the of the operations of the Lands Tribunal

Although the Lands Tribunal is fairly a new institution its popularity is steadily increasing. More and more people are going to the Lands Tribunal for litigation. This, it is suggested is likely to continue provided it promptly decides cases and remains impartial in its decisions, especially in cases involving the government.

There are, however, serious contradictions in the procedure of the Lands Tribunal and also in the supervising Ministry. Section 24 of the Lands Act confers power upon the Chief Justice to make regulations to govern the procedure of the Tribunal and for summoning witnesses to appear before the Tribunal. The regulations issued by the Chief Justice in 1996 appear to limit the jurisdiction of the Lands Tribunal.¹⁰⁶ For instance, Regulation 3(1) provides ‘ Any appeal to the Tribunal against any directive or decision may be instituted by sending to the secretariat, in duplicate a written notice of appeal..’ When critically looked at it appears that the rules of the Tribunal were framed on the assumption that the Lands Tribunal is an “appeals tribunal” and not a Tribunal with jurisdiction to hear any matter arising under the Lands Act.

According to rule 3(1) for the Tribunal to be moved there must be a decision or directive made under the Lands Act and one must be aggrieved by such a decision or

¹⁰⁵ In interview with the Registrar of the Lands Tribunal at the Lands Tribunal on 4th October 2005. op cit

¹⁰⁶ SI No. 86 of 1996

directive. The role of the Lands Tribunal is therefore to review such a decision or directive.

This is contrary to section 22 of the Lands Act in that it does not make reference to appeals. The Lands Tribunal has the power to hear any matter concerning land provided it could be related to some provision of the Lands Act. According to the regulations, the Lands Tribunal cannot entertain a dispute between two chiefs over the extent of their customary lands. This is so because no decision has been made in the matter.

Section 22 employs expressions such as the Tribunal shall 'inquire into and make awards and decisions in any dispute', 'inquire and adjudicate' relating to land under the Lands Act. These expressions connote original jurisdiction on the part of the Lands Tribunal to hear and determine any matter covered by the Lands Act. The jurisdiction of the Lands Tribunal is not limited to appeals, as the regulations appear to suggest.

The Lands Tribunal has authority to hear and decide any matter under the Lands Act which has been decided upon by a person in authority. Section 15(1) of the Act provides that any person aggrieved with a decision or directive of a person in authority may apply to the Lands Tribunal and section 15(2) defines a person in authority as the President, Minister or Registrar.

Matters of land in Zambia fall under the Ministry of Lands and Natural Resources. The Lands Tribunal as an administrative agency is supposed to be under the Ministry of Lands. However, this is not the case. Section 28 provides that the Ministry responsible for legal affairs will provide secretarial and accounting assistance to the Lands Tribunal. The rationale for this arrangement is difficult to establish because the right ministry to provide such assistance is the Ministry of Lands.

The Lands Tribunal also suffers some administrative problems. Inadequate and inconsistent funding to the Tribunal is one problem that has repeatedly caused delays in disposing of cases.

This in itself defeats the whole purpose for which the Tribunal was established if the hearing of matters is going to be delayed for one whole year due to lack of funding. With the huge public demand for its services, the Lands Tribunal should ideally be sitting every month. In its operations from 1996 to 2002, the Tribunal has only managed to handle a total of 458 cases. On average the Tribunal has handled 65 cases per year and only 5 cases per month.

Cases Handled by the Lands Tribunal (1996-2002) ¹⁰⁷

Year	Number of Cases
1996	25
1997	59
1998	89
1999	101
2000	47
2001	72
2002	65
Total	458

It is evident that this funding is inadequate for the operations of the Tribunal. The Tribunal has resorted to waiting until about three months for the funds to accumulate before it can sit to hear cases.¹⁰⁸ The waiting period results into denial of justice to the people with land disputes as justice delayed is justice denied. Currently, the Lands Tribunal does not have offices of its own. Instead it rents offices at Mulungushi

¹⁰⁷ Based on data provided by the Tribunal.

¹⁰⁸ In interview with the Deputy Chairperson of the Lands Tribunal on 19th September 2005 Op cit

International Conference Centre at a cost of seven hundred and fifty thousand Kwacha per month. This is unsustainable.

Despite all these shortcomings, the Lands Tribunal is of great importance in land dispute resolution and is indeed a necessary institution in land administration as it also ensures that justice is done during the land delivery process whenever a complaint comes up.

3.2.0 LAND DEVELOPMENT FUND

Among the recurrent complaints of prospective land developers is that much land in Zambia is in an unsurveyed state and there is inadequate infrastructure to entice developers. The Lands Act provides for the establishment of a Land Development Fund whose source of finance are the National Assembly; the monies received by the President as consideration for alienation of land to applicants in the proportion of seventy-five percent, and ground rent collected from all land to the tune of fifty percent.¹⁰⁹ The Fund is vested in the Ministry of Finance but is administered by the Ministry of Lands with the sole objective of opening up new areas for development.¹¹⁰ District Councils may apply to the Fund for money from the Fund to develop their areas. It is submitted that as new areas are opened up and alienated, the resources of the Fund will increase through the alienation and ground rent. What is not clear is whether the 'opening up of new areas' will also include those areas under customary. However, since the President has authority conferred upon him to alienate land under customary tenure to any person subject to consultation with relevant authorities, there is no reason to prevent the Ministry of lands from opening up these areas.

¹⁰⁹ Section 16(1)

¹¹⁰ Section 18

There is constituted a Lands Development Fund Committee whose function is to consider and determine applications for the disbursement of funds from the Fund¹¹¹. The Commissioner of Lands also sits on this committee and is its Vice Chairperson.¹¹²

In order to ensure transparency and accountability in the management or administration of the Fund, the Act makes a requirement that the Ministers of Finance and Lands furnish the National Assembly with an annual statement of the income and expenditure of the Fund.¹¹³

In land administration the Fund is of great importance in that it will lead to the opening up of more land for development thereby enhancing access to land. It is suggested that District Councils make use of this Fund in order to facilitate the opening up their areas to development for the sake of improving the living standards of the rural poor.

An evaluation of the operations of this Fund is not possible. This is due to the fact that it was not operational. It was still in the making until recently when steps were taken to make it operational.¹¹⁴

¹¹¹ Regulation 3 of The Lands (Development Fund) Regulations contained in Statutory Instrument N0. 88 of 1996

¹¹² ibid

¹¹³ Section 19

¹¹⁴ In an interview with Land Officer (Mr. Ngoma F) at Lands Department, Mulungushi House, Lusaka on 22nd December 2005.

CHAPTER FOUR
SHORTCOMINGS OF THE LANDS ACT NO. 20 OF 1995,
RECOMMENDATIONS AND
CONCLUSIONS

4.0 Shortcomings of the Act

There are a good number of shortcomings of the Lands Act No. 20 of 1995, which include the following;

Firstly, the meaning of land in the Act excludes mineral rights. This works against the poor whose land is being used by miners thereby leaving them landless.

Secondly, the Lands Act gives immense discretion in the chief which discretion appears to be misused and abused by some chiefs.

Thirdly, the right to convert customary tenure to leasehold tenure seems to favour persons who have the support of chiefs, and have sufficient financial resources to apply for the conversion of customary tenure into leasehold tenure.

Fourthly, the land allocation system under the Act is too cumbersome, long and costly for poor people. This therefore disadvantages the poor who are the majority.

Fifthly, the provision on illegal occupation of vacant land does not give adequate consideration to the cases of people who have occupied land for a long time.

Sixthly, the provisions in the Act relating to customary tenure together with the regulations¹¹⁵ do not provide sufficient and detailed protection for holders of land under customary tenure.

¹¹⁵ Statutory Instrument No. 89 Of 1996

Seventhly, by implication, the Act considers customary tenure inferior to leasehold tenure. This puts those holding land under customary tenure more at risk of losing land than the holding under leasehold.¹¹⁶

Finally, the law ignores that historically, women have not had access, ownership and control over land. In addition, the long, costly and cumbersome land administration system works to the disadvantage of women. This it is submitted is not balanced by a gender sensitive framework.¹¹⁷

4.1 Advantages of the Act

The Act has a good number of advantages that include the following;

Firstly, the Act has attached economic value to land and the aspect of land without value has been abolished. This has also brought in the issue of having to pay rates like ground rent, which is a source for government revenue.

Secondly, land having economic value has enabled people with title deeds to use their land as collateral for loans.

Thirdly, the Lands Act offers more opportunities to non-Zambians to own land and has encouraged investment in both customary and leasehold lands.

Fourthly, the provision of conversion of customary tenure to leasehold tenure enables those who manage to convert the tenure to sell part of their land and raise money to fund their various activities, buying of farm implements and inputs included.

¹¹⁶ Interview with Commissioner of Lands on 15th September, 2005.

¹¹⁷ Ibid

4.2 Recommendations

1. As regards provisions relating to customary lands and interests it is recommended that;

(a) The protection of land rights under customary tenure require to be reviewed so that they can provide security of tenure. This is so because experience has taught the country that lack of clarity in and certainty of security of tenure under customary land leads to abuse of procedure by customary authorities and contributes to lack of security in land tenure.

(b) The discretion granted to chiefs and local authorities in the administration of land requires to be reviewed. This is owing to the fact that immense discretion that has been reposed in chiefs has been misused and abused by some chiefs. An instance of abuse is were a chief recommends people to the council for land allocation on the basis of familiarity or nepotism or were he recommends a piece of land for allocation over which he knows that there are people with interests therein. Further, there is need for the establishment of village land committees at that level. Such committees elected by local communities should be the ones to sign the required documents such as the letter of consent for land seekers, after wide consultation with affected communities.

1A There is need for equity distribution of land. This can be achieved by controlling the quantity of land that may be held by a single person. It is submitted that when this is effected, instances were one person owns thousands of hectares alone and others none will avoided.

2. Office of Commissioner of Lands

The Office of Commissioner of Lands was created by Statutory Instrument Number 7 of 1964 and Gazette Notice No. 1345 of 1975. The Office of Commissioner of Lands is a Presidential appointment and this subjects the position to political interference or political manipulation and abuse as already noted.¹¹⁸ This has repeatedly occurred and people have come and gone. It is therefore, recommended that the Office of Commissioner of Lands be established as a constitutional office enjoying security of tenure just like other constitutional Offices. The position should be subjected to the same conditions as other constitutional Offices in respect of appointment and removal from office. This is so as matters of land in any country are key to the life of a country and that this office should not be open to any interference by politicians in government.

Alternatively it is recommended that the Lands Act be amended so as to create the Office of Commissioner of Lands and should provide for functions and terms of tenure of Office.

3. Lands Tribunal

As earlier noted in Chapter Three, the funding by government to the Tribunal is extremely inadequate and this has gravely affected its operations. It is therefore recommended that the funding to this important institution be increased so as to enhance its operations. It is further recommended that there should be the decentralization in the operations of the Lands Tribunal so as to enable the poor women and men access justice with regard to their land rights. Currently the Lands

¹¹⁸ Issuing of title deeds at a Political Rally on the Copperbelt subject to the directions of the Republican President.

Tribunal only sits in Lusaka. The Tribunal should publicise its existence and operations so that people know about it and use it. Currently an average person in a remote area such as Mbala knows nothing about the Lands Tribunal. It is further recommended that the Lands Act be reviewed in order to;

- (a) Expand the jurisdiction of the Lands Tribunal to cancel or uphold title deeds where necessary. Further the jurisdiction should include traditional land, especially in cases involving chiefdoms.
- (b) That there should be provision in the Lands Act for the enforcement of the judgments of the Tribunal instead of the current position where they are just mere declarations.

It is recommended as an immediate step that, the government needs to provide office accommodation for the Tribunal so that they do not use the limited finances to pay rent.

4. Vesting of land in the President

Vesting of all land in the President makes the administration of land susceptible to abuse. It is recommended that there be reform in this area so as guard against such abuse by the President. This can be achieved by making restrictions which will make it impossible for the President abuse the administration of land. Another way is to provide checks and balances to the powers that he/she exercises by virtue of land vesting in him.

5. Lands Department

It is recommended that a close monitoring system be established by the Lands Department and their agents, the local authorities. There should be established an effective national data base so that wherever one is he or she can be able to check the status of a particular stand number and establish whether or not it is on title. This system

will reduce or cut down on the number of disputes relating to issues of allocating the same piece of land to two persons.

Further, it is recommended that the Lands Department be decentralized further than the current position. It is recommended that Provincial Officers already established that be empowered to issue title subject to confirmation by the head office in Lusaka. These titles issued from Provincial centers should be registered by Registrars to be stationed at every Provincial centre. This will reduce on the load that the Lusaka office has in that each province will be dealing with cases from its own provincial jurisdiction. The current system of having one office with one officer each, dealing with files from either two or three provinces each is ineffective. It has in one way encouraged corrupt practices by those who would like their files worked on fast. Therefore, if the provincial centers were empowered then there will be less the pressure on the Lands Department.

4.3 Conclusion

Prior to independence, the Territory had three categories of land namely; Native Reserves, Trust Lands and Crown Land to which customary law and statutory law applied respectively. After independence Zambia continued to have the same categories of land but what was crown land was renamed state land. The law relating to land administration in Zambia went through a lot of changes until 1995 when the current Lands Act No. 20 was enacted.

The aim of this Essay was to make an appraisal of the efficacy of the Lands Act No. 20 of 1995 in administration of Land in Zambia. In achieving this, the Essay evaluated salient provisions of the Lands Act, which have a bearing on land administration. In so doing the Essay noted that the Lands Act has many good features like those adding value

to land, recognizing those who hold land under customary tenure, allowing those who hold land under customary tenure to convert their holding into statutory leaseholds, hence enabling them to use the land as collateral, the creation of the Lands Tribunal which is an institution charged with the responsibility of resolving land disputes, the creation of the Land Development Fund which is supposed to assist local authorities develop their areas.

The Essay has also noted from the research conducted that land administration as regards alienation of land is not expeditious, cumbersome and expensive to the poor and in this respect it tends to favour the rich and discriminates against the poor. Applications for acquisition of land take long to be processed and this has tempted those who want their files to be worked on fast to engage themselves in corrupt practices.

The Lands Tribunal is a good creation of the Act as regards land administration in that it provides the service of dispute resolution in land matters. However, it suffers a lot of set backs amongst which are that its jurisdiction is limited in that it cannot cancel the title deed and that it cannot entertain a dispute between chiefs. It also suffers from inadequate funding which has greatly affected its effectiveness in its operations. Ultimately, it has been recommended that the Lands Act need to be reviewed with respect to the jurisdiction of the Tribunal and that the government increase the funding to this important institution.

The Land Development Fund, it has been noted is also a good creation of the Lands Act. If properly used it can encourage the opening up of rural areas to development. Unfortunately, the Fund has not been operational for the past years until recently when it was made operational. Local authorities are therefore encouraged to make use of this Fund.

The vesting of land in the President and the office of the Commissioner of Lands being a presidential appointment has exposed land administration to abuse by the President. The Commissioner of Lands is an important office where land administration is concerned. This office needs to be protected from political interference so that it can discharge its duties without this interference from the President or the ruling party. As regards the Office of Commissioner of Lands, it has been recommended that there is need for reform in this area of the law in order to provide for security of tenure of the Office by either making it a constitutional Office or amending the Lands Act so as to create it under the Act and provide for its functions and terms of tenure of office. Further, there has been abuse by the President of Land Administration by virtue of land vesting in him, therefore, it has been suggested that there be put safeguards in the law like restrictions that make it impossible for the President to abuse the vesting of land in him..

Finally land is indeed a lifeline, it is an important resource in the life of a country as regards human survival in terms of social and economic advancement. In recognition of this fact, there is need to improve the procedures that make land available for development both in state and customary areas.

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