

CHAPTER 3

LAND ALIENATION UNDER THE HOUSING AND STATUTORY IMPROVEMENT AREAS

Introduction

The housing, statutory and improvement areas were created with the objective of curbing and addressing the increasing problem of unplanned settlements in urban areas. This category of land has continued to grow at very fast rate. However, the procedures in the alienation of land have not been developed to respond to the growing demand for housing in these areas. This Chapter therefore discusses the system of land alienation under the statutory housing and improvement areas.

Background

The problem of unplanned settlements in Zambia has its roots in the housing and migration policies of the colonial government. The colonial employment policy on Africans was that only male workers were allowed to stay in the urban areas for the duration of their employment contracts. Employers of African

workers had the responsibility of providing housing to their workers. Upon termination of the employment contracts, the workers were evicted from the institutional houses, and were to return to their villages. Individuals in informal employment or the unemployed had to provide housing for themselves in alternative areas which were in most cases on private land or farms located in the vicinity of major towns.²²²

When Zambia became independent in 1964, informal settlements grew rapidly because the restrictions on movement of persons from rural areas to urban areas were removed. The Zambian Constitution provided that;

“No person shall be deprived of his freedom of movement, and for the purposes of this section, the said freedom means the right to move freely throughout Zambia, the right to reside in any part of Zambia, the right to enter Zambia and immunity from expulsion from Zambia”.²²³

As a result of the free movement from rural to urban areas, the urban population grew rapidly causing housing shortage, and the unplanned settlements to become rampant.

²²² P. Matibini, **The Urban Housing Problem for low-income Groups with Special Reference to the City of Lusaka: A Socio-Legal perspective**, LLM Thesis, University of Zambia, 1989(unpublished), p16

²²³ Article 24 of the Independence Constitution of the Republic of Zambia, 1965 edition

Government made several attempts towards developing sustainable human settlements in response to the rural urban drift, and the housing crisis. The first official government programme on housing was aimed at preventing the development of slums or squatter settlements especially along the line of rail²²⁴. The development of the unplanned settlements was to be addressed by provision of as many standard houses as possible. However, the urban housing crisis was not curbed. Unplanned settlements continued to mushroom in the country.

Government issued the first Circular,²²⁵ which was the first Informal Housing Policy meant for government's implementation. Under this Circular, the government intended to provide thirty percent (30%) of the six thousand (6,000) proposed new housing units per year within five years that followed in Site and Service areas.²²⁶ Government issued another Circular²²⁷ in 1966, which called for the building of twenty thousand (20,000) self-help houses from 1967, and the subsequent years. Later, the government produced another informal housing

²²⁴ Transitional National Development Plan (1965-1966)

²²⁵ Circular No. 17 of 1965

²²⁶ C. Rakodi, **Colonial Urban Policy and Planning in Northern Rhodesia and its legacy**, *Third World Planning Review*, p.193-217 (1986)

²²⁷ Circular No. 59 of 1966

Circular²²⁸ in 1968, that dealt with the “Resettlement of Squatters”.

At this point, it may be observed that the Zambian Government was slowly accepting informal settlements as a solution to the urban housing crisis, and the permanency of informal settlements in urban areas was also being recognised. It should be noted also that during the Second National Development Plan²²⁹, the urban housing crisis had reached unprecedented levels. The Government therefore, embarked on squatter upgrading programmes as it was then clear that unplanned settlements were to be a permanent feature in urban areas.

Although the Government had embarked on the policy of providing housing in the urban areas, there was no policy on land alienation to individuals who would wish to acquire land and construct houses on their own.

²²⁸ Circular No. 29 of 1968

²²⁹ (SNDP, 1972-1976)

Legal structure

The main statutes that govern the administration of land in the Housing and Improvement areas are the Housing (Statutory and Improvement Areas) Act²³⁰ and the Local Government Act.²³¹ The Housing (Statutory and Improvement Areas) Act provides for the control and improvement of housing in certain areas and it is through this Act that government recognises and legalises the unplanned settlements. The rationale behind such legislation was to create an environment that would encourage housing development through Site and Service Schemes and upgrading of unplanned settlements. The Housing Act introduced a simplified system of land administration for areas to which the Act applies.

Declaration of statutory housing areas

One of the salient features of the Housing (Statutory and Improvement Areas) Act,²³² is that the Minister may declare an area to be a Statutory Housing Area.

The Act provides that;

“The Minister may by statutory order declare any area of land within the jurisdiction of a council to be a Statutory Housing Area, and may at any time thereafter declare that the whole or part of the land comprised in the

²³⁰ Chapter 194 of the Laws of Zambia

²³¹ Chapter 281 of the Laws of Zambia

²³² Chapter 194 of the Laws of Zambia

Statutory Housing Area shall cease to be part of a Statutory Housing Area...²³³

A Statutory Housing Area is basically land, which is granted to the Local Authority by the Ministry of Lands for the purposes of constructing houses by the Local Authority for tenants who become sub-lessees. A Statutory Housing Area is declared by the Minister through a statutory order²³⁴.

The Minister may not declare any land to be a Statutory Housing Area unless:

- (i) the land is situated within the jurisdiction of a council;
- (ii) the land is held by the Council by way of leasehold;
- (iii) a plan has been drawn by the Council showing the particulars or details of the property, duly approved by the Surveyor-General and deposited with the Registrar of Lands and Deeds;²³⁵
- (iv) the deposited plan contains, *inter alia*, the name and description by which the Statutory Housing Area is known or is to be known, the existing roads if any, the roads proposed to be constructed, the

²³³ Section 4 (1) of the Housing Statutory and Improvement Areas Act, Chapter 194 of the Laws of Zambia

²³⁴ The Declaration is made by a Minister responsible for Housing

²³⁵ Sections 4(1) and 37(1) of Chapter 194 of the Laws of Zambia

existing areas for common use, the proposed areas for common use and the location of each building identified by a serial number.²³⁶

The Housing (Statutory and Improvement Areas) Act²³⁷ provides for leasehold interests in the Statutory Housing Areas. Dealings in land covered by the Housing Act are registered not with the Ministry of Lands, but with the Council Deeds Registries in the jurisdiction of the Council concerned. The Housing Act provides that;

“In every council where there is a Statutory Housing Area or Improvement Area, there shall be a registrar who shall keep, and maintain a register to be called the register of titles, and shall file therein all copies of all grants and of all certificates of title issued under this Act. Each grant and the relative certificate of title shall constitute a separate folio of such register and the registrar shall record therein the particulars of all the documents, dealings and other matters by this Act required or permitted to be registered or entered in the register, affecting land contained in each grant and certificate of title.”²³⁸

Thus, in the Statutory Housing Areas, Council Certificates of Title are issued for a period of 99 years, and are subject to renewal if the terms, conditions and

²³⁶ Section 4(2) of the Housing Statutory and Improvement Areas Act, Chapter 194 of the Laws of Zambia

²³⁷ Chapter 194 of the Laws of Zambia

²³⁸ Section 11 of the Housing Statutory and Improvement Areas Act, Chapter 194 of the Laws of Zambia

covenants of the lease are not breached. Furthermore, all land dealings in the Housing Areas are regulated under the Housing Act. The rationale for enacting the Housing Act was to create a legal framework in which land alienation in these would be easy, affordable and time-saving.

The Housing Area is one that used to be established under land given to the District Councils as head-lessees for the construction of what used to be called Council Houses. The District Council was required to identify an area which was to be declared as a Council Housing Area by the Minister. The District Council concerned would then register and issue Certificates of Title in respect of the created plots to the occupiers of the houses in these areas. Examples of Statutory Housing areas include; Chilenje Stage 1 in Lusaka, Ndeke Township in Kitwe and Lukanga Township in Kabwe.

Declaration of Statutory and Improvement Areas

The Housing (Statutory and Improvement Areas) Act also makes provision for declaration of Improvement areas. Pursuant to section 37(1), of the Act,

“The Minister may by statutory order declare any area of land within the jurisdiction of a council to be an Improvement Area, and may at any time

thereafter declare that the whole or part of the land comprised in the Improvement Area shall cease to be part of an Improvement Area...”

A Statutory Improvement Area is one where in most cases people would move on some state land and occupy the same and is developed into a squatter settlement. Thus, instead of having an area planned before allocation or occupation, the area is first occupied and later, declared as a Statutory Improvement Area.

The Local Authority in whose area the land is located prepares a sketch plan for the area which is lodged with the Commissioner of Lands and the Registrar of Lands and Deeds. In any case, the Area declared as a statutory improvement area is published in the government gazette and annexed to the Act, by way of a schedule.

Occupancy Licences are issued to occupants in Improvement areas instead of certificates of title. The Occupancy Licence does not show the dimensions or area of the piece or parcel of land but relates to the land under and immediately surrounding the house which is identified simply by giving it a serial number on

aerial photography.²³⁹ Occupants of land in Improvement Areas are granted Occupancy Licenses for a period of thirty years. The Housing Act provides that the holder of an Occupancy License has such rights and obligations as are prescribed under the Act. These obligations include;

- a) pay charge for water supplied to the Improvement Area;
- b) pay charge for sewerage service if supplied to the Improvement Area;
- c) pay a charge in lieu of rates based on the value of the average of the normal dwelling and out-building within the Improvement Areas;
- d) occupy premises as residence for himself and immediate family only
- e) keep premises clean and tidy; and
- f) not to sub-licence or assign without the consent of the Council.

The primary purpose of the obligation of the licensee is to make contributions for the maintenance and improvement of the statutory improvement areas.

It is vital to distinguish the two categories of land as they tend to be confused with each other. The difference between a Statutory Housing Area and an

²³⁹ R. Martin, "Lusaka squatters are licensed" in **Geographical Magazine**, Vol. 48(8), May 1978 p.477

Improvement Area lies in the level of service provision and planning. Council housing estates or any other fully serviced areas are called Statutory Housing Areas, while upgraded areas or partially serviced areas are referred to as Improvement Areas.²⁴⁰ Additionally, an occupancy licence is issued to a person with an interest in land in Improvement Areas while a council certificate of title is issued to a person with an interest in Statutory Housing Areas. It should be noted that Site and Service Schemes are planned housing developments. Improvement Areas are not but are formerly squatter settlements. This is one of the major differences between the two types of housing areas²⁴¹.

In the administration of land in these areas, strict rules of planning under the Town and Country Planning Act²⁴², survey requirements under the Land Survey Act²⁴³ and registration of title under the Lands and Deeds Registry Act²⁴⁴ do not apply.²⁴⁵ It is practically difficult to subject the housing development to modern methods of surveying that require precision and accuracy. Survey diagrams

²⁴⁰ Daily Parliamentary Debates No. 36 of 2nd august 1974

²⁴¹ P. Matibini, **The Urban Housing Problem for low-income Groups with Special Reference to the City of Lusaka: A Socio-Legal perspective**, opcit, p. 28

²⁴² The Town and Country Planning Act, Chapter 283 of the Laws of Zambia

²⁴³ The Land Survey Act, Chapter 188 of the Laws of Zambia

²⁴⁴ The Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia

²⁴⁵ Section 48 of the Housing Statutory and Improvement Areas Act, Chapter 194 of the Laws of Zambia

cannot be easily processed, and in their absence, land cannot be registered under the Lands and Deeds Registry Act. It is for this reason that land under the Statutory Housing and Improvement Areas is registrable under the Housing Act.

Institutional structure

The institution responsible for the upgrading, resettlement, infrastructure provision and maintenance is the Ministry of Local Government and Housing through the Department of Physical Planning and Housing, which is responsible for identifying statutory housing and improvement areas. Under the same Ministry, the Department of Infrastructure and Support Services is responsible for the management of donor projects that support infrastructure development, improvement and rehabilitation in Improvement Areas.

Local authorities play a significant role in the management of land in the Statutory Housing and Improvement Areas. The functions of the Local Authorities include-

- (a) enforcement of building standards;
- (b) the planning and regulation of land use and new developments;

- (c) the management of upgrading schemes and
- (d) the allocation of land.

In addition, local authorities are responsible for local planning, development control, provision of local roads, drainage and solid waste management and other environmental health functions.

Water and sewerage companies have taken up most responsibilities of providing water and sewerage services to Statutory Housing and Improvement Areas since most local authorities have no capacity to do so. Although the primary role of these commercial utility companies is to supply water to existing customers on commercial basis, the companies also play a role of financing the expansion of water networks to improvement areas. Costs are later recovered by the companies through payment of service charges²⁴⁶. Examples of these companies include: Lusaka Water and Sewerage Company Limited, Nkana Water and Sewerage Company limited in Kitwe and Kalulushi, Mulonga Water and Sewerage Company limited in Mufulira and Chingola.

²⁴⁶ A. Banda, **An Assessment of the management process of upgrading programmes in Improvement Areas of Lusaka**: Obligatory Essay, A case study of Chawama compound, Copperbelt University, Kitwe, 2006, p.37-41

It should be noted that although the Housing (Statutory and Improvement Areas) Act²⁴⁷ provides for the legalisation of areas which are in practice referred to as illegal settlements, informal settlements, squatter settlements, slums, ghettos, or unplanned settlements, the Act does not provide for procedure on land alienation in these areas.

In the absence of legally established procedures for land alienation, people invade private or public land without permission from any lawful authority. The settlers build their houses and establish their settlements wherever they can. Sometimes, the settlers build on sites ill-suited to housing and this usually poses a danger to health and the environment. Further, the settlers have no tenure and are not protected at law. These people build at their own risk and if the owners of the land withdraw their permission or licence, or if they decide to demolish a structure built in the absence of any lawful permission, the squatter is the one that bears the loss.²⁴⁸

²⁴⁷ Chapter 194 of the Laws of Zambia

²⁴⁸ *Chilufya V City Council of Kitwe* (1967) Z.R. 115 (H.C.)

The occupiers of land in these areas often build without regard to health and building regulations. Diseases such as cholera are now perennial and they appear to have come to stay. Water supply is erratic and illegal water supply and connections are common. There is haphazard city and township growth which is often spontaneous.

Mbao has observed that,

“The exclusion of the Town and Country Planning set is another significant aspect of the Housing Act. However the exclusion of the Act raises the question of who does the planning. The answer seems to be that the aspect of planning is left to the squatters themselves to continue spontaneous and dynamic planning with less or no official control from the Planning Authorities. The Housing Act makes the National Housing Authority or Council as the Planning authority for the Statutory Housing and Improvement Areas but due to lack of technical staff to plan and design Housing Developments, squatters take it upon themselves.”²⁴⁹

It has been shown that the land rights for occupiers of land in the Housing and Improvement Areas are not adequately addressed perhaps due to a belief that they are illegal settlers, or undesired elements as they tend to make the Cities and Towns untidy, create a haven for crime and prostitution, infested with diseases

²⁴⁹ M.L. Mbao, *Legal Pluralism and the Implications for Land Ownership and the Control of Land Use in Zambia*, MPhil., Thesis, Clare College, University of Cambridge (unpublished) 1982, p.89

such as cholera and many more vices. But it is no doubt that the same areas are held dearly when it comes to the general elections these areas host some desirable numbers of electorates. They also provide cheap labour and manual work to neighbouring leasehold areas and industries. However, the land tenure in these areas is not guaranteed as the occupiers are not lessees but licensees.

Some of the factors that make people occupy land without lawful authority have their roots in politics. The phenomenon of unlawful occupation of land is not novel in the country as all the succeeding political parties in the Zambian history have used land to reward their supporters and sympathisers commonly referred to as “Cadres.” Political Parties, both in government and in the opposition, want their supporters to settle within reach but since procedures and mechanisms to grant them land are nonexistent, political leaders let their supporters settle in seemingly cheap areas, of course with improper infrastructure.

As a result of political considerations, the option of demolishing unplanned buildings, however, appears unlikely. One of the reasons is that the large population in the urban constituencies form a base for the electorate in these

areas. There is therefore no political party, either in government or in opposition, which would dare have the audacity to demolish the unplanned settlements and close its eyes on the political effect.

The other factor leading to increase in unlawful occupation of land is an argument that construction in these areas is cheap due to the informal nature of land development and non-adherence to building standards. The assumption in favour of the settlers is that if all planning and building standards were to be religiously followed, the majority of the housing units in these areas would be razed down. In this regard, a number of statutory provisions have been ignored by both the occupiers of land and the institutions that are responsible for enforcing the law.

With the current investments driven by the private sector, there is no obligation on the part of employers, under the Employment Act,²⁵⁰ to provide decent accommodation to employees on one hand. On the other hand, the investors, especially in the mining sector, need a vibrant workforce to provide labour. The

²⁵⁰ Chapter 268 of the Laws of Zambia

question is; where are these workers expected to live? Principles of corporate social responsibility demand that an employer must take responsibility of the welfare of its employees. Even in the newly upcoming investments such as the Chambishi Economic Zone, no discussion on the land rights and security of tenure of the workers seems to be a priority by both the government and civil society. Given this trend, it can be said that informality in the acquisition and development of land has come to stay.

The Lands Act provides that a person shall not without lawful authority occupy or continue to occupy vacant land and any person who occupies land in contravention of this law is liable to be evicted²⁵¹. However, this Act does not apply in Statutory and Improvement Areas. It therefore means that a person cannot be evicted for contravening this law. The non-applicability of this statute has led to serious invasion of bare land in cities and towns.

It has been shown that the land rights for occupiers of land in the Housing and Improvement Areas are not adequately addressed perhaps due to a belief that

²⁵¹ Section 9 (1) of the Lands Act, Chapter 184 of the Laws of Zambia

they are illegal settlers, as they tend to make the Cities and Towns untidy, create a haven for crime and prostitution, and often, infested with diseases such as cholera. However, the land tenure in these areas is not guaranteed as the occupiers are not lessees but licensees. Regardless of the justifications given for unplanned settlements, the effects have far reaching implications on both the inhabitants in these areas and the government.

CHAPTER 4

LAND ALIENATION UNDER CUSTOMARY LAND

Introduction

Customary tenure in the context of land alienation refers to that land which was previously referred to as Reserves and Trust Land.²⁵² The law governing land alienation is basically customary law based on rules, traditions and customs practised by the tribes in each locality. However, a person who uses or occupies land in a customary area may convert it into leasehold tenure as provided under the Lands Act. In this process, chiefs play a significant role. This Chapter therefore discusses the process of land alienation under customary tenure.

Land ownership under customary tenure

In the pre-independence era, when the population of the country was very low, the most common way of acquiring land under customary tenure was by way of mere clearing of unoccupied land. Where land was unoccupied, and a person moved onto such land, he established ownership and control over such land.

²⁵² Land previously referred to as Trust Land and Reserves is now known as customary land after the enactment of the Lands Act of 1995

White made this observation-

“An individual establishes rights by opening up land over which no prior individual has already established rights. The rights of the individual, once established, remain permanent unless the individual transfers them to another, extinguishes them by abandonment or terminates them by his own death. Rights over fallow or resting land are therefore normal and regular.”²⁵³

However, this observation may not be tenable at the present day because so many factors such as population growth, economic, social and political factors have changed with time, and mere clearing and occupation of land does not in itself confer ownership.

The question of actual ownership of land under customary tenure has been highly debated.²⁵⁴ One school of thought holds that no individual person holds land under customary tenure as all land is communally held. The other school of thought suggests that there is individual land ownership in customary areas. It has been observed that land ownership under customary tenure vary from community to community and this is largely accounted for by the unique historical development of political groupings and the consequent variation of

²⁵³ C. M. N. White, “Factors Determining the Content of African Land Tenure Systems in Northern Rhodesia” cited in **African agrarian systems**, D. Biebuyck (ed), Oxford University Press, 1963 p.364

²⁵⁴ M. P. Mvunga, **The Colonial Foundations of Zambia's Land Tenure System**, opt.cit, 1980, p.7

legal and institutional structures in different polities.²⁵⁵

Furthermore, some early writers, unable to grasp the clusters of rights and claims which may be involved in any given situation in customary tenure endeavoured to make the distinction that customary tenure involved the use or usufruct of land in contrast to ownership. The understanding of landholding under customary land was that the idea of individual ownership of land was foreign to African customary tenure. There was no registered title in land available to any one person and occupation of land was done by family units and therefore, communal ownership of land was implied.

The belief that land ownership in Africa is group or communal was expressed by Viscount Haldane in the case of **Amodu Tijani v. Secretary, Southern Nigeria**,²⁵⁶ where he observed that,

“the fact which is important to bear in mind in order to understand the nature of land law is that the notion of individual ownership is quite foreign to native ideas. Land belongs to the community, the village or the family, never to an individual.”

²⁵⁵ Kwamena Bentsi-Enchill, “Do African Systems of Land Tenure Require a Special Terminology?”, 1965, in **Journal of African Law**, Vol.9, No.2 p.115

²⁵⁶ [1921] 2 AC 399

The principal view expressed in the case was that Africans under customary tenure had no individual right of ownership over land and they merely exercised user rights. The assumption was that since chiefs were traditional rulers, land rights were owned by the chief.

Viscount Haldane in the **Amadu Tijani case** also observed that:

“A very usual form of native title is that of usufructuary right which is a final qualification of a burden on the radical or final title of the sovereign where that exists. In such cases, the title of the sovereign is a pure legal estate to which beneficial rights may or may not be attached.”²⁵⁷

This view was later applied in the case of **Sobhuza v. Miller and Others**,²⁵⁸ where Viscount Haldane once again stated that:

“...the notion of individual ownership is foreign to native ideas. Land belongs to the community and not to the individual. The title of the native community generally takes the form of usufructuary rights, a mere qualification of a burden or final title of whoever is sovereign.”²⁵⁹

In Northern Rhodesia, the colonialist's view of indigenous tenure in the Territory was that land was a tribal property vested in the chief to be allotted by him in accordance with the needs of the tribesmen. In 1945 the Eccles Land

²⁵⁷ Ibid.

²⁵⁸ [1926] AC 516

²⁵⁹ Ibid.

Commission was appointed to look into the nature of African land tenure in Northern Rhodesia. This Commission came up with this observation:

“As far as it is possible to generalize, native land tenure in Northern Rhodesia can be described as communal ownership by the tribe vested in the chief, coupled with an intensely individual system of land usage. Every individual member of the tribe has the right to as much arable land as he needs for himself and his family, and so long as he is making use of this land, he enjoys absolute legal tenure....”²⁶⁰

On the other hand, T.O. Elias describes the holding of land in African customary tenure as fallacious. He thus observes:

“A member’s right to his holding is in the nature of a possessory title which he enjoys in perpetuity and which confers upon him powers of user and of disposition scarcely distinguishable from those of an absolute holder under English law. His title is, therefore, in a sense that of a part owner of land belonging to his family; he is not a lessee; he is not a licensee; he is not, as is so often said, a usufruct. He pays tribute to nobody, he is accountable to none but himself, and his interests and powers far transcend those of the usufruct under Roman law.”²⁶¹

Elias further notes that,

“the individual’s holding does not come to an end at his death; it is heritable by his children to the exclusion of all others. In short, he is a kind of beneficial owner, with perpetuity of tenure and all but absolute

²⁶⁰ Report of the Land Commission consisting of three members- S. Gore-Browne (member of the Legislative Council representing African interests), J. S. Moffat (government officer) and L. W. G. Eccles (Commissioner for Lands, Mines and Surveys) 1945

²⁶¹ T. O. Elias, **The Nature of African Customary Law**, Manchester University Press, 1956, p.165

power of disposition.”²⁶²

It can therefore be said that individual ownership of land under customary tenure actually exists and that the chief merely exercises the right of control while actual ownership vests in the individual land users.²⁶³ A pre-independence judge in Nyasaland described the system of landholding in customary areas as being exercised by individuals and not the chiefs. In the case of **Cox v The African Lakes Corporation Limited** (otherwise known as the Kombe Case),²⁶⁴ Nunan, J. observed that:

“...the chief’s jurisdiction even in theory is a purely personal jurisdiction over the natives of his tribe. His proprietary rights in the absence of any special treaty stipulations are rights in the name of his tribe to existing villages and plantations, and the user of unoccupied lands.”²⁶⁵

The interpretation that can be attributed to this passage is that the chief’s authority pertains more to his subjects than over the lands. A chief can therefore not be conceived as landlord or as a person in whom land is vested. A chief is therefore in no sense to be considered the landlord of the land in which he exercises jurisdiction over the natives of his tribe. Even under the native law of

²⁶² Ibid., p.166

²⁶³ M.P. Mvunga, **Land Law and Policy in Zambia**, op.cit., p.103

²⁶⁴ [1901] unreported, cited in M. P Mvunga, **Land Law and Policy in Zambia**, opt. cit. p.103

²⁶⁵ M. P Mvunga, **Land Law and Policy in Zambia**, op. cit. p.103

the tribal system, he would not have been considered the sole proprietor.²⁶⁶

In agreeing with Justice Nunan's view, Mvunga has argued that "...it appears that in Nyasaland, Nunan, J. would have been disturbed to learn that the chief as sovereign had a radical or final title which was burdened by beneficial interests of various individuals."²⁶⁷ Justice Nunan refused to conceive the chief as a landlord and stated that the chiefs' jurisdiction as sovereign was purely personal. This means that:

"...specific land rights are acquired and exercised by individuals. Such land rights are attributes of persons and they emerge as individualistic rights except in limited cases where some element of lineage landholding is present. Consequently, in general the sum total of rights which make up the features of African land tenure can only be regarded as equivalent to individual tenure."²⁶⁸

In most cases in fact, there is no requirement to consult or get permission from a chief before a person occupies land in his own village. For instance, during the study of land alienation in the Southern part of the country, White noted that-

"The Tonga had no traditional authorities to allocate land in any case, and the Tonga headman of a village does not allocate land to his villagers, and

²⁶⁶ Ibid. p.86

²⁶⁷ Ibid.

²⁶⁸ Ibid., p.100

his only participation in the acquisition of land is to provide information on whether or not existing rights are already enjoyed by an individual in a piece of land which another wishes to acquire.”²⁶⁹

The chief is not an institution that alienates land to its subjects since mere cultivation of land not previously held by any person confers rights and is equivalent to absolute ownership to an individual. As noted by Mvunga, this view was endorsed by the United Nations Report on Customary or Tribal Tenure, which Report observed that,

“The security of tenure provided under tribal customary laws is almost equivalent to the security of tenure provided under freehold. Any individual who establishes his residence in a village can acquire customary rights over land, although nobody can lay claim to land over which another individual has established rights. The rights are permanent unless they are extinguished by abandonment or by death.”²⁷⁰

The Adjudication of land rights in Reserves and Trust land

The categorisation of land into Crown land, Native Reserves and Trust land and the establishment of the dual system of land holding as noted earlier²⁷¹, was based on both English and customary law and was intended to cater for the

²⁶⁹ C. M. N. White, “Terminological confusion in African Land Tenure,” in Mvunga M. P., **Land Law and Policy in Zambia**, op.cit p.117

²⁷⁰ Report of the UN/ECA/FAD Economic Survey Mission on the Economic Development of Zambia, Ndola, United Nations, 1964 paras.44 and 46 at p.59, cited in M. P Mvunga, **Land Law and Policy in Zambia**, op. cit. p.100

²⁷¹ The categorization of land and the tenure system are discussed under chapter 1 of this dissertation.

interests of both white settlers and the indigenous.

However, white settlers continued to advocate for the introduction of the registration procedures in Reserves and Trust land. To legalise that desire, the colonial government enacted the Native Reserves and Native Trust land (Adjudication and Titles) Ordinance.²⁷² One of the salient features of the Ordinance was that it sought to introduce land registration procedures in customary areas.

The adjudication of land rights was voluntary as the colonial government was aware of the difficulty of applying registration processes countrywide. Therefore, the application of the Ordinance was dependent on the Local Native Authorities²⁷³.

Some of the provisions of that Ordinance were that before land under customary tenure could be registered, the Superior Native Authority was required to recommend to the Governor to apply the provisions of the Ordinance to its

²⁷² The Native Reserves and Native Trust land (Adjudication and Titles) Ordinance, Act No. 32 of 1962

²⁷³ Section 4(2) of the Ordinance

area. The Governor would then declare the area to be an adjudication area. It was then up to any individual African occupying land within the adjudication area to apply to the Adjudication Committee to adjudicate upon his claim to have sole and exclusive right to occupy such land.²⁷⁴ The Governor would then grant Certificate of Title whose effect once granted would be the same as the Certificate of title issued under the Lands and Deeds Registry Ordinance²⁷⁵ which applied to Crown lands.

The intention of the government at that time was to allow individuals who desired to convert their land rights in Native Reserves and Trust land to Crown lands to do so. At that time, however, there was no demand for the adjudication of titles in reserves and Trust land. As a result, the provisions of that Ordinance were of little consequence and the Ordinance was never applied up to the time when it was repealed under the Land Conversion of Titles Act of 1975.²⁷⁶

²⁷⁴ Section 5 of the Native Reserves and Native Trust land (Adjudication and Titles) Ordinance, Act No. 32 of 1962

²⁷⁵ Act No. 58 of 1950

²⁷⁶ Anthony C. Mulimbwa, "Land Policy and Economic Development in Zambia", cited in **Zambia Law Journal**, Special Edition, Lusaka: Unza Press, p.63

However, the principle of converting customary land to leasehold tenure was re-introduced in the Lands Act²⁷⁷ as we discussed in chapter two.

Status of customary tenure today

Since the enactment of the Lands Act in 1995, and the repeal of the Zambia (State Lands and Reserves) Orders; 1928 to 1964 and the Zambia (Trust Land) Orders, 1947 to 1964; customary land is taken to constitute all land that was previously or before the commencement of the Lands Act referred to as Reserve land and Trust land.

The Lands Act recognises the continuation of customary tenure. It provides that-

“...every piece of land in a customary area which immediately before the commencement of the Lands Act was vested in or held by any person under customary tenure shall continue to be so held and recognised and any provision of the Lands Act or any other law shall not be so construed as to infringe any customary right enjoyed by that person before the commencement of the Lands Act.”²⁷⁸

This means that customary tenure is a legally recognised system of landholding in Zambia. The law further provides that-

²⁷⁷ Chapter 184 of the Laws of Zambia

²⁷⁸ Ibid., Section 7 (1)

“...the rights and privileges of any person to hold land under customary tenure shall be recognised and any such holding under the customary law applicable to the area in which a person has settled or intends to settle shall not be construed as an infringement of any provision of this Act or any other law except for a right or obligation which may arise under any other law.”²⁷⁹

This entails that customary tenure is just as important as leasehold tenure in terms of its protection of the rights and interests of landholders. However, when land has become subject to leasehold title, customary rights cease to exist over and in relation to that piece of land.

Institutional framework

Land under customary tenure, as the case is with State land, is vested absolutely in the President who holds it in perpetuity for and on behalf of the people of Zambia.²⁸⁰ In alienating customary land, headmen and chiefs play an important role of ensuring that the land in their localities is administered for the benefit of their subjects. These are known to have authority to administer the unwritten customary law based on their respective tribal customs and traditions.

²⁷⁹ Ibid., Section 7 (2)

²⁸⁰ Section 3(1) of the Lands Act, Chapter 184 of the Laws of Zambia

Chiefs are by custom and practice recognised as institutions that play a major role in the alienation of land under customary tenure. The specific powers and authority of chiefs in land matters have not been clearly defined either by statute or custom itself. The institution of chiefs is established under the Chiefs Act.²⁸¹

In terms of the chiefs' functions, the Act provides that,

“Subject to the provisions of this section, a chief shall discharge-

- (a) the traditional functions of his office under African customary law in so far as the discharge of such functions is not contrary to the Constitution or any written law and is not repugnant to natural justice or morality; and
- (b) such functions as may be conferred or imposed upon him by this Act or by or under any other written law.”²⁸²

Arising from the above citation, the chiefs' role is restricted to perform his functions under customary law in so far as such is not contrary to the Constitution or any other written law²⁸³. However, under the Lands Act, chiefs have a statutory role to play by giving consent in the conversion of customary tenure to leasehold.

²⁸¹ Chapter 287 of the Laws of Zambia

²⁸² Ibid., Section 10(1)

²⁸³ section 10(1)(a) of the Chiefs Act, Chapter 287 of the Laws of Zambia

Legal framework

The Lands Act provides for the conversion of land held under customary tenure to leasehold tenure. Thus, the law provides:

“notwithstanding the recognition and continuation of customary tenure, any person who holds land under customary tenure may convert it into a leasehold tenure not exceeding ninety-nine years on application, in the manner prescribed, by way of a grant of leasehold by the President; or by way of any other title that the President may grant or by any other law.”²⁸⁴

The law further provides that:

“a person who has a right to the use and occupation of land under customary tenure; or using and occupying land in a customary area with the intention of settling there for a period of not less than five years; may apply, to the Chief of the area where the land is situated for the conversion of such holding into a leasehold tenure.”²⁸⁵

The procedure for converting customary tenure to leasehold is provided for under a Statutory Instrument,²⁸⁶ which is now incorporated under the subsidiary legislation in the Lands Act.²⁸⁷ The regulations on the conversion of customary tenure to leasehold are issued by the Minister of Lands pursuant to section 31 of the Lands Act. The procedure for conversion of customary land to leasehold was

²⁸⁴ Section 8 (1) of the Lands Act, Chapter 184 of the Laws of Zambia

²⁸⁵ *ibid*

²⁸⁶ Statutory Instrument No. 89 of 1996

²⁸⁷ Chapter 184 of the Laws of Zambia

first issued in 1996.²⁸⁸

The procedure on conversion of customary tenure into leasehold tenure as provided is that a person who has a right to the use and occupation of land under customary tenure²⁸⁹ or using and occupying land in a customary area with the intention of settling there for a period of not less than five years²⁹⁰ may apply to the Chief of the area where the land is situated for the conversion of such holding into a leasehold tenure.

The Chief shall consider the application and shall give or withhold consent.²⁹¹

Where the Chief refuses consent, he shall communicate such refusal to the applicant and the Commissioner of Lands stating the reasons for such refusal.²⁹²

Where the Chief consents to the application, he shall confirm-

- (a) that the applicant has a right to the use and occupation of that land;
- (b) the period of time that the applicant has been holding that land under customary tenure; and

²⁸⁸ Ibid., section 8

²⁸⁹ Lands (Customary Tenure) (Conversion) Regulation 2(1)(a)

²⁹⁰ Ibid., regulation 2(1)(b)

²⁹¹ Ibid., regulation 2(2)

²⁹² Ibid., regulation 2(3)

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

The Chief shall thereafter refer the recommendation to the Council in whose area the land that is to be converted is situated.

It should be noted however, that the role of planning and demarcation of land in a customary area is performed by the Department of Agriculture, also known as the Land use and Technical Services Unit. This Department verifies the availability of the land being recommended for conversion by comparing the Location Map with the Base Map of the area concerned. Land demarcated by the Department of Agriculture is subject to a 14 year lease. A 99 year lease is only granted by the Commissioner of Lands when land has been surveyed under the Land Survey Act.²⁹³

The application for conversion is considered by the Council after the chief has acted upon it, and before making a recommendation to the Commissioner of Lands. One of the most important considerations the Council takes into account

²⁹³ Chapter 188 of the Laws of Zambia

when making a recommendation for alienation to the Commissioner of Lands is whether or not there is a conflict between the customary law of that area, and the Act.²⁹⁴ If the Council is satisfied that there is no conflict between the customary law of the area, and the Act, the Council makes a recommendation to the Commissioner of Lands,²⁹⁵ who may accept or refuse the recommendation. The Commissioner of Lands is required to inform the applicant of his or her decision accordingly.²⁹⁶

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 a leasehold tenure, the Council is required, in consultation with the Chief in whose area the land to be converted is situated, to apply to the Commissioner of Lands for conversion.²⁹⁷ Before making an application, a Council is required to consider the following;

- (a) ascertain any family or communal interests or rights relating to the parcel of land to be converted, and

²⁹⁴ Lands (Customary Tenure) (Conversion) Regulation 3

²⁹⁵ Ibid., regulation 3(2)

²⁹⁶ Ibid., regulation 3(3)

²⁹⁷ Lands (Customary Tenure) (Conversion) Regulation 4

(b) specify any interests or rights subject to which a grant of leasehold tenure will be made.²⁹⁸

It is now a requirement by law that once land has been converted to leasehold tenure, the lessee is obliged to pay ground rent. The Lands Act²⁹⁹ provides that a person holding land on leasehold after the conversion of such land from customary tenure shall be liable to pay such annual ground rent in respect of that land.³⁰⁰

In the administration of this procedure under the Lands Act³⁰¹, a person aggrieved by a decision of the Commissioner of Lands may appeal to the Lands Tribunal.³⁰²

In the process of converting land from customary to leasehold tenure, the law requires that the President consults the Chief, the local Authority in the area as

²⁹⁸ See appendix for the Forms used in the conversion of customary tenure to leasehold tenure are found in the subsidiary legislation to the Lands Act, Chapter 184 of the Laws of Zambia

²⁹⁹ Chapter 184 of the Laws of Zambia

³⁰⁰ Lands (Customary Tenure) (Conversion) Regulation 5

³⁰¹ Chapter 184 of the Laws of Zambia

³⁰² Lands (Customary Tenure) (Conversion) Regulation 6

well as any other person who may be affected by the grant.

Section 3(4) of the Lands Act provides that the President shall not alienate any land situated in a district or an area where land is held under customary tenure without taking into consideration the local customary law on land tenure which is not in conflict with the Lands Act, or without consulting the Chief and the local authority in the area in which the land to be alienated is situated or without consulting any other person or body whose interest might be affected by the grant.³⁰³

The Lands Act further provides that,

“...any person who holds land under customary tenure may convert it into a leasehold tenure not exceeding ninety-nine years on application and such conversion of rights from a customary tenure to a leasehold tenure shall have effect only after the approval of the chief... in whose area the land to be converted is situated....”³⁰⁴

Sub-section 3 of this section goes on to state that;

“Except for a right which may arise under any other law in Zambia, no title, other than a right to the use and occupation of any land under customary tenure claimed by a person, shall be valid unless it has been

³⁰³ Ibid., Section 3(4)

³⁰⁴ Section 8(1) of the Lands Act, Chapter 184 of the Laws of Zambia

confirmed by the chief, and a lease granted by, the President.”

In this regard, an applicant for a leasehold title is required to obtain approval of the chief and the local authority within whose area the land is situated before converting customary land to leasehold tenure. This provision suggests that what has to be obtained from the chief and the Local Authority is consent and not mere consultation from both institutions.

The conversion of land under customary tenure into leasehold without consultation with interested or affected parties and the traditional Chief in the area concerned renders the disposition void at law. This requirement was elaborated in the case of **Siwale Henry Mpanjilwa & Six Others v. Siwale Ntapalila**.³⁰⁵ The brief facts of this case were that the Appellants, and the Respondent were all children of the same father (deceased) who had been allocated about 400 hectares of land by the colonial authorities in consultation with the local traditional chief in 1928. The deceased settled on and developed his land but he did not acquire title deeds to the property as it fell in customary land previously known as native trust land. But the property was known and

³⁰⁵ (1999) Z.R. 84

accepted as the homestead of the deceased's family. Later on, his youngest son joined him and stayed with him until his demise. The youngest son thereafter sought authority from the local Chief and obtained title deeds to only 200 of the 400 hectares. He did not consult his other brothers. His brothers sought an order in the High Court to have their names included on the certificate of title. The learned trial Judge refused to grant them such Order and they appealed to the Supreme Court.

The Appellants advanced the following grounds of appeal, that the learned trial judge;

- (i) erred when he held that the deceased had not acquired title to the land;
- (ii) further misdirected himself in fact when he found that the Respondent had used 'normal channels' to obtain the title deeds;
- (iii) further erred when he found as a fact that the Appellants had no interest in the land belonging to their late father;
- (iv) also erred when he held that the inclusion of the Appellants on the title deeds would bring further problems or that it was not in the interest of the family; and

- (v) on the totality of the evidence before the learned trial judge, it was wrong for him to refuse the application before him.

On appeal, the Supreme Court invoked the provisions of section 3(4) of the Lands Act which provides that;

“... the President shall not alienate any land situated in a district or an area where land is held under customary tenure without taking into consideration the local customary law on land tenure which is not in conflict with the Lands Act, or without consulting the Chief and the local authority in the area in which the land to be alienated is situated, or without consulting any other person or body whose interest might be affected by the grant; and, if an applicant for a leasehold title has not obtained the prior approval of the Chief and the local authority within whose area the land is situated.”³⁰⁶

The Supreme Court therefore, found that the appellants had as much right to the land as the respondent and further that in terms of section 3(4) of the Lands Act, they were persons who were affected by the grant of the land to the respondent and therefore, were supposed to have been consulted. The appeal was allowed.

³⁰⁶ Section 3(4)(a)(b)(c) and (d) of the Lands Act, Chapter 184 of the Laws of Zambia

In another case of **Albert Phiri Mupwayaa** (Village headman) & **Kamaljeet Singh v. Matthew Mbaimbi**,³⁰⁷ the first appellant was a headman of Mupwaya village in Chief Mungule's area and the respondent was one of his subjects. The second appellant was an Indian, resident in Zambia. He was introduced to the first Appellant when he was looking for a piece of land to settle on and he was given land belonging to the respondent who had inherited it from his late father without consulting the respondent. The respondent took up his complaint to the Lands Tribunal, which upheld his claim. The appellants then appealed to the Supreme Court.

The Supreme Court found that the piece of land was held under customary tenure, and that the first appellant did not consult the respondent before alienating his land to the second appellant. The Supreme Court held that since the respondent as an interested person affected by the grant was not consulted, the law was not complied with, and the appeal must fail.

³⁰⁷ SCZ/41/1999

Similarly, in the case of **Still Water Farms Limited v. Mpongwe District Council, Commissioner of Lands, Dawson Lupunga & Bautis Kapulu**,³⁰⁸ where the appellant company was challenging the decision of the Lands Tribunal in favour of the four respondents, the main issue before the Supreme Court was whether or not the procedure adopted by the current Chief of allocating land to the appellant company without consulting the third and fourth respondents was proper. The Lands Tribunal held that the allocation of land was null and void because the then current Chief Lesa, did not follow the right procedures stipulated in section 3(4) (c) of the Lands Act of 1995, in that he did not consult the Councillors as he alleged, and the interested parties before allocating the land to the appellant company.

The Supreme Court upheld the Tribunal's finding that failure to follow the laid down procedures results in the purported allocation being null and void. It held further, that the appellant company was however entitled to recover its expenses incurred in developing the land in question.

³⁰⁸ LAT/30/2000

These cases illustrate the fact that lack of consultation with parties interested in the particular piece of land or likely to be affected by its conversion to statutory tenure renders such alienation null and void.

The Lands Act recognises the role of chiefs in the administration of land under customary tenure, as there could be no legal conversion without the Chief's consent. On the other hand, it is a legal requirement that any person or body whose interest might be affected by any land alienation ought to be consulted. Prior approval of both the Chief and the Local Authority is also a necessary requirement in the conversion of customary land to leasehold tenure.

It should be noted that once land in a customary area is converted into leasehold tenure, the Chief no longer has the authority or control over the administration of that land. In the case of **Major Makwati v. Chieftainess Nkomeshya**,³⁰⁹ the appellant bought land from one Mapulanga who had converted his land in Chieftainess Nkomeshya's area into leasehold with the Chieftainess's consent.

³⁰⁹ LAT/60/1997

When the Appellant began making improvements on the land, the Chieftainess rose to object to such developments arguing that he had no authority to go on with developing such area. The Lands Tribunal was called upon to determine whether the Chieftainess still had control over land which was on title.

Having carefully considered the facts in issue, the Lands Tribunal held that once title deeds were issued to the applicant, the land in issue ceased to be traditional land, and thus the respondent ceased to have control over it. There was therefore no obligation on the appellant to have sought authority from any village Headman or the respondent to be able to effect any developments on the land.

On the basis of this authority, it can be restated that once land has been converted from customary to leasehold tenure, it ceases to be subject to customary law, and the law on leasehold tenure takes over in determining the rights of the lessee. Chiefs on the other hand have argued that since the consent is sought from them in the conversion process, they should also be at liberty to recall leasehold title and convert the land back to customary tenure.³¹⁰ This

³¹⁰ This position was presented by a Committee of Chiefs during the 5th National Development Plan Conference held at Mulungushi International Conference Centre, 26th July, 2006.

argument is not supported by any legal provision as the only statutory provision with relevance to this is that which provides for the conversion of land from customary to leasehold tenure.³¹¹ The chiefs therefore, it is submitted, would have no power, let alone, authority to reconvert converted customary land.

³¹¹ Section 8 of the Lands Act, Chapter 184 of the Laws of Zambia

CHAPTER 5

LAND ALIENATION UNDER RESETTLEMENT SCHEMES AND STATUTORY RESERVES

A. RESETTLEMENT SCHEMES

Introduction

Resettlement schemes are created for certain categories of persons who need special assistance in mitigating their social and economic disadvantages. Land which is set aside for resettlement schemes is usually located under customary land. The reason is that there is not enough land under State land that could be set aside for this purpose. Land for resettlement is administered by the Department of Resettlement established under the Office of the Vice President. Therefore, this chapter discusses the establishment and administration of land under resettlement schemes with particular reference to the legal and institutional framework and challenges.

Purpose of resettlement schemes

The aim of the government under this land alienation programme is “to make available farm land for the resettlement of the unemployed, retrenched and retired persons who wish to engage in agriculture as a means of livelihood.”³¹²

The significance of the model employed in the alienation of land under resettlement schemes is that the strategy encourages rural development, and it also acts as a safety net for the people who are economically weak and have no means of accessing land under any category in the country.

Resettlement schemes are administered by the Department of Resettlement established under the Office of the Vice President. Initially, the Department was first established under the Office of the Prime Minister in 1989, to facilitate the government’s programme of resettling the unemployed, and the retired that resided in towns at the time. The Department was given statutory powers under the Statutory Functions Act,³¹³ and a Gazette Notice was to that effect issued.³¹⁴

The Department was given the responsibility of planning, policy formulation, and implementation of a land resettlement programme under the Office of the

³¹² Mission statement of the Department of Resettlement, Office of the Vice President, Lusaka, 2006

³¹³ Chapter 4 of the Laws of Zambia

³¹⁴ Gazette Notice No. 42 of 1992

Prime Minister.³¹⁵ The Department of Resettlement was later transferred to the Office of the Vice President which was a forerunner to the Office of the Prime Minister.³¹⁶

The government's objectives and responsibilities for the resettlement programmes include-

- i) creating employment for those retrenched from public service, and others that are unemployed;
- ii) creating new focal points for rural investment, and rural development;
- iii) bringing about more efficient utilisation of social services in rural areas through the creation of viable settlements as opposed to unplanned scattered resettlements;
- iv) to devise a suitable land settlement policy and procedural guidelines;

³¹⁵ Michael Roth, (ed.), **Land Tenure, Land Markets and Institutional Transformation in Zambia**, Wisconsin: Madison, 1994, p.180

³¹⁶ The 1991 Constitution replaced the Office of the Prime Minister with the Office of the Vice President.

- ii) to identify, appraise, and select suitable sites in conjunction with district authorities;
- v) to initiate the survey and planning of the sites;
- vi) to coordinate all resettlement activities;
- vii) to mobilise resources; and
- viii) to supervise the implementation and monitor projects in the settlement areas.³¹⁷

The programme on resettlements is intended to create an environment where people would realise their full potential, and utilise land for economic and social improvement. This approach is preferred to the rural-urban drift which has led to the springing up of unplanned and scattered settlements. The object of the land resettlement schemes is therefore, to give free land to persons who wish to engage in productive agriculture.

Land resettlement schemes provide government with an opportunity to decongest concentrated areas especially in urban centres where people are not

³¹⁷ Gazette Notice No. 46 of 1992

engaged in any productive activities. Besides providing farming plots, these schemes provide a complete integrated solution to rural development by bringing schools, rural health centres, boreholes and many other infrastructures to the service centres of these schools.

Land acquisition Process

The location of and selection of land for resettlement is done by the Department of Resettlement guided by District and Provincial officers. When an area has been identified with features suitable for a resettlement scheme, a number of field planning activities are undertaken at the planning phase. The features suitable for the creation of a resettlement scheme include the suitability of the undulating nature of the land, availability of natural streams or underground water, and weather conditions of the area.

Application for land under Resettlement Schemes is done through statutory forms which are obtained from the Department of Resettlement at National, Provincial and District levels. The applications are examined by the Provincial Resettlement Officers, who should be satisfied that the applicant qualifies by

being unemployed, or retrenched, or retired; or having attained the age of 51 years.

In the process of land allocation, the Department of Resettlement targets youths, persons with disabilities, retired and retrenched persons, and the unemployed. The category of youths include youths who are school leavers, orphans, and reformed street kids graduating from the Zambia National Service training camps. The categories of persons with disabilities include persons of various physical challenges. Disability means any restriction resulting from an impairment or inability to perform any activity in the manner which is considered normal for a human being.³¹⁸ The category of retirees covers persons with 50 years of age or more who wish to retire, and undertake agricultural activities. Retrenchees comprise persons whose employment is pre-maturely terminated before they are ready for retirement.

³¹⁸ Section 2 of the Persons with Disability Act, Chapter 65 of the Laws of Zambia

The applicants who satisfy the conditions, are interviewed and those that are successful are given letters of offer, farm size in hectares, and are physically shown beacons defining farm boundaries.

Institutional framework and Collaboration

The Department of Resettlement is responsible for the general administration of the resettlement programme, and carries out the activities of land acquisition, and dispute resolution, monitoring of the national programme, inter agency and stakeholder collaboration, facilitation of multi disciplinary extension services in resettlement schemes, farm plot demarcations; and socio-economic and physical surveys.

The Department also carries out scheme infrastructure development by updating the national land resettlement infrastructure development plan, pegging, clearing and formation of access roads, facilitation of drilling and equipping of wells, and boreholes, construction of rural health centres, construction of staff housing units, construction of storage sheds and facilitation of construction of small bridges and culverts.

The Department of Resettlement collaborates with other institutions in the establishment and administration of resettlement schemes. The Department collaborates with the Ministry of Lands on land alienation, especially in the process of conversion of customary land to leasehold tenure. The Ministry of Lands formalises the allocations and granting of certificates of title to the settlers or beneficiaries of the allocated land in the resettlement areas, as recommended by the Department of Resettlement.

The Department collaborates with the Ministry of Agriculture through provision of agriculture extension services to schemes, demarcation and mapping services. The Department also collaborates with the Ministry of Energy and Water Development through joint identification and mapping of schemes most suitable for connection to the national electricity grid in the most effective way and the drilling of boreholes. There is also collaboration with traditional chiefs at the stage of locating the land and acquisition for the purpose of converting customary into State land in order to establish schemes. The collaboration further extends to selection of suitable applicants for settlements once schemes are established.

The Department of Resettlement is responsible for the monitoring of developments in the resettlement schemes. Resettlement officers inspect farms in the scheme in order to monitor land use and practices as well as the general development. Where the land remains idle for a long time, or where farm plots are abandoned, the Department of Resettlement would withdraw the offer from the developer, who is notified of the intention to withdraw. In the event that a defaulting developer already has title, the Commissioner of Lands is advised to re-enter the property and revoke the title.

Administration of resettlement schemes presents very serious lapses. The Office of the Vice President where the Resettlement Department is placed is ill-equipped to handle the issues of land alienation. This is so because land alienation requires a fully established Department with physical planners, surveyors and officers with sufficient knowledge in land administration. Placing the alienation of land under Resettlement schemes in the Office of the Vice President is therefore a very serious misplacement of ministerial functions.

When it comes to administration of land under resettlement Schemes, there is lack of clear guidelines on who should benefit from these schemes. When resettlement schemes were first introduced, the main beneficiaries were supposed to be retired persons, retrenched persons and disadvantaged groups. The loss of this objective has caused a watering down of the original intended purpose of the schemes which was to resettle the unemployed and retired persons. The end result is that it now seems that any Zambian can acquire land under these Schemes whether or not they qualify to do so. The target groups seriously require to be spelt out in order to forestall a situation where the law on resettlement will be seen to be discriminatory.

The Scheme has also failed under the hands of the Office of the Vice President because of the local people being denied plots in the Schemes. For this reason, the traditional rulers have become increasingly reluctant to release land for resettlement because there are allegedly no benefits to the locals.

Another reason for the seeming failure of the Resettlement Schemes is that the rules and procedures for obtaining title to this land which are supposed to be

different from the procedures under State land or customary land are instead the same as those in any other category of land. Thus, the continued existence of Resettlements as well as their relevance is highly questionable. The incentives initially promised to settlers such as the provision of essential services, like schools, health centres, roads and water were never offered. Further, the procedure for obtaining title in these schemes is laborious and bureaucratic. This makes the land alienation system in this category of land even more inefficient.

The other concerns are that in certain circumstances, Government opens up Resettlement schemes without provision of essential services such as schools, health centres, roads and water. The other challenge is that procedures in the acquisition of certificates of title in resettlement schemes are the same as those procedures under any other category of land, and thus the benefit of having land under resettlement schemes cannot be seen. If Resettlement schemes have to continue, there is need not only to clearly spell-out the target groups or beneficiaries but also ensure that sufficient resources and expertise are invested to facilitate alienation of land and acquisition of title.

B. STATUTORY RESERVES

Introduction

Statutory reserves are areas which are created by statute or gazetted for specific purposes. Common among these areas are reserves for Forestry, Game Management or National Parks. These areas are reserved for purposes of distinguishing them from the general State land or customary land. Forest reserves are created for the conservation and protection of forests and trees. Game management areas are created for the conservation and protection of wild life. To conserve trees and wild life, it is important that human activities are restricted and regulated in these areas. In certain circumstances, human beings are permitted to acquire land in these reserved areas either by licence or leasehold. This section of the chapter therefore, discusses circumstances under which land may be alienated to a person in the statutory reserves.

Forest Reserves

Legislation that has made provision for the creation of forest reserves is the Forests Act.³¹⁹ This Act provides for the establishment and management of forests and it also makes provision for the conservation and protection of forests and trees.³²⁰ In the administration of land within the provisions of the Forests Act, areas falling under this category of land are defined as not belonging either to State land or customary land. This means that the Forests Act has created an entirely separate category of land that is specifically dealt with by the Act itself.

In the definition section of the Forests Act, State lands means,

“all lands in Zambia other than former Reserves and Trust Land (now customary land), except National Forests and Local Forests and land the freehold or leasehold of which is vested in any person”.³²¹

Forests are excluded from the definition of State land proper.

National forests and Local forests are created by the President under the provisions of the Forests Act. The Act provides that the President may, by statutory instrument, declare any area of land within the Republic to be a

³¹⁹ Chapter 199 of the Laws of Zambia

³²⁰ *Ibid.*, Preamble

³²¹ Section 2 of the Forests Act, Chapter 199 of the Laws of Zambia

National or Local forest. In the like manner, the President may declare that any National or Local forest or part of it shall cease to be a National or Local forest. The President may also extend or alter the boundaries of any National or Local forest.³²² In so declaring that an area is a forest reserve, it should be noted that where any area proposed to be declared a National or Local Forest lies within the jurisdiction of a local authority, it shall not be declared to be a National forest or local forest unless the local authority within which such area lies has been consulted.³²³

The rights in National Forests shall *mutatis mutandis*, (with necessary modifications) apply to any Local forest as they apply to a National forest.³²⁴ This means that the rights exercised and enjoyed in a National forest, are the same as those exercised and enjoyed in a Local forest. The difference between a National forest and a Local forest is that all land comprised in a National forest is used exclusively for the conservation and development of forests with a view to securing supplies of timber and other forest produce, providing protection

³²² Ibid., Section 8

³²³ Ibid., Section 17

³²⁴ Ibid., Section 20

against floods, erosion, and desiccation and maintaining the flow of rivers³²⁵, while all land comprised in a Local forest is used exclusively for the conservation and development of forests with a view to securing supplies of timber and affording protection to land and water supplies in the local area³²⁶.

Alienation of land in a Forest Reserve

The law relating to alienation of land in Forest Reserves suggests that leasehold title can be issued both in National and Local forests provided that the use of the land by the leaseholder is consistent with the provisions of section 15 and 23 of the Forests Act. In particular, section 15 provides as follows:

“Nothing in this Act shall be so construed as to prevent or restrict the granting, under any written law, for any purpose not inconsistent with the provisions of this Act, of any right, title or interest in or in relation to any area of land comprised in a National Forest, provided that the Minister may impose such conditions on the exercise and enjoyment of any such right, title or interest as are not inconsistent with the nature thereof.”

With regard to Local Forests, section 23 provides that;

“Nothing in this Act shall be so construed as to prevent or restrict the granting under any written law, for any purpose not inconsistent with this Act, of any right, title or interest in or relation to any area of land comprised in a Local Forest.”

³²⁵ Ibid., Section 12

³²⁶ Ibid., Section 21

To ensure that the alienation of land under National and Local forests is consistent with the provisions of the Forests Act, the Department of Forestry should be consulted. As to the nature of a grant of leasehold title to land in a forest reserve, the High Court decision in the case of **Robert Chimambo, Rhidah Mung'omba and Adam Pope v. Commissioner of Lands, Safari International Zambia Limited, Environmental Council of Zambia and Fingus Limited**³²⁷ is instructive. On application for judicial review, the applicants were seeking an order of the Court to quash the Commissioner of Lands decision to allocate the land in issue to the 2nd respondent disregarding the fact that the said land was protected as a gazetted forest area. The question for determination by the Court was whether the Commissioner of Lands (1st Respondent) had powers, under the provisions of the Forests Act to grant title to the land in question to Safari International Zambia Limited (2nd Respondent) and Fingus Limited (4th Respondents).

The case involved Lot No. 6496/M and Lot No. 6497/M. In the case of the former, the undisputed facts of the case were that, by Statutory Instrument No.

³²⁷ (2008) Z.R. 1

20 of 1983, Lusaka East Reserve No. 27 was de-gazetted and thus it became State land. In 1996, it was re-gazetted as a Local forest. It was during this period between 1983 and 1996, when it was State land that the 4th Respondent, Fingus Limited, obtained title to lot No. 6496/M in 1993.

With regard to the 2nd Respondent's acquisition of Lot No. 6497/M, the undisputed facts were that the Lusaka East Forest Reserve No. 27 was re-gazetted pursuant to Statutory Instrument No. 161 of 1996. The said Lot No. 6497/M was located in or was part of the Lusaka East Forest Reserve. In September, 2004, the 1st Respondent issued a Certificate of title to the 2nd respondent in respect of the said No. 6497/M despite it being in a Local forest.

The Court considered the submissions of the parties and established that title to land in a Local Forest Reserve may be granted under any written law, to anybody for any purpose which is not inconsistent with the objectives of the Forest Act. This therefore meant that the 1st Respondent could grant to anybody under the Lands Act, title to land in any local forest area so long as that person or body of

persons used that land for purposes which are in conformity with the laid down objectives stipulated under the said Forests Act.

After considering the objectives of the Forests Act as stated in section 21, the High Court noted that the 2nd and 4th respondents in this case intended to build a Golf course. The restrictions as to how the land was to be used in the Local Forest area are contained in section 16 as read together with section 24 of the Act.

Section 16 and section 24 provide restrictions in a National and Local forest. The law provides that no person shall without a licence fell or cut, or remove any forest produce from the forest. The Act further restricts camping, residing, building, cultivating crops, or using any road other than a public road in any National forest in any manner contrary to the law. Any of the restricted activities may only be undertaken with permission or an order published in the Gazette.

The application of section 16 is limited by the proviso under section 24 which states that the President may, by statutory instrument, permit in a Local forest the doing of any of the prohibited acts under section 16.

The High Court found that there was no evidence suggesting that the President had, by statutory Instrument, permitted the occupation of the Local forest for purposes of building a golf course in the Local forest.

In his ruling, Nyangulu J, had this to say:

“What legal purpose would the proviso to section 24 serve or what was the motive for re-gazetting Lusaka East Forest into Local Forest No. 27 in 1966, and permitting its use only by the order of the President through the issuance of a Statutory Instrument? ...There was therefore “illegality”, “irrationality,” and “procedural impropriety,” on the part of the 1st Respondent when he granted a Certificate of title to Lot 6897/M to the 2nd Respondent. It is therefore, the finding by this Court that the 1st Respondent fell into error when he granted a Certificate of title to Lot No. 6497/M in the Local Forest Area No. 27, to the 2nd Respondent as he had no legal powers under the said Act to do so.”³²⁸

In the absence of a written authority from the President as required by the Act, the 1st Respondent could not have lawfully exercised his right to grant title to the

³²⁸ At p. J.18

2nd Respondent under section 23 of the Forest Act, as such right had not yet accrued to him in that the President had not yet given him the green light to do so through the issuance and publication of a statutory instrument in the gazette as required under the provision of section 24 of the Act.

With regard to Lot No. 6496/M granted to the 4th Respondent, the land was found to fall in a different category and not under the Local Forest Area No. 27. The High Court also found that Lot No. 6496/M formed part of Lusaka East Reserve No.27, that by statutory Instrument No. 20 of 1983, Lusaka East Reserve No. 27 was de-gazetted and thus, it became State land. The 4th Respondent applied for it and was granted title to Lot No. 6496/M, while it was still State land, and was given a Certificate of title to the same. Although it was re-gazetted in 1996, the 4th Respondent had already obtained title to Lot No. 6496/M, and therefore the re-gazetted area did not include the area comprised in Lot No. 6496/M, as this had already been removed from the rest of the Local Forest No. 27 by virtue of the allocation and issuance of the Certificate of title

7relating thereto. The State no longer had any claim of title to Lot No. 6496/M.³²⁹

The parties appealed the Supreme Court against the decision of the High Court. The appeal concerned a dispute, in the court below, over Local Forest No. 27 located in the East of Lusaka. The action was commenced by the Appellants by way of judicial review challenging certain actions of the 1st Respondent relating to the allocation of land in the said Local Forest No. 27.

The reliefs the Appellants sought in the court below were, *inter alia*:

- (i) an order of certiorari to remove into High Court and quash the 1st Respondent disregarding the fact that the said land is protected;
- (ii) an order that the actions of the 1st and 2nd Respondents are null and void ab initio; and
- (iii) any other relief the court may deem fit in the interest of conserving the protected forest in question and in the interest of all the stake holders in the Chalimbana river catchment area; and

The grounds upon which reliefs were sought were that the decision by the 1st Respondent to allocate Local Forest No. 27 to the 2nd Respondent was illegal

³²⁹ Ibid.

null and void and that the forest in issue is still protected and as such could not be allocated to the 2nd Respondent without the due process of the law. The Supreme Court affirmed the decision of the High Court and held that:

1. The Commissioner of Lands can, on behalf of the President, make a grant or disposition of land that is free or unencumbered to any person who qualifies under the law.
2. The power of the Commissioner of Lands to allocate land during the period Local Forest No. 27 was de-gazetted cannot be impeached because the land was vacant state land and available for allocation to deserving persons.
3. The Commissioner of Land's power to administer land is limited to the Lands Act. There is no provision in the Lands Act which allows the Commissioner of Lands to override the provisions of the Forest Act –an Act of Parliament which is at par with the Lands Act.

This case clearly shows that where land has been gazetted as a National forest or local forest, the Commissioner of Lands has no power to alienate such land outside the Lands Act.

National Parks

National Parks and Game Management Areas are commonly referred to as Game Reserves. In establishing National Parks and Game Management Areas, the law provides that the President may after consultation with the Zambia Wildlife Authority, and the local community in the area, by Statutory Order, declare any area of land within the Republic to be a National Park. The main purpose for declaring an area as a National Park is for conservation or protection and enhancement of wildlife, eco-systems, biodiversity and natural beauty.³³⁰

The law outlines instances when land may be alienated to a person in a National Park. The Zambia Wildlife Act states that nothing shall be construed as preventing or restricting the granting of any land within a National Park of any mining right, or other right, title, interest or authority necessary or convenient for the enjoyment of a mining right.

This means that a right, interest or leasehold title may be obtained in a National Park. In the case of a person applying for land for mining in a National Park, or

³³⁰ Section 10 of the Zambia Wildlife Act, Act No. 12 of 1998

an adjoining Game Management Area, it is a requirement that an environmental impact assessment is conducted in accordance with the procedures specified by the Environmental Council, under the Environmental Protection and Pollution Control Act.³³¹ The procedures should take into account the need to conserve and protect the air, water, soil, plants, fisheries, and scenic attractions on the land over which the right is sought so that wild animals are not affected. When a mining right is being granted in a National Park, the Director General of the Zambia Wildlife Authority, and the Director of Mines should consult each other.

The Act further states that nothing shall be construed as preventing or restricting the granting of any land within a National Park for any purpose not inconsistent with the Act, of any right, title, interest or authority under any written law³³². The exercise of any right, title, interest or authority granted shall be subject to any conditions which the Zambia Wildlife Authority may impose.³³³ This means that if land is being alienated for any purpose other than mining in a National Park, the Commissioner of Lands should consult the Director of the Zambia Wildlife

³³¹ The Environmental Protection and Pollution Control Act, Chapter 204 of the Laws of Zambia

³³² Section 13 (1)(b) of the Zambia Wildlife Act, Act No. 12 of 1998

³³³ Ibid., Section 13 (3)

Authority, who shall identify the piece of land to be alienated.³³⁴

Game Management Areas

Game Management Areas are created by the President through a Statutory Instrument or Order. This is done in consultation with the Zambia Wildlife Authority and the local community. Game Management Areas are created for purposes of sustainable utilisation of wildlife.³³⁵

Most Game Management Areas lie in close proximity with rural communities in customary areas. Unlike in National Parks, settlements are allowed in Game Management Areas, provided that a person who settles there should conform to the provisions of the Management Plan developed by the Community Resource Boards.³³⁶ A Community Resource Board is a group of persons in a local community along geographic boundaries contiguous to a chiefdom in a Game Management Area, or an open area or a particular chiefdom with common interest in the wildlife and natural resources in that area.

³³⁴ Section 4 (3)(b) of the Lands Act Chapter 184 of the Laws of Zambia

³³⁵ Section 26(1) of the Zambia Wildlife Act No. 12 of 1998

³³⁶ Section 28 of the Zambia Wildlife Act No. 12 of 1998

Acquisition of leasehold title is also permissible in the Game Management Areas subject to the approval of the Director General of the Zambia Wildlife Authority.³³⁷

Legal and Institutional structure

The Zambia Wildlife Act and the Lands Act contain provisions on the granting of land in Game Management Areas. The Zambia Wildlife Act provides that no leasehold title can be issued by the President in a Game Management Area without the approval of the Zambia Wildlife Authority. In the same vein, the Lands Act provides that the President shall not alienate any land situated in a Game Management Area, without consulting the Director General of the Zambia Wildlife Authority.³³⁸ This entails that persons wishing to use and occupy land in a Game Management Area, may be granted leasehold title in compliance with the governing statutes.³³⁹

There are some challenges faced in the alienation of land under Game Management Areas. These challenges arise from lack of institutional

³³⁷ Ibid.

³³⁸ Section 3 (4) (b) of chapter 184 of the Laws of Zambia

³³⁹ Section 26 (3) of Act No. 12 of 1998 and section 3 (4) (b) of Chapter 184 of the laws of Zambia

coordination and inadequate legal provisions on the procedure. Most Game Management Areas are located in customary lands which fall within the Chief's administrative boundaries. The villages within the Game Management Areas are subject to administration by the chief. However, the Lands Act,³⁴⁰ and the Zambia Wildlife Act,³⁴¹ state that the President shall consult the Director General of the Zambia Wildlife Authority in granting land in a Game Management Area. Both statutes do not provide for the role of traditional chiefs in the alienation of land in these areas.

It may be concluded however, that for purposes of orderly land alienation, and development, the traditional chiefs, Community Resource Boards, District Councils in the area concerned, and the Director General of the Zambia Wildlife Authority should all play a consultative role, and be involved in the management and alienation of land in Game Management Areas.

³⁴⁰ Chapter 184 of the Laws of Zambia

³⁴¹ The Zambia Wildlife Act, No. 12 of 1998

The Lands Act³⁴², the Zambia Wildlife Act³⁴³, the Chiefs Act,³⁴⁴ and the Local Government Act,³⁴⁵ do not provide for the coordination of different institutions in the administration and alienation of land in Game Management Areas. There is need for appropriate legislation in respect of the roles of chiefs, Local Authorities and the Zambia Wildlife Authority in the administration, management and control of land rights and interests in Game Management Areas. The existing legal provisions are inadequate.

³⁴² Chapter 184 of the Laws of Zambia

³⁴³ The Zambia Wildlife Act, No. 12 of 1998

³⁴⁴ Chapter 287 of the Laws of Zambia

³⁴⁵ Chapter 281 of the Laws of Zambia

CHAPTER 6

LAND REGISTRATION

Introduction

The process of land alienation is completed by land registration. Registration is necessary to have a record of title holders, and the land which has been alienated. Land is registered in the Lands and Deeds Registry. The Lands and Deeds Registry Act is the statute that governs the registration of title to land. Land which is required to be registered is land under State land. Land under customary tenure is not registrable. However, it becomes registrable when it is converted to leasehold. The advantage of registration is that security of tenure on registered land is assured. This Chapter therefore discusses the administration of land registration in the process of land alienation.

Registration of title

When land has been allocated to a person, after it is planned, demarcated and surveyed, the interest or right which the person obtains is required to be registered in the Lands Register at the Lands and Deeds Registry. The Land

register describes the current ownership of the property, the size of the land, its location and the outstanding, charges if any. Under State land, land registration is normally compulsory and any unregistered interest is not recognised at law.

The importance of land registration is recognised in all modern land administration systems. Peter Dale has explained the essence of land registration by stating that:

“Registration of title seeks to make a definitive statement as to the nature and extent of title, the land being identified by reference to a map. In registration of title an official examines the progress of deeds relating to a property and makes up a formal certificate of title beyond which no further examination need, in principle, be made. Except for any ‘over-riding interest’ as defined in statute, the formal title sheet is determinative of title. In most cases, title, once issued, is indefeasible.”³⁴⁶

Land registration systems provide the means for recognizing formalized property rights, and for regularising the character and transfer of these rights. Registration of documents in a public office provides some measure of security against loss, destruction or fraud. Registration of documents can be used as evidence in support of a claim to a property interest. Registration of a document gives public

³⁴⁶ Peter Dale and J. McLaughlin, **Land Administration**, opt.cit., p.36

notice that a property transaction has occurred and the time of registration provides a priority claim.”³⁴⁷

A system of registration of title to land achieves several purposes. Some of these are that;

- (a) the title of every land owner is thoroughly investigated once and for all, and is placed on a public register and a perusal thereof, will give an intending purchaser all the necessary information about previous dealings in land;
- (b) the registration of the land owner’s title is an insurance against any adverse claims by others and is indispensable to the validity of all transactions relating to the land in question; and
- (c) the instruments registered and executed by the parties are by reference to the land in question.

³⁴⁷ Ibid.

The objectives of land registration were also stated in the case of **Gibbs v. Messer**,³⁴⁸ where the Court stated that;

“the object of land registration is to save persons dealing with the registered proprietor from the trouble and expense of going behind the register in order to investigate the history of their author’s title, and to satisfy themselves of its validity. That end is accomplished by providing that everyone who purchases *bonafide* and for value, from a registered proprietor and enters his deed of transfer or mortgage on the register shall thereby acquire an indefeasible right notwithstanding the infirmity of his author’s title.”³⁴⁹

The holding in this case illustrates that registration protects those who derive title relying on the information in the Lands register. It is, however, important that a person wishing to rely on the information in the register must ascertain the existence and identity, the authority of any agent acting on behalf of the registered owner, and the validity of the documents purporting to effect a claim.

Lord Wilberforce stated in the case of **Williams & Glyn’s Bank v. Boland**,³⁵⁰ that “subject to overriding interests, it is an essential feature of registration of

³⁴⁸ [1891] AC 248

³⁴⁹ Ibid., p.254

³⁵⁰ [1981] AC 487

title, which a purchaser is entitled to rely and act upon the information shown on the register and nothing else.”³⁵¹

Nature of documents required to be registered

In understanding the nature of documents and rights that are required to be registered, the Lands and Deeds Registry Act provides that;

“Every document purporting to grant, convey or transfer land or any interest in land, or to be a lease or agreement for a lease or permit of occupation of land for a longer term than one year, or to create any charge upon land, whether by way of mortgage or otherwise, or which evidences the satisfaction of any mortgage or charge, and all bills of sale of personal property whereof the grantor remains in apparent possession, must be registered.”³⁵²

In order to ascertain what kind of documents are registrable in the Lands and Deeds Registry, the test to be applied is very wide. Every document as long as it purports to have the effect of conveying, transferring, charging, or affecting an estate has to be registered.

³⁵¹ Ibid., p 490

³⁵² Section 4 of the Lands and Deeds Registry Act Cap 185 of the Laws of Zambia

There are two types of registers kept at the Lands and Deeds Registry and these are the Lands Register and the Miscellaneous Deeds Register.³⁵³ All documents relating to land not subject to customary land are registered in the Lands Register. Direct State leases, transactions affecting the transfer of title such as assignments, gifts, transfers, mortgages, and any such interests are, therefore, recorded in the Lands register.

In the Miscellaneous Deeds Register, the Registrar records any deed other than that which directly relates to land, or a deed either required by any law to be registered, and in respect of which no special registry office is indicated, or which it is desirable and proper to register.³⁵⁴ These Deeds include debentures, floating charges, power of attorney, and agricultural charges.

One core principle of the system of land registration is that it gives public notice as to who a registered property owner is, and that a property transaction has occurred. The general public is therefore allowed to investigate title, and any land transactions affecting a particular property. The Lands and Deeds Registry is

³⁵³ Ibid., Section 9

³⁵⁴ Ibid., Section 10

open to the public for them to conduct searches in the Lands Register, and the Miscellaneous Deeds Register.³⁵⁵ This kind of search previously entailed going through the files, the manual land registers, and the Miscellaneous Deeds register. But in practice, whenever a search is made, it is the register and not files which are perused.

With the computerisation of the Lands and Deeds Registration system, an amendment to the Lands and Deeds Registry Act, was passed in 1994, to give effect to conducting a search through a computer generated data. The law states that:

“Where a register or part of a register is kept other than in the form of a book, it shall be made available for search in a convenient written form, as a printed document or by means of an electronic device.”³⁵⁶

Computer print-outs generated from the Lands Register provide sufficient and official record of the Lands Register.

³⁵⁵Ibid., Section 22(1)

³⁵⁶ Ibid., Section 22(2)

Priority of registration of interests

It is a core principle in the system of registration of deeds and title that the time of registration determines the priority claim. In practice, priority of registration becomes critical especially where more than one person is claiming a piece of land or an interest in the same. In resolving disputes relating to who gets a priority interest in land, solace is found in the Act which provides that all documents required to be registered shall have priority according to the date of registration. Notice of a prior unregistered document required to be registered as aforesaid shall be disregarded in the absence of actual fraud. The date of registration shall be the date upon which the document shall first be lodged for registration in the Registry.³⁵⁷

In applying this principle, the High Court has given some doubtful interpretation of this provision in light of the case of **Moonga vs Makwabarara & Abeve Company Limited**.³⁵⁸ The facts of the case in brief were that the first Respondent owned some piece of land, 5 hectares in extent, in Lusaka. The second Respondent, according to the contract of sale, purchased 5 acres, which

³⁵⁷ Section 7 of the Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia

³⁵⁸ 2002/HP/1127 (Unreported)

piece of land was to be marked off from the remaining extent of 5 hectares owned by the first Respondent. After sometime, the first Respondent went back to the second Respondent and asked him if he could buy the whole remaining extent, which the second Respondent agreed. Instead of redrafting the contract of sale, they executed an Assignment through advocates which the second Respondent duly registered at the Deeds Registry. After the second Respondent obtained a Certificate of title in their name for 5 hectares, the Appellant appeared, and claimed that he had purchased a portion of the said land in extent of 5 acres before the second Respondent purchased the whole land. Evidence showed that the Appellant and the first Respondent had executed a contract of sale for a piece of land as claimed by the Appellant and the survey diagrams were prepared, but they were not registered, or marked on the parent Certificate of title that was passed to the second Respondent.

Professor Mvunga, representing the second respondent argued that as for priority of registration of interest, it is the first registered interest that takes

priority even though the unregistered document was the first in time of existence.³⁵⁹

Counsel for the Plaintiff on the other hand, argued that since the contract of sale was executed between the Appellant and the first Respondent earlier than the contract of sale between the first Respondent and the second Respondent, the earlier contract of sale should be given priority. Counsel for the Plaintiff further urged the High Court to cancel the certificate of title issued to the second Respondent.

The Court adopted the argument advanced by Counsel for the Appellant and gave effect to the contract of sale between the Appellant and the first Respondent and ordered the cancellation of a certificate of title issued to the second Respondent so that the appellant could get his certificate of title for a proposed subdivision 'G', which was unregistered.

³⁵⁹ 2002/HP/1129 (unreported)

As it can be seen from the above case, the second Respondent had registered his interest, and had obtained a Certificate of title. It is apparent that if the High Court had properly directed itself, and properly interpreted the provisions of section 7 of the Lands and Deeds Registry Act, an earlier registered title cannot be affected by a subsequent unregistered interest in the absence of mistake or indeed fraud.

In determining the question of priority of registration, the High Court in the special case submitted by the Registrar has interpreted the law as being that the time, and date to be considered is the time and date when the document was first lodged or presented with the registry for registration and not the date when the document was signed by the Registrar.³⁶⁰

Even at Common law, a deed takes effect from the time of registration, and not from the day on which it is therein stated to have been made or executed, and a party to a deed is not stopped by any statement in the deed as to the day or time of the execution from proving that it was delivered at some other time.³⁶¹

³⁶⁰ Re Special case submitted by the Registrar of Lands and Deeds(2002) HP/1090 Unreported,³⁶⁰

³⁶¹ **English v. Cliff**, [1914] 2 Ch. 376 and **Leschallas v. Woolf** [1908] 1 Ch 641 at 651

It should be noted that the regulations under the Act stress the point further by providing that no document relating to land other than a State Grant of land shall be registered by the Registrar, unless it is presented for registration by some person interested in the property being registered or by a legal practitioner practising in Zambia and having an office or place of business in Zambia.³⁶²

Effect of failure to register documents

The effect of failure to register any document required to be registered by law and not registered within the time specified renders the documents null and void.³⁶³ The meaning of the words 'null and void' has been interpreted by a number of decided cases. In **Ward v. Casale & Burney**,³⁶⁴ it was held that although an unregistered document may be void at law, the same could take effect in equity. However, this view can no longer be held or regarded as valid, because several cases decided thereafter have placed a different construction on the terms 'null and void'. In **Sundi v. Ravalia**,³⁶⁵ the words null and void were

³⁶²Lands and Deeds Regulations, rule 3

³⁶³ Ibid., Section 6

³⁶⁴ 5 NRLR, p.759

³⁶⁵ [1949-54] NRLR 345

construed as rendering a document which is required to be registered, but not registered, to be of no effect whatsoever both in equity and at law.

The effect of non compliance with the foregoing at Common law and equity would entail that a person who failed to register the documents within the given period of time could not have his rights or interests registered thereafter no matter what reasons one could advance. However, this position is salvaged by the proviso:

“the Court may extend the time within which such document must be registered, or authorise its registration after the expiration of such period on such terms as to costs and otherwise as it shall think fit, if satisfied that the failure to register was unavoidable, or that there are any special circumstances which afford ground for giving relief from the results of such failure, and that no injustice will be caused by allowing registration.”

³⁶⁶

This position was judicially tested in the case of **Patel v. Ishmail**,³⁶⁷ where the lessor had delayed in registering the documents. The Court allowed the registration of documents out of time having considered that the failure to register was unavoidable, and that no injustice would ensue to the Defendant by allowing registration.

³⁶⁶ Section 6(2) of the Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia

³⁶⁷ 5 NRLR 563

Conclusiveness of registered interests

The Land register in Zambia provides conclusive evidence of ownership of the land in question. There is normally reason to assume that registered rights exist and that no other rights exist other than those registered. In practice therefore, the Lands register enjoys public confidence. Registered rights should be presumed to exist, and that rights that have been cancelled according to the registered transaction should be presumed to have ceased to exist. This means essentially that interested parties are entitled to rely on information provided by the register.

It is possible nevertheless, that a registered right may be challenged where there is duress, forgery, mistake of fact or acting contrary to good faith and fair dealing.

A Certificate of title is issued only to a holder of land or to the original lessee or subsequent transferee of a State Lease.³⁶⁸ In terms of its effect, a Certificate of title is conclusive as from the date of its issue notwithstanding the existence of

³⁶⁸ Ibid., Section 30

any other estate or interest in any other person who could have derived it from the President by grant or otherwise.³⁶⁹ It means that a holder of a Certificate of title acquires an overriding interest in land over any other person.

The sanctity of leasehold in relation to land implies that where there is a certificate of title issued, no claim of adverse possession can be entertained as against the registered title holder. In the case of **Rhodesia Wattle Company Limited v. Taziwa & Others**,³⁷⁰ the Respondents claimed to be the remnants of a community that had occupied that land openly before 1897. In 1948, the Applicant Company applied for that land and became the registered owner. The Applicant Company later sought an order for ejecting the Respondents from the land. For the purposes of the case, however, the High Court assumed in the Respondents' favour and found that the Respondents had, acquired by prescription such rights to occupy the land as they claimed to possess. The Applicant Company appealed and on appeal, the High Court found that the Respondents claim to have owned the land were to some extent disputed, and on the papers before the Court, it was not clear what the precise origins or

³⁶⁹ Ibid., Section 33

³⁷⁰ [1957] Rhodesia & Nyasaland Law Reports, p.656

conditions of the Respondent's occupation were. The High Court held that even on the basis of any assumptions in favour of the Respondents, the Applicant was entitled to the land because he had papers indicating that he owned the land which the Respondents did not have.

In David Nzooma Lumanyenda & Goodwins Kafuko Muzumbwa v. Chief Chamuka & Kabwe Rural District Council & Zambia Consolidated Copper Mines Limited,³⁷¹ the Appellants claimed title by prescription as occupiers of land to which the third Respondent said it had a Certificate of title. At the trial the third Respondent produced a Certificate of title under a lease. Upon that evidence the High Court found in their favour on the basis that title by prescription does not apply to leasehold land. The Appellants appealed. On appeal the arguments were based on adverse possession. The third Respondent produced evidence which, *inter alia*, showed that it had a Certificate of title in terms of a lease. It was argued that in terms of section 35 of the Lands and Deeds Registration Act, adverse possession cannot be acquired against land to which there is a Certificate of title.

³⁷¹ [1988-1989] ZR 194

The Appellants argued that under section 32 of the Act, any rights or benefits that existed at the time of the issue of a certificate of title still accrue and will override the issue of a certificate of title. The High Court held that no rights by adverse possession can be acquired if land becomes the subject of a certificate of title. The Registered proprietor of the land comprised in such Certificate therefore, except in case of fraud, mistake, or misrepresentation, holds the land subject only to such encumbrances, liens, estates, or interests as may be shown by such Certificate of title at the time of its issuance, or any encumbrances, liens, estates or interests created after the issue of such Certificate as may be notified on the Lands Register or memorized in the Certificate of title.

Having demonstrated the sanctity of a Certificate of title under leasehold tenure, mere claims cannot impugn the rights of a leaseholder or the validity of the Certificate of title. The only legally known instances where leasehold Certificate of title can be challenged are-

- (a) in the case of a mortgage as against a mortgagor in default;
- (b) in the case of the President as against the holder of a State lease in default;

- (c) in the case of a person deprived of any land by fraud;
- (d) in the case of a person deprived of or claiming any land included in any Certificate of title (of other land) by misdescription; and
- (e) in the case of a registered proprietor claiming priority in date where two or more Certificates of title have been issued in respect to the same land.

After land has become the subject of a Certificate of title, no other title or right over the same land can be acquired by prescription in derogation of the title of the registered lessee.

The objectives of land registration are justified. However, the process is hindered in so many ways. Some of the hindrances to effective land registration include the centralisation of the Lands and Deeds Registry, inadequate surveyed land and administrative problems.

The Lands and Deeds Registry is located in Lusaka and Ndola. This means that all registrable land has to be lodged with the Registrar of Lands and Deeds in

either of the two registries. Considering that the registries are not found at Provincial or District levels, the process and the time it takes to lodge documents with the Registrar of Lands for issuance of Certificate of title is long. This causes high costs of processing title and promotes inefficiency.

The law requires that before land can be registered, it has to be surveyed and cadastral diagrams produced or described on a sketch plan. For the Certificate of title to be issued, the lease executed by the Commissioner of Lands should be accompanied by a cadastral diagram or a sketch plan. However, most of the land in the country is not surveyed and planned. Further, survey services provided by the Government are not adequate to efficiently address the demand for survey.

Another challenge faced in the process of land registration is administrative. There is inadequate trained human resource to deal with land registration efficiently. For instance, a person holding the Office of Registrar of Lands is required to be an Advocate or holder of a Degree in Law. It has been difficult to recruit lawyers to take up the positions. It is however hoped that with the increasing number of law graduates currently graduating from the Universities

coupled with improved remuneration being paid to lawyers employed in Government, this hurdle may be overcome.

CHAPTER 7

AN APPRAISAL OF THE LAND ALIENATION SYSTEM

Introduction

The land alienation system in Zambia is currently grappling with a number of bottlenecks ranging from the existence of a dual land tenure, to uncoordinated institutional structures and unconsolidated legal framework. As we have observed in the preceding chapters of this study, a number of questions on the availability of land, and how to access it require redress. Some of the plausible answers to these questions may be found by evaluating the land tenure system, legal structure and institutional framework.

As we have seen in Chapter 1, the existence of the dual tenure system is historical, arising from the introduction of the British legal system within the already existing customary law. The existence of a dual land tenure system poses challenges in that the British colonial land administration introduced in the Territory was foreign in nature, and as a result, it has been difficult for the majority of people in the country to understand the statutory land tenure system.

Sir Frederick Pollock has pointed out the problem of countries where English land law is the main source of law governing the land tenure system. He stated that:

“...there is no country where land owners are as ignorant of their legal position and so dependant on legal advice as in England. It has been said that land law in countries under the common law of England is a ‘rubbish heap’ which has been accumulating for hundreds of years and ... is ... based upon feudal doctrines which no one (except professors in law schools) understands, and rather with the implication that even the professors do not thoroughly understand them or all understand them the same way.”³⁷²

This observation correctly reflects a similar position in Zambia, where the majority of the Zambian population has not had an opportunity to learn the principles and practices of land administration which are based on English law. In this regard, many people in the country have not been to a law school to understand the complex English approach to land law which is reflected in the Zambian statutory law.

The attainment of independence in 1964, brought with it hope among the Zambian people that the laws governing land administration would be revised

³⁷² **Miller v. Tripling** (1918) 43 O.L.R. p.1

and that institutions involved in land alienation would similarly be reformed so as to make land accessible to the people. It was expected that land ownership, and occupation could not continue to be restricted under the self-governing regime.

It is however, important to note that some land tenure reforms and measures aimed at putting in place institutions to administer land have been undertaken since independence. It is said that “land tenure systems are not static, they respond to changes in society. They are modified, redefined or structured in response to many factors such as population growth and density, conflict of interest or changes in the political or economic organisation of society.”³⁷³ The abolishment of freehold tenure, the enactment and subsequent repeal of the Land (Conversion of Titles) Act in 1975, and the enactment of the Lands Act in 1995, were all measures taken in response to the changed political and economic environment in land alienation.

However, it is evident that the land tenure system has continued to be based on a dual system as introduced in the colonial period. Land has continued to be

³⁷³ Patrick M. Mvunga, *The colonial foundations of Zambia's land tenure system*, opt.cit. p.1

administered under both statutory tenure and customary tenure. The question that needs redress is whether the dual land tenure system as introduced by the colonial administration is still the best form of land tenure in the country, and whether further land reforms are desirable. It is also important to evaluate the legal framework and institutions involved in the administration of land in each category.

Legal and Institutional Framework under Leasehold Tenure

(a) The status of State land

As observed under Chapter 2, State land was designated for white settlers who were to have its exclusive use and possession. Therefore, it is not strange that this category of land constituted only six per centum (6%) of the total landmass in the country.³⁷⁴ It has been established in this study that the attainment of independence in 1964 led to the disappearance of racial segregation that once characterised this category of land. Both Zambians and non-Zambians, were entitled to acquire land in this category. There was such a high demand for land

³⁷⁴ Ben Kakoma, *op.cit.* p.1

in this category that it became difficult for institutions involved in land alienation to cope with the demand. As a result, the alienation of land under State land was faced with numerous challenges which hitherto, have not been effectively addressed.

The most challenging issue in the alienation of land under State land is that currently, there is inadequate land under this category for effective, and equitable distribution to those in search of land. It was hoped that the size of State land would be increased to accommodate the huge demand for leasehold land by many Zambians interested in developing land, but this has not been the case for many years.

On the other hand, as it has been observed in this study, one of the advantages of leasehold tenure is that land is surveyed and registered, thus, there is certainty as to the boundary and size of the alienated land. The other advantage is that land disputes relating to the size of the land are lessened and security of tenure is guaranteed. In this regard, acquisition of land under State land is more attractive than in customary areas. However, the rate of planning and surveying is often

slower than the demand for land and hence, occupation in most urban areas precedes allocation. This is one of the many reasons which have led to the springing up of unplanned settlements.

(b) The Statutory Housing Areas and Improvement Areas

The category of land under the Housing and Improvement Areas falls in most cases, under State land. As already illustrated in Chapter 3, the creation of the Housing and Statutory Improvement Areas was an emergency response to the rapidly increasing unplanned settlements that emerged in the urban areas during the post independence era. These areas could be classified as a hybrid category of State land in that they mostly exist on State land, but they exhibit less compliance with planning and registration laws.

Although the Housing and Improvement areas exist in State land, we refer to it as a hybrid category of State land because there are some differences in the laws and institutions that administer land in these two areas. The land tenure under the Housing and Improvement Areas is different from State land in the following ways:

- (i) The law that governs land alienation under State land proper is different from the law that governs land alienation under the Housing (Statutory and Improvement) Areas. Land alienation under State land is governed by the Lands Act,³⁷⁵ while the Housing (Statutory and Improvement) Areas Act³⁷⁶ governs land under the Housing (Statutory and Improvement) Areas;
- (ii) In terms of application of the law, the Town and Country Planning Act and the Lands and Deeds Registry Act do not apply in the Housing (Statutory and Improvement) Areas, while these Acts apply in State land.
- (iii) Documents evidencing title to land offered to tenants in the Housing (Statutory and Improvement) Areas, and those offered to land owners under State land are also different. A leasehold title to land under State land is called a Certificate of title issued under the hand and seal of the Registrar of Lands and Deeds, while Council Certificates of title, Land Record Cards and Occupancy Licences are issued under the Housing (Statutory and Improvement) Areas

³⁷⁵ Chapter 184 of the Laws of Zambia

³⁷⁶ Chapter 193 of the Laws of Zambia

by the Council Registrar

- (iv) The institutions involved in land alienation in either category are also different. The Ministry of Lands has the overall mandate to alienate land under State land while the mandate to alienate land under the Housing (Statutory and Improvement) Areas lies with each Local Authority concerned.

When an unplanned settlement has emerged and later on declared as an Improvement area, orderly development is usually difficult to achieve. According to the Assistant Director for City Planning for Lusaka City Council,

“.....one of the hurdles faced under the Housing, Statutory and Improvement Areas is that boundaries of the plots are difficult to locate. This is because there is no strict adherence to survey rules and the plots in these areas are not surveyed. The Act also does not provide for planning permission, therefore the development of the city is distorted.”³⁷⁷

Under this category of land, there are many political cadres and political party officials who play a potent role in land alienation although the Act does not recognise them. As observed in Lusaka, the Assistant Director of City Planning, Lusaka City Council stated that, “Creating plots has proved to be difficult

³⁷⁷ Personal interview with Ms Nina Nkhuwa, Assistant Director of City Planning, Lusaka City Council, Civic Centre, Lusaka 5th December 2008

because of political leadership in some areas, as party cadres have taken over control of the allocation of the plots.’’³⁷⁸

Now, considering that the country has been independent for more than 45 years, it is the writer’s view that it is not desirable for different practices, laws and institutions to govern land alienation within this category of land in urban areas. In other words, it is not prudent to encourage the mushrooming of unplanned settlements in State land and upgrade them later. The dangers eminent in these areas which include perennial occurrence of water-borne diseases such as cholera are as a result of lack of planning and due to the manner in which houses are built in these areas.

(c) Legal Framework

The law that governs the aspect of land alienation in State land is contained in several statutes. Currently, there are not less than ten statutes that have a bearing, directly or indirectly, on the system of land alienation in Zambia.³⁷⁹ This state of

³⁷⁸ Personal interview with Ms Nina Nkhuwa, Assistant Director of City Planning, Lusaka City Council, Civic Centre, Lusaka 5th December 2008

³⁷⁹ The laws with relevance to land alienation in Zambia include the Lands Act, Chapter 184 of the Laws of Zambia; the Land Survey Act, Chapter 188 of the Laws of Zambia; the Lands and Deeds

affairs in which there are many statutes dealing with land alienation is not desirable and makes the system inefficient and ineffective. For instance, in relation to agricultural land, the Lands Act, the Agricultural Lands Act and the Land Circular No. 1 of 1985, all make reference to the alienation of agricultural land in Zambia. But even when one reads all these statutes, the procedure for acquiring this land is not clear. This situation creates uncertainty in the minds of the people and the institutions responsible for land alienation.

There have been no major changes in legislative developments in land alienation since the advent of colonial rule and the little changes that have been effected are ad hoc in nature, usually implemented in response to urgent situations.³⁸⁰ After independence, the enactment of the Lands Acquisition Act³⁸¹, the Land (Conversion of Titles) Act,³⁸² and the Lands Act, has not adequately addressed the challenges associated with land alienation in the country.

Registry Act, Chapter 185 of the Laws of Zambia; the Agricultural Lands Act, Chapter 187 of the Laws of Zambia; the Forestry Act, Chapter 199 of the Laws of Zambia; the Zambia Wildlife Authority Act, Act No. 12 of 1998; the Housing (Statutory and Improvement Areas) Act, Chapter 194 of the Laws of Zambia; and the Town and Country Planning Act, Chapter 283 of the Laws of Zambia.

³⁸⁰ Commissions such as the East Luangwa District and the Tanganyika District illustrate this point

³⁸¹ Chapter 189 of the Laws of Zambia

³⁸² Chapter 289 of the Laws of Zambia, 1972 edition (repealed)

These statutes do not provide statutory procedures in land alienation. Further, the criteria for selecting applicants for land is not defined or provided for under the Lands Act or any other statute for that matter. This leaves the Commissioner of Lands with wide discretionary powers to determine the suitability and capacity of land applicants.

Circular No. 1 of 1985, though not a statute or statutory instrument, provides guidelines to local authorities on the process of land alienation. Under this Circular, after the local authority has identified land, it is required to advertise and invite members of the public to apply for the land. The Circular also provides that the Council may advertise the planned plots inviting prospective developers to apply for land to the Council in the area concerned.³⁸³

After interviewing the applicants, the local authority concerned proceeds to select the most suitable applicant for the grants. The list of selected applicants and their full particulars together with recommendations by the local authority are then forwarded to the Commissioner of Lands for approval.

³⁸³ Ibid.

There is a requirement under the Circular³⁸⁴ that the Commissioner of Lands should be satisfied that the approved layout plans are in order, and that the land is available. Under the Town and Country Planning Act,³⁸⁵ however, any inquiry into techniques of physical planning is the role of the Minister responsible for Local Government and Housing or the Director of Physical Planning in the same Ministry. The role of the Commissioner of Lands is merely to check the records in the folios and ascertain whether encroachments would result if he proceeded to number the plots. The Commissioner of Lands is by law not required to inquire into the technicalities of planning, but merely to make land available and leave the aspect of planning to the City Councils, Municipal Councils and Provincial Planning Authorities³⁸⁶. This scenario is undoubtedly a serious lapse in the system of land alienation in that the Commissioner of Lands should have a responsibility to ensure that the land being alienated is properly planned and alienated for the intended purpose.

When land has been identified, planned, numbered and surveyed, local authorities are required to provide services such as roads and water. The Circular

³⁸⁴ Land Circular No. 1 of 1985

³⁸⁵ Chapter 283 of the Laws of Zambia

³⁸⁶ Section 5 of the Town and Country Planning Act

provides that stands have to be fully serviced by the Council concerned. If the stands are not serviced, the District Council is supposed to give reasons to the applicants of its inability to provide the necessary services before any recommendations for allocation can be considered by the Commissioner of Lands.³⁸⁷ The requirement for provision of services by local authorities is premised on the assumption that Councils have sufficient resources or can collect service charges to finance the exercise. In practice, however, plots are allocated to applicants and they pay service charges as demanded by Councils but in most cases the required services are never provided. Most local authorities in the country do not in fact have the technical capacity to provide services in their localities.

The absence of any provision for procedure in the Lands Act, or any subsidiary legislation has made institutions dealing with land alienation to continue relying on Land Circular No. 1 of 1985 for guidelines on alienation. However, this Circular is merely an administrative document on procedures for land alienation with no force of law, and does not bind the Commissioner of Lands as illustrated

³⁸⁷ Land Circular No. 1 of 1985

by the Supreme Court in the case of **Yengwe Farms Limited v. Masstock Zambia Limited, the Commisioner of Lands and the Attorney General**³⁸⁸

What is required, therefore, is an amendment of the current land laws so that the procedure for land alienation can be clearly provided for. In this regard, some of the provisions of the Circular can be incorporated into legislation so that the relevant provisions are given the force of law.

The absence of clear conditions or qualifications to be considered by local authorities when selecting successful applicants for land has led to local authorities applying different terms and conditions to be satisfied by the applicants for land. The tests applied are therefore likely to be subjective in that a council can recommend any person it considers appropriate since there are no conditions or criteria stated in the Lands Act or the Circular on land alienation.

The subjectivity of the Circular is noted by a Kitwe City Council town clerk who states that:

³⁸⁸ (1999) Z.R. 65

“There are no written rules or regulations by which the Council is guided when considering applications for land. Although we have Circular No. 1 of 1985 in place, it is very difficult to adhere to it in practice, because its provisions are not practical. Each application is determined on its own merits though the Council tries as much as possible to be objective in making recommendations to the Commissioner of Lands.”³⁸⁹

Simwinga further notes that:

“There are also instances where the President directs a Council to allocate land to specific individuals and when that happens, the local authority has no option but to alienate land as directed. For instance, in 2008, the President of the Republic of Zambia directed Kitwe City Council to alienate 30 hectares of land to NFC Metals, a Chinese Investment Company in Kitwe. The Council proceeded to do so despite some resistance from councillors. In circumstances of this nature, the Circular No. 1 of 1985 is not applied.”³⁹⁰

In confirming that there is no written procedure in land alienation by which local authorities are bound, the Town Clerk of Kabwe, agrees with Simwinga and states that:

“The Council does not religiously follow the provisions of the Circular because if it did so, there would be unnecessary delays and most investors would not be interested to wait for the Council to advertise land, call for an interview and make recommendations to the Commissioner of Lands, which may take several months.”³⁹¹

³⁸⁹ Personal interview with Mr. A.D. Simwinga, Town Clerk, Kitwe City Council, Civic Centre, Kitwe Friday, 26th December 2008.

³⁹⁰ Personal interview with Mr. A.D. Simwinga, Town Clerk, Kitwe City Council, Civic Centre, Kitwe Friday, 26th December 2008.

³⁹¹ Personal interview with Ms. Vivian Chiwila Chikoti, Town Clerk, Kabwe Municipality Council, Civic Center Kabwe Thursday, 18th December 2008

There are some uncertainties in the procedures of land alienation; first, the Circular states that the Council 'may advertise' the stands. The Circular does not state what the other means of selecting applicants could be since advertising is not mandatory. Secondly, the Circular states that the local authority would select the 'most suitable applicants.' The conditions or factors to be taken into account in arriving at the 'most suitable applicants' are not stipulated or outlined in the Circular, or any statute or regulation for that purpose.

In practice, a suitable applicant is one who would prove before the Council or the Ministry of Lands that he has the capacity and ability to own land and develop it. This is done by the applicant coming for interviews with his identity card (National Registration Card or Passport) and a bank statement showing his financial capacity to develop the allocated land. These requirements are not provided for under any law and the practice is merely administrative.

It has also been noted that statutes governing land alienation are not comprehensive and do not address all the needs in land administration. In view of this, it is recommended that a comprehensive review, harmonisation and

updating of the various land-related laws is done in order to provide a clear regulatory framework for policy implementation.

(d) Institutional Framework

An evaluation of institutions involved in land alienation reveals that there are several institutions that play important roles in the process of land alienation. Each of these institutions plays a critical role in implementing various functions of land administration in their departments.

One of the institutions that plays a significant role in land alienation is the Ministry of Lands. As noted earlier in Chapter 2, there is no statute in place defining the authority, jurisdiction and powers of the Commissioner of Lands. The establishment and functions of the Commissioner of Lands are derived from Statutory Instrument No. 7 of 1964, which was revoked and replaced by Statutory Instrument No. 4 of 1989. In view of this lacuna in the law, the Mung'omba Constitution Review Commission proposed the establishment of a Lands Commission whose functions would include the holding, alienating and

management of any land in Zambia.³⁹² The Commission further recommended the re-establishment of the Office of the Commissioner of Lands which should carry out the functions of the office under the supervision of the Lands Commission. The Commission was of the view that the Commissioner of Lands should not be responsible for the approval and allocation of land because it is too vast a function to be discharged by an individual.³⁹³

In its reaction to the Constitutional Review Report, the Committee of the National Constitutional Conference (NCC) on Lands and Environment rejected the recommendation to establish a Lands Commission on the grounds that the Lands Commission will be too bureaucratic and costly thereby making land alienation even more inefficient and ineffective. The Committee instead adopted the establishment of the Office of the Commissioner of Lands as a constitutional office with functions and powers to be prescribed under an Act of Parliament. It is hoped therefore that the Office of the Commissioner of Lands shall be formally established in a manner and style that would make it function properly and effectively.

³⁹² The Mung'omba Constitutional Review Commission, 2004, Government Printer, Lusaka p.780

³⁹³ Government of the Republic of Zambia Interim Report of the Constitutional Review Commission 2005 p.779

The other challenge faced by the Ministry of Lands in the land alienation process is linked to the lack of qualified personnel. Due to shortage of trained staff, the Ministry of Lands is unable to provide surveys timely. The inability to provide surveys efficiently is a major bottleneck in the land alienation system because for land to be registered, it must be surveyed first. To overcome this problem, the Ministry of Lands has adopted the issuance of 14 year leases in certain circumstances, for which it requires only a sketch plan instead of a survey diagram for a certificate of title to be issued. The effect of issuing title on a 14 year Lease is that the Certificate of title issued is provisional.

In addition to the Ministry of Lands, other institutions that play a role in the process of land alienation are local authorities. These institutions include District, Municipal and City Councils which have been given delegated authority to discharge land alienation functions on behalf of the Commissioner of Lands. The first hurdle faced by this arrangement is that by establishment, local authorities fall under the Ministry responsible for Local Government and Housing and not the Ministry of Lands. This makes it difficult for the Ministry of Lands to supervise local authorities. Thus, in the event that local authorities committed a

breach, there would be no direct sanctions from the Ministry of Lands. The sanctions can only be taken by the Minister responsible for local government on behalf of the Ministry of Lands under the circumstances.

In practice, the Ministry of Lands has been taking sanctions against local authorities when found at fault by suspending them from administering land or making recommendations to the Commissioner of Lands in their respective localities. This measure by the Minister of Lands is however, not legally provided for under any statute, statutory instrument or regulation. The agency relationship is based on the fact that the Ministry of Lands has no institutional structure at District level and therefore, local authorities act on its behalf. To curtail political whims and caprices, it is necessary that the regulatory and supervisory functions of local authorities by the Minister of Lands are provided for by law.

Another factor contributing to the failure by local authorities to alienate land efficiently and effectively can be attributed to the lack of resources and qualified personnel to effectively deal with issues of land identification, physical planning and survey. This ultimately leads to inefficiency in the land delivery system.

The function of physical planning is one important aspect that requires urgent redress. It is acknowledged that for the orderly alienation of land to be enhanced, physical planning and surveying are prerequisite functions of land alienation. It is important therefore, that these functions are coordinated under one institution to ensure the timely planning and survey of new areas. The department of Physical Planning, Provincial Planning Authorities, the Agricultural Land Use and Technical Services Unit in the Ministry of Agriculture and the Planning section in the Department of Resettlement in the Office of the Vice-President are all engaged in planning. However, there is no statute that governs planning aspects and therefore, there is no coordination among these institutions.

Legal and Institutional Framework under Customary Tenure

(a) The status of customary tenure

We noted under Chapter 4 that customary tenure is recognised under section 7 of the Lands Act. It has also been established in the preceding chapters that the greater part of land in Zambia is held under customary tenure. However, there are some critics of customary tenure who argue that customary tenure is

inadequate in various respects and would be better replaced by leasehold tenure. This appears to be the driving force in the provision of the law allowing customary tenure to be converted to leasehold.³⁹⁴ Since the enactment of the Lands Act of 1995, there has been an increase in the number of people who intend to acquire land under customary tenure and later convert it to leasehold.

There are however, some challenges faced in the alienation of customary land. One of the challenges faced under customary tenure relates to security of occupation. It has been emphasised under the law that customary tenure *per se* gives an occupier full security and recognition of his rights as enshrined under section 7 of the Lands Act. Specifically, subsection (1) of section 7 provides that;

“.....every piece of land in a customary area which immediately before the commencement of this Act was vested in or held by any person under customary tenure shall continue to be so held and recognised and any provision of this Act or any other law shall not be so construed as to infringe any customary right enjoyed by that person before the commencement of this Act.”

Subsection (2) of section 7 further assures that;

“..... the rights and privileges of any person to hold land under customary tenure shall be recognised and any such holding under the customary law applicable to the area in which a person has settled or

³⁹⁴ Section 8 of the Lands Act, Chapter 184 of the Laws of Zambia

intends to settle shall not be construed as an infringement of any provision of this Act or any other law except for a right or obligation which may arise under any other law.”

However, despite having an assurance under the Lands Act that persons occupying or using land under customary tenure will continue to do so, it was the writer’s observation during his tenure of office as Commissioner of Lands that some customary land holders had been caused to move without their consent from the lands they had occupied in order to pave way for others, usually purported investors. Perhaps, the effect of displacements could be avoided if there is strict adherence to the law. Under section 3(4) of the Lands Act, it is provided that:

“Notwithstanding subsection (3), the President shall not alienate any land situated in a district or an area where land is held under customary tenure-

- (a) without taking into consideration the local customary law on land tenure which is not in conflict with this 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 area, and the Director of National Parks and Wildlife Service, 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 whose area the land is situated.

The preceding provisions entail that the President is not supposed to alienate any land situated in or held under customary tenure without taking into consideration the local customary law on land tenure which is not in conflict with the Lands Act. It is also mandatory that the President consults the Chief and the local authority in the area in which the land to be alienated is situated. Furthermore, any other person or body whose interest might be affected by the grant must also be consulted. It is also a legal requirement that an applicant for a leasehold title must obtain the prior approval of the chief and the local authority within whose area the land is situated.

The law as cited in the preceding sections appears sound but there is one weakness with regard to formalities. The statutory forms used in the process of converting customary land to leasehold (as shown in the Appendix) do not include particulars demonstrating whether any other person or body, whose interest might be affected by the grant, was consulted. This omission in the law can render the whole process not to be transparent in effectively guaranteeing

the rights and interests of customary land holders since this is not brought to the attention of the Ministry of Lands at the time of granting the land by the Commissioner of Lands. This can however be modified by statutory provisions requiring that these rights be registered in some register at the village level and the details must be provided when filling in some statutory form and thereby bringing it to the attention of the Ministry of Lands through the Provincial Lands Officers.

The other problem identified in the administration of customary land is that the law has ignored the formal acquisition of land through transfers. It has become common for people to get land through transfers from existing land holders in customary areas. There is a huge demand for land in customary areas, and the process of acquiring land through the Chief and the local authorities no longer seem to be effective especially around Lusaka, Copperbelt and areas along the line of rail. Both the Lands Act,³⁹⁵ and the Lands and Deeds Registry Act,³⁹⁶ do not make provision for conveying, assigning or transferring customary land.

³⁹⁵ Chapter 184 of the Laws of Zambia

³⁹⁶ Chapter 185 of the Laws of Zambia

During the writer's tenure of office as Commissioner of Lands, he observed that there were a lot of land transactions that had taken place on customary land for which there was no documentary proof that a person in possession or who sold land has rights in respect of the same. Further, in the absence of survey diagrams, there is no certainty as to the boundaries of the subject land. The simple and comprehensive solution to these problems is by means of a system of registration of title backed by survey diagrams. The title thus registered would be the interests and rights under customary tenure which would be converted to leasehold tenure.

As an option to converting land from customary to leasehold, it may be essential that some land use plan is introduced within some selected areas falling under customary tenure. In such areas, the implementation of a land use plan could be accompanied by the survey of holdings and adjudication and registration of granted rights. The possibility of registering these as leaseholds to replace customary rights would furnish a further means of ensuring the proper development of the land use plan.³⁹⁷ This could be the surest way of improving

³⁹⁷ These are some measures that form the basis for establishing farming blocks such as Nansanga farming block in Serenje in the Central Province

land use as opposed to advocating for the wholesome conversion of customary tenure to leasehold, which most chiefs are currently opposed to.

It should be noted however, that the process of registering land rights under customary tenure was attempted under the Native Reserves and Trust land (Adjudication and Titles) Ordinance.³⁹⁸ As explained in Chapter 4, the intention of the government at that time was to allow individuals who desired to convert their land rights in Native Reserves and Trust land to Crown lands to do so through legislation. The process under the Native Reserves and Trust land (Adjudication and Titles) Ordinance was not successful because there was no demand for the registration and conversion of land rights from customary to statutory tenure in the Reserves at that time. However, circumstances have since changed and the demand for registration of land rights under customary tenure is inevitable. The principle of registering customary land rights as anticipated under the repealed Native Reserves and Trust land (Adjudication and Titles)

³⁹⁸ The Native Reserves and Native Trust land (Adjudication and Titles) Ordinance, Act No. 32 of 1962

Ordinance,³⁹⁹ should be revisited as it has the potential to resolve the many challenges being faced in the acquisition of land rights under customary land.

It is the writer's opinion that currently, customary tenure does not afford the security of title or the facilities which a modern economic society requires if it is to function effectively. The needs of physical planning, survey and land registration cannot be overemphasised in the effective alienation of customary land. Customary tenure may satisfy the needs of a subsistence economy in an under populated country, but pressure of population growth, as seen lately in urban areas, will reduce its effectiveness. The population of the country is growing and the idea that every adult man should have a piece of land upon which to grow food and put some infrastructure on his or her land should take into account the need to increase leasehold land.

The categorisation of land into customary land and State land has continued to create an imbalance in terms of land and infrastructure development between the two categories of land. In as much as there is a high demand for land under State

³⁹⁹ The Native Reserves and Native Trust land (Adjudication and Titles) Ordinance, Act No. 32 of 1962

land, more land should be carved out of customary tenure and converted to leasehold. This fact therefore calls for the immediate reform of the land tenure system, as it is not only cumbersome, but must also change with the current demands and existing circumstances. The present statutory law has not addressed the increasing demand for land and the problem of dual land tenure system.

(b) The institution of Chief

It is well established that all land in Zambia is vested in the President. However, for land under customary tenure, headmen or Chiefs play a very significant role in land alienation. As noted earlier,⁴⁰⁰ when alienating customary land, headmen and chiefs play an important role of ensuring that the land in their localities is administered for the benefit of their subjects. The chiefs and headmen have authority to administer the unwritten customary law based on their respective tribal customs and traditions. As we observed earlier, the specific powers and authority of chiefs in land matters are not defined under the Lands Act, save for instances when one intends to convert land from customary to leasehold tenure.

⁴⁰⁰ Under chapter 4 of this study

The institution of chief is established pursuant to the Chiefs Act,⁴⁰¹ which provides for the chiefs' functions as follows:

“Subject to the provisions of this section, a chief shall discharge-

- (a) the traditional functions of his office under African customary law in so far as the discharge of such functions is not contrary to the Constitution or any written law and is not repugnant to natural justice or morality; and
- (b) such functions as may be conferred or imposed upon him by this Act or by or under any other written law.”⁴⁰²

Arising from the above, the chiefs' role is restricted to perform his or her functions under customary law in so far as such is not contrary to the Constitution or any other written law.⁴⁰³ However, under the Lands Act, chiefs have a statutory role to play by giving consent to the conversion of customary tenure to leasehold tenure.⁴⁰⁴

Considering the mammoth task bestowed on the chiefs in the administration of land, there are however, no institutional structures at village level to constitute either committees or boards that may consider applications for land. Therefore, a

⁴⁰¹ Chapter 287 of the Laws of Zambia

⁴⁰² Ibid., Section 10(1)

⁴⁰³ section 10(1)(a) of the Chiefs Act

⁴⁰⁴ Section 3(4) and section 8 of the Lands Act, Chapter 184 of the Laws of Zambia

chief alone can validly make recommendations for allocation of land. This poses a serious threat to principles of transparency and accountability.

The limitation of the chief's functions and powers in the alienation of land is justified for a number of reasons. Modern land administration techniques demand that land administrators are trained in aspects of physical planning, land use, zoning, surveying and land registration skills. Most chiefs do not possess these qualifications. Further, the concept of individual title to land in most customary areas is challengeable and most chiefs are reluctant to effectively participate in the alienation and conversion of land from customary tenure to leasehold.

The relationship between the Chief and the President, however, is that whereas the Chief's recommendation is crucial, such recommendation is subject to the approval of the Commissioner of Lands. This is so because even where the Chief has recommended alienation of land in a customary area, and forwards such recommendation to the Commissioner of Lands, the latter is not bound to approve the Chief's recommendation.

(c) Local authorities

Local authorities are involved in the alienation of land in both State land and customary land. In relation to customary land, the Lands Act places emphasis on the President to consult local authorities whenever the President alienates land in a customary area.⁴⁰⁵ This means that in circumstances where land is held and managed in a customary manner, local authorities do not get involved. They only get involved when a person holding land under customary tenure intends to convert it to leasehold.

The involvement of local authorities in the alienation of customary land is justified on the basis of the procedure on conversion of customary tenure into leasehold tenure. The procedure is that any person who has a right to the use and occupation of land under customary tenure may apply, to the Chief of the area where the land is situated, for the conversion of such holding into leasehold tenure. The local authority receives a form from the chief indicating that the chief has consented to the conversion. The local authority is then required to consider whether or not there is a conflict between customary law of that area

⁴⁰⁵ Section 3(4)(b) and (d) of the Lands Act, chapter 184 of the Laws of Zambia

and the Act before making a recommendation to the Commissioner of Lands. It is the duty of the council to ascertain any family or communal interests or rights relating to the parcel of land to be converted and specify any interests or rights subject to which a grant of leasehold tenure will be made before making a recommendation to the Commissioner of Lands.

It is important to note that although the Lands Act has recognised the local authorities in the conversion of customary land to leasehold, the functions of preparing Site Plans, Sketch Plans, and land identification are performed by the Department of Land Use in the Ministry of Agriculture and Cooperatives in conjunction with Provincial Planning Authorities. The vast parcels of land in the country fall under the jurisdiction of District councils. Under the law⁴⁰⁶ District councils are not planning authorities hence, the involvement of the Provincial Planning Authorities.

The local authorities' capacity to effectively participate in land alienation is further hampered by lack of human resources to carry out the functions. Most

⁴⁰⁶ District Councils are not planning authorities. See schedule of planning authorities under the Town and Country Planning Act, Chapter 283 of the Laws of Zambia

District councils are located very far from the Survey Department in Lusaka. This makes it difficult for the local authorities to consult survey records kept at the Survey Department in Lusaka on the availability of land to be alienated. Yet, it is a legal requirement that, “every general plan or diagram submitted for approval shall be prepared in accordance with the requirements prescribed, and the numerical and other data recorded thereon shall be within the prescribed limits of consistency.”⁴⁰⁷ For this consistency to be attained, the need to have qualified staff cannot be overemphasised.

(d) Zambia Wildlife Authority

The alienation of land in National Parks and Game Management Areas is equally well regulated by the Zambia Wildlife Act,⁴⁰⁸ as discussed under Chapter 4. However, there is a problem of institutional coordination in the alienation of land in Game Management Areas. This is largely caused by the fact that Game Management Areas are situated in customary areas and therefore, conflicts between villagers, Chiefs and the Zambia Wildlife Authority often arise. Local authorities also face difficulties in the course of performing land alienation

⁴⁰⁷ Section 31 of the and Survey Act, Chapter 188 of the Laws of Zambia

⁴⁰⁸ Act No. 12 of 1998

functions in Game Management Areas, because the governing statutes clearly state that the management of Game Management Areas is a preserve of the Zambia Wildlife Authority. The occupiers of land in these areas, however, look up to the local authorities to provide all social services to them.

Again, the law is silent on how to resolve problems of land alienation where the interests of the villagers, the District Council, the chiefs and the Zambia Wildlife Authority are at variance. One such case in the Mambwe District of Eastern Province can illustrate this problem. When the writer visited Mambwe District during his tenure of office as Commissioner of Lands, it was revealed that very little progress has been made in land alienation in the district because of lack of clarity as to the jurisdiction and powers of chiefs, the local authority, and the Zambia wildlife authority. There are also uncertainties regarding the boundaries of State land, Customary land and Game Management Areas. During the meeting held at the Mambwe District Council offices, it was learnt that most of the land in Mambwe District lies in a Game Management Area bordering Luangwa National Park which is managed by the Zambia Wildlife Authority. There are also several Chiefs in the area who administer the same land, and contend that

the land in this area is customary land. The District Council is also expected to alienate the same land to applicants. It was learnt that each time the District Council attempted to create stands for allocation, it faced opposition from the other institutions. The Chiefs also complain that the Zambia Wildlife Authority has been encroaching in their areas. As a result of these misunderstandings, land alienation is slow and development is hindered.⁴⁰⁹

Nevertheless, the Lands Act,⁴¹⁰ and the Zambia Wildlife Act,⁴¹¹ require that whenever land is being alienated and converted to leasehold tenure in Game Management Areas, the Director General of the Zambia Wildlife Authority, Chiefs, and the local authorities concerned or the people who have occupied land in these areas should be consulted. This approach is legally sound but it has not addressed the problem where these various interests are in conflict, and which interest should prevail.

⁴⁰⁹ ⁴⁰⁹ Personal visit as Commissioner of Lands to Mambwe District 8th August, 2006

⁴¹⁰ Section 8(2) of the Lands Act, Chapter 184 of the Laws of Zambia

⁴¹¹ The Zambia Wildlife Act, Act No. 12 of 1998

(e) The Department of Forestry

The Forests Act⁴¹² adequately covers the conditions of alienation of land in a forest reserve. Forest reserves are also areas created and regulated by statute. Once land is declared as a Forest reserve, the Commissioner of Lands cannot alienate or administer any part of the land without the consent of the Conservator of Forests. If the Commissioner of Lands purports to alienate any part of a Forest without the consent of the Conservator, such an action will be void.⁴¹³

Again, since the country has only two systems of land tenure, it is presumed that Forests fall under State land. This argument is often disputed by some Chiefs. For instance, during the writer's visit as Commissioner of lands to Chief Chipeco's area in the Central Province,⁴¹⁴ the Chief explained that his chiefdom was experiencing some shortage of land and that he had directed some of his subjects to occupy some fertile land in the forest reserve bordering his chiefdom.

⁴¹² Chapter 199 of the Laws of Zambia

⁴¹³ **Robert Chimambo, Rhidah Mung'omba and Adam Pope v. Commissioner of Lands, Safari International Zambia Limited, Environmental Council of Zambia and Fingus Limited**, (2008) Z.R. 1

⁴¹⁴ Personal visit as Commissioner of Lands to Chief Chipeco's Palace in Kapiri Mposhi District 20th May, 2006

When advised to liaise with the Department of Forestry, he contended that he would not do so because his royal influence transcended beyond all areas in the District including the land reserved as a forest. It was the chief's position that since forest reserves were originally land under his jurisdiction and lay in close proximity to customary areas, a chief should have a say on how to manage land in these areas.

This is a clear indication that various institutions and persons interested in the occupation, use and management of forests should coordinate and the law should clearly stipulate the functions, jurisdiction and interests of the institutions involved in land alienation.

(f) Office of the Vice President

The institutional structure in the administration of Resettlement Schemes poses several challenges. The major challenge relates to the establishment of the Department of Resettlement itself. The Office of Vice President, where the Department is established, is ill-equipped to perform land alienation functions. This role was originally designed to be carried out by the Ministry of Lands.

There is therefore a misplacement of Ministerial functions between the Ministry of Lands and the Department of Resettlement in the Office of the Vice President, thereby contributing to the inefficient and ineffective delivery of land. As we have noted in chapter 5, the category of land for Resettlement is not a creature of statute. Further, most resettlement schemes are established in customary areas. However, the question of determining whether land under Resettlement schemes becomes State land, or remains customary land or becomes a hybrid category has been raised by some chiefs.

For instance, the government obtained the Chief's consent to establish the Kanyenshya Resettlement Scheme in Central Province in the late 1980s, and the land on which people would settle was identified. The land was then planned by the Department of Resttlement. Later, Officers from the Department of Resettlement went to the area to interview people in order to allocate the land. However, by the time this was happening, there was a new Chief in the area who refused to recognise and abide by his predecessor's decision to release the identified land for resettlement. The chief instead advised the Department of Resettlement not to go ahead with the interviews and allocation because it did

not have his blessing. The Officers from the Department of Resettlement attempted to go ahead with the interviews in 2006, but they were sent away by the chief.⁴¹⁵

In practice, institutions such as Provincial Planning Authorities, and the Department of Resettlement in the Office of the Vice President believe that land under Resettlements is State land, while most chiefs contend that it is customary land. This problem can only be resolved by clearly defining the status of land under resettlement by statute in order to avoid possible disputes with regard to land tenure and land alienation in these areas.

Problems of institutional coordination

The problems in the system of land alienation in Zambia can be attributed largely to institutional failure to plan and alienate land efficiently. The institutions responsible for implementing the various functions of land alienation are many and there is inadequate co-ordination among them and their line Ministries.⁴¹⁶

Institutions operate within their statutory framework, and often without much

⁴¹⁵ Personal interview with Mr. Harry Mwewa, Provincial Lands Officer, Central Province, Kabwe, on 12th December 2006.

⁴¹⁶ Roth, M (ed.) **Land tenure, land markets and institutional transformation in Zambia**, Madison, opt. cit, p.24

co-ordination and co-operation and often with overlapping powers, functions, and jurisdiction. There is therefore need to restructure the different institutions and departments responsible for land alienation in order to have an efficient land alienation system. There is also need to clarify the roles and responsibilities amongst the institutions involved in the land alienation process and policy.

There are also various pieces of legislation dealing with land matters. The problem of land legislation is that it is a colonial remnant which introduced land related laws in a piecemeal fashion. The categorisation of land into customary and crown land also ensured that different laws were applied in these areas. To this day, the country does not have comprehensive human settlement and land development legislation. Numerous piecemeal statutes attempt to regulate the acquisition⁴¹⁷, development and use of land under leasehold tenure. The statutes in place neither serve the present needs nor respond to changing conditions.

It is for this reason that land use and development under customary tenure is almost unregulated. There is therefore need to bring all land related statutes up

⁴¹⁷ The Lands Act, Chapter 184 of the Laws of Zambia

to date and make them relevant and responsive to the problems being faced in land alienation.

Having analysed the system of alienation of land in the country, it is evident that an efficient and orderly alienation of land is required under a well-structured legal and institutional framework. This will ensure that land is properly planned, surveyed, alienated and registered. Considering that most of the land under State land has been alienated, there is need to open up more customary land to development ventures.

CHAPTER 8

CONCLUSIONS AND RECOMMENDATIONS

The conclusion of this dissertation is on the need to have an efficient and effective legal and institutional framework within which a land alienation system would promote people's access to land. It has been established in this study that a number of challenges ranging from land tenure, legal and institutional framework and administrative problems hinder the effective alienation of land in the country.

This study has revealed under Chapter One that the introduction of the dual land tenure system in the Territory by the colonial administration has continued to be a colonial legacy. The colonial administration categorised land into Crown land and Reserves so that the white settlers could live separately from the natives. Land under Reserves, now customary land, has not received adequate attention in terms of infrastructural development since independence. There is need to adapt to the changes in the political, social and economic trends in the country so that people can access land anywhere in the country without hindrance.

It has been observed in Chapter Two that the category of land known as State land that had originally been established for the white settler population is no longer enough to cater for the Zambian urban population. By design, this category of land was to accommodate white settlers who were very few in number. Currently, one of the challenges with respect to land alienation under State land is that there is apparently very little land left as most of the land in the country falls under customary tenure. With the current increasing demand for land for development in State land, measures such as converting more land from customary tenure to leasehold tenure as provided under the Lands Act, should be encouraged so that more land is brought under statutory law.

It has been observed that in ensuring that land alienation is improved, there is need to address the problems associated with the legal framework. It has been observed in this study that there are many pieces of legislation dealing with different aspects of land which potentially have become difficult to manage. It is recommended that various land related statutes should be consolidated into one Land Administration Act so that all aspects of land alienation processes and procedures are regulated under one statute. Thus, the problems in the current

legislative situation where land administration issues are found in several different statutes will no longer be a factor affecting the efficient and effective alienation of land in Zambia.

This study has also revealed under Chapter Three that failure to make land available to land applicants under State land has exacerbated the emergence of unplanned settlements. This has been caused by lengthy, bureaucratic and cumbersome procedures involved in land alienation. People opt to occupy land without authority or through political party chairmen and cadres. In this regard, there is need for the government to formulate a policy that encourages persons wishing to acquire land to do so in serviced areas after following proper procedures and guidelines.

It has been established in this study that the administration of land under the Housing (Statutory and Improvement) Areas in its current state is not likely to positively address the system of land alienation and housing problems in the country. The planning and survey aspects are not given priority and the orderly development of land in these areas is unlikely. There is therefore a need to

harmonise this category of land with State land in order to ensure that the laws relating to land holding guarantee security of tenure to all. There is also need to enact one Land Administration Act, that could be applied uniformly to all categories of land and conform to the practical realities of the present day.

It has been noted under Chapter Four that although customary tenure is a recognised form of land holding, there has been no legal machinery in place to administer it. The traditional chiefs countrywide have therefore assumed the role of custodians of this land with some even contending that the land is vested in them. This view is conceptually wrong as all land in Zambia is vested in the President. Further, it has been revealed that some traditional chiefs have been reluctant to release land for developmental purposes. One of the fears expressed by the Chiefs is that alienation of land to non-members of their communities may lead to displacements. This, however, is addressed by the legal requirement under the Lands Act that a person who has acquired an interest in the land, or has settled on land held under customary tenure, shall not be displaced. It is recommended that State land should be increased by carving out some land from customary land.

The option of increasing State land lies in the identification and creation of land reserves for commercial and investment development in customary areas where both local and foreign investors would have efficient and effective access to land. Customary tenure therefore requires reform in order to make the institutional and legal structure in these areas conducive for easy accessibility of land by all Zambians. There should be a government policy to protect the rights of persons on land that is already occupied within the provisions of the law. For land which is unoccupied, the Government, in consultation with chiefs, should create and protect special areas which should be set aside for development in chiefdoms. It is further recommended that introducing land registration in customary areas, though costly, may be another way of protecting customary land rights, and investment in customary areas.

It has been observed under Chapter Five that statutory reserves play a significant role in the preservation of natural resources such as forests and wildlife. It has been observed however, that the administration of statutory reserves faces a number of institutional and legal challenges due to lack of clarity as to the powers and jurisdiction of institutions administering land under the statutory

reserves. There is need for corroboration and coordination among institutions dealing with land administration in these areas. Another clear way of addressing the challenges is to restructure departments such as the Department of resettlement, and take its functions to the Ministry of Lands, and clearly provide under statute, the powers and jurisdiction of chiefs, local authorities and the Zambia wildlife Authority in land alienation under Game Management Areas.

It has further been revealed under Chapter Six that registration of land that has been alienated is a very important aspect as it assures and guarantees security of tenure. Considering that land registration is centralised and limited to State land in most instances, it is recommended that land registration is extended to areas reserved for development in both State land and customary areas. This entails that more land registries should be established in the country.

Chapter Seven discussed a number of challenges in the land alienation system. One of them is the lack of co-ordination amongst the various institutions involved in the land alienation process. It has been noted that serious challenges in the system of land alienation exist. This study has revealed that it is not

desirable to have many institutions dealing with land other than the Ministry of Lands, which by law, is mandated to administer land in the country. One of the many challenges facing the institutional framework is that there are many institutions dealing with land alienation in different categories of land. These institutions have been noted to have no clear guidelines on what their respective roles are, thereby leading to lack of effective co-ordination among them. Further, it has been established that there is inadequate institutional, administrative and technical capacity among the institutions dealing with land alienation.

It is recommended that one plausible way to alleviate this problem is by restructuring the institutions involved in land administration and transfer all land administration functions to one institution, being the Ministry of Lands. This would enable one institution to deal with functions of physical planning, survey, valuation, land allocation, resettlement and title registration. This in itself will streamline and simplify the system for allocation of land as it will reduce the number of authorities involved in land alienation, and make the system more accessible, coherent and efficient.

In addition to institutional reform, there should be a comprehensive review, harmonisation and updating of the various land-related laws in order to provide a clear regulatory framework for policy implementation.

In conclusion, it is submitted that in order to address the challenges discussed in this dissertation, a National Land Policy should be formulated. This will provide guidance on how land shall be alienated. This would remove historical imbalances, address land tenure issues and provide for an effective and efficient legal and institutional framework that meets the current land needs of the people in the country.

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APPENDIX

THE LANDS (CUSTOMARY TENURE) (CONVERSION) REGULATIONS

Title

1. These Regulations may be cited as the Lands (Customary Tenure) (Conversion) Regulations.

Procedure on conversion of customary tenure into leasehold tenure

2. (1) A person-
 - (a) who has a right to the use and occupation of land under customary tenure; or
 - (b) using and occupying land in a customary area with the intention of settling there for a period of not less than five years;
may apply, to the Chief of the area where the land is situated in Form I as set out in the Schedule, for the conversion of such holding into a leasehold tenure.
- (2) The Chief shall consider the application and shall give or refuse consent.
- (3) Where the Chief refuses consent, he shall communicate such refusal to the applicant and the Commissioner of Lands stating the reasons for such refusal in Form II as set out in the Schedule.
- (4) Where the Chief consents to the application, he shall confirm, in Form II as set out in the Schedule-
 - (a) that the applicant has a right to the use and occupation of that land;
 - (b) the period of time that the applicant has been holding that land under customary tenure; and
 - (c) that the applicant is not infringing on any other person's rights;
and shall refer the Form to the Council in whose area the land that is to be converted is situated.

Consideration of the application by the Council

3. (1) The council shall, after receiving the Form referred to in sub-regulation (4) of regulation 2, and before making a recommendation to the Commissioner of Lands, consider whether or not there is a conflict between customary law of that area and the Act.
- (2) If the council is satisfied that there is no conflict between the customary law of that area and the Act, the council shall make a recommendation to the Commissioner of Lands in Form III as set out in the Schedule.
- (3) The Commissioner of Lands shall accept or refuse to accept the recommendation, and shall inform the applicant accordingly.

Conversion by council of customary tenure into leasehold tenure

4. Where a council considers that it will be in the interests of the community to convert a particular parcel of land, held under customary tenure into a leasehold tenure, the council shall, in consultation with the Chief in whose area the land to be converted is situated, apply to the Commissioner of Lands for conversion.
- (2) The Council shall, before making the application referred to in sub-regulation (1)-
 - (a) ascertain any family or communal interests or rights relating to the parcel of land to be converted; and
 - (b) specify any interests or rights subject to which a grant of leasehold tenure will be made.

Requirement to pay ground rent

5. A person holding land on leasehold after the conversion of such land from customary tenure shall be liable to pay such annual ground rent in respect of that land as the Commissioner of Lands may prescribe.

Appeals

6. A person aggrieved by a decision of the Commissioner of Lands may appeal to the Lands Tribunal.

(Regulations 2 and 3)

FORM I

(Regulation 2)

APPLICATION FORM FOR CONVERSION OF CUSTOMARY TENURE INTO
LEASEHOLD TENURE

Particulars of Applicant

1. Name
2. Postal and Physical Address:
3. Location of land:
4. Size of the land and plan No.
5. Declaration of Rights:
 - (a) I or my family have had the right to the use and occupation of the land shown on the plan for a continuous period of years;
 - (b) I am entitled to or my family's is entitled to (delete as appropriate), the benefit to the land and I am not aware of any other person's right to the use or, occupation of the land or part of the land except:

And granting leasehold to me will not affect these rights.

Signed: Date:

Note:

- (i) *If in occupation for less than five years, describe how the use and occupation of the land began, by stating the name of the Chief or the Headman who gave you permission to occupy and use the land;*
- (ii) *Prove that the use and occupation of the land is exclusive, by describing the use that the land has been put to;*
- (iii) *Please attach six layout plans of the land in issue to this Form.*

FORM II

(Regulation 2)

APPROVAL OF THE CHIEF OF AN APPLICATION FOR CONVERSION OF
CUSTOMARY TENURE INTO LEASEHOLD TENURE

I..... Chief of (village) confirm and certify that-

1. I have caused the right to the use and occupation of(property number) by.....
(the applicant)... to be investigated and the investigation has revealed that the applicant or his
family has for the last..... years been in occupation of the land described in the plan to
which plan I have appended my signature.

2. I am not aware of any other right(s), personal or communal, to the use and occupation
of the land or any other part of the land, except that these rights have always been enjoyed by
the community and shall not affect the right of the applicant to the use and occupation of the
land.

3. I have caused the consultation to be made with members of the community.

4. As a result of the consultation and the information made available to me I hereby
give/refuse my approval for the said land to be converted into leasehold tenure.

Signed:

Date:

FORM III

(Regulation 3)

APPROVAL OF THE LOCAL AUTHORITY FOR THE CONVERSION OF
CUSTOMARY TENURE INTO LEASEHOLD TENURE

I, , in my capacity as Council Secretary of District Council confirm and state that(property number) the land to be converted from customary tenure to leasehold tenure by the applicant(name of applicant) falls within the boundaries ofDistrict Council.

AND THAT the said.....(property number) falls within the Jurisdiction of Chief The approval/refusal of the.....Chief for the land to be converted from customary tenure to leasehold tenure is herewith attached.

2. The applicant.....(name) has occupied and has had the right to the use and occupation of the said land for a continuous period of.....years.

3. I am not aware of any other rights personal or communal to the use and occupation of the land or any part of the land.

4. As a result of the information available to me, I hereby give/refuse my approval for the said land to be converted into leasehold tenure.

Signed:

Date: