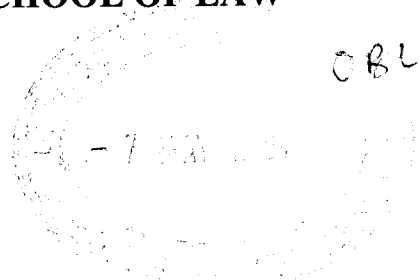


THE UNIVERSITY OF ZAMBIA

SCHOOL OF LAW



**CUSTOMARY LAW AND WOMEN'S ACCESS TO LAND AND
PROPERTY IN ZAMBIA: A CASE STUDY OF SHIFWANKLULA
VILLAGE IN CHIEF MUNGULE'S AREA.**

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SILUMESI MUCHULA

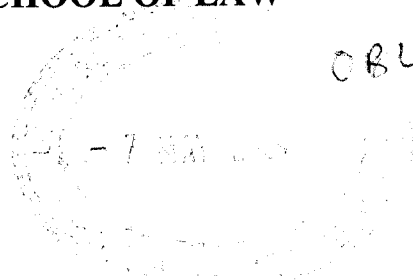
(22089381)

UNZA

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**Being a research paper submitted to the University of Zambia in partial
fulfillment of the requirements of the Bachelor of Laws (LLB) Degree
Programme.**

The University of Zambia

School of Law,

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Lusaka

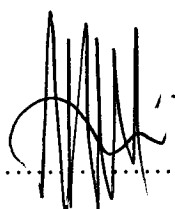
Zambia

February, 2009.

DECLARATION

I SILUMESI MUCHULA COMPUTER NUMBER 22089381 DO HEREBY declare that the contents of this directed research are entirely based on my own findings and that I have not in any respect used any person's work without acknowledging the same.

Date..12th february 2009.

Signature.....

CHAPTER ONE

WOMEN’S RIGHTS TO LAND AND PROPERTY

1. INTRODUCTION AND BACKGROUND

Women’s rights to land and property is a subject that has been widely researched by various scholars not only in Zambia, but also in many parts of Africa. This debate has been necessitated by the perceived discrimination against women in as far as access, possession and control of land and property is concerned. Various scholars have demonstrated that both statutory and customary law as well as the general attitude of people have to a large extent prevented the realization of women’s rights to land and property.

Literature on women and land in Zambia emphasizes that in many ethnic groups, African customary law made a provision for women to have land rights, although this might not be the case in the post colonial period. It is argued¹ for example that under the traditional system in many Zambian ethnic groups, such as the matrilineal Bemba of the Northern Province, the Tonga of Southern province and the Lozi of Western province, both men and women had access to and control over productive resources such as land. However, research has shown that this equality has overtime been eroded beginning from the colonial period when there came an emphasis on men owning land to produce for the market while women remained as subsistence cultivators.² The safeguards which were provided by customary law have in short been eroded by the

¹ Keller, B.E Phiri, and M Milimo. 1990. Women and Agricultural Development. *In The Dynamics of agricultural policy reform in Zambia*: Iowa State University Press.

² Ibid

introduction of money economy, rural urban migration and imported land patterns which has made access to land more difficult for women.³

It is generally felt that efforts at reforming traditional land tenure systems do not seem to have addressed the concerns of women. The International Labour Organization (ILO) is of the view that in African countries where land reforms have been attempted, such as Ethiopia, Ivory Coast and Senegal, women's rights in land have not been properly addressed and women continue to remain dependent on men.⁴ In the Zambian case, a research conducted by Muntemba in 1989⁵ shows that women in matrilineal societies held more secure rights in land than those in patrilineal societies. In the later societies, women are usually able to access land only through male relatives, whether husbands, brothers or uncles. Women did not inherit land in their own right and could therefore not pass it on to their own children. In matrilineal societies women like men have usufructuary rights in land, and these rights could be exercised when a woman was single, during marriage, upon divorce or widowhood; and women could inherit land and pass it on to their children. Married women whose husbands stayed in the wife's village were able to acquire and own land over which their husbands had no rights or control.

However, in a research conducted by Machonga in 1987⁶ it was observed that in both matrilineal and patrilineal societies in Zambia, the widow does not have rights to inherit property, including land from her husband. This observation is largely true even among the Lozi who allow a man's property to be shared equally between his male and female children living out the widow. In both

³ Women and Law in Southern Africa research and Educational Trust, A critical Analysis of Women's Access to Land in the WLSA Countries, 2001, Harare

⁴ Ahmed, M., and Loufti. 1982 Women in rural Development: A programme of the ILO. Geneva: ILO

⁵ Muntemba, M.S 1977. Thwarted development: A case study of economic change in Kabwe Rural District of Zambia. In the roots of rural poverty in Central and Southern Africa, London: Heinemann

⁶ Machonga, M. 1987. Women, property and land tenure: The Zambian experience. Report on analyzing situations of rapid social change in Southern Africa, UNESCO, September.

matrilineal and patrilineal forms of social organization, preference is given to male heirs although in some cases a widow may be allowed to continue cultivating her late husband's field as long as she does not marry outside the husband's village.⁷

A study by Pio⁸ indicates that major sources of obstacles for women to own, inherit and use land are associated with cultural, economic and social barriers. Under cultural factors, it is observed that customary law mainly confers inheritance and ownership rights to men, and that Zambian culture does not cater for land allocation to women. Women could only have land rights through their fathers and/or husbands, and that upon divorce or death of a husband in a virolocal marriage the land reverts to the man's family and the woman has no claim to the land whatsoever. According to Pio⁹ allocation of land to a woman in her own right is unheard of.

Further, in a study conducted by the Catholic Commission for Justice and Peace (CCJP)¹⁰ it was discovered that men and women did not have equal access to land and that the majority of women had neither direct access nor control over land but through husbands. The study also indicates that married women did not own land, but husbands allowed them to use part of the land to plant crops of their choice. The study further indicated that women were not allowed to own land as men thought that this would undermine their authority. Married women therefore could only request for land if the husbands approved the request.

⁷ Mvunga, M.P 1982. Land law and policy in Zambia. Zambian Papers No. 17 published for the institute of African Studies, University of Zambia.

⁸ Pio, PSC (2004), Women's rights to property in Zambia: A myth or reality! P. 29

⁹ Ibid

¹⁰ Research on the Impact of the Land Act 1995 on the livelihood of the Poor Peasants in Zambia, CCJP National Office,(2003)

Writing about contemporary trends regarding tenure and gender in Sub-Saharan Africa, Birgegard¹¹ has remarked that women are increasingly being marginalized. He has observed that in traditional tenure systems women are ascribed inferior tenure rights to men. While men have primary rights, women have secondary rights; while men get access to land through their lineage or clan, women usually get access to land through their husbands. Women do not inherit land because they hold only secondary rights. In a research conducted by Bigegard¹² in Kenya, it was observed that the law defines men's rights in as far as titling is concerned, whereas women's rights are deferred to customary law; and the customary user rights of women are eroded as the formal legal system expands its influences. Those who are particularly vulnerable are unmarried women, divorcees and widows, as such, land reform has resulted in a situation where women own only 2 to 5 percent of the land and many women have become landless.

According to Fortman in 1998¹³ a similar situation exists in Zimbabwe where it was observed that generally, women have less land than men, and that in the communal areas of Zimbabwe, a divorced woman has no rights to her husband's land, including the trees she herself has planted; and she does not even have the right to live in a home that she herself has built. Widows have no right to inherit their husband's property, including the trees which they themselves have planted.

¹¹ Birgegard L.E. 1993. Natural Resource tenure: A review of issues and experiences with emphasis on Sub-Saharan Africa. Swedish University of Agricultural Sciences

¹² Ibid

¹³ Fortman, L. 1998. Why women's property rights matter. *In proceedings of the international conference on land tenure in the developing world with a focus on southern Africa*, Dept of Geomatics, University of Cape Town.

Fortman further observes that African women's bundle of rights to land do not ensure sufficient security of tenure. These bundle of rights do not guarantee the right to rent, lease, sell or bequeath.¹⁴

A study of land ownership by over 800 farmers in the rural settlement schemes of Zambia indicated that 95.7 percent of titles were held by men, and only 3.7 percent were held by women whereas 0.6 percent were titles held by married couples, whereas in urban land, outside the customary tenure, the vast majority of the 99 year leasehold title deeds are held by men. It is estimated at present that only about 15 percent of title deeds are held by women.¹⁵

According to a study conducted by Pio¹⁶ even though females are the majority, about 51 percent of the total population, they are disadvantaged in social, economic, cultural and political spheres, and that the Zambian government in 2002 the Zambian government approved a National Gender Policy as a way of removing all barriers to equal participation by women and men at all levels of national development. According to the National Gender Policy acquisition and ownership of land in Zambia continues to be a major hindrance to women's effective participation. Pio further observed that despite the provision in the land draft policy¹⁷ that 30 percent of all land demarcated be allocated to women, the policy has no legal status as such, it cannot compel local authorities to implement the provision. This therefore means that women will continue facing the same problems.

¹⁴ Ibid

¹⁵ Bonnie Keller: Women's access to land in Zambia; A paper prepared for the International Federation of surveyors, November 2000.

¹⁶ Supra Note 9, P:27

¹⁷ Republic of Zambia (2006) Draft Land Administration and Management Policy, Lusaka: Ministry of Lands

Despite this erosion of women's rights in land and property, some women have devised coping strategies. According to Munah¹⁸ some women in East Africa have responded to the erosion of their rights in land by migrating to those areas where they can obtain paid employment. The proceeds from paid employment whether formal or informal is used in some cases to purchase land. Therefore in a study of land sales in Central Kenya it was found that the women purchasers of land had increased by 12 percent between 1958 and 1984. According to this study other women resorted to sharecropping arrangements where they are granted oral licenses to farm for a season or other fixed period, while others resorted to having cooperatives as a way of having access to land.

1.1 STATEMENT OF THE PROBLEM

It is clear from the literature review that much research and writing has been done on the problems that women face in exercising their rights to land and property in most African countries including Zambia. All these have emphasised that women's rights to land and property have overtime been eroded, resulting in more men having access to land and property than women. However, the above mentioned studies have not brought out in detail the customary rules and procedures of acquiring land under customary law. It is important to understand the rules and procedures in detail in order to find out ways in which women are disadvantaged in as far as land acquisition is concerned. This is arising from the fact that rules and procedures for acquiring land and property will differ from one ethnic group to another as such even the challenges that women face will differ. Professor Mvunga¹⁹ argues that under customary law men and women can inherit land and property, but the rules of inheritance vary from one tribe to

¹⁸ Munuh, T 1989. Women, the law and land tenure in Africa. In women's role in natural resources management in Africa. Ottawa, Canada.

¹⁹ Supra Note 8

status are able to take advantage of the opportunities available to them and thus break the stereotype view that they are always disadvantaged, dependent and hopeless.

Further, the studies have not considered whether customary law has in place mechanisms of resolving land disputes. Much has been written concerning property grabbing against widows after the death of their husbands and thus creating an impression that customary law does promote this practice. In order to settle in such a conclusion, it is important to find out whether customary law has in place rules that deal with such practices. What recourse does customary law offer to a widow who has lost land or any other property by property grabbing and What is the attitude of the chief or chiefs toward this practice. The studies should also have taken into consideration the property that women have and how they obtained such property. Asset ownership will to a great extent help determine the level of discrimination if any that women face under customary law.

It is therefore against this background that a field research will be conducted in Shifwankula Village North of Lusaka in Zambia in order to assess the position of women with respect to their current status in terms of access to land, customary procedures of accessing land and property, the general attitude of women toward acquisition of land and property, the attitude of traditional leaders toward women, what property women own, the need for security in land, the strategies of coping with insecurity, women's awareness in relation to acquisition of title deeds in as far as empowerment of women is concerned, and how the process of conversion of land tenure can be harmonized with traditional authority to avoid disruption of relatively peaceful social relations in a rural community.

1.2 RATIONALE OF THE STUDY

This study will provide knowledge on the influence of customary law on land acquisition in Zambia. The study will shed light on the various methods of land acquisition under customary law, as such, will bring out the actual problems that women face in acquiring land under customary tenure.

The study will bring out the insecurities that women face under customary tenure and will shed light on the various strategies that women have put in place to cope with the insecurities. Further, the study will also provide knowledge on the women's awareness about conversion of land tenure and acquisition of title deeds.

1.3 OBJECTIVES OF THE STUDY

To examine the customary procedures of accessing land

To examine the discrimination that exists against women with respect to access and ownership of land and property under customary law.

To examine the obstacles that women face in acquiring land under customary tenure.

To determine the level of women's awareness about their rights to land and property under customary tenure.

1.4 METHODOLOGY

DESK RESEARCH

An analysis will be done of various laws which include the Constitution of Zambia²², Lands Act²³, the Intestate and Succession Act²⁴, the Wills and Administration of Testate Estates Act²⁵, decided cases, International Instruments such as the Convention on the Elimination of all forms of Discrimination Against Women(CEDAW)²⁶ as well as other literature dealing with customary law and property in Zambia. Various websites will also be visited in order to get more information on customary law and ownership of land and property in Zambia.

FIELD RESEARCH

The proposed study will rely on both primary and secondary data. The data will be collected by conducting personal interviews with men and women in Shifwankula village. Different categories of women will be interviewed ie the married, single, widows and divorced. These will shed light on their various experiences with regard to the issue of women’s access to and ownership of land and property. Interviews will also be conducted with the Headwoman and elders of Shifawnkula village who will shed light on the customs and practices of the village with respect to women’s access and ownership of land and property.

1.5 ORGANISATION OF THE PROPOSED RESEARCH

CHAPTER ONE: INTRODUCTION AND BACKGROUND

This chapter will introduce and give background information on the proposed topic.

²² Cap 1 of the Laws of Zambia
²³ Lands Act of 1995
²⁴ Cap 59 of the Laws of Zambia
²⁵ Cap 60 of the Laws of Zambia
²⁶ Carlson Anyangwe, Introduction to Human Rights and International Humanitarian Law, 2004 UNZA Press

CHAPTER TWO: LAW AND POLICY ON LAND AND PROPERTY IN ZAMBIA

This chapter will analyze both statutory and customary law with respect to acquisition and ownership of land and property in Zambia. Under this chapter statutes such as the Constitution of Zambia²⁷, the Lands Act²⁸, the Intestate and Succession Act²⁹, Wills and Administration Act³⁰ and International Instruments such as the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), will be analysed in relation to customary law in Zambia.

CHAPTER THREE: THE STUDY AREA

This chapter will give a description of the study area in terms of the location, the history, the type of economic activity in the area, and the population of the area. The population will reflect categories in terms of households headed by married women, households headed by single women, widows and divorcees.

CHAPTER FOUR: METHODS AND DISCUSSION OF RESULTS

This chapter will discuss in detail the methods used in collecting data, and will also discuss the results of the study.

CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS

This chapter will bring out the conclusions and recommendations arising from the results of the study.

²⁷ Cap 1 Laws of Zambia
²⁸ Lands Act of 1995
²⁹ Cap 59 Laws of Zambia
³⁰ Cap 60 Laws of Zambia

CHAPTER TWO

LAW AND POLICY ON LAND AND PROPERTY IN ZAMBIA

2.0 INTRODUCTION

The law and policy on land and property in Zambia can be found in various statutes and Customary law. Some of these pieces of legislation include the Constitution¹ of Zambia which is the supreme law of the land. The Constitution provides for various rights which also include the right to protection from deprivation of property without compensation.¹ The Intestate and Succession Act² is also another piece of legislation that deals with property in Zambia. This Act has various provisions that govern inheritance of property where the deceased is intestate. The Wills and Administration of Testate Estates Act³ also deals with inheritance of property, except it specifically deals with cases where the deceased is testate. Both the Intestate Succession Act and the Wills and Administration Act were enacted in 1989⁴. Another piece of legislation which deals with property is the Lands Act⁵ of 1995. This is the law that governs the administration and management of land in Zambia.

Customary law is yet another source of law in Zambia in as far as land and property is concerned. Customary law has no uniform application in Zambia, but varies from tribe to tribe or locality to locality.⁶ Customary law is generally the law that governs customary tenure and plays

¹ Cap 1 of the Laws of Zambia

² Cap 59 of the laws of Zambia

³ Cap 60 of the Laws of Zambia

⁴ Mushota L, Family Law in Zambia: Cases and Materials, University of Zambia, 2005,P421.

⁵ Cap 184 of the Laws of Zambia

⁶ Mudenda F.S, Land Law in Zambia: Cases and Materials, University of Zambia, 2007, p12

a vital role in the settlement of land disputes that may arise under land held under customary tenure.⁷

2.1 THE CONSTITUTION OF ZAMBIA

The constitution of Zambia⁸ is the supreme Law of the land. It is an enactment of the people's desires and expectations, the rules by which people have agreed to be governed; thus all other laws must be in compliance with it in order to be valid. It basically sets out the structure and powers of government and indicates people's rights and duties *vis a vis* the state⁹.

The Zambian Independence Constitution, like those of other Common Wealth African countries included a Bill of Rights. It was one of Britain's important legacies on her former colonies to include a bill of rights in the constitutions of the independent states¹⁰. The subsequent constitutions have therefore always contained the Bill of Rights despite the various reviews that have so far taken place starting from the Chona Constitutional Review Commission, the Mvunga Constitutional Review Commission, the Mwanakatwe Constitutional Review Commission as well as the Mung'omba Constitutional Review Commission. The Bill of Rights is an entrenched clause designed to protect and guarantee certain fundamental rights and freedoms of the Individual.

In the Zambian Constitution, the Bill of Rights¹¹ has divided the Fundamental Rights and Freedoms of an individual into categories, such as the Right to Life, Right to Personal Liberty, Protection from Slavery and Forced Labour, Protection from Inhuman Treatment, Protection

⁷ Ibid

⁸ Constitution of Zambia, Cap 1 (As amended by Act No. 18 of 1996).

⁹ Munalula M.M, Legal Process: Zambian cases, Legislation and commentaries. 2004, p 76

¹⁰ Nwabueza B.O, Constitutionalism in Emergent States, New York.(1939)

¹¹ Part III of The Constitution of Zambia.

from Deprivation of Property, as well as Protection for Privacy of Home and other Property. All these rights are largely derogated from, and are subject to wide exceptions. These derogations are often perceived to be a major weakness of the Zambian constitution in as far as protection and promotion of fundamental Human Rights is concerned. The wide derogations with regard to property means that the Constitution does not offer adequate security with regard to possession and control of property. It means that one can easily lose possession and control of property under any of the circumstances as provided in the derogations. These derogations therefore work to the detriment of both men and women in as far as possession and ownership of property are concerned¹².

Article 11 of the Republican Constitution guarantees to the effect that every person in Zambia has been and shall continue to be entitled to the fundamental rights and freedoms of the individual whatever his race, place of origin, political opinions, colour, creed, sex or marital status. Going by this provision, it therefore means that even when it comes to ownership and possession of property men and women should be treated equally without any discrimination. Further, Article 23 of the Republican Constitution provides to the effect that a law shall not make any provision that is discriminatory either of itself or in its effect. It therefore follows that this provision forbids even laws that discriminate on the basis of sex. However, it must be noted that the provisions of Article 23 of the Republican Constitution explicitly excludes personal law such as that concerning devolution of property inheritance and divorce.¹³ Further, Article 23 explicitly excludes the application in the case of members of a particular race or tribe, of customary law with respect to any matter¹⁴. The exclusion of the application of customary law and personal law

¹² Supra Note 8

¹³ Article 23(4) (c)

¹⁴ Article 23(4) (d)

in effect means that the two can be applied regardless of their discriminatory provisions. Customary law in particular is perceived to be discriminatory against women in as far as ownership and possession of property is concerned. Women generally are not expected to own land in their own right, ownership of land comes through their husbands or other male relatives. It means therefore that the status quo remains and men therefore continue to benefit more than women. This is also bearing in mind that the majority of land in Zambia is customary land and only a small part is state land. Statistics show that approximately 94 percent of the country is designated as customary area, and only 6 percent is state land.¹⁵ This means that laws on customary inheritance continue to be a major determining factor to accessing land by women.

2.2 CUSTOMARY LAW

Customary law is basically law that is based on traditions and customs of a particular group of people. A Custom can be defined as a rule of conduct, obligatory on those within its scope, established by long usage; it must have a force of law, it must be of immemorial antiquity, certain and reasonable, obligatory and not repugnant to statute.¹⁶

Zambia follows a dual legal system where Customary law and statutory law exist side by side. The local customary laws are applicable to the majority of indigenous Zambians in certain circumstances, such as marriages and settlement of family disputes¹⁷. The Constitution of Zambia recognizes the validity of customary laws even where the same are discriminatory.¹⁸ However, adjectival law limits the application of customary law that is repugnant or contradicts

¹⁵ Mudenda, Land Tenure and Boundary Conflicts in Rural Zambia, CASLE conference paper, 2006

¹⁶ Supra Note 23, P 45

¹⁷ Ibid

¹⁸ Article 23(4)(c) (d)

the written law¹⁹. For example, Section 16 of the Subordinate courts Act²⁰ provides to the effect that African Customary law shall be applied provided it is not repugnant to justice equity or good conscience or incompatible either in terms or by necessary implication with any written law for time being in force in Zambia. A dispute based on customary law must be commenced in the local courts, and can only be heard by higher courts upon review or appeal.²¹

Customary law is further recognized in the Constitution of Zambia through the provisions relating to the House of Chiefs²² and through the non- discrimination clause,²³ which excludes customary law from the need to ensure that no discrimination is sanctioned by law.²⁴

Customary law pertaining to land and property in Zambia differs from one tribe to another. Different customs and traditions regulate and govern access, possession and control of land. Despite there being different customs and traditions, there are some common practices and beliefs, which in the long run may have caused disparities between men and women in as far as access, possession and control of land and property is concerned. For example, as earlier stated, women are usually disadvantaged in that they are generally considered to be inferior to men, as such cannot be allowed to own land and property in their own right. A married woman for example can only have access to land through her husband²⁵. And upon the death of the husband, in some traditions like that of the Tonga, the widow cannot inherit the land from her late husband. The land goes to the husband's nephews or to the man who takes over the widow. If a

¹⁹ Supra Note 26, P 70

²⁰ Cap 28 of the Laws of Zambia

²¹ Kaniki v Jairus (1967) SJZ 92

²² Article 127

²³ Supra Note 30

²⁴ Supra Note 28, P 87

²⁵ Joyce Shezongo, Women's Property Rights In Zambia, a paper presented to the strategic litigation workshop held from 14th to 18th August 2005 in Johannesburg, South Africa.

widow refuses to be inherited by another man (often a brother in law) within the family of the deceased she is required to return to her natal home.²⁶

Upon divorce, some traditions do not oblige the husband to share his property with the wife. For example, among the lozi people upon divorce, the woman walks away with nothing. This experience was seen in the case of *Mwiya v Mwiya*.²⁷ This was a divorce case where the parties had been married under Lozi customary law. Upon the dissolution of the marriage, the woman was awarded personal items and kitchen utensils. The woman appealed the decision and asked the court to order the respondent to keep her and share property. The High Court dismissed this appeal and held that as the marriage was held under Lozi customary law, the property settlement had to be done in accordance with the Lozi custom, and that there is no Lozi custom which supports the appellant's claims.

On the other hand, the custom under the Ushi is different from that of the Lozi. In the case of *Chibwe v Chibwe*²⁸ the couple was married under the Ushi customary law, and under the Ushi custom, the wife is entitled to a reasonable share of the matrimonial property. The court reiterated that as long as the spouse had contributed directly or in kind they were entitled to financial provision and that the Court may reallocate family assets. This decision therefore was not solely based on the provisions of customary law but also on principles of English law. In this case, it was further observed by the Supreme Court that the dichotomy resulting from the application of unrecorded customary law, against the background of the changed environment of the macro-economic with its ramifications, the growth of the common law of Zambia, with the changes in the social values influenced by the international values received by Zambia through

²⁶ Ibid
²⁷ (1977) ZR 113
²⁸ SCZ Judgment No. 38 of 2000

its ratification of various International instruments more or less created two justice paradigms. The existence of these two justice paradigms in some cases result in gross disparities bringing about inequality before the law contrary to Constitutional provisions. The court further stated that it was incumbent upon all courts including the local courts which administer customary law to uphold the constitution, which requires that in Zambia Courts must invoke both the principles of equity and law concurrently. Therefore, customary law in Zambia is recognized by the Zambian Constitution provided its application is not repugnant to any written law.

However, it is important to note that despite the observations made by the Supreme Court, the judgment in this case was not unequivocal, because it left room for a case of similar facts to be decided along the lines of *Mwiya v Mwiya*.²⁹ The Court said that:

'...we are therefore surprised that both the local and magistrates courts which sat with the assessors who are experts of the Ushi customary law made no references to the Ushi customary law which should have been invoked at the High Court level that the appellant was entitled to a reasonable share in the property acquired during the subsistence of the marriage. Additionally, the law applicable both at High Court and in this Court in divorce matters is normally the English Divorce law applicable at the time.'

From this observation, it is clear that the basis of the decision was both Ushi custom regarding share of property and English law. The question that remains however is what would happen in the case where the customary law invoked does not accord the woman with an equitable share in the marital property. The Supreme Court in this case did not categorically state that customary

²⁹ Supra Note 27

laws that deprive a surviving spouse of property from the deceased's estate is repugnant to natural justice.

2.3 INTESTATE SUCCESSION ACT CAP 59 OF THE LAWS OF ZAMBIA

This Act is meant to provide a uniform intestate succession law that will be applicable throughout the country: to make adequate financial and other provisions for the surviving spouse, children, dependants and other relatives of an intestate to provide for the administration of the estates of persons dying not having made a will³⁰. The Act provides that it shall apply to all persons who are at their death domiciled in Zambia and shall apply only to a member of a community to which customary law would have applied if this Act had not been passed.³¹ Going by these provisions it is clear that the Act makes no exceptions as to whether a marriage is contracted under customary law or not, settlement of property will be according to the provisions of this Act provided the deceased has not left a will. This to a large extent protects the interests of a surviving spouse in the estate of the deceased. In as far as distribution of the estate is concerned, the Act provides to the effect that 20 percent of the estate shall devolve upon the surviving spouse; except that where more than one widow survives the intestate, 20 percent of the estate shall be distributed among them proportional to the duration of their respective marriages to the deceased, and other factors such as the widow's contribution to the deceased's property may taken into account when justice so requires.³² According to the Act, 50 percent of the estate shall devolve upon the children in such proportions as are commensurate with a child's

³⁰ Mushota L, Family Law in Zambia: Cases and materials. University of Zambia,2005, P 421

³¹ Section 2(1) of Cap 59 of the Laws of Zambia.

³² Section 5(1)

age or educational needs or both.³³ The 50 percent is regardless of whether the children are male or female, they all benefit.

The Act further provides to the effect that 20 percent of the estate shall devolve upon the parents of the deceased,³⁴ whereas the remaining 10 percent of the estate shall devolve upon the dependants in equal shares.³⁵ This also is regardless of whether the parents and dependants are male or female.

The Act will apply to all property which forms part of the deceased's estate. However, the Act shall not apply to land which at the time of death of the intestate had been acquired and was under customary law.³⁶ This in effect means that the land acquired under customary law will not be divided in accordance with the provisions of section 5 of the Act, as such, this land has to be inherited in accordance with the customary law of the area regardless of whether the custom of the deceased is discriminatory against women or not.

It must be noted that the Intestate Succession Act has not been well received by certain sectors of society as it is regarded to be discriminatory against the relatives of the deceased, and that it generally favours the surviving spouse. For example, section 9(1) provides to the effect that where the estate includes a house the surviving spouse or child or both, shall be entitled to that house. Section 9(2) provides to the effect that where the estate includes more than one house the surviving spouse or child or both shall determine which of the house shall devolve upon them and the remainder shall be part of the estate. These provisions imply that the dependants and the parents of the deceased will not benefit if the deceased left only one house. Further, if the

³³ section 5(1) (b)

³⁴ section 5(1)(c)

³⁵ section 5(1)(d)

³⁶ *ibid* section 2(2)(a)

deceased left more than one house, the spouse is given the power to choose which houses will be part of the deceased estate. This provision has brought an out cry from most *Zambians* especially the parents of the deceased, who in most cases feel they have contributed significantly in bringing up the deceased.

The Act is also perceived to have a shortcoming with regard to section 9(1)(b) which provides to the effect that the surviving spouse shall have a life interest in that house which shall determine upon the spouse's remarriage. This in effect means the surviving spouse enjoys possession of the house while ownership goes to the children. The Act therefore disregards the contribution of the surviving spouse towards the acquisition of the said property³⁷.

However, it is also important to note that despite the shortcomings, this piece of legislation has expressly legislated against property grabbing which has been a longstanding problem in as far as sharing of the deceased's property is concerned. The Act provides to the effect that any person who unlawfully deprives any person of the use of any part of the property of the deceased to which that person is entitled under the Act or any property shared with the deceased to which the Act applies or otherwise unlawfully interferes with the use by any person of any property of the deceased shall be guilty of an offence and liable upon conviction to a fine not exceeding seven hundred and fifty penalty units or imprisonment not exceeding two years or both.³⁸

2.3 Wills and Administration of Testate Estates Act Chapter 60 of the Laws of Zambia

This is an Act to simplify the law governing the making of wills; to provide for adequate financial and other provisions to be made for dependants in a will; to provide for the

³⁷ Supra Note 8

³⁸ Section 149(a)(b)

administration of estates of persons dying having made a will; and to provide for matters connected with or incidental to the foregoing.³⁹

Basically, the Act allows any adult of sound mind to decide what will happen to property which is his or to which he will be entitled at the time of his death or which he may be entitled thereafter.⁴⁰ The Act also gives power to the testator to appoint one or more persons to be his executor or executors.⁴¹ The executor may, subject to the Trust Restriction Act, attach any terms and conditions in relation to the disposition of any part of his estate.⁴² Further, the Act gives the testator power to appoint a guardian for his minor child where the surviving parent of the minor child is incapable, by physical or mental infirmity, to take guardianship of the minor child.⁴³ It is important to note that the power exercisable by the testator on the disposal of his estate is not absolute. This means that the testator's will can be varied by the Court of Law if it is of the opinion that some provisions of the will are unreasonable.⁴⁴ This in effect means that the person who has been disadvantaged by the will can contest the will on the basis that a certain provision is unreasonable.⁴⁵ These provisions apply to all persons, whether under customary law or statute, provided the deceased left a valid will. There is no discrimination on the basis of sex or marital status, as the Act applies to both men and women, married or unmarried, provided there is a will involved. Therefore, condition for the application of this Act is basically the existence of a valid will as stated in the preamble.

³⁹ Preamble of Cap 60 of the Laws of Zambia.

⁴⁰ Section 5(a)

⁴¹ Section 5(a)

⁴² Section 5(c)

⁴³ Section 5(d)

⁴⁴ Section 20(1)

⁴⁵ Ibid

This Act however does not apply to land which at the death of the testator had been acquired and was held under customary law and which under that law could not be disposed of by will⁴⁶. The Act does not also apply to property which at the death of the testator was institutionalized property of a chieftainship and had been acquired and was being held as part of the chieftainship property.⁴⁷ Land held under customary tenure is governed by customary law regardless of whether the particular customary law is discriminatory against women or not. The deceased therefore would simply be wasting his time if he included in his will any land under customary law. Such provision will have no effect in as far as that land is concerned.

The Wills and Administration of Testate Estates Act⁴⁸ like the Intestate Succession Act⁴⁹ has made a provision to protect beneficiaries of the deceased's estate from vices such as property grabbing. Under section 65 (2)(a)(b) the Act provides to the effect that any person who unlawfully deprives any person of the use of any part of the property of the deceased to which that person is entitled, or otherwise unlawfully interferes with the use of such property shall be guilty of an offence and liable upon conviction to a fine not exceeding seven hundred and fifty penalty units or imprisonment not exceeding two years or both.

However, some shortcomings have been observed which include the requirements necessary to make a valid will as provided under section 6 (1)(a)(b). The requirements for a valid will have not been simplified making it difficult for an ordinary Zambian to make a will⁵⁰. Apart from that, it is generally felt that the penalty for the offence of meddling with property of the deceased is

⁴⁶ Section 2(a) of Cap 60 of the Laws of Zambia

⁴⁷ Ibid Section 2(b)

⁴⁸ Cap 60 of the Laws of Zambia

⁴⁹ Cap 59 of the Laws of Zambia

⁵⁰ Supra Note 8

very inadequate considering that this is a violation of the deceased person's last wish and testament⁵¹.

2.4 LANDS ACT CAP 184 OF THE LAWS OF ZAMBIA

This is the Law that governs the administration of land in Zambia. From the preamble, the objectives of the Act are to provide for the continuation of Leaseholds and Leasehold tenure; to provide for the continued vesting of land in the President and alienation of land by the President; to provide for the statutory recognition and continuation of customary tenure; to provide for the conversion of customary tenure into Leasehold tenure; to establish a land Development fund and a Lands Tribunal; to repeal the land (conversion of titles) Act; to repeal the Zambia (State lands and Reserves) orders, 1928 to 1964, the Zambia (Trust Land) Orders, 1947 to 1964, the Zambia (Gweembe District) Orders, 1959 to 1964, and the Western Province (Land and Miscellaneous Provisions) Act, 1970.⁵²

The Act provides that all land in Zambia shall vest absolutely in the president and shall be held by him in perpetuity for and on behalf of the people of Zambia⁵³. This provision is qualified by subsection 4 of section 3 to the extent 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, and without consulting the chief and the local authority in the area in which the land to be alienated is situated. Further, the Act provides that the president shall not alienate any land situated in a District or an area where land is held under customary tenure if an

¹ Supra Note 8

² Supra Note 28. P 407

³ Section 3(1)

applicant for leasehold title has not obtained the prior approval of the Chief and the local authority within whose area the land is situated⁵⁴.

Going by the provisions of section 3(4), section 7(1)(2) and section 8(2)(3) of the Act, it is clear that the Lands Act of 1995 recognizes customary law. This recognition of customary law is important because it is a well established fact that more than 90 percent of Land in Zambia is under customary tenure.

The Act provides that any person who holds land under customary tenure may convert it into leasehold tenure not exceeding ninety years on application⁵⁵. The Act also provides that the conversion of rights from customary tenure to leasehold tenure shall have effect only after the approval of the chief and the local authorities in whose area the land to be converted is situated⁵⁶ and that no title other than the right to the use and occupation of any land under customary tenure claimed by a person shall be valid unless it has been confirmed by the chief and a lease granted by the president⁵⁷.

From the above provisions it is clear that Lands Act has clothed chiefs with statutory authority. The chiefs have been endowed with a superintending role in the administration of customary areas to the extent that the chiefs are required not only to be consulted when land is alienated or allocated but to grant approval to applicants for leasehold titles in customary areas. The lands Act in section 3 subsection 4(c) places a further obligation to consult any person or body whose interest might be affected by the grant of land.

⁵⁴ Section 3(4)(d)

⁵⁵ Section 8

⁵⁶ Section 8(2)

⁵⁷ Section 8(3)

The application of the Act is complimented by the Land (Customary Tenure Conversion) regulations⁵⁸ which outline the procedure of converting customary tenure into leasehold tenure. Under regulation 2 paragraph 2 A chief is empowered by the regulations to grant or refuse consent to convert customary tenure into leasehold tenure. Regulation 2 paragraph 3 provides to the effect that where the chief refuses consent, he shall communicate such refusal to the applicant and the Commissioner of Lands stating the reasons for such refusal. Regulation 2 paragraph 4 provides to the effect that where the chief decides to grant consent to the application he shall confirm that the applicant has a right to the use and occupation of the land. He shall also confirm the period of time that the applicant has been holding that land under customary tenure; and that the applicant is not infringing on any other person's rights.

The application, according to regulation 3 paragraph 1 shall subsequently be referred to the council in whose area the land to be converted is situated. Regulation 4 provides to the effect that where the Council considers that it will be in the interest of the community to convert a particular parcel of land held under customary tenure into leasehold tenure the Council shall in consultation with the chief in whose area the land to be converted is situated apply to the Commissioner of lands for conversion.

The conversion of tenure from customary to the modern statutory tenure is associated with security of tenure. It is often argued that the lack of title in customary lands brings about insecurity because rights are not recognized and protected by law.⁵⁹ Land tenure security is often associated with land titling and land registration. Secure individual tenure, and free land market, have been promoted in the belief that they will lead to higher levels of agriculture investment and

⁵⁸ Statutory Instrument No. 89 of 1996

⁵⁹ Mudenda, Land Tenure and Boundary Conflicts in Rural Zambia, CASLE Conference paper(2006).

productivity and thus provide a firm basis for national development.⁶⁰ The World Bank argues that customary tenure encumbers commercialization; it is insecure, lacks certainty and frustrates rural land markets.⁶¹ As a result of such views there has been a call for land tenure reform attempting to replace customary tenure with modern secure tenure. It is such arguments that led to the implementation of the 1995 Land Act in Zambia. However it has been observed that chiefs and other local people object to this because to them resources such as land act as an important social safety net and that people should have equal access to the resources that nature has provided.⁶² The argument of the chiefs and local people is that the conversion of customary land to state land has limited the local people's access and control to the land which in most cases is being given to Investors who are foreigners. This has led to the local people losing full access to common pool resources upon which they have depended for their livelihood.

The Lands Act has its own shortcomings, some of which include the contentious problem of vestment of land in the president. Many quarters are of the view that all traditional land should be vested in the chiefs and not the President of Zambia, this is under the misconception that vesting of all land in the President entails that the President owns land in his own right and not for and on behalf of the People of Zambia⁶³. Another shortcoming of the Lands Act is that it lacks restrictions or limitations to foreigner ownership of land. Foreigners can own as much land as they wish provided they follow the necessary procedures; this is regardless of whether it is to the disadvantage of the Zambians⁶⁴. Further, the Act lacks provisions on the functions of the Commissioner of Lands.

⁶⁰ Mudenda, *The Challenges of Customary Land Tenure in Zambia*, Munich, Germany, October 8-13, 2006

⁶¹ World Bank, "The theory behind market-assisted land reform", Washington D.C, 2004

⁶² Supra Note 56

⁶³ Supra Note 62, P 456

⁶⁴ Supra Note 8

In as far as land under customary tenure is concerned; the Act lacks clarity in the role of chiefs as custodians of customary land. The Act has not spelled out the exactly what the role of the chiefs is in as far as customary land is concerned. Much has been left to the chiefs themselves to administer land as they deem fit. The Act also lacks provisions relating to jurisdiction for dispute resolution involving land rights originating from customary tenure. Further, the Act also lacks provisions for formal registration of customary tenure. Generally, the occupiers of customary land are often granted verbal permission by the Chief or Headman to occupy and use the land without having to register any such interests.

In an effort to address the above shortcomings and many others, the government has since come up with a Draft Land Administration and Management Policy document which if formalized will promote efficient and effective land administration system that will ensure security of tenure, equitable access and control of land for the sustainable socio-economic development of the people of Zambia⁶⁵.

2.5 LAND POLICY AND GENDER IN ZAMBIA

In as far as women’s access to land is concerned, the Government policy⁶⁶ recognizes the fact that acquisition and ownership of land in Zambia continues to be a hindrance to women’s participation in national development. In order to liberalize and enhance land acquisition and its usage the Government passed the 1995 Lands Act to provide for ownership of land, including land under customary tenure through title deeds. This Act also guarantees women, the majority

⁶⁵ Republic of Zambia,(2006) Draft Land Administration and Management Policy document, Lusaka: Ministry of Lands.

⁶⁶ Republic of Zambia,(2000) National Gender Policy document, Lusaka: Ministry of Gender and Women in Development.

of whom are in rural areas, the possibility of being land owners with security of tenure for 99 years.

The major drawback, however, is that the Land Act allows even customary laws which mainly confer land ownership on men to apply to the administration of traditional land. As earlier mentioned, this is in line with the provisions of Article 23(4)(c)(d) of the Republican Constitution which recognizes the application of customary laws in matters dealing with land.

It must be noted that the current statutory laws do not discriminate against anyone on the basis of gender. The Government has however, recognized that women still lack control over land in some customary areas as opposed to lacking access that they gain through their male relatives. The reason for this lies in some customary practices. In order to address the perceived disparities between men and women in as far as access and control of land is concerned, the Government has implemented a policy requiring at least 30 percent land ownership for women⁶⁷.

⁶⁷ Ibid

CHAPTER THREE

3.1 THE STUDY AREA.

Shifwankula village is located about 10 km north of Lusaka in Chibombo District of the Central province of Zambia. The Head of Shifwankula village is Headwoman Shifwankula who is under Chief Mungule.

During the study it was observed that the village is situated near dambos which, according to Headwoman Shifwankula, have moisture available through out the year. The moist conditions have encouraged small scale farming in the area. It was also observed that the area is suitable for the production of maize, vegetables and watermelons which, according to Headwoman Shifwankula are activities which are done through out the year. The Headwoman further stated that small scale farming is the main economic stay of the village.

Since the village is located only 10 km from Lusaka the small scale farmers are able to market their produce in Lusaka urban. Traders from Lusaka town come to buy the produce from the village, and it is also possible for the small scale farmers to sell their produce at the roadside market or by travelling to Lusaka. Some traders come from Lusaka to exchange second hand clothes with the produce from the village such as maize.

According to the Headwoman, Shifwankula village's suitability for agriculture has attracted migrants from other villages and from the rest of the country to settle in the area. Because of this in- migration Shifwankula village is now composed of various ethnic groups which include the Lenje, the Lozi, the Chewa, the Nsenga, the Tonga, the Ngoni the Tumbuka, the Swaka and the Chikunda. This emigration has caused a population increase which in turn has caused a population pressure on land, and has consequently led to land scarcity in the village.

An interview with Headwoman Shifwankula further revealed that the number of households in the village increased from about 20 to about 30 between September 2000 and August 2007. This is an increase of about 67 percent of the number of households over a period of only 7 years. According to the Headman there is an average of 5 people per household which brings the average population of the area to 150. This was the estimated total population of the village at the time of conducting the field research. Out of the 30 households 18 are male headed while 12 were female headed households. Among the female headed households 3 are single women, 5 are widows and 4 are divorcees.

According to Headwoman Shifwankula the majority of the people in the area are the Lenje speaking peoples, and that they are a matrilineal society. A research conducted by Muntemba among Lenje Speaking people in Chibombo revealed that they are matrilineal and therefore inheritance of land and property is through the maternal line¹. Headwoman Shifwankula stated that the lifestyle of the people in the village was not very different from the rest of the people in Chibombo area, which in the past had been a beneficiary of improved peasant farming schemes which have overtime led to agricultural change in terms of crops, land tenure and means of production. The changes in land use have overtime led to land scarcity because most people are now able to use larger pieces of land than before.

Apart from the improved methods of farming, Headwoman Shifwankula also mentioned that pressure for land has overtime increased because of the sudden rise in the number of migrants from various parts of the country, which has led to increase in the population of the village. Headman Shifwankula mentioned that the number of people coming to her area to ask for land

¹ Muntemba, M.S, Thwarted Development: A case study of economic change in Kabwe Rural District of Zambia. In the roots of rural poverty in Central and Southern Africa, London: Heinemann, 1985.

has increased, and these are mainly from Lusaka town. This has overtime enhanced land value resulting in increased individual land disputes which have to be resolved almost on a daily basis. According to Headwoman Shifwankula land disputes are common in her area, and these include illegal sale of portions of land by some subjects who are often in a hurry to make money, illegal allocations of portions of land without following the laid down procedures, disputes over boundaries as well as disputes relating to inheritance of land. Some of these disputes are in the courts of law. In some cases people who had previously been allocated land but temporarily left it for one reason or another have eventually lost the land because the Headwoman has often used her discretion to repossess the unused land and allocated it to another person who desperately needs it.

In the study conducted by Muntemba² it is pointed out that because of the scarcity of land in the Chibombo area, some people who previously had access to land but had not put it to use found themselves landless or assigned less productive land. Some men and women who had been entitled to own and inherit land under the matrilineal Lenje society found that their inheritance rights were being challenged. Some of the most affected were widows who no longer had access to the best land in the area.

Headwoman shifwankula also stated that the customary law of the village has overtime changed in a way due to the inter-marriages between her subjects and people from outside the village. The customary law of the village is not being applied as strictly as it was in the past. For instance, she stated that before the inter-marriages were common, it was a taboo for a married woman whether from within or outside the village to single handedly approach the Headman or Headwoman to request for land on behalf of her family, this was considered to be a man's job. The Headwoman

² Ibid

mentioned that now it is common for her and other surrounding Headmen to receive married women from other villages who come to look for land on behalf of their families.

CHAPTER FOUR

4.1 METHOD AND DISCUSSION OF RESULTS

In order to obtain information on the objectives of the research both desk research and a field research were conducted.

The objectives of the research were to assess the current land tenure situation in Shifwankula village with respect to women's access to customary land, the procedures followed in accessing the customary land, examining the obstacles if any that women face in accessing the land as well as examining the level of women's awareness about their rights to land and property under customary law, so as to determine whether indeed customary law disadvantages women in as far as access to land and property is concerned.

Under the desk research a review of some literature on the subject was done. An analysis of the provisions of the Constitution of Zambia¹ was done, as well as other pieces of legislation such as the Lands Act², the Intestate and succession Act³, the Wills and Administration of Testate Estates Act⁴ as well as decided cases. Apart from the analysis of the current legislation on property in Zambia, writings by various scholars were also consulted.

Under the field research, the qualitative data was obtained through semi-structured interviews, where open ended questions covering various objectives of the research were formulated before the interviews. The questions covered areas such as procedures for acquiring customary land and other properties, women's knowledge about land policy in Zambia and procedures for acquiring title deeds; obstacles that women face in accessing land and property in Shifwankula

¹ Cap 1 of the Laws of Zambia

² Cap 184 of the Laws of Zambia

³ Cap 59 of the Laws of Zambia

⁴ Cap 60 of the Laws of Zambia.

village as well as issues of inheritance of land and property. Where necessary, questions were asked through an interpreter, and the responses were recorded there and then.

Upon entry into the community, with the assistance of Headwoman Shifwankula members of the village committee were contacted and requested to provide a list of all heads of male and female headed households. A village register was provided, and a random sample of 10 such women and 10 such men was identified and interviewed. The interview basically took the form of a one to one conversation with those who were sampled.

This method was found to be helpful in as far as learning from the people of the village as well as sharing of information with the heads of the households was concerned. It was hoped that with the information provided in the course of the interviews, they would be able to act intelligently in future with respect to issues of empowerment through title deeds which the Lands Act confers, even on female farmers. This method also helped some of the women farmers to know what the government was attempting to do in terms of land policy, so that they can act in an informed manner and not be left out due to ignorance.

Out of the random sample of the 10 women identified, 3 (30 percent) were single; 2 (20 percent) were widows; 2 (20 percent) were divorced and 3 (30 percent) were married but not living with their husbands. Out of the random sample of 10 male headed homes, 2 (20 percent) were polygamous and the rest were monogamous. The majority of the women identified were between the age of 30 and 60 years and in terms of education, 5 (50 percent) had primary education, 2 (20 percent) had secondary education, 3 (30 percent) had no education at all. This brings out the fact that it is imperative that ways must be devised by the government to reach out to female peasant farmers and provide information concerning issues of empowerment given the low levels of education.

The majority of the men identified were between the age of 35 and 70. Out of the 18 households headed by men a random sample of 10 men was identified and interviewed and it was found that 3 (30 percent) had secondary education; 5 (50 percent) had primary education and 2 (20 percent) had no education at all. The status of men in terms of education was found to be the same as that of women.

In terms of family size the 12 female headed households had a total of 42 children giving an average of 3.5 children per household. The male headed households had a total of 52 children giving an average of 4.3 children per household.

In order to establish the tenure system and the rules and procedures that must be followed in order to obtain land in Shifwankula village, Headwoman Shifwankula was interviewed, and it was revealed that initially, all the land in Shifwankula village was under customary tenure as it was under the control of Chief Mungule. Overtime, due to pressure for ownership of land, people have resorted to applying for the authority of the chief to enable them obtain title deeds to their portions of land. This situation has been aggravated by people from Lusaka as well as other towns who frequently come to Shifwankula village looking for land to buy from the subjects. Most of the subjects sell some portions of their land to outsiders because they see this as an opportunity to make quick money. Often times this is done without the knowledge of the Headman or the Chief. This situation has resulted in certain portions of land being converted to leasehold tenure. There has been an increase in the number of people applying for authority to convert customary tenure to leasehold tenure. According to Headwoman Shifwankula, the immigration of new settlers has generally resulted in scarcity of land in Shifwankula village. On average each house has an average of only 1.5 hectares of cultivatable land. The scarcity of land

is prompting many of her subjects to convert to leasehold tenure which is considered to be more secure.

With regard to procedures and rules of accessing customary land, Headwoman Shifwankula stated that first priority is given to her subjects whose names appear in the village register. If the subject wants a portion of land which they have identified, regardless of whether it is a man or woman, he/she can make such a representation verbally or in writing to Headwoman through the village committee stating the reasons for applying for such a portion of land. The village committee will scrutinize the application. If it is found that the applicant is a resident of the village, a loyal subject and has no other land previously given to him within the village, the request is granted. Headwoman Shifwankula further stated that if the applicant is not from within the village, the village committee which is the advisory committee of the Headwoman will rarely recommend such a person unless they are convinced that grant of land to such a person will be for the benefit of the village.

With regard to conversion of title from customary tenure to leasehold tenure, the Headwoman emphasized that if the applicant was a Zambian citizen and considered to be a loyal subject, he/she can approach the Headman/woman who then refers the application to the village committee. The committee will deliberate on the application. If the committee gives approval, the application is then forwarded to the Headman/woman who can either approve or disapprove the application. According to Headwoman Shifwankula, the application may be rejected if she feels that the applicant is not a loyal subject, and a letter will be written to the chief and to the applicant stating the reasons why the application was rejected. However, if she approves the application, the Headwoman then writes to the chief recommending the applicant. If the chief also approves, a letter is written to the council and the applicant. The applicant then submits the

letter from the chief and the application for title to the council, who must survey the land and come up with a sketch map. If the council approves, all the documents are finally submitted to the Commissioner of lands who approves such applications on behalf of the President. After the whole process is completed title is granted by the Commissioner of lands. The Headwoman emphasised that as far as she was concerned, applications for conversion of title will be carefully scrutinized so that title is given only to loyal and cooperative citizens. It was the view of the Headwoman that if the tenant with title does not respect tradition, the chief should be able to repossess the land since it still belongs to the chief. She expressed fear that if title is granted to individuals who are not loyal, such persons will in future refuse to respect the Headman, and will also refuse to participate in community work since they would now be independent and answerable only to the president. She also stated that the government must find a way to ensure that title works in favour of both the holders and traditional leaders. There is need to develop values over title to land which are harmonious with the local village culture so that the issuance of such title does not destabilize rural society by turning the holders against traditional leaders, or women against men.

The Headwoman added that the procedure for acquiring land in her village is more or less standard regardless of whether the applicant is a man or woman. According to Headwoman Shifwankula, customary land in her village is granted on merit. Subjects are given land according to their needs to ensure that they have land to carry out various activities for their survival. Single women, the widowed even divorcees can go through the same process and acquire land of their own from the Headman.

The Headwoman, however, stated that the procedure with regard to married women is different. A married woman cannot on her own request for her own land from the Headman/woman. This

is so because every married man in the village is given enough land to accommodate his wife and the rest of the family. The land does not belong to the man alone, but to the entire family who must work on the land for their survival. The Headwoman added that this measure is for the sake of bringing harmony to the families. Granting land to a married woman in her own right may bring disunity in the family, as it would mean the woman would concentrate her efforts on her own piece of land neglecting the family land and this may in the long run cause conflicts in the family. The Headwoman further emphasised that when a married man has been given land, it does not belong to him alone, but to the entire family. The man equally cannot be allowed to own some other land in his personal capacity as it may also bring disunity in the family. Headwoman Shifwankula stated that as opposed to granting land to either a married woman or married man in their own capacity, she would rather give additional land to the family as a whole, and only if it is evident that the family has expanded to such an extent that they would need additional land. These measures, according to the Headwoman are meant to ensure that there is unity in the entire village by promoting unity at the family level.

In the event that the man dies, the widow is allowed to continue surviving on the family land. If the widow came from another village, the choice is hers whether to continue living in her late husband's home or go back to her own village. If she decides to go back to her village, the land is left for the children to cultivate and property grabbing is not condoned. In the event of divorce, the woman is free to request for her own land from the Headman/woman or may make a request that she be given a portion of the family land for her and her children's survival.

In terms of women's access to land in Shifwankula village, the Headwoman stated that the majority of the women settled in the village obtained land on their own by following the above stated procedures. Most of these women came to search for land so that they could independently

take care of themselves and their children. While some came after the death of their husbands, others came after divorce or separation. Others came to settle with their husbands or followed either their parents or other relatives.

The sample of 10 women who were identified was interviewed in order to first of all establish the manner in which they obtained land in the area. Out of the three single women interviewed, two stated that they were given land by the Headman and, one stated that she was given land by her male relative. Of the two widows who were interviewed one stated that she was given land by the Headman after she left the village where she was staying upon the death of her husband. The other widow stated that she inherited land from her late husband within the village. Of the three married women who were interviewed one stated that she obtained land from the Headman before she got married and was allowed to hold on to the land even after she got married. The other two married women stated that they obtained land through their husbands and they regarded this land as family land. Of the two divorced women who were interviewed one stated that she obtained land from the Headman, and the other one stated that she obtained part of the family land after her husband left her for another woman within the village.

The above results indicate that 50 percent of the women obtained land on their own from the Headman, 40 percent either got land from their husbands or inherited the land after the death of the husband, and 10 percent got their land from a male relative. These results indicate that the majority of women in Shifwankula village have no problems in as far as accessing land on their own is concerned. This seems to be in disagreement with the literature on the subject of women and land in other parts of Zambia. For instance in a study conducted by Milimo⁵ it was found that 25.3 percent of the female headed households acquired land by inheritance, 23 percent were

⁵ Milimo, J. T. 1990. Differential impacts of Zambia's macro-economic and sectoral policies on agricultural production by male and female farmers. Consultancy Report, NCDP, Lusaka, February.

given by the Headman, 23 percent were given by the father and 7.8 percent and 7.4 percent were given by a husband or mother, respectively. Another 11.8 percent were given land by a male relative. This gave a general picture that women are disadvantaged in as far as accessing of land on their own is concerned.

It must be acknowledged however that the results of this study generally indicates that the customary procedures and requirements for one to acquire land in Shifwankula village discriminate against married women in that a married woman cannot request for land to own in her personal capacity. However, it was generally felt by all the ten men who were interviewed including the Headwoman that it was necessary to follow the procedure of not allowing married men or women to request for land to own in their personal capacity, this is in order to avoid creating sociological problems such as conflicts between husbands and their wives and traditional leaders, which may bring about disunity in the village.

The general picture that emerged when the 10 men who were interviewed was that a married woman was supposed to obtain land from her husband. It was emphasized that its rare for a married woman to ask for land from the Headman because she was under the control of the husband. If the husband does not have enough land to give to his wife, then he can approach the Headman to ask for extra land for his wife. With respect to divorced women, more than 60 percent of the men and women stated that divorcees are supposed to be allocated land by the Headman so that they can sustain themselves and their children. The same was true for the widow. The majority of the men felt that while it was expected that a widow was supposed to continue to cultivate the land which was left by her deceased husband; it was also unanimously pointed out that if such land is grabbed by the relatives of the husband, then it is important that the headman allocates land to such a widow so that she can have the means of sustenance.

The 10 women and the 10 men were also interviewed in order to establish their level of awareness with regard to obtaining leasehold title to land. It was discovered that 7 (70 percent) of the women and 5 (50 percent) of the men were aware that they could apply to the relevant authorities for them to acquire leasehold title to the land given to them by the Headwoman. This brings the total of those who are knowledgeable to 12 (60 percent) out of the sample of 20. Out of the 70 percent of the women who were aware of the procedure for obtaining leasehold title, 4 (57 percent) stated that they had already acquired leasehold title to the land they were occupying, and the other three women stated that they were in the process of acquiring one. Out of the 50 percent of the men who knew the procedure of acquiring a leasehold title, 3 (60 percent) stated that they had already acquired leasehold title and the other two stated that they were comfortable with customary title granted to them by the Headman. This brings the total of those who have leasehold title to 7 (35 percent) out of the 20. All the women and men who acquired leasehold title to their land stated that it was the most secure way of owning land as opposed to just having a customary title.

According to a 44-year old Lenje divorcee, getting title is a good idea which the government has introduced because it means that the land can now be registered in the farmer's name. She added that with title there is no "pack and go"- referring to the insecurity caused by the fear of eviction by a traditional leader. To emphasise on the point of security in a leasehold title a Tonga widow stated that her late husband who was one of the earliest settlers in the village had been given 40 hectares in 1983 by the Headman. Before he died all his three wives were given portions of land to cultivate while the rest was for himself. Because no of the women had obtained title to their portions of land, when the man died the land was grabbed from them. Traditional leaders participated in grabbing some land from the estate and gave it to the relatives of the deceased

who came from outside Shiifwankula village. She was told to go back to her home village in Monze and ask for land which her late husband left.

Both men and women stated that they had no problems obtaining their leasehold title. These results demonstrate that there are more women than men who have information on how to obtain title to land. The results also indicate that there are more women than men with leasehold title in Shiifwankula village, and of those who had not yet acquired leasehold title, more women than men were interested in acquiring the title. It was also discovered that 80 of the men and women who had leasehold title, or were in the process of acquiring one are those who attained some secondary school education, and only 20 percent had either primary or no education at all. This goes to indicate that the level of education has a bearing on whether or not one would obtain title to the land they occupy in the village.

With respect to inheritance in the event of death, the majority stated that children were supposed to inherit the estate. It was generally felt by 60 percent men and 40 percent of women who were interviewed that male children were supposed to be in charge of the estate, controlling major assets such as cattle and land on behalf of the family, whereas the girls would play a more or less passive role in the administration of the estate. However, when the girl is fully grown and can live on her own, she is entitled to claim her share of both the land and cattle. On the other hand, 40 percent of the men and 60 percent of the women felt that whoever is older and responsible in the family whether male or female should be given the responsibility of managing the assets of the family. These views on inheritance generally reflect the weight of tradition which favours the male rather than the female child. Surprisingly even some of the women are of the view that women should be below men. The men and women who were interviewed all expressed some

knowledge about existence of the Intestate and succession Act,⁶ and the Wills and Administration of the Testate Estates Act.⁷ It was however clear that the majority did not know how the Act operates.

Seventy five percent of the men who were interviewed said they had reservations about the Intestate and Succession Act in that it only favours women and completely disregards the parents of the deceased. According to them, the law demands that the wife of the deceased should get the house and all other big assets of the estate without giving anything to the parents of the deceased. As far as the men are concerned, they die earlier than the women, and when this happens, their parents will suffer. More or less the same views were expressed by 50 percent of the women. The married women stated that it was not their wish that the parents of their husbands should suffer. Their view is that whatever property is left by the deceased, it must be shared by the surviving spouse, the children and the parents of the deceased. As far as they are concerned, the customs and traditions of the village of Shifwankula are adequate in as far as inheritance of property is concerned because it ensures that everyone who is entitled to benefit from the deceased estate benefits. This is an indication that the as far as the people in Shifwankula village

The level of ownership of property other than land among the 10 men and 10 women who were sampled was also analysed. This was done by comparing the level of property ownership of men to that of women. The type of property that was considered in this case was that which pertains to farming since agriculture is the main economic activity of the village. The various properties that were considered included hand hoes, ox-drawn ploughs, scotch carts, light trucks, and cattle. It was found that 5 (50 percent) of the men had hand hoes only, 3 (30 percent) of the men had hand hoes and cattle, 2 (20 percent) of the men had hand hoes, cattle, ox-drawn ploughs and a

⁶ Supra Note 3

⁷ Supra Note 4

scotch cart. Among the women it was found that all the 10 (100 percent) had more than one category of property. 7 (70 percent) had hand hoes and cattle, 2 (20 percent) had hand hoes cattle and an ox-drawn plough, 1 (10 percent) had hand hoes, cattle, a light truck, and an ox-drawn plough. 3(30 percent) of the women stated that some of the properties they had was inherited from their parents, 2 (20 percent) stated that they inherited some of their properties from the husbands, 2 (20 percent) stated that they given by their relatives, and 3(30 percent) stated that they bought the property on their own. It is clear from the results that women own more property than the men. Most of these properties were either bought by the women themselves or inherited from their husbands, their parents or other relatives. In this way, most of the women in the village are able to sustain their households independently. For instance, there is a 38- year old Chewa mother of three with a grade seven education who is polygamously married, but manages her farming responsibilities alone. Although the husband who stays in another village is a successful farmer, she stated that before she got married, she managed to get two portions of land which she has continued to cultivate. She owns a plough, a scotch cart and ten animals. She stated that she does not get any help from her husband in cultivating the land, as she owns her own implements and animals. She further stated that in the 1997/98 season when she benefited from government support in terms of agricultural inputs such as fertilizer, she managed to harvest 90 x 90-kg bags of maize, sold some and left some for consumption. This example indicates that although this woman is married, she enjoys independence in as far as control over her property is concerned.

There is also a 50-year old lozi widow who is a mother of nine children who stated that she settled in Shifwankula village in 1990 from Lusaka. She cultivates about 4 hectares of maize. She owns three ox-drawn ploughs, two scotch carts and 18 animals. She stated that she bought

the livestock and the agricultural implements herself using the money realized after selling some of her maize. She stated that she runs some small businesses such as selling charcoal, and also selling fish in Lusaka. She further stated that due to government support in the 1996/97 agricultural season she managed to harvest 100 x 90-kg bags of maize. According to her this was the highest harvest she had since she obtained the land because in that season the government provided inputs such as fertiliser. She sold some of the maize and managed to hire people to make burnt bricks for her new house.

These two examples show that as opposed to the general view held by many, there are women, even in rural areas who have access to land and property, and are as successful as their male counterparts and are using their initiative to run their farming and other enterprises with business acumen. To a great extent these experiences speak volumes about how women irrespective of their marital status are able to take advantage of opportunities available to them and thus break the stereotype view that they are always disadvantaged, dependent and perhaps hopeless.

Even if some of the women do not have all the implements they require such as ploughs to carry out their farming activities, many of them stated that they are able to borrow from their female and male neighbours or hire such implements at a fee, as such, they are not completely disadvantaged in terms of access to these requirements. These results are contrary to the view that was expressed in a study conducted by Larson and Kanyangwa,⁸ where it was stated that women generally do not own oxen and implements and have to wait before their fields are ploughed and therefore lose out because of late planting. It should be noted however that hiring of implements is a creative way of accessing the technology. This according the results in this study has helped some women in Shifwankula village to cope with the fact they have not been

⁸ Larson, K., and J. Kanyangwa. 1990. Women in market oriented agriculture, in the Dynamics of agricultural policy and Reform in Zambia. 473-493. Ames, Iowa State University.

able to accumulate their own equipment and animals. This indirect way of having access to improved technology cannot be underestimated because enterprising women farmers in Shifwankula village are learning to adapt and cope with the prevailing circumstances. In this way, they are able to sustain their households independently.

With regard to the proposed government policy⁹ which requires that 30 per cent of the available plots to be allocated to women, all the women in the sample stated that they were not aware of such an effort on the part of the government. However, they were of the view such a policy is welcome and that it should be extended to customary land to ensure that even women in rural areas can benefit.

⁹ Draft Land Administration and Management Policy, Ministry of lands, Lusaka.

CHAPTER FIVE

5.1 CONCLUSION AND RECOMMENDATIONS

This study has attempted to bring out various factors pertaining to customary law and women's access to land and property in Shifwankula village. The issues addressed in the study were the status of land tenure in Shifwankula village, women's access to land and other property, the procedures followed in obtaining land, the obstacles that women face in accessing land and property, and the level of women's awareness with regard to conversion of title from customary tenure to leasehold tenure.

From the findings of the study, it can be concluded that the majority of land in Shifwankula village is under customary tenure, and only a small part of the land is under leasehold tenure. However, there is likely to be a gradual increase in leasehold tenure because some people in the area have obtained title, and some are in the process of obtaining title while others have expressed interest in having a leasehold title to the land they are occupying. A leasehold title is considered by many to be a more secure way of owning property as opposed to owning land under customary tenure which can be taken away by the traditional rulers at any time.

On the other hand, the traditional rulers are often reluctant to grant authority for their subjects to obtain title for fear that some of the subjects may become disloyal to the rulers as they would only be answerable to the president who granted them the title. It is therefore felt that the granting of title indirectly takes away the authority that the traditional rulers have over their subjects. It is also clear from the study that the traditional rulers also have fears that due to the increase in the demand for land, outsiders are making high offers to purchase land from those

who have obtained title, leading to a further loss of control over land by the chiefs and consequently their authority.

In view of these concerns raised by the traditional rulers it is possible to conclude that such fears are among the obstacles that both men and women face in as far access to land is concerned. It is therefore imperative that such fears are addressed by the government by developing values over customary title to land which are harmonious with the local village culture so that the issuance of such title does not destabilize rural society by putting the holders against traditional rulers, or women against men. The government can do this by for instance inserting a 'protective clause' about repossession of customary land in the 1995 lands Act.¹ This would create a situation where local culture would be promoting rather than hindering access to land, thus promoting customary tenure with greater access and security.

In terms of women's access to land and property, it can be concluded from the study that women like men in Shifwankula village generally have access to land and property. It should be emphasized that the findings of this study show a contrary view to that expressed by many. Many studies as earlier pointed out in the first chapter of this paper indicate that women generally are disadvantaged in as far as access to land and property is concerned, and that if they have access at all, it is through their husbands or male relatives. However, the study on Shifwankula village shows that more women have access to land directly from the Headman without going through their male relatives. It is also clear that the Women of Shifwankula village are able to obtain other properties apart from land through inheritance from either parents or their husbands. Incidents of property grabbing are therefore almost non existent. It also means that the women in Shifwankula village enjoy security in property, and land which they cultivate.

¹ Cap 184 of the Laws of Zambia

The study has also shown that the majority of women in Shifwankula village are aware of the provisions in the lands Act which entitle them to seek authority from their traditional rulers to convert title from customary tenure to leasehold tenure. This knowledge has worked to the advantage of some of these women as they have acquired title to the land they cultivate. The study has in fact demonstrated that more women than men in Shifwankula village are enlightened about the advantages of obtaining title to the land they occupy. As such more women than men have expressed interest in acquiring title, and in fact more women than men have actually acquired title to the land they occupy. It is therefore concluded that women in Shifwankula village do not face any obstacles in accessing land, provided they are able to show their loyalty to the headman or the chief, and their names appear in the village register as residents of the village. This finding is contrary to the general view that women are disadvantaged in as far as access to land is concerned. It goes to show that the difficulties and challenges that women face in as far as access to land is concerned differ from one traditional setting to another. The traditional practices of one village may promote the empowerment of women in terms of land ownership as seen in the case of Shifwankula village, while practices in other villages may not as seen in other studies. It may therefore be misleading to conclude generally without closely examining the various traditional practices that exist in Zambian villages.

However, the study indicates that the only category of women that seems to be disadvantaged is that of the married women because they cannot approach the Headman directly to ask for land as tradition demands that land should be given to a man who should then give a portion of that land to the wife. This is true especially in the case where a woman moves to the husband's village or home after marriage. In such a case, the chief or headman cannot allocate land to the married

woman without the consent of the husband. This means that the man has power over the land he has been given, and it is within his powers to give or not to give any part of it to his wife. In order to address this problem it is recommended that the government comes up with a system of registering village land where land owners under customary tenure will have their land registered under the village land registry, and on registration the owner whether an individual, a family or a clan head, will be issued with a simple certificate, and in order to avoid disenfranchisement of women, both the names of the owner of the parcel of land and that of the spouse or spouses will be included in the certificate. This to a great extent will bring order to the customary system. It is also recommended that in order to avoid over accumulation of land by individuals, which in most cases creates landlessness in the villages, the government must put a statutory restriction on the amount of land that an individual can own in the villages.

It is further recommended that in Zambia, where a market economy is being promoted, democratic institutions have to be created in which all stakeholders at the local level are represented, including women. Such institutions should be given the task of allocating land to both men and women. In this way, both sexes will have a say in the sharing of land and property. Such institutions should be enshrined in the land law of the country. The creation of these new institutions at the local level to empower women and guarantee their rights to land and other resources have to be done democratically and in a peaceful manner, as part of the gradual process so that relationships in households and communities are not destabilized. It would therefore be essential for the state and other interested parties to sensitize communities and promote continuous dialogue to enlist the cooperation of traditional leaders, especially headmen, chiefs and other stakeholders through village meetings and other participatory approaches, on how resources should be shared, based on new values and new institutions. This will in the long

run promote modernization and democratic land reform, without destabilizing rural society and rural households.

It is evident from the study that the majority of the women in Shifwankula village are not aware of the government policy on land administration and management which provides that at least 30 per cent of state land must be allocated to women. This calls for the government and other interested organizations to conduct community sensitization in order to educate women on this policy so that they can take advantage of it and own land of their own. It must however be emphasized that the provision of the policy does not affect customary land. It is therefore recommended that the policy should be extended to customary land to ensure that women in rural areas also benefit. Further, consideration should be made to have the policy of 30 per cent land for women made into law so that the authorities concerned are bound by this provision. As it stands, no authority is bound by law to follow the policy, as such it is not something that women can pursue in the courts of law if it is not implemented.

With regard to the Intestate and succession Act,² the study has shown that the majority of people in Shifwankula village are ignorant of its provisions regarding the way property is distributed upon the death of a spouse. As far as they are concerned, the law favours women in that women are allowed to get all the property upon the death of the husband living out the parents of the deceased. It is therefore recommended that the government and civic organizations conduct community education programs to sensitize the rural community on the application of this law, bringing out the fact that the distribution of the property is regardless of whether the person who has died is the wife or husband, and that the percentages will also apply accordingly.

² Cap 59 of the Laws of Zambia

It is also recommended that the Lands Act³ should be amended to include express restrictions or limitations to foreign ownership of both state and customary land. Such a provision will ensure that there is control of the amount of land that traditional rulers can give out to foreigners. This will in effect protect the interests of the local people by reducing the risk of them being landless.

³ Supra Note 1

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