

THE SYSTEM OF LAND ALIENATION IN ZAMBIA

A critical analysis of the Legal and Institutional Framework

THESIS
LL.M.
SIC
2010
1

THE SYSTEM OF LAND ALIENATION IN ZAMBIA:

A critical analysis of the Legal and Institutional Framework.

By

FRIGHTONE SICHONE

23537485

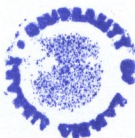
05782807

Thesis submitted to the University of Zambia School of Law in fulfilment of the requirements for the award of the Degree of the Master of Laws (LLM).

The University of Zambia

P. O. Box, 32379

LUSAKA



DECLARATION

I, FRIGHTONE SICHONE, [Computer number: 23537485], DO HEREBY solemnly declare that the contents of this dissertation entirely represent my own work, and it has not previously been submitted for a degree at this or another University.



Signed

21/06/2010

Date

© 2010 by Frightone Sichone
All rights reserved

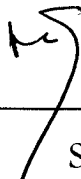
THE UNIVERSITY OF ZAMBIA
SCHOOL OF LAW

I recommend that the thesis prepared under my supervision by
FRIGHTONE SICHONE

Entitled;
THE SYSTEM OF LAND ALIENATION IN ZAMBIA:
A critical analysis of the Legal and Institutional framework.

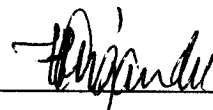
be accepted for examination. I have checked it carefully, and I am satisfied that it fulfils the requirements pertaining to the format as laid down in the regulations governing Master of Laws Theses.

0279807



Supervisor

Dated the 23rd..... day of June..... 2010



External Examiner

Dated the 9TH..... day of JULY..... 2010

ABSTRACT

Since the advent of colonial rule, the system of land alienation in Zambia has not received adequate attention both in terms of legal and institutional reform in line with political and socio-economic changes, and population growth. Even with the attainment of political independence in 1964, there has been no clear legislation to govern the procedure on land alienation.

Currently, there are several statutes that have some bearing or relevance to land alienation, and there are several government Ministries and Departments that play a role in land identification, planning, surveying and title registration. Admittedly, the challenge faced with this kind of legal and institutional structure is that there is lack of co-ordination among land alienation institutions, and there are conflicting regulations in certain instances. To cope with the current demand for land, there is need for equitable access to land, as well as secure land tenure for the people of Zambia.

This dissertation is a study of the system of land alienation in Zambia in both State land and Customary land. The study critically analyses the law relating to the land tenure system in the country, and evaluates the legal framework and

institutions that are involved in land alienation. Basically, the whole study is an examination of real practices and procedures followed in the alienation of land in different categories of land.

During this study, it has been revealed that the system of land alienation in Zambia has continued to be based on and influenced by the colonial forms of tenure introduced during the colonial rule that have little relevance to the needs of the country. This study has further revealed that there is lack of institutional establishment, and technical capacity in the alienation of land. Furthermore, there is lack of rules and guidelines on the roles to be played and functions to be performed by the institutions involved in the alienation of land.

The study reveals that some indigenous forms of customary tenure are no longer suitable in light of the increasing demand for land posed by population growth, urbanisation, rural-urban migration, and other demographic factors. There is now need to devise suitable methods of land alienation to cater for various uses of land such as land for housing, agriculture, commerce, and industrial development. The study has suggested that legislation governing land holding, land acquisition, usage and delivery in both systems of land tenure should be consolidated with a view to unifying land alienation and administration. Similarly, legislation should recognise the rights of land users by

defining these rights through formal survey and registration so that everyone, irrespective of social status, gender or origin can have similar rights to land.

The study has concluded that the law relating to land alienation should be revised and the institutions involved in land alienation should be restructured and decentralised in order for them to deliver land in an efficient, effective, transparent, democratic and equitable manner for the socio-economic development of the Zambian people and the country.

It is hoped that the findings of this study will provide a contribution to the scholarly works on the system of land alienation and administration in Zambia.

DEDICATION

This work is dedicated to my late brother Joel Sichone

ACKNOWLEDGMENTS

I wish to express my gratitude to my supervisor Professor Mphanza Patrick Mvunga, SC, for his co-operation, patience, keen interest, and valuable time he spent going through my work as well as whose ideas, comments and suggestions made it possible for me to write this Thesis. This work would not have been successfully completed without his guidance.

I further wish to convey my gratitude to Mr. Fredrick Mudenda, a lecturer of Land Law in the School of Law at the University of Zambia. He gave me the inspiration and encouragement during the time I was part-time tutor of Land Law in the School of Law at the University of Zambia. He invited me to co-author one of the chapters in his book 'Land Law in Zambia, Cases and Materials; and he allowed me to conduct several tutorials and lectures on Land Law in the School of law. I thank him for the confidence he had in me and I will always remain indebted to him.

My special thanks go to my wife Diana, for the time she spent with me during my study, and for her unwavering support even in the face of seemingly insurmountable obstacles.

I further wish to thank my friends, Mr. Majumo Khunga, Assistant Chief Registrar of Lands and Deeds in the Ministry of Lands, Mr. Philemon Songolo, Corporation Secretary at Zambia National Broadcasting Corporation, and Mr. Christopher Besa, Corporation Secretary at Zambia National Building Society, for their enduring and persistent encouragement to me during my study.

I wish to thank all the people who contributed to my successful completion of this study in many ways. Specifically, thanks are due to Justice Phillip Musonda, Judge of the High Court of Zambia, Dr. Ngosa Simbyakula, the Director, Zambia Institute of Advanced Legal Education (ZIALE), Dr. Margaret Munalula and Dr. Patrick Matibini, SC, Dean and Assistant Dean Postgraduate Studies respectively, in the School of Law, University of Zambia

Finally, I wish to convey my heartfelt thanks to all those who made comments on my work either positively or negatively because the comments enhanced my work.

TABLE OF CONTENTS

	Page No.
Declaration.....	iii
Certificate of Approval.....	v
Abstract	vi
Dedication	ix
Acknowledgments	x
Table of Contents	xii
Table of Cases	xvi
Table of Statutes	xviii
Preface.....	xx

CHAPTER 1 THE SYSTEM OF LAND ALIENATION

Introduction	1
Sources of Law	5
(i) English law	6
(ii) African Customary Law	8
(iii) Zambian and foreign Case Law	10
(iv) Statute Law	11
Historical Development of the Land alienation	12
Land Alienation under British Direct Rule – 1924-1964	17
Categories of land established	21
(a) Crown Lands	22
(b) Native Reserves	23
(c) Native Trust Land	24
Freehold and Leasehold tenure	27
Post 1964 Legislative Developments	31
Land (Conversion of Titles) Act 1975.....	38
Circular No.1 of 1985.....	40
Land Reforms in the Third Republic	41

CHAPTER 2

LAND ALIENATION UNDER STATE LAND

Introduction	49
Administration and Control of Land	51
Legal framework	53
The Town and Country Planning Act.....	53
The Land Survey Act.....	56
Circular Number 1 of 1985.....	59
The Lands Act	63
Eligibility to hold land in Zambia	65
(i) Permanent residents	67
(ii) Investors.....	80
(iii) Presidential consent under his hand.....	81
(iv) Companies registered under the Companies Act.....	84
(v) Statutory Corporations.....	85
(vi) Cooperative Societies.....	86
(vii) Bodies registered under the Land (Perpetual Succession) Act....	88
(viii) Interest or rights arising out of a lease or tenancy agreement....	90
(ix) Acquisition of right or interest on death by survivorship or operation of law.....	92
(x) Commercial Banks.....	93
(xi) Acquisition of Land through a concession or right under the Zambia Wildlife Authority Act.....	94
Conditions on alienation of land	94
Circumstances where land is granted without consideration.....	95
Conditions for assigning or transferring land.....	96
Compliance with lease conditions.....	97
Institutional Framework	104
(a) The Ministry of Lands	104
(i) Lands Department.....	106
(ii) Survey Department.....	110
(iii) Lands and Deeds Registry Department.....	112
(b) Local Authorities	114
(c) Planning Authorities	116

CHAPTER 3

LAND ALIENATION UNDER THE HOUSING, STATUTORY IMPROVEMENT AREAS

Introduction.....	121
Background.....	121
Legal Structure.....	125
Declaration of Statutory Housing Areas	125
Declaration of Improvement Areas	128
Institutional structure	132

CHAPTER 4

LAND ALIENATION UNDER CUSTOMARY LAND

Introduction	140
Land ownership under customary tenure.....	140
The Adjudication of land rights in Reserves and Trust Land.....	147
Status of customary tenure today	150
Institutional framework	151
Legal framework	153

CHAPTER 5

LAND ALIENATION UNDER RESETTLEMENT SCHEMES AND STATUTORY RESERVES

A. RESETTLEMENT SCHEMES

Introduction	167
Purpose of resettlement schemes	168
Land acquisition Process	171
Institutional framework and Collaboration	173

B. STATUTORY RESERVES

Introduction	178
Forest Reserves	179
Alienation of land in a Forest Reserve	181
National Parks	189
Game management Areas	191
Legal and institutional structure	192

CHAPTER 6

LAND REGISTRATION

Introduction	195
Registration of title	195
Nature of documents required to be registered	199
Priority of registration of interests	202
Effect of failure to register documents	206
Conclusiveness of registered interests	208

CHAPTER 7

AN APPRAISAL OF THE LAND ALIENATION SYSTEM

Introduction.....	215
Legal and Institutional framework under leasehold tenure.....	218
(a) Status of State land.....	218
(b) The statutory Housing Areas and Improvement Areas.....	220
(c) Legal framework.....	223
(d) Institutional framework.....	231
Legal and Institutional framework under customary tenure.....	235
(a) Status of customary tenure.....	235
(b) The Institution of Chief.....	243
(c) Local authorities.....	246
(d) Zambia Wildlife Authority.....	248
(e) The Department of Forestry.....	251
(f) Office of the Vice President.....	252
Problems of institutional coordination.....	254

CHAPTER 8

CONCLUSIONS AND RECOMMENDATIONS

Conclusions and Recommendations	257
---------------------------------------	-----

TABLE OF CASES:

Amodu Tijani v. The Secretary of Southern Nigeria [1921] 2 A.C. 399

Attorney-General & Ministry of Works and Supply & Rose Makano v. Joseph Emmanuel Frazer & Peggy Sikumba Frazer (2001) Z.R. 87

Construction and Investment Holdings Limited v. William Jack & Company Limited, [1972] Z.R. 66

Cox v The African Lakes Corporation Limited (otherwise known as the Kombe Case), 1901 (unreported)

David Nzooza Lumanyenda & Goodwins Kafuko Muzumbwa v. Chief Chamuka & Kabwe Rural District Council & Zambia Consolidated Copper Mines Limited [1988 – 1989] Z.R. 194 (SC)

Gibbs v. Messer [1891] A.C. 248

Henry Mpanjilwa Siwale & Six Brothers v. Ntapalila Siwale, (1999) Z.R. 84

Kawana Mwangala v. Bwale Nsokoshi & Ndola City Council, (2000) Z.R. 131

Krige & Another v. Christian Council of Zambia (1972) Z.R. 152

Lake Kariba Boating Services Limited v. Kariba North Bank Company Limited [1982] Z.R. 35

Lenton Holdings Limited v. Airforce Moyo (1984) Z.R. 46

Major Mukwati v. Senior Chieftainess Nkomeshya, LAT/60/1997

Mark Chuunyu Chona v. Evergreen Farms Limited, 1996/HP/2727(Unreported)

Mobil Oil Zambia Limited v. Loto Petroleum Distributors (1977)Z.R. 336

Moonga v. Makwabarara & Abeve Company Limited.2002/HP/1127 (unreported)

Mutwale v. Chinengu 1999/HP/1770 (Unreported).

Mupwayaa, Albert Phiri (Village headman) & Kamaljeet Singh v. Matthew Mbaimbi SCZ/41/1999

Mwangelwa v. Nsokoshi and Ndola City Council LAT/98/99 (unreported)

Patel v. Ishmail 5N.R.L.R. 563

R v. Penesi Jonas, 1N.R.L.R. 92

Raphael Ackim Namung'andu v. Lusaka City Council (1978) Z.R. 358 (HC)

Re: F. Brian Coulson & In Re: The Registrar of Lands and Deeds Registry Regulations Ex-parte Robert Eric Shannon, 4N.R.L.R. 137

Re: Special case submitted by the Registrar of Lands and Deeds, 5N.R.L.R. 475

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

Rhodesia Wattle Company Limited v. Taziwa & Others (1957) (R.N.L.R.) 656

Sobhuza v. Miller and Others (1926) A.C. 226

Still Water Farms Limited v. Commissioner of Lands & 3 Others, LAT/30/2000 (unreported)

Sundi v. Ravalia, (1949-54) N.R.L.R. 345

Thomas Edwards Roberts v. Solomon Bandawe & 24 Others LAT/30/1999 (unreported)

Ward v. Casale & Burney, 5N.R.L.R. 759

William Jacks & Company Limited v. Registrar of Lands and Deeds and Construction Investment Holdings, (1967) Z.R. 109

Williams & Glyn's Bank v. Boland ((1981) A.C. 487

Yengwe Farms Limited v. Masstock Zambia Limited, the Commissioner of Lands and the Attorney-General, (1999) Z.R. 65

TABLE OF STATUTES:

Agricultural Lands Act, Chapter 187 of the Laws of Zambia
Banking and Financial Services Act, Chapter 387 of the Laws of Zambia
British Acts Extension Act, Chapter 10 of the Laws of Zambia
Chiefs Act, Chapter 287 of the Laws of Zambia
Companies Act, Chapter 388 of the Laws of Zambia
Conveyancing and Property Act of 1881
Co-operative Societies Act, Chapter 397 of the Laws of Zambia
English Conveyancing Act, 1882
English Law (Extent of Application) Act, Chapter 11 of the Laws of Zambia
Forests Act, Chapter 199 of the Laws of Zambia
High Court Act, Chapter 27 of the Laws of Zambia
Housing (Statutory and Improvement Areas) Act, Chapter 194 of the Laws of Zambia
Intestate Succession Act, Chapter 59 of the Laws of Zambia
Investment Act, Chapter 385 of the Laws of Zambia
Landlord and Tenant (Business Premises) Act, Chapter 193 of the Laws of Zambia
Lands Act, Chapter 184 of the Laws of Zambia
Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia
Lands Acquisition Act, Chapter 189 of the Laws of Zambia
Land (Conversion of Titles) Act, Chapter 289 of the Laws of Zambia (repealed)
Land (Conversion of Titles) (Amendment) Act No. 2 of 1985
Land (Perpetual Succession) Act, Chapter 186 of the Laws of Zambia
Land Survey Act, Chapter 188 of the Laws of Zambia
Local Courts Act, Chapter 26 of the Laws of Zambia
National Housing Authority Act (1971)

National Parks and Wildlife Act, Chapter 201 of the Laws of Zambia
Native Reserves and Native Trust Land (Adjudication and Titles) Ordinance,
Act No. 32 of 1962
Northern Rhodesia Order-In-Council, 1924
Northern Rhodesia (Crown Lands and Native Reserves) Orders-In-Council
1947
Northern Rhodesia (Gwembe District) Order-In-Council 1959
Northern Rhodesia (Native Reserves) (Tanganyika District) Order-In-Council
(1929)
Property Transfer Tax Act, Chapter 340 of the Laws of Zambia
Rent Act (1972)
Statutory Functions Act, Chapter 4 of the Laws of Zambia
Subordinate Courts Act, Chapter 28 of the Laws of Zambia
Tanzanian Lands Act, No.2 of 1999
Town and Country Planning Act, Chapter 294 of the Laws of Zambia
Wills and Administration of Testate Estates Act, Chapter 60 of the Laws of
Zambia
Zambia (Trust Land) Order 1964

PREFACE

The importance of land and its administration in every society is a subject that has been widely discussed for centuries in all parts of the world. In the words of E. Okon:

“The importance of land to man cannot be over-emphasised. It is, has been and ever shall remain an eternal resource of livelihood and everlasting of sustenance to mankind. As a principle source of wealth in both agricultural and industrial societies alike, land should be accorded its rightful place in the annals of legal history.”¹

Generally, the Zambian land tenure system is a remnant of the colonial legacy which divided land administration into Crown land for the occupation of white settlers, and Reserves for the indigenous people. After independence, some strides have been made with a view to reforming the land tenure system, based on the socio- economic and political exigencies of the time. Notable among the reforms were the Land Reforms of 1975, through the Land (Conversion of Titles) Act, under the One-Party State, and the 1995 Land Reforms under the Multi-party democratic system. Further to these reforms, there has been an emergence of new categories of land such as the Housing (Statutory and Improvement) Areas, Resettlement Schemes and Game Management Areas, which are all hybrid categories whose system of land alienation has not been properly addressed.

¹ Okon, E, “Land Law as an Instrument of Social Change”, in Zambia Law Journal, Vol. 17 1985, p.46

Furthermore, a great wind of change has blown across the country ushering in social, political and economic changes in the last two decades, especially since the Land reforms in the Third Republic, which led to the enactment of the Lands Act of 1995. Undoubtedly, some of the potent factors of change have been the recognition under the Lands Act that bare land has economic value; land under customary tenure may be converted to leasehold; the creation of the Land Development Fund for opening up new areas for development, and the establishment of the Lands Tribunal. All these provisions are aimed at improving the system of land administration. Further, the enactment of the Lands Act², and the Zambia Development Agency Act³, seeks to promote economic development by providing for the opening up of land to both local and foreign investment in State and customary areas. However, none of these reforms has adequately addressed the question of land tenure, legal structure and institutional framework to effectively deal with land alienation in the country.

Basically land development and economic development cannot be achieved in the absence of a properly organised land tenure system, coupled with an

² Chapter 184 of the Laws of Zambia

³ No. 11 of 2006

efficient institutional structure and legal framework. This is important especially for developing countries like Zambia, which are striving to make agricultural development as a priority sector in the country's economic development.

The current situation reveals that in the alienation of State land, statutory law, the common law of England, and doctrines of equity apply to this category of land. In terms of Zambian legislation, some of the statutes which apply are: the Lands Act;⁴the Land Survey Act;⁵ the Lands and Deeds Registry Act;⁶the Housing (Statutory and Improvement) Areas Act;⁷and the Town and Country Planning Act;⁸among others. There are also various institutions which are involved in land alienation in various categories of land. Some of the institutions include the Ministry of Lands, City, Municipal and District councils, and the Department of Resettlement among others.

However, despite having these statutes and institutions in place, alienation of land has remained ineffective. Scarcity of land is prevalent. Questions on the availability of land, and how to access it in both State and Customary land are often raised. For instance, a person travelling from Chipata to Zambezi or from

⁴ Chapter 184 of the Laws of Zambia

⁵ Chapter 188 of the Laws of Zambia

⁶ Chapter 185 of the Laws of Zambia

⁷ Chapter 194 of the Laws of Zambia

⁸ Chapter 283 of the Laws of Zambia

Nakonde to Mongu or from Mansa to Livingstone, would observe large tracts of land seemingly lying idle and almost unoccupied. Some of the questions that linger are: who holds that land? Why say there is shortage of land when such huge tracks of land are not occupied? What is the role of established institutions in making this land accessible in an efficient, effective and equitable manner? In answering these questions, analysis of the legal structure, and institutional framework in both State land and Customary land thus becomes compelling.

The subject of 'The system of land alienation in Zambia: A critical analysis of the legal and institutional framework; was chosen mainly because the writer holds the view that the system of land alienation in Zambia, can be improved if the laws relating to land alienation are revised, and the institutions involved are restructured so that coordination among them is improved as this would promote efficiency in land alienation.

The materials used in this study came from published and unpublished sources based on desk research through collecting, analysing and processing data on the system of land alienation in Zambia. The materials included Zambia's successive Republican Constitutions, text books, statutes, periodicals, journals, theses, dissertations, and newspaper articles. The writer interviewed officials in

the Ministry of Lands, Kitwe City Council, Kabwe Municipal Council and Lusaka City Council, Department of Forestry, Department of Resettlement, Zambia Wildlife Authority, and some traditional Chiefs. The writer also used materials obtained from conferences, workshops and seminars personally attended or attended by other persons and made available. Selected judgements were also analysed. The writer further drew from his own experience as an advocate of both the High Court and the Supreme Court of Zambia, and as former Registrar of Lands and Deeds and Commissioner of Lands.

This dissertation is a study of the system of land alienation in Zambia in both State land and Customary land. The study critically analyses the law relating to the land tenure system in the country, and evaluates the legal framework and institutions that are involved in land alienation. Basically, the whole study is an examination of real practices and procedures followed in the alienation of land in different categories of land.

Chapter 1 of this study presents the historical background of the system of land alienation, and sources of land law in the country. Chapter 2 discusses the legal and institutional framework within which land alienation under State land is governed. Chapter 3 evaluates the hybrid category of land within State land referred to as Housing, Statutory and Improvement Areas.

Chapter 4 gives an evaluation of land alienation under Customary tenure while Chapter 5 discusses land alienation in the Resettlement Schemes and examines land alienation in the National Parks, Game Management Areas, as well as Forest Reserves. In this study, these areas are referred to as Statutory Reserves, since they are created and reserved by statute. Chapter 6 explains the system of land registration with regard to registration of title to land. Chapter 7 is an appraisal of both the legal and institutional framework governing the system of land alienation in the Country and finally, Chapter 8 gives conclusions and recommendations of this study.

CHAPTER 1

THE SYSTEM OF LAND ALIENATION

Introduction

Zambia is a landlocked country located in Southern Africa. It covers an area of about 752,614 square kilometres between latitudes 8 and 18 degrees South, and the longitudes 22 and 23 degrees East. A large part of the country is on the Central African plateau between 1000 meters, and 1600 meters above sea level. The system of land tenure in Zambia is based on statutory and customary law. Statutory law comprises rules and regulations which are written down, and codified. Customary law, on the other hand, is not written, but it is assumed that the rules and regulations under this system are well known to members of the community. Statutory law is premised on the English land tenure system, while customary tenure is essentially based on tribal law. Land in Zambia is administered through various statutes by established institutions in the country.

Land administration in general is a way and means by which land alienation and utilisation are managed. The process of land administration therefore, includes the regulating of land and property development, the use and conservation of the land, the gathering of revenue from the land through ground rent, consideration fees, survey fees, and registration fees; and the resolving of conflicts concerning the ownership and use of the land.¹

Functions of land administration may be divided into four components, namely: juridical, regulatory, fiscal and information management.² The *juridical* aspect places greatest emphasis on the acquisition and registration of rights in land. It comprises a series of processes concerned with the allocation of land through original grants from the President. *Adjudication* refers to the dispute resolution process, while *registration* is the process of making and keeping records of property rights. The *regulatory* component is concerned with the development and use of land. The latter involves imposing restrictions on land use through zoning and designation of areas into residential, commercial, agricultural or any other use.

¹ P. Dale and J. McLaughlin, **Land Administration**, Oxford: Oxford University Press, 1999, p.10

² Ibid, p11

Within the general context of land administration, there are functions which relate to land use. The term 'land use' refers to the utilization of the surface of the earth and all its natural resources or the legal enjoyment thereof.³ One fundamental objective of good land administration is to ensure sustainable development. The term 'land use' has many different interpretations, but in the present context, it may be defined as the economic and cultural activities practiced upon the land. It virtually means the way in which land is used.⁴

There are two basic approaches to regulating how land is developed and used. One is by way of legislation applying to all properties uniformly, while the other is by way of a permit system in which a property owner must make an application for such use at the time of a proposed development. The most common forms of land use control are zoning, site plan control, building regulations, and development control. The legal aspect of land use in Zambia is regulated by the Town and Country Planning Act.⁵

³ M. Webster, **Collegiate Dictionary**, Springfield, Massachusetts, USA, 1993. p.1301

⁴ Peter Dale and John McLaughlin, *op.cit.*, p.73

⁵ Chapter 283 of the Laws of Zambia

When we speak of land tenure, we refer to the manner in which rights in land are held. Land tenure is defined by a broad set of rules, some of which are formally defined through laws concerning property, while others are determined by custom.⁶ Tenure therefore, refers to control, or the way in which people hold, individually or collectively, rights to land and all or part of the natural resources upon it.⁷ In Zambia, the land tenure system is based on customary and statutory law.

Land alienation comprises a series of processes concerned with the allocation of land through original grants from the President. This process describes the manner in which persons acquire land from the state in both state land and customary areas. Land alienation essentially refers to the manner in which land is distributed to the people,⁸ through established institutions, by the President who holds it in perpetuity for and on behalf of the people of Zambia.⁹ Emphasis is placed on the acquisition and registration of rights in land.

⁶ Peter Dale and John McLaughlin, op.cit., p.17

⁷ L. Rihoy, **Natural Resources Tenure in Africa: Policy Brief** IUCN, Harare, 1998

⁸ www.Lawsoc.co.za

⁹ Section 3 of the Lands Act, Chapter 184 of the Laws of Zambia

In some jurisdictions¹⁰, the peaceful occupation of land without formal legal grant or agreement can lead to the prescription of rights by a process known under the common law as adverse possession.¹¹ The period of peaceful occupation necessary for prescription is laid down in the law after which the occupier can make a full claim to the ownership of the land. In Zambia, land cannot be acquired by prescription,¹² and therefore, land alienation refers only to specific grants. Land alienation by the President through established laws and institutions forms the basis of this study as it explains how land is acquired in different categories of areas in the country.

SOURCES OF LAW

The main sources of law governing the system of land administration in Zambia are:

- (i) English law;
- (ii) African Customary law;
- (iii) Local and foreign case law; and

¹⁰ Most Commonwealth countries where common law is practiced

¹¹ Peter Dale and John McLaughlin, *opt.cit.*, 17

¹² **David Nzooma Lumanyenda & Goodwins Kafuko Muzumbwa v. Chief Chamuka, Kabwe District Council & Zambia Consolidated Copper Mines Limited** (1988-89) Z.R. 194 (S.C.)

(iv) Zambian Statute law.

(i) English law

English law refers to the system of law applicable in England, and is based on statutes, principles of the Common law of England, as well as the doctrines of Equity. The recognition of Common law principles and doctrines of Equity as formal sources of law in the Republic of Zambia is acknowledged through the English Law (Extent of Application) Act,¹³ which provides that Common law, the doctrines of Equity, and statutes that were in force in England prior to 17th August, 1911, shall continue to have the force of law in the Republic.¹⁴ This position has been emphasised by the High Court in the case of **The People v. Shamwana & Others**,¹⁵ where the Court held *inter alia*, that the English Law (Extent of Application) Act is an enabling Act in that in the absence of any legislation in Zambia on any subject, English statutes passed before 17th August, 1911, will apply in Zambia.

¹³ Chapter 11 of the Laws of Zambia

¹⁴ Section 2 the English Law (Extent of Application) Act, Chapter 11 of the Laws of Zambia

¹⁵ [1982] ZR 122

Apart from the principles of Common law and doctrines of Equity, some British Acts form the source of law in Zambia. Recognition and effect of certain English Acts has been acknowledged through the British Acts Extension Act.¹⁶ This Act provides that, “the Acts of Parliament of the United Kingdom set forth in the Schedule to this Act are to be deemed to be of full force and effect within Zambia.”¹⁷ These Acts have the same application in Zambia as they applied in the United Kingdom at the time they were enacted. An illustration of such Acts is the English Conveyancing Act of 1911, which is still applicable in Zambia today by virtue of the British Acts Extension Act.

However, the application of English law in Zambia is restricted by some Zambian statutes. For instance, the High Court Act,¹⁸ and the Subordinate Courts Act,¹⁹ restrict the applicability of English statutes only to the extent that local circumstances would permit. They both provide that,

“All statutes of the Parliament of the United Kingdom applied to Zambia shall be in force so far only as the limits of the local jurisdiction and local circumstances permit. It shall be lawful for the Court to construe the same with such verbal alterations, not affecting the substance, as may be

¹⁶ Chapter 10 of the Laws of Zambia

¹⁷ Ibid., section 2

¹⁸ Chapter 27 of the Laws of Zambia

¹⁹ Chapter 28 of the Laws of Zambia

necessary to make the same applicable to the proceedings before the Court.”²⁰

The application of English statutes is further restricted by the principle that where a pre-1911 statute covers the same subject matter as a Zambian Act, provisions of the Zambian Act must prevail to the extent of any inconsistency between the two.

Some English statutes are therefore, still applicable in Zambia subject to restrictions imposed by Zambian statutes and are only relevant so far only as the limits of the local jurisdiction and local circumstances permit

(ii) African Customary Law

Customary law in the context of land alienation refers to rules, traditions, and customs that regulate the system of land holding, occupation, and use in customary areas. Zambia has more than seventy-two tribes, and each of these tribes practices different customs and practices. As a result, the scope of application of customary law is very wide. Customary law therefore has no

²⁰ Section 12 of the High Court Act and section 14 of the Subordinate Courts Act, Chapters 27 and 28 of the Laws of Zambia respectively

uniform application in Zambia but, varies among tribes or locality.²¹

Nonetheless, there are some limitations imposed by law in the administration of customary law. The original jurisdiction in the administration of customary law lies in the local courts. The Local Courts Act²² provides that, “a local court shall administer the African customary law applicable to any matter before it in so far as such law is not repugnant to natural justice or morality or incompatible with the provisions of any written law....”²³

There are instances however, where a subordinate court may also administer customary law as a court of original jurisdiction. To this effect, section 16 of the Subordinate Courts Act provides that;

“...nothing in this Act shall deprive a subordinate court of the right to observe and to enforce the observance of, or shall deprive any person of the benefit of, any African customary law, such African customary law not being repugnant to justice, equity or good conscience, or incompatible, either in terms or by necessary implication, with any written law for the time being in force in Zambia. Such African customary law shall be deemed applicable in civil causes, and matters where the parties thereto

²¹ M. Ndulo, “The Changing Nature of Customary Marriage in Zambia”, cited in **Law in Zambia**, M. Ndulo (ed), East African Publishing House Limited, 1984, p.143

²² Chapter 26 of the Laws of Zambia

²³ Ibid., section 12

are Africans.”²⁴

In the alienation of land under customary tenure, the general administration of customary law applies the rules of justice, equity and good conscience. This can be summed up as the ‘*twin-test of inconsistency and repugnancy*’, and this entails that for any customary law relating to land alienation to apply, it must satisfy this standard provided by the law.

(iii) **Zambian and foreign Case Law**

This source of law refers to the decisions made by both the Zambian and foreign Common law courts. Zambia, being a former British Protectorate, is part of the common law jurisdiction and as such the common law principles are applicable which are based on the doctrine of judicial precedents or *stare decisis*.²⁵ The doctrine of judicial precedent simply means that the courts do adhere or follow their past judicial decisions which in turn form a source of law.²⁶ The applicability of foreign case law is restricted by the principle that although foreign decisions form a source of law, but they are not binding on the Zambian

²⁴ Section 16 of the Subordinate Courts Act, Chapter 27 of the Laws of Zambia

²⁵ W. L. Church, “The Common Law and Zambia”, in **Law in Zambia**, Ndulo, M. (ed), East African Publishing House Limited, 1984, p.1

²⁶ Ibid.

courts. They merely provide persuasive authority.

(iv) Statutory Law

The Zambian Statute law refers to ‘Ordinances,’ ‘Acts’ and ‘Statutory Instruments’ passed by Parliament. Currently, the following statutes form a source of land law, and have relevance on land alienation: the Lands Act²⁷; the Land Survey Act²⁸; the Lands and Deeds Registry Act²⁹; the Agricultural Lands Act³⁰; the Forestry Act³¹; the Zambia Wildlife Authority Act³²; the Housing (Statutory and Improvement Areas) Act³³; and the Town and Country Planning Act.³⁴

²⁷ Chapter 184 of the Laws of Zambia

²⁸ Chapter 188 of the Laws of Zambia

²⁹ Chapter 185 of the Laws of Zambia

³⁰ Chapter 187 of the Laws of Zambia

³¹ Chapter 199 of the Laws of Zambia

³² Act No. 12 of 1998

³³ Chapter 194 of the Laws of Zambia

³⁴ Chapter 283 of the Laws of Zambia

HISTORICAL DEVELOPMENT OF LAND ALIENATION

The English land tenure system in Zambia was introduced by the British Administration in the late 1890s. Before the introduction of English law, land in the Territory was administered according to African customary law. The customs and traditions on the basis of which land was administered varied from chiefdom to chiefdom due to the multiplicity of tribes in the Territory.

When the colonialists entered the Territory, they introduced English law to regulate the system of land administration. They either misunderstood the existing African tribal tenure system or disregarded it altogether³⁵ and, therefore, transplanted the tenure system based on English law or statutory tenure since that was what they understood and believed could fully protect their interests. The current dual land tenure system in Zambia is therefore a result of the colonial history which brought with it Western tenure concepts.³⁶

³⁵ S Mbaya, **Land issues in East and Southern Africa: An overview**, Vol. 1, Harare: Mwengo Publication, 2001, p.4

³⁶ Ibid., p.3

The introduction of the English system of land administration was introduced in the Territory through the British South African Company (BSA) Co. This was done through Concessions and Orders-in-Council. A concession was basically an agreement entered into between a chief, who stood in a fiduciary relationship with his subjects, on one hand, and the British settlers represented by the (BSA) Co, on the other.

In order to properly administer the Territory, the White settlers divided it into two administrative units being North-Eastern Rhodesia, and North-Western Rhodesia. North-Eastern Rhodesia constituted the area east of the Rail line that runs from the southern part of the country being Livingstone to the north-east part of the country in the Copper-belt Province of the Republic of Zambia, while North-Western Rhodesia was the area west of the Rail line, and included Barotseland and some parts of the North-Western Province of Zambia.

The BSA Co. entered into several concessions with the African traditional chiefs in the western part of the Territory that enabled it to carry out mineral exploration. It should be noted at the very outset that there was no explicit

power of alienation of land vested in the BSA Co.

The intent of the BSA Co. to acquire mineral rights on one hand, and the chiefs' expectation of benefits on the other hand, was not properly understood by the parties to the concessions, and as much as there was no *consensus ad idem* in the understanding of these agreements. In this regard, it has been noted that:

“...the documents signed as Concessions were in general, fairly technical and it was therefore, highly unlikely that any African Chief could have understood them comprehensively. Further evidence shows that the chiefs were not informed of the true nature and quality of the documents they were signing as Concessions.”³⁷

Hannah further notes as follows:

“...the wording of the treaties were generally vague and many of the Chiefs who signed them had in fact no authority to do so, and the whole business of treaty-making with illiterate chiefs whose legal notions were far removed from those of a nineteenth century White man was always open to misunderstanding.”³⁸

The Concessions therefore conferred on the Company mere rights to the minerals. The BSA Co, however, claimed that all mineral rights as well as the

³⁷ Northern Rhodesia Government, British South Africa Company and claim to mineral rights in Northern Rhodesia, White paper (1964) p.15, cited in F. Mandu, **Land Registration in Zambia**, LLM thesis, UNZA, Lusaka, 2000 (unpublished) p.12

³⁸ A. J. Hannah, *The story of the Rhodesias and Nyasaland*, London: Faber and Faber, 1965, cited in Ngenda Sipalo, **Constitutional Development in Zambia, 1890-1975**, LL.M Thesis, University of Zambia, 1978, p.22

ownership of land in the Territory were vested in the Company. It has been noted however that the treaties entered into were misunderstood by the Chiefs.

The BSA Company continued to administer the Territory under the powers conferred to it through the 1911 Order-in-Council. By virtue of the 1911 Order-in-Council, the common law of England, the doctrines of equity, and the statutory law in force in England on the 17th of August, 1911, were to be applied in Northern Rhodesia.

There was no clear land policy by the BSA Company on land alienation as the Company was merely interested in acquiring land for itself especially in areas suspected to have mineral deposits. Thus, it has been observed that,

“From the time the British South Africa Company came to the territory up to 1924, when the British Colonial Office took over the administration of the territory, very little was done to improve the land tenure system. ...The main reason for this was because the Company had no intention of investing in the country, its main interests being the mineral deposits.”³⁹

The first provision of land alienation to the natives of the Territory was under the 1911 Order-in-Council. It was provided that; “...the BSA Company may

³⁹ E. Colson, “The impact of the colonial period on the definition of land rights,” Turner, V.(ed), In **Colonialism in Africa 1870-1960** (vol.3), 1969, (Cambridge:CUP,1969), pp.193-215 at p.208

assign land to the Africans inhabiting Northern Rhodesia sufficient for their occupation and suitable for agricultural and pastoral requirements.”⁴⁰ The assumption here was that all land fell under the administration of the BSA Co. and it was up to the Company to decide which land to assign or alienate to Africans. Although an African could hold land like a non-African, there was a further provision protective of the African titleholder in certain cases as deemed fit by the BSA Company. In this regard, the Order-in-Council further provided that “a native could acquire, hold, encumber and dispose of land on the same conditions as a person who was not a Native but no contract for encumbering or alienating land the property of a Native would be valid unless the contract was made in the presence of or attested by a Magistrate and bore a Certificate signed by him stating that the consideration for the contract was fair and reasonable, and that he had satisfied himself that the native understood the transaction.”⁴¹

The requirement that a native could alienate land only in the presence of a Magistrate goes to suggest that Africans were deemed not to have understood, or appreciated the nature of land transactions, and therefore, any alienation was to

⁴⁰ Cited in **The Johnson Land Commission**, 1967, Lusaka: Government Printer, p.16

⁴¹ **The Johnson Lands Commission Report**, op.cit, p.104

be invalid if not executed in the presence of a Magistrate, who at that time, was a white man.

It was, therefore, a policy of the British administration that land occupied by Africans be administered under customary law. Thus, the Africans would enjoy beneficial occupation of land as permitted by customary law, but subject to the overriding powers of the Secretary of State for Colonies.⁴²

Land Alienation under British Direct Rule – 1924-1964

When the British Crown took over the administration of Northern Rhodesia from the BSA Co. after the promulgation of the 1924 Order-in-Council, the power to administer the Territory was entrusted to a Governor appointed by the British Crown. The Governor was expressly empowered on behalf of the British Crown to make grants and dispositions of land within the Territory other than Barotseland.⁴³

⁴² Ibid.

⁴³ The Litunga retained the power to administer customary land in Barotse land.

Under the 1924 Order-in-Council, no express provision for the assignment of land for occupation of Africans existed, but the provision guaranteeing the Africans protection against their removal by the colonial settlers from their land was maintained. It was provided that no African was to be removed from any land assigned to him for occupation except after a full inquiry by, and by order of, the Administrator approved by the High Commissioner. In terms of making grants or dispositions of land, the Governor made grants of land to non-Africans under the express power conferred upon him by the Order-in-Council.⁴⁴

The colonial administration through the Governor appointed the Native Reserves Commission,⁴⁵ known as the East-Luangwa Commission. This Commission was mandated to inquire into what land should be set aside as a reserve for African occupation. As a result of the recommendations of the Commission, the first reserve in the Territory was created in the East Luangwa District of North- Eastern Rhodesia. The creation of East Luangwa District Reserves by an Order-in-Council in 1928, was precipitated by growing European

⁴⁴ The **Johnson Land Commission Report**, op.cit, p.17

⁴⁵ The Native Reserves Commission for East Luangwa was appointed on 10th October 1924

settlements in the area⁴⁶. The Commission had the following terms of reference:

“... to examine the Native Reserves within the District having special regard to the sufficiency of land suitable for agricultural and pastoral requirements of the natives, including in all cases a fair and equitable proportion of springs or permanent water, bearing in mind not only their present requirements, but their probable future necessities consequent on the growth of native population...”⁴⁷

This Commission was set up to establish how much land could be set aside for the natives in the East-Luangwa area (now part of the Eastern Province of Zambia). This was the first attempt at establishing a policy of land reservation.

The land along the Rail Line was another area where the policy of land reservation was pursued in 1926. The primary motivation for the establishment of reserves along the line of rail was mineral development. A Native Reserves Commission of 1926 was appointed to demarcate reserves along the line of rail because certain Africans were to be affected by actual or probable European settlement or by actual or probable mineral development. In delimiting reserves, the Commission had to take into account requirements of the local people. The

⁴⁶ M.P Mvunga, **The Colonial Foundations of Zambia's Land Tenure System**, Lusaka: NECZAM, 1980, p 10

⁴⁷ Mvunga, Patrick. M. **Land Law and Policy in Zambia**. (1978) London: (Ph.D Thesis,) University of London p.11

following were the recommendations of the Commission:

“Reserves were to be situated away from the rail line, but where possible, with lanes or corridors giving access to it; reserves were to be homogenous and not mingled areas of European settlement; reserves were to be tribal so that no part of a tribe was to be cut off by intervening land from the rest of the tribe; they were to be permanent and perpetual; they were to be suitable and of sufficient size; and they were to be an indivisible part of a general scheme for the improvement and civilisation of the native.”⁴⁸

This Commission’s terms of reference restricted its land alienation along the line of rail. Several African villages were moved from these areas stretching from Livingstone to the Copperbelt Province. Apart from the inquiry into the land along the line of rail, the Commission did not address the specific land problems of the Africans.

Another reserve known as the Tanganyika Native Reserve was created in 1929. The reasons for the creation of the Tanganyika Native Reserves were somewhat similar to those of the East Luangwa District. In 1927, another Commission was appointed to demarcate reserves in the Tanganyika District, taking into account possible economic development and an increase of African population in the

⁴⁸ Report of the **Native Reserves (Rail line) Commission- 1926**, National Archives of Zambia, ZP 1/2/11 pp.70-71

District⁴⁹. In making their conclusions, the Tanganyika Native Reserves Commission had this to say;

“In selecting the reserves we are recommending, we have endeavoured to adhere to the principle that they should be tribal or for a portion of a tribe. We have made them generous in size, allowing for future economic development. We are causing as little movement of the natives as possible and have done our best to keep the paramount chiefs, and more important sub-chiefs on their lands.”⁵⁰

Following recommendation by the Commission, the Northern Rhodesia (Native Reserves) (Tanganyika District) Order-in-Council was passed in 1929, and it created additional areas which were set aside as Native Reserves in that part of the Territory.

CATEGORIES OF LAND ESTABLISHED

The introduction of Reserves as a result of the recommendations of the various Commissions brought about the indirect creation of different categories of land. In order to give effect to the legal establishment of Reserves and the recognition of Crown lands, an Order-in-Council called the Crown Lands and Native

⁴⁹ M.P Mvunga, **The Colonial Foundations of Zambia's Land Tenure System**, op.cit ,p 18

⁵⁰ Report of the Native Reserves Commission (Tanganyika District) 1927, National Archives of Zambia, ZP1/1, Zambia, p.137, cited in M.P Mvunga, **The Colonial Foundations of Zambia's Land Tenure System**, opt.cit, p 18

Reserves Order-in-Council, was passed in 1928, by the Colonial Administration.

(a) Crown Lands

Crown Lands were established for the occupation of White settlers. Crown lands were regulated by English law. The interests created in these lands were estates and tenures in freehold and leasehold. Crown lands were therefore created for the exclusive occupation and use by the European settlers. It has been reported that:

“Crown land was for non-native settlement and for mining development. It included land certified as a result of geological survey to be suitable for European development, and all land known to contain potential mineral resources....”⁵¹

Most of this land was located along the line of rail from Livingstone to Chililabombwe. The powers of alienating such land were vested in the Governor, who was empowered to make grants and dispositions of Crown Lands. There was no Ordinance in place that prescribed the procedure for land alienation.

⁵¹ Johnson Land Commission Report, opt.cit., p.20

(b) Native Reserves

Native Reserves on the other hand referred to land that was set apart in perpetuity for the sole and exclusive use and occupation of the natives of Northern Rhodesia. These Reserves were vested in the Secretary of State, and as Mvunga observes;

“Reserves were essentially a permanent habitat of the indigenous people; Europeans could acquire land in reserves only for a five-year period, if this was considered by the Governor to be in the best interests of the indigenous people; and mineral exploitation was permissible, but would be regulated to ensure that the indigenous population in reserves was not unduly interfered with.”⁵²

The Colonial Government land policy after the dividing of land into Crown lands and Native Reserves was said to be that of providing sufficient land for the Natives in order to enable them develop a full native life in their own areas; meet the inevitable expansion of native population and enable Government with a quiet conscience to release for European settlement other areas suitable for the purpose.⁵³

⁵² M.P Mvunga, *The Colonial Foundations of Zambia's Land Tenure System*, opt.cit., p.16

⁵³ *Legislative Council Debates*, 25th November, 1930, p.105

(c) Native Trust Land

With the passage of time, land set aside as Native Reserves became insufficient for the occupation and use of the Natives. The demand for more land by Africans grew in the 1930's. Reacting to these demands and pressures, the colonial Government introduced legislation to address the issue of setting aside more land for Africans. This was done through the Northern Rhodesia (Crown Lands and Trust Lands) Order-in-Council of 1947. Basically, the only difference between reserves and 'native trust land', lay in the duration of the alienable interest to a 'non native' in reserves, as we have already seen, the interest granted to a non-African could not exceed five years.

In Trust land on the other hand, the alienable interest called the 'right of occupancy', was ninety-nine years. This could be granted to a non-native so long as, in the Governor's determination, the grant was in the interest of the community as a whole. But like reserves, Trust land was vested in the Secretary of State for the Colonies for the use, and common benefit, direct or indirect, of natives.⁵⁴

⁵⁴ M.P Mvunga, *The Colonial Foundations of Zambia's Land Tenure System*, opt.cit p. 30

In determining which land would constitute Native Trust Land, the terms of reference for the Commission were that such land would be;

“...all that land which will be potentially or actually available for non-native settlements on an economic basis, and for mining development, neither of which government is desired to restrict. It will include land certified as a result of geological survey to be suitable for European development, and all land known to contain potential mineral resources. It may also include some areas the final allocation of which it cannot at present be determined.”⁵⁵

Like Native Reserves, Native Trust lands were to be vested in the Secretary of State, and set apart in perpetuity for the sole and exclusive use and occupation of the Natives of Northern Rhodesia. Government could also have access to this land for the purpose of establishing townships. This category of land could also be alienated to non-natives in special cases in respect of limited areas where such alienation could be shown to be for the benefit of the natives. The periods of occupation between Natives and non-Natives also differed as Natives were to hold land in Native Trust land in perpetuity while the non-Natives could hold land for a term of up to 99 years.⁵⁶ It was in respect of these provisions for alienation that Native Trust Land differed from the Native Reserves. It should also be noted that any areas that were known to include minerals of economic

⁵⁵ **Government Gazette Notice** No. 416 of 1942 dated 29th July 1942

⁵⁶ *Ibid.*

value were excluded from Native Trust Land.

Despite the creation of Native Trust land, Africans continued to face many hardships caused by the creation of different categories of land, and the movement of people from their original areas to new places.

It is difficult to understand why in many parts of the Territory natives were compulsorily moved into reserves in spite of the fact that there was no demand for occupation by Europeans of the areas left vacant. The result of this policy was to create a profoundly unsatisfactory situation in many of the reserves, and to cause unnecessary suffering and ill-will.⁵⁷

However, the White settlers encountered very little or no problems in relation to land alienation in Crown lands due to the availability of land in these areas, and the protection offered by the registration of rights in land.

At the conclusion of the creation of Trust Land, there were, therefore,

⁵⁷ Report of the Eccles Land Commission 1946, Government Printer, 1946, p.2

established three categories of land in the Territory. These were the Crown Lands, Native Reserves and Native Trust Land. In terms of size, Crown land was 4,518,953 hectares (6 per cent), Native Reserves was 27,297,500 hectares (36 per cent) and Native Trust Land was 43,447,900 hectares (58 per cent) of the total landmass of Zambia.⁵⁸ In terms of land administration and the applicable law in the three categories of land, Crown lands were governed by English law as it was obtaining in England at the time, while Reserves and Trust lands were governed by African customary law.

Freehold and Leasehold tenure

The land tenure system that characterised land administration in Crown lands was freehold and leasehold tenure. Freehold tenure was introduced in the country by the settlers, and its administration was based on English statutes as they existed in England at the time. Freehold tenure was a landholding system where a person owned a right of beneficial occupation of the land that might devolve upon his successors *ad infinitum*, but could come to an end on the failure

⁵⁸ B. Kakoma, Ministry of Lands, **Ministerial Statement in Parliament**, 4th August, 1987 Government printers, Lusaka.

of successors.⁵⁹ This entailed that a landholder enjoying this system of land tenure, held land indefinitely unless the land escheated to the Crown. Thus, the Crown only had a reversionary interest to the land when there was a total failure of successors to inherit title.

It was argued that freehold tenure offered the greatest security to land holders because the land was in effect 'owned' by the landholder, and was ordinarily favoured as the most suitable for European settlers.⁶⁰ On the other hand, freehold tenure was criticised in that, 'the system enabled land speculation, and rather than the security it conferred, it could not encourage the landholder to develop his land and it robbed him of the incentive to do so with the full knowledge that there would be no interference with his land rights.'⁶¹

Land tenure under the leasehold system was similar to that under the freehold system save for the fact that the duration on the other hand under which a person could hold an interest in land was determined or was capable of being

⁵⁹ Ibid., p.17

⁶⁰ Anthony C. Mulimbwa, 'Land Policy and Economic Development in Zambia', cited in **Zambia Law Journal**, Special Edition, Lusaka: Unza Press, 1998 p.80

⁶¹ Ibid., p.83

determined at the expiration of a period certain of the lease. A lease would also contain covenants, conditions and terms that would bind the landholder, such as payment of ground rent, and developing the land within a stipulated time frame failure to which undeveloped land could be repossessed. Hence, the lessor controlled the manner in which land was used to the extent that the lessee did not exercise his rights in landholding freely and forever or *ad infinitum*.⁶² The lessee holding land under leasehold tenure was, therefore, under a wider array of restrictions than a freeholder, the latter only being subject to statutory law such as the Town and Country Planning legislation, and Environmental legislation. It was due to these restrictions and conditions that the leasehold tenure system was the least favoured among white settlers.

Stanley, the Governor of the Territory and a proponent of freehold tenure, was succeeded by Sir James Maxwell in the 1930's. Maxwell became a great proponent of the leasehold tenure system. It was argued that leasehold tenure ensured that the government exercised some measure of control over the way land was held and, thus, freehold tenure was despised for its tendency to

⁶² The **Johnson Land Commission Report**, opt.cit., p. 104

encourage land speculation as the state was not involved in land administration.⁶³

The argument in favour of leaseholds was buttressed by the following resolution of the Land Tenure Committee in its report in 1943; "We are unanimously agreed that land should be regarded as a national asset which it is the duty of government to protect, exercising control over its transfer and use, and particularly guarding against its misuse"⁶⁴

The argument between leasehold tenure and freehold tenure tended to gravitate towards the advancement of the interests of the white settlers, without having regard to the Africans' plight in land matters. According to Mvunga, "Maxwell would have done well to address himself first to a provision in the Orders-in-Council which granted Africans the right to acquire land on the same terms and conditions as Europeans anywhere in the territory."⁶⁵

⁶³ Mvunga M.P, **Land Law and Policy in Zambia**, opt.cit., p.300

⁶⁴ Report of the Land Committee 1943, Government printer, Lusaka, 1949, p.5

⁶⁵ Mvunga M.P, **Land Law and Policy in Zambia**, opt.cit., p.301

It has been observed that there were no major changes in legislation from the 1911 Order-in-Council⁶⁶ to 1964. The little changes that were effected were usually *ad hoc* in nature. Thus, usually Commissions of inquiry were appointed in response to urgent situations.⁶⁷

POST 1964 LEGISLATIVE DEVELOPMENTS

At independence in 1964, the country inherited a dual land tenure system based on the received land tenure system of freeholds and leaseholds on one hand, and the autochthonous⁶⁸ or indigenous customary law on the other. Freehold and Leasehold tenure system was applicable in Crown lands, while customary tenure applied in Native Reserves and Trust land. The country also inherited Acts (formerly known as Ordinances) that had a bearing on town and country planning, land survey and land registration, among others.⁶⁹ The question that still required government's redress was however with regard to making land accessible in both land tenure systems with clear procedures and guidelines.

⁶⁶ The Order-in-Council should be read with the British Acts Extension Act, Chapter 10 of the Laws of Zambia and the English Law (Extent of Application) Act, Chapter 11 of the Laws of Zambia

⁶⁷ Commissions such as the East Luangwa District and the Tanganyika District illustrate the point

⁶⁸ Munkner H. H, "Land rights in Africa- collective use rights or private property" in **Agriculture and Rural Development**, Vol. 3 No. 2, 1996, p.10

⁶⁹ Lands and Deeds Registry Ordinance; the Land (Perpetual Succession) Ordinance; the Agricultural Lands Ordinance; the Land Survey Ordinance and the Town and Country Planning Ordinance

With the change in Government, there was a general expectation of changes in the system of land administration in order for it to take into account the local demands. The Government, however, did not make any major changes in the land tenure system immediately after independence except for the changes in a few names in a changed political system. For instance, the Northern Rhodesia (Crown Lands and Native Reserves) Orders-in-Council 1928 to 1963, were changed to Zambia (State Lands and Reserves) Order 1964. Similarly, the Northern Rhodesia (Native Trust Land) Orders-in-Council 1947 to 1963, were changed to the Zambia (Trust Land) Order 1964.

The Zambia (Trust Land) Order 1964, for instance, transferred to and vested in the President of the Republic of Zambia all Native Trust Land that was vested in the Secretary of State prior to independence in order to conform to the changed status of the Protectorate. This Order went further to stipulate that;

“any estate, right or interest in or over any land which the Governor or any other officer of authority of the Government of Northern Rhodesia had prior to independence created, granted, recognised or otherwise acknowledged under the Northern Rhodesia (Native Trust Land) Orders-in-Council should continue to have the same validity as they had before independence..”⁷⁰

⁷⁰ Cited in the **Johnson Land Commission Report**, op.cit, p.25

The powers of land alienation with regard to Native Trust Land, which were formerly exercised by the Governor were conferred upon the President, and all references to instructions, directions and approval of the Secretary of State were deleted from the Orders relating to Native Trust Land.

In that changed environment, the Government felt that the administration of land required serious reform in order to give it a homogeneous character, because,

“Experience had demonstrated that policies... of the previous administrations [towards land] were discriminatory in that (until about two years before independence) one had, in general, to have a white skin before one could acquire a piece of land on State Land and provided his skin was of a dark pigmentation, his only resource was in the (Native) Reserves or (Native) Trust Lands which were far from markets, badly served by communications and transport and in some areas infertile, tsetse fly infested and lacking in water. These policies were seen as an economic colour-bar of a subtle nature.”⁷¹

In view of the inadequacies of previous land policies of the colonial Administration, Government appointed a Land Commission referred to as the Johnson Land Commission to review the Land Policy, and recommend a land administration suited to the needs of Zambia. The terms of reference of the

⁷¹ Ibid., p.1

Johnson Commission were basically three-fold:

- (a) to examine all aspects of land policy and administration which were inherited on independence;
- (b) to examine the land problems submitted by the Provincial Working Committees; and
- (c) to submit recommendations to the Cabinet on the future land policy and land laws of Zambia.

Based on their findings, the Commission came up with recommendations, some of which were that:

- (1) the Orders-in-Council be revoked by legislation to be titled the Land Administration Act;
- (2) the new Act should provide only for two categories of land, viz: State Land and Customary Land;
- (3) all land in Zambia should be declared by the Act to be vested in the President on behalf of the Republic (including land in the Barotse Province), where immediate and necessary steps should be taken to regularise the question of title;

- (4) the Act shall provide for the appointment of Commissioner of Lands to administer the Act with such powers as may be prescribed; and
- (5) customary land be brought under the provisions of the Land Administration Act relating to the acquisition of land rights as soon as reasonably practicable.⁷²

The Land Commission, however, observed that:

“To change the land administration radically would create uncertainty in the most viable part of the economy. However, by amending it on the lines of the English legislation of 1925, and having regard to local requirements, continuity in the legal structure can be maintained, and an improved system suitable for the needs of Zambia provided.”⁷³

The recommendations of the Commission were not implemented as the Government felt that these recommendations were not in line with the socialist tenets which the Government intended to pursue at the time.⁷⁴ These socialist tenets were expressed under the First National Development Plan of 1968. The Government instead pursued a land policy that was premised on socialism which

⁷² Ibid., p.161

⁷³ Cited in the **Johnson Land Commission Report**, op.cit, p.11

⁷⁴ The Government policy was expressed under the First National Development Plan of 1968, Government Printer, Lusaka

put man at the centre of development, through the philosophy of Humanism, and enacted laws that established state control in all land matters. Specific land reforms were announced in the Mulungushi Economic Reforms of 1968, and these included the following;

- (a) all land should be vested in the President of the Republic of Zambia;
- (b) all land under freehold should be converted to leasehold tenure for a duration of one hundred years;
- (c) land under customary tenure should not be converted into leasehold; and
- (d) land reforms should be directed at improvement of the use of agricultural land.⁷⁵

In order to implement these reforms, legislative measures were taken through the enactment of the Land (Conversion of Titles) Act of 1975.

⁷⁵ First National Development Plan of 1968, Government Printer, Lusaka

These reforms as intimated were premised on the philosophy of Humanism that was pursued by the Government. The principles of Humanism that influenced land reforms were that Zambia was a man-centred society, and, therefore, did not encourage exploitation of man by man in the alienation of land. This belief that land was the property of the state was shared by the former President of Tanzania, Julius Kambarage Nyerere, ostensibly Kaunda's ally in political thought, who said,

“To us in Africa, land was always recognised as belonging to the Community. Each individual within our society had a right to use the land because otherwise he could not earn a living.... But the African right to land was simply the right to use it; he had no other right to it, nor did it occur to him to try and claim one.”⁷⁶

In line with the view that no individual should own land, Kaunda observed that:

“..we humanists categorically state that not a centimetre of land, nor indeed any natural resources, should be owned by an individual. An individual or groups of individuals may be leased land by the state or other form of community government..... the law of the land must be specific so that we can work out a system of land reform, so that land ownership reverts to the society as a wholewe must establish a new order....one in which land is not subject to machinations of merciless speculators and manipulators. It is the most sacred and indeed the most highly priced of all natural resources in God's creation, and it must

⁷⁶ J. K Nyerere, “Ujama Essays on Socialism,” cited in Patrick M. Mvunga, **Land Law and Policy in Zambia**, opt.cit., p.382

therefore be made available to all on equal terms.”⁷⁷

Mvunga has observed that the whole tenet of the 1975 land reforms hinged on President Kaunda and his Political Party's thinking that land must remain the property of the state, a position or premise which in no way departed from the traditional heritage.⁷⁸

The Land (Conversion of Titles) Act of 1975

The salient provisions of the Land (Conversion of Titles) Act of 1975 were that;

- (i) all land in Zambia was to continue to vest in the President,
- (ii) freehold tenure was abolished and all land was to be held under leasehold tenure for the period not exceeding 99 years,
- (iii) the sale of vacant or bare land was prohibited,
- (iv) presidential consent was required in all land transactions, and
- (v) the Land (Conversion of Titles) Act 1975 was enacted to provide for these matters.

⁷⁷ Kenneth K.D. Kaunda, **Humanism in Zambia and a guide to its implementation**, Part II, Government Printer, Lusaka (1974), PP 33-34

⁷⁸ M.P Mvunga, **Land law and Policy in Zambia**, Gweru, Mambo Press (1982) p.86

In the administration of the Act, the President delegated his powers in land administration to the public officer for the time being holding the office or executing the duties of Commissioner of Lands.⁷⁹

Later, the Government introduced an amendment to the Land (Conversion of Titles) Act which disqualified non-Zambians from acquiring land in the country save for special reasons.⁸⁰ Such reasons required to satisfy the President himself that the non-Zambian was to engage in investment or use land for the promotion of investment in the country.⁸¹ Further, the Government introduced a policy of decentralisation in the local government system, and it was felt that Local Authorities should participate in the process of land alienation at district level, since the Ministry of Lands had no structures at that level. This was done through Circular No. 1 of 1985.

⁷⁹ Gazette Notice No. 1345 of 1975

⁸⁰ Land (Conversion of titles) (Amendment) Act No. 2 of 1985

⁸¹ Ibid.

Circular No. 1 of 1985 and its salient provisions

Circular No. 1 of 1985, was issued by the Minister of Lands and Natural Resources and the Circular was titled as "Procedure on Land Alienation"⁸² This Circular was directed to all Provincial Permanent Secretaries and District Executive Secretaries. The Circular was intended to lay down general policy guidelines regarding the procedure all District Councils are expected to follow in the administration and allocation of land.

The Circular stated that pursuant to the policy of decentralisation, and the principle of participatory democracy, it was decided that District Councils should participate in the administration of land. To that effect, all District Councils were responsible for processing of applications, selecting of suitable candidates and making recommendations as may be decided upon by them, on behalf of the Commissioner of Lands. The Circular stated further that such recommendations made by District Councils would be invariably accepted by the Commissioner of Lands, unless in cases where it becomes apparent that doing so would cause

⁸² File No. MLNR/103/28/3

injustice to others or if a recommendation so made, is contrary to national interest or public policy⁸³.

The Circular accordingly, laid down the procedures which District Councils and Provincial Permanent Secretaries were to follow and ensure that the provisions of the Circular are strictly adhered to.⁸⁴ Circular No.1 of 1985, therefore, has great relevance to the land alienation process. It is a policy document that gives guidelines to Local Authorities on the procedures for alienation of land. The detailed provisions of the Circular are discussed in chapter 2 of this dissertation.

LAND REFORMS IN THE THIRD REPUBLIC

When Zambia returned to multi-party politics in 1991, the government's political and economic policies were different from those pursued by the government in the Second Republic. The need to revisit the land policy became necessary in order to bring it in line with the country's policy of a liberalised economy.

⁸³ Paragraph 3 of Circular No.1 of 1985

⁸⁴ Paragraph 4 of Circular No.1 of 1985

The Movement for Multi-party Democracy (MMD), the party that formed government in 1991, had indicated in its manifesto the relevance and the need to review the land policy in a new political dispensation. The party's manifesto, which became the government's vision, stated that;

“The MMD shall institutionalise...a land code intended to ensure the fundamental right to property and ownership of land as well as to be an integral part of a more efficient land delivery system. To this end, the MMD will address itself to the following fundamental issues: A review of the Land (Conversion of Titles) Act of 1975; the Trust Land and Reserve Orders-in-Council (respectively); Conversion of land allocation in customary lands; Land adjudication shall be co-ordinated in such a way that confidence shall be returned in land investors; The land planning system and related legislation shall evolve such land strategy, as not only to merge Reserve and Trust Land but also to meet the varied development needs...attach economic value to underdeveloped land, and to promote regular issuance of title deeds in both rural and urban areas.”⁸⁵

In order to put the changes to the land administration system, Government decided to revisit the law governing land alienation in Zambia. In this regard, consultative meetings were carried out whose objective was to establish consensus in the system of land administration. For instance, it was observed that “the MMD Government accepts the principle of land being held by the President who holds it on behalf of the people of Zambia; but disagrees with the

⁸⁵ Paragraph M of the **MMD Manifesto** 1991

current law that declares all virgin land as being valueless, and asserts that “land is a saleable commodity.” The policy of the MMD Government is to encourage foreign investors to invest in agriculture. The policy prohibiting non-Zambians from owning land has had a negative impact on the promotion of land investments by non-Zambians. It was suggested that the Land (conversion of titles) (Amendment) Act No. 15 of 1985, that prohibits foreigners from owning land be repealed, and foreigners be allowed to invest in land with or without the participation of Zambians⁸⁶.

During one of the Parliamentary Debates preceding the enactment of the law, it was submitted that;

“The government was to remove discrimination against non-Zambians, remove artificial classifications, and make land law uniform throughout the Republic of Zambia. The government was to encourage investment in all parts of Zambia, and recognise the holding of land under customary tenure, as well as facilitate its conversion into leasehold.”⁸⁷

⁸⁶ R.K.K Mushota, “The MMD and its Manifesto provisions on land law and policy reforms in the Third Republic of Zambia” cited in A. Ng’andwe, **‘Report on the National Conference on Land Policy and Legal Reform in the Third Republic of Zambia’** (1993) Lusaka: UNZA Centre for Continuing Education, pp.10-12

⁸⁷ Parliamentary Debates- Second Session of the Seventh National Assembly (No. 93) 15th January- 18th March 1993, Lusaka, p.1377

In order to have consensus on the nature of legal and policy reforms to be undertaken, the MMD Government decided to hold a “National Conference on Land Policy Reform in the Third Republic of Zambia”, in 1993. The aim of the Conference was to discuss and suggest to government the socio, economic, legal and policy issues which government should take into account before enacting the Lands Act.

A wide range of people from government officials, members of the opposition political parties, legal scholars, chiefs, members of the Farmers’ Union, to ordinary citizens, attended the Conference. In his opening address to the Conference, the then Vice-President Levy Mwanawasa, SC, stated that it was government’s hope that the Conference would address constraints to land development and suggest ways and means of removing antiquated methods of holding land within the country.⁸⁸

The issues to be considered by the Conference by way of terms of reference included:

⁸⁸ A. Ng’andwe, ‘Report on the National Conference on Land Policy and Legal Reform in the Third Republic of Zambia’ (1993) Lusaka: UNZA Centre for Continuing Education, p.1

- (a) the review of the land tenure system in Zambia and its suitability to development in the Third Republic;
- (b) the review of systems of land allocation in Zambia;
- (c) the review of the legal framework relating to land transactions, for example, property taxation, licensing, land surveys, and registration; and
- (d) suggestions on legal reform.⁸⁹

After deliberations, key recommendations of the Conference were that:

- (a) all land was to be vested in the President to hold on behalf of the people of Zambia. However, all land (including virgin land) was to have value and was to be a saleable commodity. Hence, the Lands (Conversion of Titles) Act (as amended) was to be repealed;⁹⁰
- (b) land should be held under a leasehold tenure rather than freehold (which was advocated for by certain quarters of society). The lease period was to be for 99 years, and automatically renewable. This would

⁸⁹ A. Ng'andwe, *ibid*, p.5

⁹⁰ R.K.K Mushota, *op. cit.*, pp.10-12

provide the security of tenure enjoyed under freehold, yet at the same time ensure government control through covenants in the lease;

- (c) a holder of customary land should have direct access to the Commissioner of Lands if he/she wishes to obtain title to such land.⁹¹

To this extent, it was recommended that a person who is not holder of land under customary tenure may be alienated land in customary areas by the President upon consultation with the Chief;⁹²

- (d) a land development fund be created for the purposes of 'opening up' new areas i.e., funds raised would be available to local authorities for use in development of their areas.

The new Government promised a liberalised economy that would cure the nation from its ailing state, and thereby eradicate poverty. Such an economy meant that free market forces of demand and supply would be allowed to

⁹¹ Hansungule and Mwansa- **"Land Tenure Reform in Zambia- Another Review"** – A paper submitted during the Land Policy Conference of 1993 held at Mulungushi International Conference Centre, Lusaka

⁹² A.M Khan- **"Land Registration Systems in Zambia"** - A paper presented during the Land Policy Conference of 1993 held at Mulungushi International Conference Centre, Lusaka

operate on their own, and thus, in terms of land, it had to have a value even though it was bare. Hence, this necessitated a change in the land laws, with a view to bringing it in conformity with reality in the third Republic. On the need for change in the land tenure system, it has been noted;

“land tenure systems are not static, they respond to changes in society. They are modified, re-defined or structured in response to many factors such as population growth and density, conflict of interest, or changes in the political or economic organisation of society.”⁹³

Therefore, it was justified for the new government to re-define the land tenure system in line with the political and economic changes of the new regime. In this regard, the Lands Act was enacted in 1995, to provide the legal machinery through which the land alienation system would be governed, and for the implementation of the new government's land policy. This Act provides for the granting of land on leasehold tenure, and it also provides for the vesting of land in the President. The Act further provides for the statutory recognition of customary tenure as well as the conversion of customary tenure into leasehold tenure. This Act is the principal legislation that governs land alienation in Zambia today.

⁹³ Patrick M. Mvunga, *The colonial foundations of Zambia's land tenure system*, opt.cit., p.1

Having discussed the historical development of the system of land alienation in this Chapter, the next Chapter is devoted to discussing the process of land alienation under State land.

CHAPTER 2

LAND ALIENATION UNDER STATE LAND

Introduction

This Chapter discusses the procedure, legal and institutional framework that regulates the manner in which land is alienated under State land. Land alienation refers to specific grants of land made by the State under statutory law⁹⁴ as land acquisition by prescription is not recognised in Zambia.

The land tenure system that governs land alienation under State land is statutory or leasehold tenure. Land tenure describes the manner in which rights in land are held. It is defined by a broad set of rules, some of which are formally defined through laws concerning property, while others are determined by custom.⁹⁵ Tenure therefore, refers to control, or the way in which people hold, individually or collectively, rights to land and all or part of the natural resources upon it.⁹⁶

⁹⁴ The Lands Act, the Land Survey Act, the Town and Country Planning Act and the Lands and Deeds Registry Act are essential statutes in the alienation of land under state land

⁹⁵ Peter Dale and John McLaughlin, **Land Administration**, op.cit., p.17

⁹⁶ L. Rihoy, **Natural Resources Tenure in Africa: Policy Brief**. IUCN, Harare , 1998

Land use control is also an important component that has a bearing in the alienation of land under State land. The most common forms of land use control are zoning, site plan control, building regulations, and development control. The legal aspect of land use in Zambia is regulated by the Town and Country Planning Act.⁹⁷

State land, by description, refers to that category of land which prior to independence was designated as Crown lands and administered by the Governor of the Territory.⁹⁸ This category of land was from its inception designated for occupation and use exclusively by the white settler community. Crown land, now State land only constituted six percent (4,518, 953 hectares)⁹⁹ of the country's total land mass. The creation of only six percent as Crown land was premised on the belief that the white community was small, and therefore Crown land created for their use was sufficient for their occupation. Crown land was generally located along the line of rail from Livingstone in the Southern Province, to the Copperbelt Province, and a few areas around Chipata in the Eastern Province,¹⁰⁰

⁹⁷ Chapter 283 of the laws of Zambia

⁹⁸ Crown Lands and Native Reserves Order-in-Council, 1928-1963

⁹⁹ Ben C. Kakoma, **Ministerial statement in Parliament**, op.cit, p. 1

¹⁰⁰ Located in the Eastern Province of the Republic of Zambia

Mkushi in the Central Province,¹⁰¹ and Mbala in the Northern Province.¹⁰²

With the advent of political independence in 1964, the Northern Rhodesia (Crown Lands and Native Reserves) Orders-in-Council 1928-1963, were changed to Zambia (State Lands and Reserves) Order 1964. These Orders transferred to and vested in the President of the Republic of Zambia all land that was vested in the Governor and the Secretary of State prior to independence in order to conform to the changed status of the country.

Administration and Control of Land

All land in Zambia is vested absolutely in the President who holds it in perpetuity for and on behalf of the people of Zambia.¹⁰³ The President is empowered to grant or alienate land vested in him in State land to any Zambian. The President may also alienate land to non- Zambians of certain categories subject to the conditions outlined under the Lands Act.¹⁰⁴ All land in Zambia is required to be

¹⁰¹ Located in the Central Province of the Republic of Zambia

¹⁰² Michael Roth, A. M. Khan and M. C. Zulu, "Legal Framework and Administration of Land Policy in Zambia", in **Land Tenure, Land Markets and Institutional Transformation in Zambia**, Michael Roth and Steven G. Smith (eds), University of Wisconsin-Madison, 1994, p.15

¹⁰³ Section 3(1) of the Lands Act, Chapter 184 of the Laws of Zambia

¹⁰⁴ Ibid., section 3(5)

administered and controlled by the President for the use or common benefit, directly or indirectly of the people of Zambia.

In alienating land, the President is required to;

- (a) take such measures as shall be necessary to control settlements, methods of cultivation and utilisation of land as may be necessary for the preservation of the natural resources on that land; and
- (b) set aside land for Forest Reserves and Game Management Areas, and National Parks and for the development and control of such Reserves, Game Management Areas and National Parks.¹⁰⁵

In the process of alienating land, there are laws and regulations that govern the system of alienation.

¹⁰⁵ Ibid., section 3(7)

Legal Framework

In the administration of State land, statutory law, the common law of England and doctrines of equity apply to this category of land. In terms of Zambian legislation, the following statutes apply: the Town and Country Planning Act,¹⁰⁶ the Lands Act,¹⁰⁷ the Land Survey Act,¹⁰⁸ the Lands and Deeds Registry Act,¹⁰⁹ and the Housing (Statutory and Improvement) Areas act¹¹⁰

The Town and Country Planning Act¹¹¹

Legislation that governs physical planning is the Town and Country Planning Act.¹¹² The primary objective of the Town and Country planning is to regulate the manner in which land is planned and zoned under State land and to ensure that land is administered according to set standards with respect to the specific use or uses to which a parcel of land may be put, the size, type, and placement of improvements on that parcel.¹¹³

¹⁰⁶ Chapter 283 of the Laws of Zambia

¹⁰⁷ Chapter 184 of the Laws of Zambia

¹⁰⁸ Chapter 188 of the Laws of Zambia

¹⁰⁹ Chapter 185 of the Laws of Zambia

¹¹⁰ Chapter 194 of the Laws of Zambia

¹¹¹ Chapter 283 of the Laws of Zambia

¹¹² Chapter 283 of the Laws of Zambia

¹¹³ Peter Dale and John McLaughlin, *Land Administration*, op. cit, p. 79

Legislation dealing with aspects of town and country planning was introduced in Northern Rhodesia as part of the law of the Territory to regulate orderly physical planning and development. The first planning law in Northern Rhodesia was the 1929 Town Planning Ordinance.¹¹⁴ The general object of the Ordinance was to secure proper sanitary conditions, amenity and convenience in connection with laying out and use of land.¹¹⁵ The Ordinance, which only applied in Crown land, gave powers to prepare planning schemes for proclaimed or private townships with very restricted powers of control and to control subdivisions under twenty acres. The Ordinance provided for the appointment of a Town Planning Board with the power to prepare a plan for any town referred to it by the Governor and impose building standards.

The current Town and Country Planning Act was revised in 1962, and is modelled on the 1947 English Town and Country Planning Act. This statute makes provision for the appointment of Planning Authorities, the establishment of a Town and Country Planning Tribunal, and for the preparation, approval and revocation of development plans. It also provides for the control of

¹¹⁴ Chapter 123 of the 1958 Edition of the Laws of Zambia

¹¹⁵ *Ibid*, section 23

development and subdivision of land, the assessment and payment of compensation in respect of planning decisions, the preparation, approval, and revocation or modification of regional plans.¹¹⁶

The Town and Country Planning Act applies in areas under State land. The Republic is not bound by the provisions of the Act.¹¹⁷ The Act does not also apply to customary areas as defined under the Lands Act.¹¹⁸ However, the President may, by statutory Order apply all or any of the provisions of the Act to any customary area.¹¹⁹ In the process of land alienation under State land, the relevance of the Town and Country Planning Act cannot be overemphasised. This is because the State cannot make grants of land unless land has been planned.

¹¹⁶ Preamble to the Town and Country Planning Act, Chapter 283 of the Laws of Zambia

¹¹⁷ Section 3(1) of Chapter 283 of the Laws of Zambia

¹¹⁸ Chapter 184 of the Laws of Zambia

¹¹⁹ See the subsidiary legislation to the Town and Country Planning Act for the cases where the President has, pursuant to section 3, decreed or ordered the application of the Act to customary areas

The Land Survey Act¹²⁰

Land Surveys in the country are regulated under the Land Survey Act which provides for the manner in which land surveys shall be carried out and diagrams and plans connected therewith shall be prepared. The Act further provides for the protection of survey beacons and other survey marks and for making further and more comprehensive provisions for the registration and licensing of land surveyors.¹²¹

Land surveys relate to the conduct of cadastral, geodetic and topographic surveys for the acquisition of primary data in the field. The word cadastral is a survey technical term that describes the placing of beacons and production of survey diagrams. Similarly, geodetic is a technical survey term that refers to the reference points or marks usually placed on the ground (such as trigonometric stations) and from which survey points are derived. The word topographic is also a survey technical term that refers to the surveying and production of survey maps. Once data is obtained from the field by surveyors, it is used to process and derive

¹²⁰ Chapter 188 of the Laws of Zambia

¹²¹ Preamble to the Land Survey Act, Chapter 188 of the Laws of Zambia

spatial information critical for a wide range of land administration, and land management functions.

Cadastral survey is very important in the identification of land by the placing of beacons. Cadastral surveying is the term generally used to describe the gathering and recording of data about land parcels.¹²² The description of land is often done by way of a beacon. A beacon within the interpretation of the Land Survey Act means 'a mark or structure made or erected at, or indicative of, the corner point of a parcel of land, or at an intermediate line point on a rectilinear boundary of a parcel of land, by a land surveyor or by his agents, servants or workmen acting under his direction, and includes a bench mark, reference mark and trigonometrical station'.¹²³

The position of any beacon or boundary deemed to have been lawfully established shall be unimpeachable, that is to say, it shall not be capable of being brought into question in any court, and the Surveyor-General or Registrar shall

¹²² Peter Dale and John McLaughlin, **Land Administration**, op.cit., p.46

¹²³ Section 2 of the Land Survey Act, Chapter 188 of the Laws of Zambia

not accept for filing or registration any document which shows any beacon or boundary inconsistent with such position.¹²⁴

The importance of beacons, (sometimes referred to as landmarks), has remained recognized since ancient times. In the Christian and old Mosaic Law, it was not only unlawful to remove beacons, but the person who did so was also cursed if he removed beacons that had been legally established. The Holy Bible provides that *"cursed be he that removeth his neighbour's landmark."*¹²⁵

In the process of land alienation and registration, it is a requirement that land which is subject of alienation has to be surveyed, and cadastral diagrams should be produced for purposes of land registration. According to the Land Survey Act, a diagram means;

"...a document containing geometrical, numerical and verbal representations of one or more parcels of land, the boundaries of which have been surveyed by a land surveyor, and which document has been signed by such Surveyor or which has been certified by a Government Surveyor as having been compiled from approved records of a survey or surveys carried out by one or more land surveyors, and includes any such document which, at any time prior to the commencement of this Act, has

¹²⁴ The Land Survey Act, Chapter 188 of the Laws of Zambia, section 25

¹²⁵ Deuteronomy Chapter 27 vs. 17, King James Version, National Publishing Company, 1978 Edition

been accepted as a diagram in the Registry or in the office of the Surveyor-General”¹²⁶

It is a legal requirement therefore that registration of land must be accompanied by an approved diagram. The law provides that no diagram of any parcel of land shall be accepted in the Registry in connection with any registration of such land, unless such diagram has been approved by the Surveyor General.¹²⁷ It is necessary that the process of land alienation is completed with registration and as such, the surveying aspect is an important component in land alienation.

Circular No. 1 of 1985

Besides statutes, there are administrative guidelines provided in the Circular No. 1 of 1985 on Land Alienation. This Circular¹²⁸ provides for administrative procedures on land alienation. It directs all Local Authorities to be responsible for and on behalf of the Commissioner of Lands in the processing of applications, selection of suitable applicants, and making recommendations to the Commissioner of Lands for approval. It provides that:

¹²⁶ Section 2 of the Land Survey Act, Chapter 188 of the Laws of Zambia

¹²⁷ The Land Survey Act, Chapter 188 of the Laws of Zambia, section 32

¹²⁸ Circular No.1 of 1985

“Pursuant to the policy of decentralisation and the principle of participatory democracy, it was decided that District Councils should participate in the administration of land. To this effect, all District Councils will be responsible, for and on behalf of the Commissioner of Lands, in the processing of applications, selecting of suitable candidates and making recommendations as may be decided upon them. Such recommendations will be invariably accepted unless in cases where it becomes apparent that doing so would cause injustice to others or if a recommendation so made is contrary to national interest or public policy.”

However, it is important to note that this Circular is merely an administrative document directed at District councils with no force of law, and the Commissioner of Land is not bound by it. This has been judicially tested in the case of **Yengwe Farms Limited v. Masstock Zambia Limited**, the **Commissioner of Lands and the Attorney General**.¹²⁹

This case centred on the powers of the Commissioner of Lands and the interpretation of circular No. 1 of 1985. The brief facts of the case were that the appellant was given a 99 year lease for Farm No. 4890, in 1986. Initially the appellant had applied for 10,000 hectares in the Lusaka rural area. The application was considered by the District Council after necessary consultations with the local chief, and the people and was sent to the Commissioner of Lands.

¹²⁹ (1999) Z.R. 65

The application was then considered by the Commissioner of Lands and the appellant was given 2,000 hectares and a Certificate of title was issued. Later after obtaining the Certificate of title, the President approved two farms for the 1st respondent. The President directed that the 1st respondent be given 20,000 hectares of land. The Commissioner of Lands however reduced the allocation to 5,000 hectares of 2,500 hectares of each farm. One of the farms encroached on Farm No. 4890. The parties took the matter to the High Court.

The Applicants challenged the powers and authority of the Commissioner of Lands contending that he allocated land in excess of 250 hectares beyond his legal powers. The Applicants relied on Circular No. 1 of 1985, as the source of their contention.

The learned trial judge considered the case and concluded that the Commissioner of Lands could not, because of circular No. 1 of 1985, give 2,000 hectares to the appellant. She concluded that the Commissioner should have either given 250 hectares or in all fairness sought the Minister's approval to give more land. She interpreted Circular No. 1 of 1985, as a directive to the Commissioner of Lands.

The learned trial judge found that the appellant had followed all the normal procedures in obtaining the land which was properly given, unfortunately outside the legal competence of the Commissioner of Lands.

The Appellant appealed to the Supreme Court and argued that the learned trial judge erred in law and in fact in holding that the Commissioner of Lands did not have powers to allocate the mass of land he allocated to the appellant. On appeal, the Supreme Court allowed the appeal, and stated that the Circular being a policy one was directed at the District Councils. This circular was intended to give guidelines to the District Councils, which in turn make recommendations to the Commissioner of Lands. The circular was not directed at the Commissioner of Lands. The Commissioner of Lands was legally entitled to award more than 250 depending on the circumstances of each case.

The Supreme Court further stated that the learned trial judge erred when she decided that the Commissioner of Lands was precluded by circular No. 1 of 1985, from giving more than 250 hectares. Therefore, this circular does not bind

the Commissioner of Lands. The Commissioner of Lands is however, bound to follow the provisions of the relevant Act¹³⁰ dealing with customary land.

The Lands Act¹³¹

The primary objectives of the Lands Act are to provide the following-

- (a) the continuation of leaseholds and leasehold tenure;
- (b) the continuation of vesting land in the President, and alienation of land by the President;
- (c) providing statutory recognition and continuation of customary tenure;
- (d) providing the conversion of customary tenure into leasehold tenure; and
- (e) establishing the Land Development Fund, and the Lands Tribunal.

Under the Lands Act, 'land' means "any interest in land whether the land is virgin, bare or has improvements, but does not include any mining right as defined in the Mines and Minerals Act in respect of any land."¹³²

¹³⁰ The Lands Act, Chapter 184 of the Laws of Zambia

¹³¹ Chapter 184 of the Laws of Zambia

¹³² Section 2 of the Lands Act, Chapter 184 of the Laws of Zambia

From the English law perspective, (where Zambia has borrowed her legal system), land means not only the ground, but also the subsoil and all structures and objects like buildings, trees and minerals standing or lying beneath it. This concept of land is often expressed in the Latin maxim, *quic quid plantatur solo solo cedit*, meaning, “whatever is annexed or attached to the soil becomes part of the soil.” while the general rule is often expressed in the Latin maxim, *cujus est solum ejus est usque ad coelum et ad inferos*, meaning, “he who owns the soil owns it from the depths of the earth up to the sky.”¹³³

The definition of land from the judicial point of view can be borrowed from the landmark decision of **Chief Justice Coke (1552-1634)**, who defined land as follows:

“Land in the legal significance comprehendeth any ground, soil or earth whatsoever as meadows, pastures, woods, moors, waters, marshes, furzes and heath. It legally includes all castles, houses and other buildings.”¹³⁴

¹³³ J.G, Ridall, **Introduction to Land law**, Oxford: Oxford University Press, p. 25

¹³⁴ See L.B Cuzon, “Land Law”, M & E Series, p.7 cited in the **Zambia Law Journal** Vol. 17, 1985 p.46

Another definition of land from an African jurisdiction, though influenced by English law, could be borrowed from the Tanzanian Lands Act of 1999, which defines land to include,

“the surface of the earth and the earth below the surface and all substances other than minerals and petroleum forming part of or below the surface, things naturally growing on the land, buildings and other structures permanently affixed to the land.”

The various definitions of land by different scholars, judges and statutes have a common interpretation that point to the fact that land includes the ground or soils, sub-soils, and mountains on the surface of the earth, all structures and objects like castles, houses, buildings, trees, or whatever is annexed or attached to the soil. In Zambia, legislation has excluded minerals as part of the land under the Mines and Mineral development Act.¹³⁵

Eligibility to hold land in Zambia

Land in Zambia is vested in the President. The vesting of land in the President under the Lands Act,¹³⁶ is a continuation of the principle from the Land (Conversion of title) Act of 1975, which vested land in the President.

¹³⁵ Chapter 213 of the Laws of Zambia

¹³⁶ Chapter 184 of the Laws of Zambia

The President may, as earlier stated, alienate land vested in him to any Zambian¹³⁷. The President may also alienate land to non-Zambians under the following categories:

- (i) a permanent resident in the Republic of Zambia;
- (ii) an investor within the meaning of the Investment Act;¹³⁸
- (iii) a company registered under the Companies Act;¹³⁹
- (iv) a statutory corporation created by an Act of Parliament;
- (v) a co-operative society registered under the Co-operative Societies Act;¹⁴⁰
- (vi) a body registered under the Land (Perpetual Succession) Act;¹⁴¹
- (vii) where the non-Zambian acquires an interest or right arising out of a lease, sub-lease, or under-lease;
- (viii) where the non-Zambian acquires an interest or right in land which is being inherited upon death or is being transferred under a right of survivorship or by operation of law;

¹³⁷ Section 3 (2) of Chapter 184 of the Laws of Zambia

¹³⁸ Chapter 385 of the Laws of Zambia (now repealed and replaced by the Zambia Development Agency Act, Act No. 11 of 2006)

¹³⁹ Chapter 388 of the Laws of Zambia

¹⁴⁰ Chapter 397 of the Laws of Zambia

¹⁴¹ Chapter 186 of the Laws of Zambia

- (ix) a commercial bank registered under the Companies Act and the Banking and Financial Services Act;¹⁴²
- (x) where the non-Zambian is granted a concession or right under the National Parks and Wildlife Act;¹⁴³ and
- (xi) where the non-Zambian has obtained the President's consent in writing under his hand.¹⁴⁴

The categories of non-Zambians who are eligible to hold land in Zambia are now discussed:

(i) A Permanent residents in the Republic of Zambia

The President may alienate land to a non-Zambian if such a person is a permanent resident in the Republic of Zambia.¹⁴⁵ A 'permanent resident' is defined under the Lands Act as "an established resident or a person holding an entry permit in accordance with the Immigration and Deportation Act."¹⁴⁶

Whereas the Immigration and Deportation Act does not define a permanent resident, it however defines an 'established resident' as, "a person who is not a

¹⁴² Chapters 388 and 387 of the Laws of Zambia

¹⁴³ Chapter 201 of the Laws of Zambia

¹⁴⁴ Section 3(3) of the Lands Act, Chapter 184 of the laws of Zambia

¹⁴⁵ Ibid., section 3(3)(a)

¹⁴⁶ Chapter 123 of the Laws of Zambia

citizen and who has been ordinarily and lawfully resident in Zambia... for a period of four years.”¹⁴⁷

An interpretation of section 3(3) of the Lands Act in relation to section 2 of the Immigration and Deportation Act therefore entails that a holder of an entry permit is deemed to be a permanent resident.

An entry permit is issued to a person who has held an employment permit for three years for those who are self-employed, and ten years for those who engage in employment under an employer resident in Zambia.¹⁴⁸ An employment permit is granted subject to certain conditions. It specifies conditions for observance by the holder, as to the area within which the holder may engage in employment and the nature of the employment in which he may engage, as well as the period of its validity. An employment permit also authorises the holder to engage in paid employment under an employer resident in Zambia.

¹⁴⁷ Section 2 of the Immigration and Deportation Act, Chapter 123 of the Laws of Zambia

¹⁴⁸ The Immigration and Deportation Act, Chapter 123 of the Laws of Zambia, section 18

The Supreme Court had opportunity of discussing the law on the qualifications of a non-Zambian to own land if such person is a permanent resident in Zambia. The case was an appeal from the Lands Tribunal involving the **Attorney General, Ministry of Works and Supply and Rose Makano v. Joseph Emmanuel Fraser and Peggy Sikumba Fraser**.¹⁴⁹ The brief facts of the case were that, the first appellant, Mr. J. E. Fraser, a Guyanese born, and holder of an entry permit number 34910, was employed in the Civil Service of the Government of the Republic of Zambia from 1971, while the second appellant, a Zambian, was his wife. Sometime in December 1991, the first appellant was allocated house number 405 Independence Avenue, Lusaka.

In September, 1998, pursuant to Clause 2.1 of the Government Policy on purchase of pool houses, he applied to purchase this house but did not receive any response to his application. Earlier, in June, 1998, while both appellants were occupying house number 405, Independence Avenue, Lusaka, the Lusaka Housing Committee had allocated the same house to the third respondent, Mrs. Rose Makano. On 27th December, 1998, the Committee on sale of Government

¹⁴⁹ (2001) ZR 87

Pool Houses made an offer to Rose Makano to purchase the house. This offer was followed by a letter of 28th December by the same Committee to the Permanent Secretary, Ministry of Communications and Transport, directing that the first appellant, who was then the current tenant in the house in issue, be found alternative accommodation to rent in order to pave way for Mrs. Rose Makano, a Zambian civil servant, who had been allocated to purchase the house. On 20th July, 1999, Mrs. Rose Makano paid the full purchase price of the house in issue, while the Certificate of Title for the same property dated 20th May, 1999, was issued in her name. On 25th August, 1999, the first appellant presented a complaint to the Lands Tribunal against the three respondents.

The grounds on which the complaint was founded were that, his house number 405 Independence Avenue had been wrongly recommended for sale by the Ministry of Works and Supply to Mrs. Rose Makano. The appellant sought the reliefs that the recommendations for the sale of his house to Mrs. Rose Makano, the third respondent, be nullified; and that the Ministry of Works and Supply be ordered to recommend him or in the alternative his wife, to purchase the house in issue, as they were the sitting tenants.

The Handbook on sale of Government pool houses, read in part as follows:

“In the spirit of empowering Zambians to acquire their own houses, the Government has decided to sell some of its pool houses to sitting tenants who are civil servants. This section contains guidelines for the sale of government pool houses. These guidelines include information on the categories of houses, modes of payment, and supervision of the sale. The guidelines are subject to review as and when the need arises.”

The relevant guidelines in the Handbook which dealt with the purchase of Government Pool Houses were provided under Clause 2.1. This Clause was couched in the following terms:-

“2.1- Eligibility:

In the process of identifying civil servants who are bona fide sitting tenants, the following criteria shall be used:-

- (a) a confirmed civil servant who is in service and is a legal tenant;
- (b) a civil servant who retired or was retrenched but was not paid terminal benefits and is a legal tenant;
- (c) a civil servant who retired but was re-appointed on contract/gratuity terms and conditions of service;

- (d) a spouse or children of a civil servant who died but was not paid terminal benefits and was a legal tenant; and
- (e) a civil servant who qualifies to own land under the provisions of section 3 (2) and (3) of the Lands Act, No. 29 of 1995.”

The Tribunal considered the documentary, oral and affidavit evidence. It also examined the relevant provisions in the Handbook on the Civil Service House Ownership Scheme which sets out persons eligible to purchase Government Houses. The Tribunal further considered the provisions of section 3 (2) and (3) of the Lands Act.

The Tribunal found that the second appellant, Mrs. Peggy Musakindwa Sikumba Fraser, though a civil servant in the Civil Service, who qualified to purchase a Government Pool House, did not apply for the purchase of the house in issue. Her appeal to the Lands Tribunal was dismissed for lack of merit. In relation to the first appellant, the Tribunal found that he was eligible to purchase the house because he was a civil servant in the Civil Service, and a legal sitting tenant in accordance with the Handbook on the Scheme to purchase Government Pool

Houses. The Tribunal further held that the first appellant was a civil servant who qualifies to own land in Zambia under the provisions of section 3 (3) (a) of the Lands Act.

The Respondents, being dissatisfied with the ruling of the Lands Tribunal, appealed against all these findings to the Supreme Court.

The Supreme Court considered the finding of the Lands Tribunal in relation to whether the first Appellant did satisfy Clause 2.1 (a) of the Handbook on the sale of Government houses. On this ground, the Supreme Court stated that the Lands Tribunal was correct when it found in favour of the first appellant because he was a confirmed civil servant who was a legal sitting tenant.

On the question of nationality, however, there was evidence that the first Appellant was a non-Zambian. In determining the eligibility of the first Appellant to own land in Zambia, the Supreme Court invoked the provisions of section 3(3) (a) of the Lands Act which provides that:

“Subject to any other provisions and procedures relating to alienation of land.....the President may alienate land to a non-Zambian where the non-Zambian is a permanent resident in the Republic of Zambia.”¹⁵⁰

On this provision, the Supreme Court found that the first Appellant had satisfied section 3(3) (a) of the Lands Act in that, although he was a non-Zambian, he was a permanent resident.

However, even if the Supreme Court found that the first Appellant was a civil servant and that he was also a permanent resident, the Supreme Court proceeded to observe:

“but this finding does not also conclude the appeal because section 3(3) (c) of the Lands Act require that for a non-Zambian who is a permanent resident to qualify to own land must obtain the president’s consent in writing under his hand. To the extent that the Lands Tribunal found that the first appellant was a permanent resident in Zambia it cannot be faulted. Further, to the extent that the Tribunal found that the first appellant was eligible to buy a Government House under Section 3(3) (a) it cannot also be faulted. There was, in our view, overwhelming evidence supporting all these findings. On the other hand, the Lands Tribunal never made a specific finding on the question of the Presidential consent in writing under his hand. In other words, consent for a non-Zambian to acquire any land in Zambia, and also to be eligible to purchase a Government Pool House, there is a requirement to obtain a Presidential consent. We have examined the first appellant’s evidence. We find no

¹⁵⁰ Section 3(3) (a) of the Lands Act, Chapter 184 of the Laws of Zambia

suggestion in his evidence that he obtained the President's consent in writing under his hand to purchase the house."

It was therefore the Court's finding that the Lands Tribunal misdirected itself when it held that consent was not a pre-requisite for the first appellant to buy a Government Pool House. The Court further held that, while the first appellant met all the conditions in relation to purchase of a government pool house, he did not obtain Presidential consent and on this ground alone the appeal succeeded.

However, an analysis and correct interpretation of the relevant section of the Lands Act,¹⁵¹ reveals that a non-Zambian can qualify to own land in Zambia if he satisfies any one of the eleven provisions of eligibility to own land in Zambia. In this context, it entails that if a person is an investor within the meaning of the Zambia Development Agency Act, that aspect alone is sufficient qualification for a non-Zambian to own land in Zambia. Similarly, if a person is a permanent resident, this too qualifies him to own land in Zambia without satisfying other legal provisions.

¹⁵¹ Section 3(3) of Chapter 184 of the Laws of Zambia

With due respect to the Supreme Court's decision in the above decision, it is submitted that the finding of the Court was erroneous at law because a non-Zambian who is a permanent resident qualifies to own land in Zambia under the Lands Act. He does not require to obtain *the President's consent under his own hand*, as this is another independent condition or provision for a non Zambian to qualify to own land in Zambia. The conditions to own land in Zambia as provided under section 3(3) of the Lands Act are disjunctive and not conjunctive.

Later, however, the Supreme Court appears to have given a correct interpretation of section 3(3) of the Lands Act in the case of **Kalyoto Muhalyo Paluku v. Granny's Bakery Limited, Ishaq Musa, Attorney General and Lusaka City Council**.¹⁵² The facts of the case were that the Appellant, a Congolese national purchased property No. 19218, Lusaka. He obtained a certificate of title on 16th June, 2003. Later, the Commissioner of Lands in a letter dated 28th April, 2004, informed him that his certificate of title to the property was cancelled, though no reasons were given. He was told that the same property had been re-numbered as

¹⁵² (2006) Z.R. 119

Stand 30751, and that the certificate of title had been re-issued in favour of the 1st and 2nd Respondents. When the Plaintiff sought redress in the High Court by way of judicial review, the Defendants raised two preliminary objections. These were:

- 1) that the Plaintiff being a Congolese national i.e. non-Zambian holding an entry permit, was not entitled to own land in Zambia under the Lands Act¹⁵³;
- 2) that since the Plaintiff had not obtained the President's consent in writing he was not eligible to own land in Zambia.

The High Court agreed with the Defendant and stated that the Defendant was a non-Zambian i.e. a Congolese national. He was not an established resident. In reference to the **Makano case**, the Judge stated that there was no evidence on record to show that the Defendant had the President's consent in writing under the President's hand.

¹⁵³ Chapter 184 of the Laws of Zambia

The Appellant appealed to the Supreme Court contending that he had an entry permit, and therefore eligible to hold land in Zambia. The Appellant described himself before the Supreme Court as a permanent resident holding a valid entry permit. In deciding this case, the Supreme Court considered provisions of section 2 of the Lands Act,¹⁵⁴ which defines a permanent resident as an established resident or a person holding an entry permit in accordance with the Immigration and Deportation Act¹⁵⁵. The Court further considered section 2 of the Immigration and Deportation Act which defines an established resident as, “in relation to any date, a person who is not a citizen or a prohibited immigrant and who has been ordinarily and lawfully resident in Zambia or the former protectorate of Northern Rhodesia or both for the period of four years immediately preceding that date”.

The Supreme Court held that since the entry permit was issued to the Appellant on 2nd July, 1999, and he registered an assignment to purchase stand number 19218, Lusaka, in the Lands and Deeds Registry on the 10th of July, 2000, barely a year or so of his stay in Zambia, the Appellant did not qualify to be an

¹⁵⁴ Chapter 184 of the Laws of Zambia

¹⁵⁵ Chapter 123 of the Laws of Zambia

established resident. In terms of the Immigration and Deportation Act, and in particular the entry permit issued under the Act, the Appellant had not yet become an established resident because he had not completed four years before he acquired the stand. Consequently, he was not a permanent resident in terms of the Lands Act to entitle him to own land on title. That being the case, he should have applied for and obtained the President's consent under his own hand.

It is the view of the writer that the **Kalyoto case** was correctly decided in relation to the position of the law on eligibility of non-Zambians, who are permanent residents to own land in Zambia, when the Court stated that;

“In matters of land alienation to a non-Zambian individual, we hasten to say that it is important to read the two definitions together in order to establish whether the applicant for land ...qualifies to own land in Zambia as a permanent resident under the Lands Act.”

A correct interpretation of the law entails that provisions of section 3(3) of the Lands Act are disjunctive. This means that a person need only establish any one of the eleven provisions in order to qualify for ownership of land in Zambia.

(ii) Investors

On foreign investors, one of the driving forces in the formulation of the Lands Act in 1995, was the government's desire to allow and attract foreign investment in land. It is provided in the Lands Act therefore, that the President may alienate land to a non-Zambian if such a person is an investor within the meaning of the Investment Act,¹⁵⁶ or any other law relating to the promotion of investment in Zambia.¹⁵⁷ The Investment Act¹⁵⁸ has since been repealed and replaced by the Zambia Development Agency Act.¹⁵⁹ Under the Zambia Development Agency Act, investment means "contribution of capital, in cash or in kind, by an investor to a new business enterprise, to the expansion or rehabilitation of an existing business enterprise, or to the purchase of an existing business enterprise from the State."¹⁶⁰ An investor is defined as 'any person, natural or juristic, whether a citizen of Zambia or not, investing in Zambia in accordance with the Zambia Development Agency Act, and includes a micro or small business enterprise, and rural business enterprise.' In the same vein, foreign investment means investment brought in by an investor from outside Zambia. A foreign investor is

¹⁵⁶ Chapter 385 of the Laws of Zambia

¹⁵⁷ section 3(2)(b) of the Lands Act, Chapter 184 of the Laws of Zambia

¹⁵⁸ Chapter 385 of the Laws of Zambia

¹⁵⁹ Act No. 11 of 2006

¹⁶⁰ Section 2 of the Zambia Development Act No. 11 of 2006

“...a person who makes direct investment in the country, and who in the case of a natural person is not a citizen or permanent resident of Zambia and in the case of a company is incorporated outside Zambia.”

In order to achieve this objective, the land administration and legislation regime were liberalised. The anticipated benefits of these provisions are undoubtedly enormous and important. At the time of enacting the Lands Act, it was anticipated that foreign investors would bring capital that would open up virgin land in both urban and rural areas.

The law as it relates to land holding in Zambia today entails that a non-Zambian who qualifies as an investor has the right to own land in Zambia on the same terms and conditions as those applicable to a Zambian. For instance, a foreign investor is granted the same leasehold title as the one granted to a Zambian.

(iii) President's consent in writing under his hand

All grants or dispositions of land in Zambia are done by the President of the Republic of Zambia through the Commissioner of Lands. However, the

President reserves the right to grant land to any person who would otherwise not have qualified under the provisions of section 3(3) of the Lands Act. The law provides that a non-Zambian may be granted land if such a person has obtained the President's consent in writing under his hand.¹⁶¹ The interpretation of this provision is that a non-Zambian can apply to the President directly, and if the President is satisfied, he would in writing grant such piece of land, and also direct the relevant institutions to process the title to land.

Since all land in the country is vested in the President, and he alone has the power to alienate the land, subject of course to the delegated powers of alienation and administration of land by the Commissioner of Lands, he can directly alienate land to any non-Zambian as long as he does so under his own hand. During my tenure of office as Commissioner of Lands, there was an instance where the President of the Republic of Zambia then received an application for consent to acquire a property in Ndola in 2006 from a Vatican based organisation that wanted to construct a community centre. The circumstances at the time were such that the said organisation did not qualify to

¹⁶¹ Section 3(2)(c) of the Lands Act, Chapter 184 of the Laws of Zambia

own land in Zambia under the first ten conditions set out under section 3(3) of the Lands Act as stated earlier. Further, the said organisation needed the land urgently, thus, following all the administrative procedures would have meant taking longer to complete the process. In this regard, they sought the intervention of the President and invoked section 3(3)(ix) by seeking the President's consent under his hand.

Having analysed the application and the objectives of the organisation that sought his consent under his hand, the President entertained the application and granted consent. In doing so, he informed the applicant of his position and advised the Commissioner of Lands to process the application in favour of the applicant.

It can be seen from this provision that the President's consent in writing under his hand is exercised or granted in certain circumstances other than those provided for under section 3(3) of the Lands Act, but which in his view, would be essential or compelling in favour of the applicant.

Although the President may grant consent in writing under his hand, the execution of the deed or lease is however, executed by the Commissioner of Lands who has delegated authority to do so.

(iv) A company registered under the Companies Act¹⁶²

When a company or entity is incorporated under the Companies Act¹⁶³, it is clothed with the legal personality to own land in Zambia. On this aspect, the Lands Act¹⁶⁴ provides that “the President may alienate land to a non-Zambian if such a person is a company registered under the Companies Act, and less than 25 per cent of the issued shares are owned by non-Zambians.”¹⁶⁵ The type of companies that could be incorporated under the Companies Act include a public company, a private company limited by shares, a company limited by guarantee, and an unlimited company.¹⁶⁶

The requirement by law is, therefore, that before any company incorporated under the Act can be eligible to own land in Zambia, seventy-six percent or more

¹⁶² Chapter 388 of the Laws of Zambia

¹⁶³ Ibid.

¹⁶⁴ Chapter 184 of the Laws of Zambia

¹⁶⁵ Section 3(2)(d) of the Lands Act, Chapter 184 of the Laws of Zambia

¹⁶⁶ Section 13 of the Companies Act, Chapter 388 of the Laws of Zambia

of the issued shares should be owned by Zambians. The question that has to be answered is whether a company limited by guarantee is eligible to own land in Zambia since it has no issued shares. The likely answer is that if more than 75 per cent of the subscribers or guarantors of a company limited by guarantee are Zambians, *ipso facto* such a company can own land on the same terms as a company limited by shares.

(v) Statutory corporation created by an Act of Parliament

The law permits the President to alienate land to a non-Zambian if such a person is a statutory corporation created by an Act of Parliament.¹⁶⁷ Once such a corporation is created by statute, it becomes eligible to own land in Zambia. This provision gives the legal status for bodies or entities created by Parliament of Zambia to hold land in the country. Other than companies incorporated under the Companies Act and registered at the Companies and Patents Registration Office as earlier discussed, statutory bodies created by Parliament may be given powers to hold land with perpetual succession. Bodies such as National Pension Scheme Authority,¹⁶⁸ and the National Housing Authority¹⁶⁹ are some of the

¹⁶⁷ Section 3(2)(e) of the Lands Act, Chapter 184 of the Laws of Zambia

¹⁶⁸ Chapter 256 of the Laws of Zambia

statutory corporations created by Parliament and they have legal capacity to own land. In this regard, Parliament may create a corporation and cloth it with the legal capacity to hold land in Zambia.

(vi) A Co-operative society

The law provides that the President may alienate land to a non-Zambian if such a person is a co-operative society registered under the Co-operative Societies Act¹⁷⁰ and less than twenty-five per centum of the members are non-Zambians.¹⁷¹ The Co-operative Societies Act¹⁷² provides for the registration of co-operative societies which belong to the people who use their services, the control of which rests equally with all their members, and the gains from which are distributed among the members in proportion to the use they make of these services or their interest in their society. This is intended to encourage co-operative development by the provision of services to assist the organisation and operation of various kinds of co-operative societies to meet the economic and social needs of their members on a self-help basis. These entities are of profound importance

¹⁶⁹ Chapter 195 of the Laws of Zambia

¹⁷⁰ Chapter 397 of the Laws of Zambia

¹⁷¹ Section 3(2)(f) of the Lands Act, Chapter 184 of the Laws of Zambia

¹⁷² Chapter 397 of the Laws of Zambia

especially in rural areas.

Upon registration with the Registrar, Co-operative Societies become bodies corporate and acquire the legal capacity to own land. In this regard, the Co-operative Societies Act states that;

“the registration of a co-operative society shall render it a body corporate by the name under which it is registered, with perpetual succession and a common seal and with limited liability, and with power to hold property, to enter into contracts, to institute and defend suits and other legal proceedings, and to do all things necessary to achieve its objects in the exercise of the powers available to it under the provisions of this Act, the rules and its by-laws.”¹⁷³

In order to encourage co-operative development, it is evident that the objectives of the cooperative society may not be attained or achieved without having the capacity to own land. The Lands Act therefore empowers non-Zambians to own land if they have incorporated a co-operative society as this is understood to be in the interest and economic development of the country.

¹⁷³ Section 13 of the Co-operative Societies Act, Chapter 397 of the Laws of Zambia

(vii) A body registered under the Land (Perpetual Succession) Act

The Lands Act provides for the ownership of land by organisations that are incorporated under the Land (Perpetual Succession) Act.¹⁷⁴ This is legislation that enables both local and foreign non-corporate organisations such as churches, non-governmental organisations (NGO's), clubs and associations to own land in Zambia. The law provides that the President may alienate land to a non-Zambian if such a person is a body registered under the Land (Perpetual Succession) Act, and is a non-profit making, charitable, religious, educational, or philanthropic organisation or institution.¹⁷⁵

The preliminary legal requirement, however, is that before these organisations can have the capacity at law to own land, they should be registered with the Registrar of Societies under the Societies Act.¹⁷⁶ It should be noted though, that the right to own land is not attained by mere registration. After the non-profit making body or organisation has been registered by the Registrar of Societies, the Trustees of the organisation or association should apply to the Minister of Lands for incorporation. The effect of incorporation of such bodies is that;

¹⁷⁴ Chapter 186 of the Laws of Zambia

¹⁷⁵ Ibid., section 3(2)(g)

¹⁷⁶ Chapter 119 of the Laws of Zambia

“After the incorporation of the trustees of any body of persons, every conveyance, demise, donation, gift and other disposition of land, or any interest therein lawfully made by deed, will or otherwise in favour of the trustees, shall take effect as if the same had been made in favour of, the corporate body for the like purposes.”¹⁷⁷

The Act does not impose any restriction on the nationality of trustees and is silent on the composition of trustees. The particulars relating to the application for certificate of incorporation are that the application must provide the following:

- (a) the nature of the community or the objects of the body or association of persons;
- (b) the rules and regulations of the same, together with the date of, and parties to, every deed, will or other instrument, if any, creating, constituting or regulating the same;
- (d) a statement and short description of the land, or interest in land, which at the date of application is possessed by, or belonging to, or held on behalf of, such community, body or association of persons;
- (e) the names, residences and addresses of the said trustees of such community, body or association of persons;

¹⁷⁷ Section 9 of the Land (Perpetual Succession) Act, Chapter 186 of the Laws of Zambia

- (f) the proposed title of the corporate body, of which title the words “trustees” and “registered” shall form part together with the proposed device of the common seal; and
- (i) the regulations for the custody and use of the common seal.

This omission is susceptible to defeat the rationale for regulating the ownership of land by non-Zambians who would otherwise not qualify to own land under any of the categories specified, but can acquire land by registering themselves as trustees. During my tenure of office as Commissioner of Lands,¹⁷⁸ a number of applications for land by bodies under the Land (perpetual succession) Act were received, and most of them were invariably approved because there is no law that restricts the nationality of trustees.

(viii) Interest or right in question arises out of a lease, sub-lease, under-lease or a tenancy agreement

The law allows the President to alienate land to a non-Zambian who intends to hold land where the interest or right in question arises out of a lease, sub-lease,

¹⁷⁸ 2005-2007

or under-lease, for a period not exceeding five years, or a tenancy agreement.¹⁷⁹

The Lands Act does not give the duration of the tenancy agreement. The assumption is that the duration may be of any term provided that it is less than ninety-nine years.

This situation arises where a non-Zambian intends to conduct business and wants to rent premises such as a house or business premises, that person may enter into a lease, under-lease, sub-lease or tenancy agreement with a land-owner. The non-Zambian in these circumstances is allowed to enter into such agreements provided that the duration of the lease, sub-lease, and under-lease or tenancy agreement does not exceed five years. This provision was intended to empower investors intending to hold land on short-term basis. For instance, non-Zambian companies and individuals have been able to acquire shops through leases and subleases at Arcades and Manda hill shopping malls, and engage in trading activities through tenancy agreements. These tenancies and leases are then registered with the Registrar of Lands and Deeds, because it is a legal requirement under the Lands and Deeds Registry Act that leases or tenancy

¹⁷⁹ Section 3(3)(h) of the Lands Act, Chapter 184 of the Laws of Zambia

agreements for a longer period than one year must be registered.¹⁸⁰ The effect of failure to register leases or other documents evidencing rights or interest in land as required by law is discussed under chapter 6 of this dissertation.

(ix) Acquisition of an interest or right in land by inheritance upon death or right of survivorship or by operation of law

This situation arises in instances where the holder of land dies and the successor in title is non-Zambian. For instance, where the land-owner dies, his interest or right may, upon death, be inherited or transferred under a right of survivorship or by operation of law. In situations where the joint tenants hold land and one joint owner dies, it means that the surviving tenant would inherit the estate or property under the doctrine of *Jus Accrescendi* or right of survivorship, notwithstanding the fact that such person is non-Zambian.

Furthermore, where the land-owner dies and, by Will, bequeathes the land to his successor in title or beneficiary, such beneficiary will be entitled to inherit the property despite being non- Zambian. Even in circumstances where the land-

¹⁸⁰ Section 4 of the Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia

owner dies intestate, the property can still be transmitted to the person so entitled by operation of law to a non-Zambian, if such person is the one entitled.

(x) A Commercial Bank

On provisions relating to acquisition of land by a commercial bank, when a commercial bank is registered under both the Companies Act,¹⁸¹ and the Banking and Financial Services Act,¹⁸² it acquires the legal status and capacity to own land in Zambia. This status and capacity gives the bank the right to act as a trustee of any trust, executor or administrator of any estate or in any fiduciary capacity for any person.¹⁸³ Since the requirement here is that a commercial bank should be registered both under the Companies Act, and the Banking and Financial Services Act,¹⁸⁴ it follows that the shareholding structure of the bank must conform to the requirements under the Companies Act before it can attain the legal status and capacity to own land in Zambia.

¹⁸¹ Chapter 388 of the Laws of Zambia

¹⁸² Chapter 387 of the Laws of Zambia

¹⁸³ Section 8 (h) of the Banking and Financial Services Act, Chapter 387 of the Laws of Zambia

¹⁸⁴ Chapter 387 of the Laws of Zambia

(xi) Acquisition of land through a concession or right under the Zambia Wildlife Act

A non-Zambian may acquire land where the non-Zambian is granted a concession or right under the Zambia Wildlife Authority Act. The land granted in this situation should be for purposes and conditions as contained in the Concession Licence issued by the Director General of the Zambia Wildlife Authority. In this regard, the President is required to consult the Director General of the Zambia Wildlife Authority before granting land in a National Park or game Management Areas.

Conditions on alienation of land

The Lands Act provides that the President shall not alienate any land to any Zambian or non-Zambian without receiving any consideration, in money for such alienation and ground rent for such land.”¹⁸⁵ Whenever land is alienated to an applicant, it is a requirement that such an applicant who has been granted land pays consideration. The fees and consideration amounts are determined by the Minister responsible for land matters through a Statutory Instrument.

¹⁸⁵ Section 4(1) of the Lands Act, Chapter 184 of the Laws of Zambia

Circumstances where land is granted without consideration

The law exempts some applicants from paying consideration where land is being alienated for public purpose. “Public purpose” includes the following:¹⁸⁶

- (a) for the exclusive use of Government or for the general benefit of the people of Zambia;
- (b) for or in connection with sanitary improvements of any kind including reclamations;
- (c) for or in connection with the laying out of any new township or the extension or improvement of any existing township;
- (d) for or in connection with aviation;
- (e) for the construction of any railway authorised by legislation;
- (f) for obtaining control over land contiguous to any railway, road or other public works constructed or intended at any time to be constructed by Government;
- (g) for obtaining control over land required for or in connection with hydro-electric or other electricity generation and supply purposes;
- (h) for or in connection with the preservation, conservation, development or

¹⁸⁶ Ibid, section 4 (2)

control of forest produce, fauna, flora, soil, water and other natural resources.

The other exception where the President can grant land to a Zambian or non-Zambian without consideration is where a person has the right of use and occupation of land under customary law and wishes to convert such right into leasehold tenure.¹⁸⁷

Conditions for assigning or transferring land

The Lands Act provides that a person shall not sell, transfer or assign any land without the consent of the President. Any person intending to sell, transfer or assign land shall accordingly apply for that consent before doing so.¹⁸⁸ The consent of the President is required in circumstances where the applicant intends to sell, transfer, or assign the property.

Where a person applies for consent and the consent is not granted within forty-five days of filing the application, the consent shall be deemed to have been

¹⁸⁷ Section 4(1) of the Lands Act, Chapter 184 of the Laws of Zambia

¹⁸⁸ Ibid., Section 5 (1)

granted.¹⁸⁹ The rationale for the Presidential consent is that it enables the President to determine whether the applicant is eligible to hold land in the country, and also to ensure that the person assigning or transferring the property has a legal interest in it or authority to deal with the property being transferred or assigned. In practice, the processing of the presidential consent to assign is done by the Commissioner of Lands to whom applications are addressed.

Where the President refuses to grant consent within thirty days, he shall give reasons for the refusal.¹⁹⁰ This idea of giving reasons is a good provision in that it enables the applicant to know why consent has been refused. A person aggrieved with the decision of the President to refuse consent may within thirty days of such refusal appeal to the Lands Tribunal for redress.¹⁹¹

Compliance with leasehold conditions

The law requires that a person holding land under State land or leasehold tenure is required to do so in compliance with the terms and conditions of the lease.

Some of the conditions of the lease are that the lessee pays ground rent annually

¹⁸⁹ Ibid., Section 5 (2)

¹⁹⁰ Ibid., Section 5 (3)

¹⁹¹ Ibid., Section 5 (4)

and that the lessee undertakes to develop the land within the stipulated time. It is a constitutional and statutory power of the President to dispossess a lessee of the property where the law or lease conditions have been breached.

Where a lessee breaches a term or condition of a covenant under this Act the President shall give the lessee three months notice of his intention to cause a certificate of re-entry to be entered in the register in respect of the land held by the lessee and requesting him to make representations as to why a certificate of re-entry should not be entered in the register.¹⁹²

If the lessee does not within three months make the representations required or if after making representations the President is not satisfied that a breach of a term or condition of a covenant by the lessee was not intentional, he may cause the certificate of re-entry to be entered in the register.¹⁹³

In practice, a lot of problems have been encountered in the administration of re-entries. Common among them is the process of service of notices and the

¹⁹² Section 13 (1) of the Lands Act, Chapter 184 of the Laws of Zambia

¹⁹³ Ibid., Section 13 (2)

subsequent allocation of land to other applicants.

In the case of **Goswami v. Commissioner of Lands**,¹⁹⁴ the Appellant used to own Stand No. 8492, Lusaka. This land was repossessed by the Commissioner of Lands who served a notice of re-entry for breach of the lease condition to pay ground rent, and allegedly for breach of the development clause. The property was generally abandoned and neglected. A notice to re-enter was served on the watchman and after the re-entry, the land was allocated to another person, and a Certificate of Title issued to him. The lessee took the matter to the Lands Tribunal challenging the decision of the Commissioner of Lands. The Lands Tribunal found in favour of the Commissioner of Lands and stated that the re-entry was proper because the Commissioner of Lands followed the correct procedure in re-entering the property and allocate it to another person.

The Appellant challenged the decision of the Lands Tribunal in the Supreme Court and argued that the speed at which the transaction was done to deprive a citizen of her land and give it to another person showed that there was injustice

¹⁹⁴ (2001) Z.R. 31

and the re-entry should be invalidated. The Supreme Court however, upheld the decision of the Lands Tribunal and held that the re-entry was proper and therefore, effective.

The Lands Act is silent on the mode and time of service. In practice, the process is derived from the principle of service as provided under the High court Act.¹⁹⁵

The rule as derived is that a notice to re-enter and a certificate of re-entry should be served on the lessee personally. However, notices in respect of which personal service cannot be effected, a notice to re-enter or a certificate of re-entry is deemed to be sufficiently served if left at the address for service of the person to be served, with any person resident at or belonging to such place, or if posted in a prepaid registered envelope addressed to the person to be served at the postal address for service. The proviso to this rule is that, where service under this rule is made by registered post, the time at which the document so posted would be delivered in the ordinary course of post shall be considered as the time of service.

¹⁹⁵ Order x of the High Court Act, Chapter 27 of the Laws of Zambia

Further, where personal service of any notice or written communication is required and it is made to appear to the Commissioner of Lands that prompt personal service cannot be effected, the Commissioner of Lands has on many occasions resorted to substituted service through public advertisement in the newspapers.

However, most lessees do not receive the notices as most of them do not maintain the same addresses for years. This problem is compounded by the fact that the three months period within which a lessee should make representations to the President as provided under the Lands Act¹⁹⁶ is not sufficient as most notices are delayed between the Office of the Commissioner of Lands and the Postal Office before they reach the lessee. There is need therefore to revisit these obstacles which are faced in the process of service of re-entries. The period within which a lessee should make representations to the Commissioner of Lands should be longer than three months, and lessees must update their addresses with the Ministry of Lands annually to enhance effective service of

¹⁹⁶ Section 13 of the Lands Act, Chapter 184 of the Laws of Zambia

notices as this will reduce the number of complaints and litigation in matters of this nature.

In the Case of **Kabwe and another Vs Daka and others**,¹⁹⁷ the Appellants appealed against the judgment of the High Court in which the learned trial Judge nullified the purported ownership of stand number 1315 Chelstone, Lusaka, by the Appellants and ordered the cancellation of the title deed in the joint names of the two Appellants, thereby restoring the title to the stand to the 3rd Respondent. The High Court heard that Stand 1315 Chelston was repossessed from the Respondents by the Commissioner of Lands and allocated to the Appellants without serving the notice of re-entry on the Respondent's properly. The High Court held that failure to serve the notice of re-entry as required by section 13 (2) of the Lands Act rendered the repossession a nullity.

The Appellants appealed to the Supreme Court against the High Court decision. The Supreme Court held that the mode of service of the notice to re-enter and cause a Certificate of re-entry to be entered in the register for a breach of the

¹⁹⁷ (2006) Z.R. 12

covenant in the lease as provided for in section 13(2) of the Land Act, is cardinal to the validation of the subsequent acts of the Commissioner of Lands in disposing of the land to another person.

The Supreme Court also stated that if the notice to re-enter is properly served, normally by providing proof that it was by registered post using the last known address of the lessee from whom the land is to be taken away, the registered owner will be able to make representations, under the law, to show why he could not develop the land within the period allowed under the lease.

The Supreme Court further stated that if the notice is not properly served and there is no evidence to that effect, there is no way the lessee would know so as to make meaningful representations.

A repossession effected in circumstances where a lessee is not afforded an opportunity to dialogue with the Commissioner of lands with a view to having an extension of period in which to develop the land cannot be said to be a valid repossession.

It is evident from the provisions of the Lands Act, and court decisions that there should be compliance with the law in repossessing land from a defaulting lessee. Failure to comply with the law renders the repossession and the subsequent alienation to another person, a nullity.

Institutional Framework

The process of land alienation under State land is undertaken by various institutions. These include the Ministry of Lands, Local Authorities and the Department of physical planning under the Ministry of Local Government and Housing. We now consider these institutions:

(a) The Ministry of Lands

The Ministry of Lands is one of the Government Ministries in the Republic mandated;

“to efficiently, effectively and equitably deliver land and land information to all Zambians for its optimum utilisation for the benefit of the Zambian people and the Country.”¹⁹⁸

The functions of the Ministry of Lands are:¹⁹⁹

¹⁹⁸ Ministry of Lands **Annual Report**, Ministry of Lands, Lusaka, 2004

¹⁹⁹ Zambia Gazette Notice No. 547 of 2004

- (i) formulation of Land Policy;
- (ii) Land administration;
- (iii) Land surveys and mapping;
- (iv) Cadastral survey and exploration;
- (v) Control of unauthorised settlements; and
- (vi) Registration of land.

In its day to day administration, the Ministry of Lands is established to carry out the following functions:

“...to formulate policies and provide guidelines for all; to effectively collect revenue on land in order to contribute to government revenue; to provide an accurate, national base and specialised mapping services; to ensure the provision of effective and efficient cadastral services; to provide up-to-date and timely information in order to facilitate expeditious land transactions and enhance public awareness of their rights regarding land; to maintain an efficient and effective administrative support service and continuously develop human resource so that the Ministry provides its services effectively and efficiently.”²⁰⁰

In order for the above mentioned objectives to be carried out effectively, the Ministry of Lands is divided into three Departments. These are;

- (i) the Lands Department;

²⁰⁰ Ministry of Lands Objectives, Ministry of Lands Annual Report 2002

- (ii) the Survey Department; and
- (iii) the Lands and Deeds Registry Department.

Each of these Departments plays specific roles ranging from the provision of policy guidelines in land administration, the identification and allocation of land as well as the surveying and registration of rights and interests in land.

(i) The Lands Department

The Lands Department is headed by the Commissioner of Lands. The Lands Department is based in Lusaka where its principal office is found. Although there are Lands Department offices established in all the nine Provinces, there are, however, no Lands offices at District level.²⁰¹

The Lands Department deals with land identification and allocation, while the Commissioner of Lands exercises the power to make grants and dispositions of land as well as execute State leases on behalf of the President, in whom land is vested. This authority is specifically bestowed on the Commissioner of Lands by

²⁰¹ Despite the Statutory Instrument No. 4 of 1989 recognising the existence of Provincial and District Lands officers, there are currently no established structures at District level.

the President through delegation under the Statutory Functions Act.²⁰² By virtue of the provisions of the Statutory Functions Act, the President has delegated his powers and functions of land alienation, through a Statutory Instrument,²⁰³ to a public officer for the time being holding the office or executing the duties of the Commissioner of Lands. This Statutory Instrument provides that,

“The President has delegated the day-to-day administration of land matters in the Republic to the public officer currently holding or executing the duties of Commissioner of Lands in the Ministry of Lands. The Commissioner of Lands is empowered by the President to make grants and dispositions of land to any person subject to the special or general directions of the Minister responsible for Land.”²⁰⁴

Other than this delegation of powers to the Commissioner of Lands, there is no statute that defines or prescribes the specific powers and duties of the Commissioner of Lands or the functions of the Lands Department as the case is with the Office of the Registrar of Lands and Deeds, where the functions of the Lands and Deeds Registry Department are prescribed and governed by statute.²⁰⁵

²⁰² Section 5 of the Statutory Functions Act, Chapter 4 of the Laws of Zambia

²⁰³ Statutory Instrument No. 7 of 1964

²⁰⁴ Statutory Instrument No. 7 of 1964

²⁰⁵ The Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia

However, although there is no statute that expressly provides for the functions of the Office of Commissioner of Lands, the power to alienate land is vested in the President pursuant to the provisions of the Lands Act,²⁰⁶ and the President has delegated that power to the Commissioner of Lands.

Specifically, the Statutory Functions Act²⁰⁷ provides that, "...the President...may, delegate to any other person any statutory function with which he is vested." Since land is vested in the President, it is therefore legal that the President has delegated the authority to make grants and dispositions of land to the Commissioner of Lands. These provisions therefore enable or empower the Commissioner of Lands to exercise powers of alienating land in the same manner and practice as the President would do.²⁰⁸

Statutory Instrument No. 4 of 1989 is the one from which delegated powers of the Commissioner of Lands, Provincial and District Lands Officers are derived.

It provides as follows:

²⁰⁶ Section 3 of Chapter 184 of the Laws of Zambia

²⁰⁷ Chapter 4 of the Laws of Zambia

²⁰⁸ The delegated power to make grants and dispositions of land in the Republic was first issued through Statutory Instrument No.7 of 1964. There have been subsequent Statutory Instruments and Gazette Notices with the effect of appointing the Commissioner of Lands since independence to-date.

“In exercise of the powers contained in Article 10A of the Zambia (State Land and Reserves) Orders 1928-1964 and Article 10A of the Zambia (Trust Land) Orders 1947-1964, the following Order is hereby made:

1. This Order may be cited as the Zambia State Lands, Reserves and Trust Land (Delegation of Functions) Order 1989;
2. The public officer for the time being holding the office or executing the duties of Commissioner of Lands is hereby authorised to exercise the functions of the President contained in the Zambia (State Lands and Reserves) Orders 1964, the Zambia (Trust Lands) Orders 1964, and the Zambia (Gwembe District) Orders 1964, subject to the specific or general directions of the Minister charged with responsibilities for land matters;
3. The public officer for the time being holding the office or executing the duties of Provincial Lands Officer is hereby authorised to exercise the functions of granting and disposing of State Land, Reserves, Trust Land or any other immovable property vested in the President under Article 5 and 6A of the Zambia (State Land and Reserves) Orders 1964, and Article 5 of the Zambia (Trust Land) Orders 1964, subject to the directions, supervision and control of the Commissioner of Lands;
4. The public officer for the time being holding the office or executing the duties of District Lands Officer is hereby authorised to exercise the functions of granting and disposing of State Land, Reserves, Trust Land, or any other immovable property vested in the President under Article 5 and 6A of the Zambia (State Land and Reserves) Orders 1964, and Article 5 of the Zambia (Trust Land) Orders 1964, subject to the directions, supervision and control of the Provincial Lands Officer.”

These provisions entail that the Commissioner of Lands performs land alienation functions on behalf of the President subject only to the ‘specific or general directions’ of the Minister of Lands. In this regard, Provincial Lands Offices are established to perform the functions of granting and disposing of land subject to the ‘directions, supervision and control’ of the Commissioner of Lands. By Statutory Instrument No. 4 of 1989, the functions of the Ministry of Lands were to be decentralised to the Provincial and District level. However, District Lands Offices have not been established.

(ii) The Survey Department

This Department is established pursuant to the provisions of the Land Survey Act.²⁰⁹ The Department is established to carry out activities relating to mapping and cadastral surveying. The Survey Department is headed by the Surveyor-General, who is a land surveyor and a public officer. With regard to the powers and functions of the Surveyor-General, the Act provides that:

“subject to the general or special directions of the Minister, the Surveyor-General shall:

- (a) Supervise and control the survey and charting of land for the

²⁰⁹ Chapter 188 of the Laws of Zambia

purposes of registration;

- (b) Take charge of land and preserve all records appertaining to the survey of parcels of land which have been approved;
- (c) Direct and supervise the conduct of such trigonometrical, topographical and level surveys, and such geodetic and geophysical operations as the Minister may direct;
- (d) Take charge of and preserve the records of all surveys and operations carried out under paragraph (c); and
- (e) Supervise the preparation of such maps as the Minister may direct from the data derived from any surveys and the amendment of such maps and generally administer the provisions of this Act.”²¹⁰

Similarly, the Department deals with the demarcating of reserves such as Forest Reserves and National Parks. These are marked and surveyed for clarification and for better controls and limitation of encroachments.

By law, surveys are carried out by both public institutions, and private practitioners. However, the inadequacy in human and institutional capacity of the Surveys and Geo-information Resource Base has over the years impacted negatively on service delivery.

²¹⁰ Section 4(2)(a)-(f) of Chapter 188 of the Laws of Zambia

(iii) The Lands and Deeds Registry Department

The Lands and Deeds Registry is established pursuant to section 3 of the Lands and Deeds Registry Act.²¹¹ Section 3(1) provides that for the registration of documents required or permitted by this Part or any other Act or by any law to be registered, there shall be an office styled “the Registry”in Lusaka, and the Minister may from time to time direct, by Gazette notice, that there shall be a District Registry.... in such place as shall be in such notice mentioned....Section 3 (2) of the Act provides that the registration of documents shall be performed by a Registrar appointed under this section. Pursuant to this section, the Minister responsible for land matters has established the Registry at Ndola.

The Department deals with the registration of documents; the issue of Provisional Certificates of Title and Certificates of Title; the registration of transfer and transmission of registered land, and generally register documents as required under section 4 of the Act. In this regard, failure to register any document required to be registered by law renders the documents null and void.²¹²

²¹¹ Chapter 185 of the Laws of Zambia

²¹² Section 6 of the Lands and Deeds Registry Act

But considering that Land Registries are only established in Lusaka and Ndola, a lot of people find it difficult to register their rights and interests in land. Because of the difficulties encountered in registering land, a lot of parcels of land in the country have remained unregistered. It has been observed by learned authors that;

“Compulsory registration, however, cannot work successfully without some means of enforcement and this is often lacking in low-income countries. Enacting a rule that registration is compulsory will often merely promote a movement back to informality if people feel that it costs too much to comply with the law.”²¹³

The conclusions to be drawn from this are that as long as the lands registration system is not made accessible to the people in their localities, there will be no motivation for registration and land transactions will be going on without formal registration.

²¹³ Peter Dale and John McLaughlin, *op.cit.*, p.39

(b) Local Authorities

Local authorities play the role of land identification and planning in their respective Districts. Local authorities are established under the Local Government Act,²¹⁴ which is currently administered by the Ministry of Local Government and Housing. In the early 1980's, Government introduced the policy of decentralisation in the local government system as it was felt that District Councils should participate in the process of land alienation at district level. This aimed at enabling all local authorities to be responsible for processing of applications, selecting of suitable applicants for land and recommend them to the Commissioner of Lands for approval. This was viewed as a way of improving efficiency in land alienation considering that the Ministry of Lands has no structure at District level. Following this development, the Government did not make any amendment to the Land (Conversion of Titles) Act, but instead, issued General Policy guidelines through a circular²¹⁵ already referred to regarding the procedure on land alienation, and the role which all Local Authorities were expected to perform in the alienation of land. Local Authorities have continued to exercise the role of identifying land and making it available to the public

²¹⁴ Chapter 281 of the Laws of Zambia

²¹⁵ Land circular No. 1. of 1985, p.1

subject to the Commissioner of Lands approval.

When land has been identified, planned, numbered and surveyed, local authorities are required to provide services such as roads and water. The circular provides that stands have to be fully serviced by the Council concerned. If the stands are not serviced, the District Council is supposed to give reasons to the applicants for land for its inability to provide the necessary services before the recommendations can be considered.²¹⁶ The requirement for provision of services by Local Authorities is premised on the assumption that Local Authorities have sufficient resources or can collect service charges to finance the exercise. In practice however, plots are allocated to applicants and they pay service charges as demanded by Local Authorities but in most cases, the required services are never provided. Most local Authorities in the country, however, have no technical capacity to provide services in their localities.

²¹⁶ Land Circular No. 1 of 1985

(c) Planning Authorities

Planning Authorities are appointed under the Town and Country Planning Act.²¹⁷ The functions of Physical Planning are carried out by the Department of Physical Planning and Housing established under the Ministry of Local Government and Housing. The Department is headed by the Director of Physical Planning and Housing whose functions are stipulated under the Town and Country Planning Act. The Director is in charge of Town and Country Planning as a strategic planning authority to exercise the functions that the Minister may delegate under the Act. In this respect, section 5 of the Act provides:

“The Minister shall designate the Director as the strategic planning authority to-

- (a) exercise such other functions as the Minister may delegate to the Director under section twenty-four; or
- (b) exercise such other functions as may be prescribed by the Minister...”

In the performance of the said functions under section 5, section 24(1) provides thus:

“The Minister may by instrument in writing and subject to such conditions, directions, reservations and restrictions as he thinks fit,

²¹⁷ Chapter 283 of the Laws of Zambia

delegate to any planning authority his functions...relating to the grant or refusal of permission to develop or subdivide land: Provided that-

- (i) the said functions of the Minister shall be delegated to the appropriate planning authority when any development or subdivision order is made affecting any of the areas...;
- (ii) in respect of subdivision for agricultural purposes of agricultural land situated outside areas subject to a structure plan or local plan or approved structure plan or local plan, the Minister shall, when any subdivision order is made affecting any area, delegate the said functions to the Environmental Council of Zambia in respect of that area.”

The Director is in charge of town and country planning as a strategic planning authority to exercise the functions that the Minister may delegate under the Act.

In this respect, the Minister has designated the Director as the strategic planning authority to exercise such other functions as the Minister may delegate and to exercise such other functions as the Minister may prescribe.²¹⁸

The Minister may by Statutory Instrument and subject to such conditions, directions, reservations and restrictions as he thinks fit, delegate to any planning authority his functions relating to the grant or refusal of permission to develop or subdivide land. The said functions of the Minister are required to be delegated

²¹⁸ Section 5 of the Town and Country Planning Act, Chapter 283 of the Laws of Zambia

to the appropriate planning authority. Currently, the following Planning Authorities have been appointed: Lusaka Provincial Planning Authority; Southern Provincial Planning Authority; Western Provincial Planning Authority; North-western Provincial Planning Authority; Luapula Provincial Planning Authority; Copperbelt Provincial Planning Authority; Northern Provincial Planning Authority; Central Provincial Planning Authority; and Eastern Provincial Planning Authority. In addition, all City and Municipal Councils in the country have been appointed as Planning Authorities accordingly.²¹⁹

Under the Town and Country Planning Act,²²⁰ however, physical planning is the function performed by the Minister of Local Government and Housing or the Director of Physical Planning. The role of the Commissioner of Lands is merely to check the records in the folios and ascertain whether encroachments would result if he proceeded to number the plots. The Commissioner of Lands is by law not required to inquire into the technicalities of planning, but merely to make land available and leave the function of planning to planning authorities.²²¹ This

²¹⁹ (S.I. No. 192) - The Town and Country Planning (Appointment of Planning Authorities and Delegation of Functions) Regulations, 1996

²²⁰ Chapter 283 of the Laws of Zambia

²²¹ Ibid, section 5

arrangement is undoubtedly a serious lapse in the system of land alienation in that the Commissioner of Lands should have a responsibility to ensure that the land being alienated is properly planned and alienated for the intended purpose.

In order to address problems related to planning, it is necessary that the Department prepares and maintains comprehensive district, regional and national land use plans according to planning standards. Similarly, the Department has to develop and implement spatial planning systems that meet the needs of urban and rural environments. It also has to enforce planning controls and restrictions by planning authorities. In addition to these functions, the Department should ensure compliance by land developers and users as well as ensure that all land for human settlements, agriculture, industry and commerce and other uses is planned and surveyed before it is allocated.

One facet of an orderly land alienation process is physical planning. It is acknowledged that for the orderly alienation of land to be enhanced, physical planning should be taken as pre-requisite function of land alienation.

Having analysed the system of land alienation in State land, it is evident that efficient and orderly allocation of land requires a well-structured legal and institutional framework that ensures that land is properly planned, surveyed, alienated and registered.