

# **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.<sup>1</sup>

Functions of land administration may be divided into four components, namely: juridical, regulatory, fiscal and information management.<sup>2</sup> 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.

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

<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup>

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.<sup>5</sup>

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<sup>3</sup> M. Webster, **Collegiate Dictionary**, Springfield, Massachusetts, USA, 1993. p.1301

<sup>4</sup> Peter Dale and John McLaughlin, *op.cit.*, p.73

<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup> 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,<sup>8</sup> through established institutions, by the President who holds it in perpetuity for and on behalf of the people of Zambia.<sup>9</sup> Emphasis is placed on the acquisition and registration of rights in land.

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<sup>6</sup> Peter Dale and John McLaughlin, op.cit., p.17

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

<sup>8</sup> [www.Lawsoc.co.za](http://www.Lawsoc.co.za)

<sup>9</sup> Section 3 of the Lands Act, Chapter 184 of the Laws of Zambia

In some jurisdictions<sup>10</sup>, 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.<sup>11</sup> 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,<sup>12</sup> 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

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<sup>10</sup> Most Commonwealth countries where common law is practiced

<sup>11</sup> Peter Dale and John McLaughlin, *opt.cit.*, 17

<sup>12</sup> **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,<sup>13</sup> which provides that Common law, the doctrines of Equity, and statutes that were in force in England prior to 17<sup>th</sup> August, 1911, shall continue to have the force of law in the Republic.<sup>14</sup> This position has been emphasised by the High Court in the case of **The People v. Shamwana & Others**,<sup>15</sup> 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 17<sup>th</sup> August, 1911, will apply in Zambia.

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<sup>13</sup> Chapter 11 of the Laws of Zambia

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

<sup>15</sup> [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.<sup>16</sup> 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.”<sup>17</sup> 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,<sup>18</sup> and the Subordinate Courts Act,<sup>19</sup> 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

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<sup>16</sup> Chapter 10 of the Laws of Zambia

<sup>17</sup> Ibid., section 2

<sup>18</sup> Chapter 27 of the Laws of Zambia

<sup>19</sup> Chapter 28 of the Laws of Zambia

necessary to make the same applicable to the proceedings before the Court.”<sup>20</sup>

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

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<sup>20</sup> 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.<sup>21</sup>

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 Act<sup>22</sup> 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....”<sup>23</sup>

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

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<sup>21</sup> 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

<sup>22</sup> Chapter 26 of the Laws of Zambia

<sup>23</sup> Ibid., section 12

are Africans.’<sup>24</sup>

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*.<sup>25</sup> 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.<sup>26</sup> 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

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<sup>24</sup> Section 16 of the Subordinate Courts Act, Chapter 27 of the Laws of Zambia

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

<sup>26</sup> 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 Act<sup>27</sup>; the Land Survey Act<sup>28</sup>; the Lands and Deeds Registry Act<sup>29</sup>; the Agricultural Lands Act<sup>30</sup>; the Forestry Act<sup>31</sup>; the Zambia Wildlife Authority Act<sup>32</sup>; the Housing (Statutory and Improvement Areas) Act<sup>33</sup>; and the Town and Country Planning Act.<sup>34</sup>

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<sup>27</sup> Chapter 184 of the Laws of Zambia

<sup>28</sup> Chapter 188 of the Laws of Zambia

<sup>29</sup> Chapter 185 of the Laws of Zambia

<sup>30</sup> Chapter 187 of the Laws of Zambia

<sup>31</sup> Chapter 199 of the Laws of Zambia

<sup>32</sup> Act No. 12 of 1998

<sup>33</sup> Chapter 194 of the Laws of Zambia

<sup>34</sup> 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 altogether<sup>35</sup> 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.<sup>36</sup>

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

<sup>36</sup> 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.”<sup>37</sup>

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.”<sup>38</sup>

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

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<sup>37</sup> 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

<sup>38</sup> 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, LLM 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 17<sup>th</sup> 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.”<sup>39</sup>

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

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<sup>39</sup> 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.”<sup>40</sup> 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.”<sup>41</sup>

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

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

<sup>41</sup> **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.<sup>42</sup>

### **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.<sup>43</sup>

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<sup>42</sup> Ibid.

<sup>43</sup> 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.<sup>44</sup>

The colonial administration through the Governor appointed the Native Reserves Commission,<sup>45</sup> 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

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<sup>44</sup> The **Johnson Land Commission Report**, op.cit, p.17

<sup>45</sup> The Native Reserves Commission for East Luangwa was appointed on 10<sup>th</sup> October 1924

settlements in the area<sup>46</sup>. 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...”<sup>47</sup>

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

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

<sup>47</sup> 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.”<sup>48</sup>

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

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

District<sup>49</sup>. 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.”<sup>50</sup>

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

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

<sup>50</sup> 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....”<sup>51</sup>

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.

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<sup>51</sup> 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.”<sup>52</sup>

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.<sup>53</sup>

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

<sup>53</sup> **Legislative Council Debates**, 25<sup>th</sup> 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.<sup>54</sup>

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<sup>54</sup> 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.”<sup>55</sup>

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.<sup>56</sup> 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

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<sup>55</sup> **Government Gazette Notice**\_No. 416 of 1942 dated 29<sup>th</sup> July 1942

<sup>56</sup> 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.<sup>57</sup>

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,

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<sup>57</sup> 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.<sup>58</sup> 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

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

of successors.<sup>59</sup> 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.<sup>60</sup> 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.’<sup>61</sup>

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

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<sup>59</sup> Ibid., p.17

<sup>60</sup> Anthony C. Mulimbwa, ‘Land Policy and Economic Development in Zambia’, cited in **Zambia Law Journal**, Special Edition, Lusaka: Unza Press, 1998 p.80

<sup>61</sup> 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*.<sup>62</sup> 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

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<sup>62</sup> The **Johnson Land Commission Report**, opt.cit., p. 104

encourage land speculation as the state was not involved in land administration.<sup>63</sup>

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”<sup>64</sup>

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.”<sup>65</sup>

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

<sup>64</sup> Report of the Land Committee 1943, Government printer, Lusaka, 1949, p.5

<sup>65</sup> 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-Council<sup>66</sup> 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.<sup>67</sup>

## 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 autochthonous<sup>68</sup> 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.<sup>69</sup> 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.

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<sup>66</sup> 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

<sup>67</sup> Commissions such as the East Luangwa District and the Tanganyika District illustrate the point

<sup>68</sup> 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

<sup>69</sup> 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..”<sup>70</sup>

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<sup>70</sup> 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.”<sup>71</sup>

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

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<sup>71</sup> 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.<sup>72</sup>

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.”<sup>73</sup>

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.<sup>74</sup> 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

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<sup>72</sup> Ibid., p.161

<sup>73</sup> Cited in the **Johnson Land Commission Report**, op.cit, p.11

<sup>74</sup> 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.<sup>75</sup>

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

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<sup>75</sup> 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.”<sup>76</sup>

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 whole .....we 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

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<sup>76</sup> 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.”<sup>77</sup>

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.<sup>78</sup>

### **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.

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

<sup>78</sup> 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.<sup>79</sup>

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.<sup>80</sup> 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.<sup>81</sup> 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.

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<sup>79</sup> Gazette Notice No. 1345 of 1975

<sup>80</sup> Land (Conversion of titles) (Amendment) Act No. 2 of 1985

<sup>81</sup> 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”<sup>82</sup> 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

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<sup>82</sup> File No. MLNR/103/28/3



injustice to others or if a recommendation so made, is contrary to national interest or public policy<sup>83</sup>.

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.<sup>84</sup> 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.

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<sup>83</sup> Paragraph 3 of Circular No.1 of 1985

<sup>84</sup> 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.”<sup>85</sup>

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

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<sup>85</sup> 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 Zambians<sup>86</sup>.

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.”<sup>87</sup>

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<sup>86</sup> 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

<sup>87</sup> Parliamentary Debates- Second Session of the Seventh National Assembly (No. 93) 15<sup>th</sup> January- 18<sup>th</sup> 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.<sup>88</sup>

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

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<sup>88</sup> 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.<sup>89</sup>

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;<sup>90</sup>
- (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

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<sup>89</sup> A. Ng'andwe, *ibid*, p.5

<sup>90</sup> 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.<sup>91</sup>

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;<sup>92</sup>

- (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

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<sup>91</sup> 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

<sup>92</sup> 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.”<sup>93</sup>

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.

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<sup>93</sup> 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 law<sup>94</sup> 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.<sup>95</sup> 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.<sup>96</sup>

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<sup>94</sup> 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

<sup>95</sup> Peter Dale and John McLaughlin, **Land Administration**, op.cit., p.17

<sup>96</sup> 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.<sup>97</sup>

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.<sup>98</sup> 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)<sup>99</sup> 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,<sup>100</sup>

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<sup>97</sup> Chapter 283 of the laws of Zambia

<sup>98</sup> Crown Lands and Native Reserves Order-in-Council, 1928-1963

<sup>99</sup> Ben C. Kakoma, **Ministerial statement in Parliament**, op.cit, p. 1

<sup>100</sup> Located in the Eastern Province of the Republic of Zambia

Mkushi in the Central Province,<sup>101</sup> and Mbala in the Northern Province.<sup>102</sup>

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.<sup>103</sup> 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.<sup>104</sup> All land in Zambia is required to be

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<sup>101</sup> Located in the Central Province of the Republic of Zambia

<sup>102</sup> 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

<sup>103</sup> Section 3(1) of the Lands Act, Chapter 184 of the Laws of Zambia

<sup>104</sup> 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.<sup>105</sup>

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

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<sup>105</sup> 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,<sup>106</sup> the Lands Act,<sup>107</sup> the Land Survey Act,<sup>108</sup> the Lands and Deeds Registry Act,<sup>109</sup> and the Housing (Statutory and Improvement) Areas act<sup>110</sup>

### **The Town and Country Planning Act<sup>111</sup>**

Legislation that governs physical planning is the Town and Country Planning Act.<sup>112</sup> 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.<sup>113</sup>

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<sup>106</sup> Chapter 283 of the Laws of Zambia

<sup>107</sup> Chapter 184 of the Laws of Zambia

<sup>108</sup> Chapter 188 of the Laws of Zambia

<sup>109</sup> Chapter 185 of the Laws of Zambia

<sup>110</sup> Chapter 194 of the Laws of Zambia

<sup>111</sup> Chapter 283 of the Laws of Zambia

<sup>112</sup> Chapter 283 of the Laws of Zambia

<sup>113</sup> 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.<sup>114</sup> The general object of the Ordinance was to secure proper sanitary conditions, amenity and convenience in connection with laying out and use of land.<sup>115</sup> 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

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<sup>114</sup> Chapter 123 of the 1958 Edition of the Laws of Zambia

<sup>115</sup> 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.<sup>116</sup>

The Town and Country Planning Act applies in areas under State land. The Republic is not bound by the provisions of the Act.<sup>117</sup> The Act does not also apply to customary areas as defined under the Lands Act.<sup>118</sup> However, the President may, by statutory Order apply all or any of the provisions of the Act to any customary area.<sup>119</sup> 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.

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<sup>116</sup> Preamble to the Town and Country Planning Act, Chapter 283 of the Laws of Zambia

<sup>117</sup> Section 3(1) of Chapter 283 of the Laws of Zambia

<sup>118</sup> Chapter 184 of the Laws of Zambia

<sup>119</sup> 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 Act<sup>120</sup>**

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.<sup>121</sup>

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

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<sup>120</sup> Chapter 188 of the Laws of Zambia

<sup>121</sup> 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.<sup>122</sup> 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’.<sup>123</sup>

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

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<sup>122</sup> Peter Dale and John McLaughlin, **Land Administration**, op.cit., p.46

<sup>123</sup> 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.<sup>124</sup>

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.”*<sup>125</sup>

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

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<sup>124</sup> The Land Survey Act, Chapter 188 of the Laws of Zambia, section 25

<sup>125</sup> 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”<sup>126</sup>

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.<sup>127</sup> 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 Circular<sup>128</sup> 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:

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<sup>126</sup> Section 2 of the Land Survey Act, Chapter 188 of the Laws of Zambia

<sup>127</sup> The Land Survey Act, Chapter 188 of the Laws of Zambia, section 32

<sup>128</sup> 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 Commisioner of Lands and the Attorney General.**<sup>129</sup>

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.

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<sup>129</sup> (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 Act<sup>130</sup> dealing with customary land.

### **The Lands Act<sup>131</sup>**

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.”<sup>132</sup>

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<sup>130</sup> The Lands Act, Chapter 184 of the Laws of Zambia

<sup>131</sup> Chapter 184 of the Laws of Zambia

<sup>132</sup> 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.*”<sup>133</sup>

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.”<sup>134</sup>

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

<sup>134</sup> 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.<sup>135</sup>

### **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,<sup>136</sup> is a continuation of the principle from the Land (Conversion of title) Act of 1975, which vested land in the President.

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<sup>135</sup> Chapter 213 of the Laws of Zambia

<sup>136</sup> Chapter 184 of the Laws of Zambia

The President may, as earlier stated, alienate land vested in him to any Zambian<sup>137</sup>. 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;<sup>138</sup>
- (iii) a company registered under the Companies Act;<sup>139</sup>
- (iv) a statutory corporation created by an Act of Parliament;
- (v) a co-operative society registered under the Co-operative Societies Act;<sup>140</sup>
- (vi) a body registered under the Land (Perpetual Succession) Act;<sup>141</sup>
- (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;

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<sup>137</sup> Section 3 (2) of Chapter 184 of the Laws of Zambia

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

<sup>139</sup> Chapter 388 of the Laws of Zambia

<sup>140</sup> Chapter 397 of the Laws of Zambia

<sup>141</sup> Chapter 186 of the Laws of Zambia

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

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.<sup>145</sup> 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.”<sup>146</sup>

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

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<sup>142</sup> Chapters 388 and 387 of the Laws of Zambia

<sup>143</sup> Chapter 201 of the Laws of Zambia

<sup>144</sup> Section 3(3) of the Lands Act, Chapter 184 of the laws of Zambia

<sup>145</sup> Ibid., section 3(3)(a)

<sup>146</sup> Chapter 123 of the Laws of Zambia

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

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.<sup>148</sup> 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.

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<sup>147</sup> Section 2 of the Immigration and Deportation Act, Chapter 123 of the Laws of Zambia

<sup>148</sup> 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**.<sup>149</sup> 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

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<sup>149</sup> (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.”<sup>150</sup>

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

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<sup>150</sup> 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,<sup>151</sup> 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.

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<sup>151</sup> 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**.<sup>152</sup> The facts of the case were that the Appellant, a Congolese national purchased property No. 19218, Lusaka. He obtained a certificate of title on 16<sup>th</sup> June, 2003. Later, the Commissioner of Lands in a letter dated 28<sup>th</sup> 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

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<sup>152</sup> (2006) Z.R. 119

Stand 30751, and that the certificate of title had been re-issued in favour of the 1<sup>st</sup> and 2<sup>nd</sup> 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 Act<sup>153</sup>;
- 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.

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<sup>153</sup> 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,<sup>154</sup> which defines a permanent resident as an established resident or a person holding an entry permit in accordance with the Immigration and Deportation Act<sup>155</sup>. 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 2<sup>nd</sup> July, 1999, and he registered an assignment to purchase stand number 19218, Lusaka, in the Lands and Deeds Registry on the 10<sup>th</sup> of July, 2000, barely a year or so of his stay in Zambia, the Appellant did not qualify to be an

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<sup>154</sup> Chapter 184 of the Laws of Zambia

<sup>155</sup> 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,<sup>156</sup> or any other law relating to the promotion of investment in Zambia.<sup>157</sup> The Investment Act<sup>158</sup> has since been repealed and replaced by the Zambia Development Agency Act.<sup>159</sup> 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."<sup>160</sup> 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

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<sup>156</sup> Chapter 385 of the Laws of Zambia

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

<sup>158</sup> Chapter 385 of the Laws of Zambia

<sup>159</sup> Act No. 11 of 2006

<sup>160</sup> 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.<sup>161</sup> 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

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<sup>161</sup> 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 Act<sup>162</sup>**

When a company or entity is incorporated under the Companies Act<sup>163</sup>, it is clothed with the legal personality to own land in Zambia. On this aspect, the Lands Act<sup>164</sup> 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.”<sup>165</sup> 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.<sup>166</sup>

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

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<sup>162</sup> Chapter 388 of the Laws of Zambia

<sup>163</sup> Ibid.

<sup>164</sup> Chapter 184 of the Laws of Zambia

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

<sup>166</sup> 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.<sup>167</sup> 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,<sup>168</sup> and the National Housing Authority<sup>169</sup> are some of the

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

<sup>168</sup> 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 Act<sup>170</sup> and less than twenty-five per centum of the members are non-Zambians.<sup>171</sup> The Co-operative Societies Act<sup>172</sup> 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

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<sup>169</sup> Chapter 195 of the Laws of Zambia

<sup>170</sup> Chapter 397 of the Laws of Zambia

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

<sup>172</sup> 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.”<sup>173</sup>

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.

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<sup>173</sup> 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.<sup>174</sup> 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.<sup>175</sup>

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.<sup>176</sup> 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;

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<sup>174</sup> Chapter 186 of the Laws of Zambia

<sup>175</sup> Ibid., section 3(2)(g)

<sup>176</sup> 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.”<sup>177</sup>

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;

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<sup>177</sup> 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,<sup>178</sup> 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,

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<sup>178</sup> 2005-2007

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

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

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<sup>179</sup> 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.<sup>180</sup> 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-

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<sup>180</sup> 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,<sup>181</sup> and the Banking and Financial Services Act,<sup>182</sup> 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.<sup>183</sup> Since the requirement here is that a commercial bank should be registered both under the Companies Act, and the Banking and Financial Services Act,<sup>184</sup> 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.

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<sup>181</sup> Chapter 388 of the Laws of Zambia

<sup>182</sup> Chapter 387 of the Laws of Zambia

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

<sup>184</sup> 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.”<sup>185</sup> 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.

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<sup>185</sup> 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:<sup>186</sup>

- (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

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<sup>186</sup> 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.<sup>187</sup>

### **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.<sup>188</sup> 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

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<sup>187</sup> Section 4(1) of the Lands Act, Chapter 184 of the Laws of Zambia

<sup>188</sup> Ibid., Section 5 (1)



granted.<sup>189</sup> 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.<sup>190</sup> 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.<sup>191</sup>

### **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

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<sup>189</sup> Ibid., Section 5 (2)

<sup>190</sup> Ibid., Section 5 (3)

<sup>191</sup> 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.<sup>192</sup>

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.<sup>193</sup>

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

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<sup>192</sup> Section 13 (1) of the Lands Act, Chapter 184 of the Laws of Zambia

<sup>193</sup> Ibid., Section 13 (2)

subsequent allocation of land to other applicants.

In the case of **Goswami v. Commissioner of Lands**,<sup>194</sup> 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

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<sup>194</sup> (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.<sup>195</sup>

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.

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<sup>195</sup> 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 Act<sup>196</sup> 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

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<sup>196</sup> 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**,<sup>197</sup> 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 3<sup>rd</sup> 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

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<sup>197</sup> (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.”<sup>198</sup>

The functions of the Ministry of Lands are:<sup>199</sup>

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<sup>198</sup> Ministry of Lands **Annual Report**, Ministry of Lands, Lusaka, 2004

<sup>199</sup> 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.”<sup>200</sup>

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;

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<sup>200</sup> 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.<sup>201</sup>

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

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<sup>201</sup> 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.<sup>202</sup> 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,<sup>203</sup> 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.”<sup>204</sup>

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.<sup>205</sup>

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<sup>202</sup> Section 5 of the Statutory Functions Act, Chapter 4 of the Laws of Zambia

<sup>203</sup> Statutory Instrument No. 7 of 1964

<sup>204</sup> Statutory Instrument No. 7 of 1964

<sup>205</sup> 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,<sup>206</sup> and the President has delegated that power to the Commissioner of Lands.

Specifically, the Statutory Functions Act<sup>207</sup> 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.<sup>208</sup>

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:

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<sup>206</sup> Section 3 of Chapter 184 of the Laws of Zambia

<sup>207</sup> Chapter 4 of the Laws of Zambia

<sup>208</sup> 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.<sup>209</sup> 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

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<sup>209</sup> 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.”<sup>210</sup>

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.

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<sup>210</sup> 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.<sup>211</sup> 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.<sup>212</sup>

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<sup>211</sup> Chapter 185 of the Laws of Zambia

<sup>212</sup> 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.”<sup>213</sup>

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.

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<sup>213</sup> 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,<sup>214</sup> 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 circular<sup>215</sup> 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

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<sup>214</sup> Chapter 281 of the Laws of Zambia

<sup>215</sup> 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.<sup>216</sup> 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.

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<sup>216</sup> Land Circular No. 1 of 1985

### **(c) Planning Authorities**

Planning Authorities are appointed under the Town and Country Planning Act.<sup>217</sup> 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,

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<sup>217</sup> 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.<sup>218</sup>

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

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<sup>218</sup> 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.<sup>219</sup>

Under the Town and Country Planning Act,<sup>220</sup> 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.<sup>221</sup> This

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

<sup>220</sup> Chapter 283 of the Laws of Zambia

<sup>221</sup> 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.



## **CHAPTER 3**

### **LAND ALIENATION UNDER THE HOUSING AND STATUTORY IMPROVEMENT AREAS**

#### **Introduction**

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

#### **Background**

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

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

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

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

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

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

<sup>223</sup> Article 24 of the Independence Constitution of the Republic of Zambia, 1965 edition

Government made several attempts towards developing sustainable human settlements in response to the rural urban drift, and the housing crisis. The first official government programme on housing was aimed at preventing the development of slums or squatter settlements especially along the line of rail<sup>224</sup>. The development of the unplanned settlements was to be addressed by provision of as many standard houses as possible. However, the urban housing crisis was not curbed. Unplanned settlements continued to mushroom in the country.

Government issued the first Circular,<sup>225</sup> which was the first Informal Housing Policy meant for government's implementation. Under this Circular, the government intended to provide thirty percent (30%) of the six thousand (6,000) proposed new housing units per year within five years that followed in Site and Service areas.<sup>226</sup> Government issued another Circular<sup>227</sup> in 1966, which called for the building of twenty thousand (20,000) self-help houses from 1967, and the subsequent years. Later, the government produced another informal housing

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<sup>224</sup> Transitional National Development Plan (1965-1966)

<sup>225</sup> Circular No. 17 of 1965

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

<sup>227</sup> Circular No. 59 of 1966

Circular<sup>228</sup> in 1968, that dealt with the “Resettlement of Squatters”.

At this point, it may be observed that the Zambian Government was slowly accepting informal settlements as a solution to the urban housing crisis, and the permanency of informal settlements in urban areas was also being recognised. It should be noted also that during the Second National Development Plan<sup>229</sup>, the urban housing crisis had reached unprecedented levels. The Government therefore, embarked on squatter upgrading programmes as it was then clear that unplanned settlements were to be a permanent feature in urban areas.

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

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<sup>228</sup> Circular No. 29 of 1968

<sup>229</sup> (SNDP, 1972-1976)

## **Legal structure**

The main statutes that govern the administration of land in the Housing and Improvement areas are the Housing (Statutory and Improvement Areas) Act<sup>230</sup> and the Local Government Act.<sup>231</sup> The Housing (Statutory and Improvement Areas) Act provides for the control and improvement of housing in certain areas and it is through this Act that government recognises and legalises the unplanned settlements. The rationale behind such legislation was to create an environment that would encourage housing development through Site and Service Schemes and upgrading of unplanned settlements. The Housing Act introduced a simplified system of land administration for areas to which the Act applies.

## **Declaration of statutory housing areas**

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

The Act provides that;

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

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<sup>230</sup> Chapter 194 of the Laws of Zambia

<sup>231</sup> Chapter 281 of the Laws of Zambia

<sup>232</sup> Chapter 194 of the Laws of Zambia

Statutory Housing Area shall cease to be part of a Statutory Housing Area...”<sup>233</sup>

A Statutory Housing Area is basically land, which is granted to the Local Authority by the Ministry of Lands for the purposes of constructing houses by the Local Authority for tenants who become sub-lessees. A Statutory Housing Area is declared by the Minister through a statutory order<sup>234</sup>.

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

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

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

<sup>234</sup> The Declaration is made by a Minister responsible for Housing

<sup>235</sup> Sections 4(1) and 37(1) of Chapter 194 of the Laws of Zambia

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

The Housing (Statutory and Improvement Areas) Act<sup>237</sup> provides for leasehold interests in the Statutory Housing Areas. Dealings in land covered by the Housing Act are registered not with the Ministry of Lands, but with the Council Deeds Registries in the jurisdiction of the Council concerned. The Housing Act provides that;

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

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

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

<sup>237</sup> Chapter 194 of the Laws of Zambia

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

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

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

### **Declaration of Statutory and Improvement Areas**

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

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



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

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

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

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

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

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

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

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

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

Improvement Area lies in the level of service provision and planning. Council housing estates or any other fully serviced areas are called Statutory Housing Areas, while upgraded areas or partially serviced areas are referred to as Improvement Areas.<sup>240</sup> Additionally, an occupancy licence is issued to a person with an interest in land in Improvement Areas while a council certificate of title is issued to a person with an interest in Statutory Housing Areas. It should be noted that Site and Service Schemes are planned housing developments. Improvement Areas are not but are formerly squatter settlements. This is one of the major differences between the two types of housing areas<sup>241</sup>.

In the administration of land in these areas, strict rules of planning under the Town and Country Planning Act<sup>242</sup>, survey requirements under the Land Survey Act<sup>243</sup> and registration of title under the Lands and Deeds Registry Act<sup>244</sup> do not apply.<sup>245</sup> It is practically difficult to subject the housing development to modern methods of surveying that require precision and accuracy. Survey diagrams

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<sup>240</sup> Daily Parliamentary Debates No. 36 of 2<sup>nd</sup> august 1974

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

<sup>242</sup> The Town and Country Planning Act, Chapter 283 of the Laws of Zambia

<sup>243</sup> The Land Survey Act, Chapter 188 of the Laws of Zambia

<sup>244</sup> The Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia

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

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

### **Institutional structure**

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

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

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

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

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

Water and sewerage companies have taken up most responsibilities of providing water and sewerage services to Statutory Housing and Improvement Areas since most local authorities have no capacity to do so. Although the primary role of these commercial utility companies is to supply water to existing customers on commercial basis, the companies also play a role of financing the expansion of water networks to improvement areas. Costs are later recovered by the companies through payment of service charges<sup>246</sup>. Examples of these companies include; Lusaka Water and Sewerage Company Limited, Nkana Water and Sewerage Company limited in Kitwe and Kalulushi, Mulonga Water and Sewerage Company limited in Mufulira and Chingola.

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

It should be noted that although the Housing (Statutory and Improvement Areas) Act<sup>247</sup> provides for the legalisation of areas which are in practice referred to as illegal settlements, informal settlements, squatter settlements, slums, ghettos, or unplanned settlements, the Act does not provide for procedure on land alienation in these areas.

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

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<sup>247</sup> Chapter 194 of the Laws of Zambia

<sup>248</sup> Chilufya V City Council of Kitwe (1967) Z.R. 115 (H.C.)

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

Mbao has observed that,

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

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

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<sup>249</sup> M.L. Mbao, Legal Pluralism and the Implications for Land Ownership and the Control of Land Use in Zambia, Mphil, Thesis University of Zambia (unpublished) 1982.p.89

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

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

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



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

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

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

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<sup>250</sup> Chapter 268 of the Laws of Zambia

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

The Lands Act provides that a person shall not without lawful authority occupy or continue to occupy vacant land and any person who occupies land in contravention of this law is liable to be evicted<sup>251</sup>. However, this Act does not apply in Statutory and Improvement Areas. It therefore means that a person cannot be evicted for contravening this law. The non-applicability of this statute has led to serious invasion of bare land in cities and towns.

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

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<sup>251</sup> Section 9 (1) of the Lands Act, Chapter 184 of the Laws of Zambia

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

## **CHAPTER 4**

### **LAND ALIENATION UNDER CUSTOMARY LAND**

#### **Introduction**

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

#### **Land ownership under customary tenure**

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

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

White made this observation-

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

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

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

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

<sup>254</sup> M. P. Mvunga, **The Colonial Foundations of Zambia’s Land Tenure System**, opt.cit, 1980, p.7

legal and institutional structures in different polities.<sup>255</sup>

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

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

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

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

<sup>256</sup> [1921] 2 AC 399

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

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

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

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

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

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

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<sup>257</sup> Ibid.

<sup>258</sup> [1926] AC 516

<sup>259</sup> Ibid.

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

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

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

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

Elias further notes that,

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

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

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



power of disposition.”<sup>262</sup>

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

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

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

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<sup>262</sup> Ibid., p.166

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

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

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

the tribal system, he would not have been considered the sole proprietor.<sup>266</sup>

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

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

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

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

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<sup>266</sup> Ibid. p.86

<sup>267</sup> Ibid.

<sup>268</sup> Ibid., p.100

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

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

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

### **The Adjudication of land rights in Reserves and Trust land**

The categorisation of land into Crown land, Native Reserves and Trust land and the establishment of the dual system of land holding as noted earlier<sup>271</sup>, was based on both English and customary law and was intended to cater for the

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

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

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

interests of both white settlers and the indigenous.

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

The adjudication of land rights was voluntary as the colonial government was aware of the difficulty of applying registration processes countrywide. Therefore, the application of the Ordinance was dependent on the Local Native Authorities<sup>273</sup>.

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

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

<sup>273</sup> Section 4(2) of the Ordinance

area. The Governor would then declare the area to be an adjudication area. It was then up to any individual African occupying land within the adjudication area to apply to the Adjudication Committee to adjudicate upon his claim to have sole and exclusive right to occupy such land.<sup>274</sup> The Governor would then grant Certificate of Title whose effect once granted would be the same as the Certificate of title issued under the Lands and Deeds Registry Ordinance<sup>275</sup> which applied to Crown lands.

The intention of the government at that time was to allow individuals who desired to convert their land rights in Native Reserves and Trust land to Crown lands to do so. At that time, however, there was no demand for the adjudication of titles in reserves and Trust land. As a result, the provisions of that Ordinance were of little consequence and the Ordinance was never applied up to the time when it was repealed under the Land Conversion of Titles Act of 1975.<sup>276</sup>

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

<sup>275</sup> Act No. 58 of 1950

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

However, the principle of converting customary land to leasehold tenure was re-introduced in the Lands Act<sup>277</sup> as we discussed in chapter two.

### **Status of customary tenure today**

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

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

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

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

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<sup>277</sup> Chapter 184 of the Laws of Zambia

<sup>278</sup> Ibid., Section 7 (1)

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

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

### **Institutional framework**

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

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<sup>279</sup> Ibid., Section 7 (2)

<sup>280</sup> Section 3(1) of the Lands Act, Chapter 184 of the Laws of Zambia

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

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

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

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

Arising from the above citation, the chiefs' role is restricted to perform his functions under customary law in so far as such is not contrary to the Constitution or any other written law<sup>283</sup>. However, under the Lands Act, chiefs have a statutory role to play by giving consent in the conversion of customary tenure to leasehold.

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<sup>281</sup> Chapter 287 of the Laws of Zambia

<sup>282</sup> Ibid., Section 10(1)

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



## Legal framework

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

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

The law further provides that:

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

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

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<sup>284</sup> Section 8 (1) of the Lands Act, Chapter 184 of the Laws of Zambia

<sup>285</sup> *ibid*

<sup>286</sup> Statutory Instrument No. 89 of 1996

<sup>287</sup> Chapter 184 of the Laws of Zambia

first issued in 1996.<sup>288</sup>

The procedure on conversion of customary tenure into leasehold tenure as provided is that a person who has a right to the use and occupation of land under customary tenure<sup>289</sup> or using and occupying land in a customary area with the intention of settling there for a period of not less than five years<sup>290</sup> may apply to the Chief of the area where the land is situated for the conversion of such holding into a leasehold tenure.

The Chief shall consider the application and shall give or withhold consent.<sup>291</sup>

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

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

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

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<sup>288</sup> Ibid., section 8

<sup>289</sup> Lands (Customary Tenure) (Conversion) Regulation 2(1)(a)

<sup>290</sup> Ibid., regulation 2(1)(b)

<sup>291</sup> Ibid., regulation 2(2)

<sup>292</sup> Ibid., regulation 2(3)

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

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

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

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

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<sup>293</sup> Chapter 188 of the Laws of Zambia

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

Where a Council considers that it will be in the interest of the community to convert a particular parcel of land held under customary tenure into a leasehold tenure, the Council is required, in consultation with the Chief in whose area the land to be converted is situated, to apply to the Commissioner of Lands for conversion.<sup>297</sup> Before making an application, a Council is required to consider the following;

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

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<sup>294</sup> Lands (Customary Tenure) (Conversion) Regulation 3

<sup>295</sup> Ibid., regulation 3(2)

<sup>296</sup> Ibid., regulation 3(3)

<sup>297</sup> Lands (Customary Tenure) (Conversion) Regulation 4

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

It is now a requirement by law that once land has been converted to leasehold tenure, the lessee is obliged to pay ground rent. The Lands Act<sup>299</sup> provides that a person holding land on leasehold after the conversion of such land from customary tenure shall be liable to pay such annual ground rent in respect of that land.<sup>300</sup>

In the administration of this procedure under the Lands Act<sup>301</sup>, a person aggrieved by a decision of the Commissioner of Lands may appeal to the Lands Tribunal.<sup>302</sup>

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

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

<sup>299</sup> Chapter 184 of the Laws of Zambia

<sup>300</sup> Lands (Customary Tenure) (Conversion) Regulation 5

<sup>301</sup> Chapter 184 of the Laws of Zambia

<sup>302</sup> Lands (Customary Tenure) (Conversion) Regulation 6

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

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

The Lands Act further provides that,

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

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

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

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<sup>303</sup> Ibid., Section 3(4)

<sup>304</sup> Section 8(1) of the Lands Act, Chapter 184 of the Laws of Zambia

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

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

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

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<sup>305</sup> (1999) Z.R. 84

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

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

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



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

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

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

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

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

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

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

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<sup>307</sup> SCZ/41/1999

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

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

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<sup>308</sup> LAT/30/2000

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

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

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

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<sup>309</sup> LAT/60/1997

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

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

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

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

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

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<sup>311</sup> Section 8 of the Lands Act, Chapter 184 of the Laws of Zambia

## **CHAPTER 5**

### **LAND ALIENATION UNDER RESETTLEMENT SCHEMES AND STATUTORY RESERVES**

#### **A. RESETTLEMENT SCHEMES**

##### **Introduction**

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

## **Purpose of resettlement schemes**

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

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

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

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

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<sup>312</sup> Mission statement of the Department of Resettlement, Office of the Vice President, Lusaka, 2006

<sup>313</sup> Chapter 4 of the Laws of Zambia

<sup>314</sup> Gazette Notice No. 42 of 1992



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

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

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

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

<sup>316</sup> The 1991 Constitution replaced the Office of the Prime Minister with the Office of the Vice President.

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

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

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

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<sup>317</sup> Gazette Notice No. 46 of 1992

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

### **Land acquisition Process**

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

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

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

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

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<sup>318</sup> Section 2 of the Persons with Disability Act, Chapter 65 of the Laws of Zambia

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

### **Institutional framework and Collaboration**

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

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

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

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

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

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

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

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

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



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

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

## **B. STATUTORY RESERVES**

### **Introduction**

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

## **Forest Reserves**

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

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

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

Forests are excluded from the definition of State land proper.

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

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<sup>319</sup> Chapter 199 of the Laws of Zambia

<sup>320</sup> Ibid., Preamble

<sup>321</sup> Section 2 of the Forests Act, Chapter 199 of the Laws of Zambia

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

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

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<sup>322</sup> Ibid., Section 8

<sup>323</sup> Ibid., Section 17

<sup>324</sup> Ibid., Section 20

against floods, erosion, and desiccation and maintaining the flow of rivers<sup>325</sup>, while all land comprised in a Local forest is used exclusively for the conservation and development of forests with a view to securing supplies of timber and affording protection to land and water supplies in the local area<sup>326</sup>.

### **Alienation of land in a Forest Reserve**

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

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

With regard to Local Forests, section 23 provides that;

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

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<sup>325</sup> Ibid., Section 12

<sup>326</sup> Ibid., Section 21

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

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

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<sup>327</sup> (2008) Z.R. 1

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

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

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

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

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

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



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

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

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

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

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

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<sup>328</sup> At p. J.18

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

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

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

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

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

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

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

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<sup>329</sup> Ibid.

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

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

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

## **National Parks**

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

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

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

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<sup>330</sup> Section 10 of the Zambia Wildlife Act, Act No. 12 of 1998

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

The Act further states that nothing shall be construed as preventing or restricting the granting of any land within a National Park for any purpose not inconsistent with the Act, of any right, title, interest or authority under any written law<sup>332</sup>. The exercise of any right, title, interest or authority granted shall be subject to any conditions which the Zambia Wildlife Authority may impose.<sup>333</sup> This means that if land is being alienated for any purpose other than mining in a National Park, the Commissioner of Lands should consult the Director of the Zambia Wildlife

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<sup>331</sup> The Environmental Protection and Pollution Control Act, Chapter 204 of the Laws of Zambia

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

<sup>333</sup> Ibid., Section 13 (3)

Authority, who shall identify the piece of land to be alienated.<sup>334</sup>

## **Game Management Areas**

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

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

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<sup>334</sup> Section 4 (3)(b) of the Lands Act Chapter 184 of the Laws of Zambia

<sup>335</sup> Section 26(1) of the Zambia Wildlife Act No. 12 of 1998

<sup>336</sup> Section 28 of the Zambia Wildlife Act No. 12 of 1998

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

### **Legal and Institutional structure**

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

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

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<sup>337</sup> Ibid.

<sup>338</sup> Section 3 (4) (b) of chapter 184 of the Laws of Zambia

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



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

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

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<sup>340</sup> Chapter 184 of the Laws of Zambia

<sup>341</sup> The Zambia Wildlife Act, No. 12 of 1998

The Lands Act<sup>342</sup>, the Zambia Wildlife Act<sup>343</sup>, the Chiefs Act,<sup>344</sup> and the Local Government Act,<sup>345</sup> do not provide for the coordination of different institutions in the administration and alienation of land in Game Management Areas. There is need for appropriate legislation in respect of the roles of chiefs, Local Authorities and the Zambia Wildlife Authority in the administration, management and control of land rights and interests in Game Management Areas. The existing legal provisions are inadequate.

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<sup>342</sup> Chapter 184 of the Laws of Zambia

<sup>343</sup> The Zambia Wildlife Act, No. 12 of 1998

<sup>344</sup> Chapter 287 of the Laws of Zambia

<sup>345</sup> Chapter 281 of the Laws of Zambia

## **CHAPTER 6**

### **LAND REGISTRATION**

#### **Introduction**

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

#### **Registration of title**

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

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

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

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

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

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<sup>346</sup> Peter Dale and J. McLaughlin, **Land Administration**, opt.cit., p.36

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

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

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

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<sup>347</sup> Ibid.

The objectives of land registration were also stated in the case of **Gibbs v.**

**Messer**,<sup>348</sup> where the Court stated that;

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

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

Lord Wilberforce stated in the case of **Williams & Glyn’s Bank v. Boland**,<sup>350</sup>

that “subject to overriding interests, it is an essential feature of registration of

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<sup>348</sup> [1891] AC 248

<sup>349</sup> Ibid., p.254

<sup>350</sup> [1981] AC 487

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

### **Nature of documents required to be registered**

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

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

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

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<sup>351</sup> Ibid., p 490

<sup>352</sup> Section 4 of the Lands and Deeds Registry Act Cap 185 of the Laws of Zambia

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

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

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

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<sup>353</sup> Ibid., Section 9

<sup>354</sup> Ibid., Section 10



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

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

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

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

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<sup>355</sup>Ibid., Section 22(1)

<sup>356</sup> Ibid., Section 22(2)

### **Priority of registration of interests**

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

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

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<sup>357</sup> Section 7 of the Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia

<sup>358</sup> 2002/HP/1127 (Unreported)

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

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

priority even though the unregistered document was the first in time of existence.<sup>359</sup>

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

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

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<sup>359</sup> 2002/HP/1129 (unreported)

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

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

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

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

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

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

### **Effect of failure to register documents**

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

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<sup>362</sup>Lands and Deeds Regulations, rule 3

<sup>363</sup> Ibid., Section 6

<sup>364</sup> 5 NRLR, p.759

<sup>365</sup> [1949-54] NRLR 345

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

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

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

<sup>366</sup>

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

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

<sup>367</sup> 5 NRLR 563

### **Conclusiveness of registered interests**

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

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

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

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<sup>368</sup> Ibid., Section 30



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

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

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<sup>369</sup> Ibid., Section 33

<sup>370</sup> [1957] Rhodesia & Nyasaland Law Reports, p.656

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

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

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<sup>371</sup> [1988-1989] ZR 194

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

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

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

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

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

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

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

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

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

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

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

## **CHAPTER 7**

### **AN APPRAISAL OF THE LAND ALIENATION SYSTEM**

#### **Introduction**

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

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

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

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

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

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

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<sup>372</sup> **Miller v. Tripling** (1918) 43 O.L.R. p.1



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

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

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

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<sup>373</sup> Patrick M. Mvunga, **The colonial foundations of Zambia’s land tenure system**, opt.cit. p.1

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

## **Legal and Institutional Framework under Leasehold Tenure**

### **(a) The status of State land**

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

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<sup>374</sup> Ben Kakoma, *op.cit.* p.1

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

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

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

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

### **(b) The Statutory Housing Areas and Improvement Areas**

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

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

- (i) The law that governs land alienation under State land proper is different from the law that governs land alienation under the Housing (Statutory and Improvement) Areas. Land alienation under State land is governed by the Lands Act,<sup>375</sup> while the Housing (Statutory and Improvement) Areas Act<sup>376</sup> governs land under the Housing (Statutory and Improvement) Areas;
- (ii) In terms of application of the law, the Town and Country Planning Act and the Lands and Deeds Registry Act do not apply in the Housing (Statutory and Improvement) Areas, while these Acts apply in State land.
- (iii) Documents evidencing title to land offered to tenants in the Housing (Statutory and Improvement) Areas, and those offered to land owners under State land are also different. A leasehold title to land under State land is called a Certificate of title issued under the hand and seal of the Registrar of Lands and Deeds, while Council Certificates of title, Land Record Cards and Occupancy Licences are issued under the Housing (Statutory and Improvement) Areas

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<sup>375</sup> Chapter 184 of the Laws of Zambia

<sup>376</sup> Chapter 193 of the Laws of Zambia

by the Council Registrar

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

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

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

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

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

because of political leadership in some areas, as party cadres have taken over control of the allocation of the plots.”<sup>378</sup>

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

### **(c) Legal Framework**

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

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

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

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

There have been no major changes in legislative developments in land alienation since the advent of colonial rule and the little changes that have been effected are ad hoc in nature, usually implemented in response to urgent situations.<sup>380</sup> After independence, the enactment of the Lands Acquisition Act<sup>381</sup>, the Land (Conversion of Titles) Act,<sup>382</sup> and the Lands Act, has not adequately addressed the challenges associated with land alienation in the country.

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

<sup>380</sup> Commissions such as the East Luangwa District and the Tanganyika District illustrate this point

<sup>381</sup> Chapter 189 of the Laws of Zambia

<sup>382</sup> Chapter 289 of the Laws of Zambia, 1972 edition (repealed)



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

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

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

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<sup>383</sup> Ibid.

There is a requirement under the Circular<sup>384</sup> that the Commissioner of Lands should be satisfied that the approved layout plans are in order, and that the land is available. Under the Town and Country Planning Act,<sup>385</sup> however, any inquiry into techniques of physical planning is the role of the Minister responsible for Local Government and Housing or the Director of Physical Planning in the same Ministry. The role of the Commissioner of Lands is merely to check the records in the folios and ascertain whether encroachments would result if he proceeded to number the plots. The Commissioner of Lands is by law not required to inquire into the technicalities of planning, but merely to make land available and leave the aspect of planning to the City Councils, Municipal Councils and Provincial Planning Authorities<sup>386</sup>. This scenario is undoubtedly a serious lapse in the system of land alienation in that the Commissioner of Lands should have a responsibility to ensure that the land being alienated is properly planned and alienated for the intended purpose.

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

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<sup>384</sup> Land Circular No. 1 of 1985

<sup>385</sup> Chapter 283 of the Laws of Zambia

<sup>386</sup> Section 5 of the Town and Country Planning Act

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

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

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<sup>387</sup> Land Circular No. 1 of 1985

by the Supreme Court in the case of **Yengwe Farms Limited v. Masstock Zambia Limited, the Commissioner of Lands and the Attorney General**<sup>388</sup>

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

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

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

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<sup>388</sup> (1999) Z.R. 65

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

Simwinga further notes that:

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

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

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

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

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

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

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

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

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

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

**(d) Institutional Framework**

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

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

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

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

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

<sup>393</sup> Government of the Republic of Zambia Interim Report of the Constitutional Review Commission 2005 p.779



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

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

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

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

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

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

## **Legal and Institutional Framework under Customary Tenure**

### **(a) The status of customary tenure**

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

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

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

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

Subsection (2) of section 7 further assures that;

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

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<sup>394</sup> Section 8 of the Lands Act, Chapter 184 of the Laws of Zambia

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

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

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

- (a) without taking into consideration the local customary law on land tenure which is not in conflict with this Act;
- b) without consulting the Chief and the local authority in the area in which the land to be alienated is situated, and in the case of a game management area, and the Director of National Parks and Wildlife Service, who shall identify the piece of land to be alienated;
- (c) without consulting any other person or body whose interest might be affected by the grant; and

- (d) if an applicant for a leasehold title has not obtained the prior approval of the chief, and the local authority within whose area the land is situated.

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

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

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

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

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<sup>395</sup> Chapter 184 of the Laws of Zambia

<sup>396</sup> Chapter 185 of the Laws of Zambia

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

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

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



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

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

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

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

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

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

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

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

#### **(b) The institution of Chief**

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

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<sup>400</sup> Under chapter 4 of this study

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

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

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

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

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<sup>401</sup> Chapter 287 of the Laws of Zambia

<sup>402</sup> Ibid., Section 10(1)

<sup>403</sup> section 10(1)(a) of the Chiefs Act

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

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

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

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

### **(c) Local authorities**

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

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

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

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

It is important to note that although the Lands Act has recognised the local authorities in the conversion of customary land to leasehold, the functions of preparing Site Plans, Sketch Plans, and land identification are performed by the Department of Land Use in the Ministry of Agriculture and Cooperatives in conjunction with Provincial Planning Authorities. The vast parcels of land in the country fall under the jurisdiction of District councils. Under the law<sup>406</sup> District councils are not planning authorities hence, the involvement of the Provincial Planning Authorities.

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

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

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

#### **(d) Zambia Wildlife Authority**

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

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<sup>407</sup> Section 31 of the Survey Act, Chapter 188 of the Laws of Zambia

<sup>408</sup> Act No. 12 of 1998



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

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

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

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

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<sup>409</sup> <sup>409</sup> Personal visit as Commissioner of Lands to Mambwe District 8<sup>th</sup> August, 2006

<sup>410</sup> Section 8(2) of the Lands Act, Chapter 184 of the Laws of Zambia

<sup>411</sup> The Zambia Wildlife Act, Act No. 12 of 1998

### **(e) The Department of Forestry**

The Forests Act<sup>412</sup> adequately covers the conditions of alienation of land in a forest reserve. Forest reserves are also areas created and regulated by statute. Once land is declared as a Forest reserve, the Commissioner of Lands cannot alienate or administer any part of the land without the consent of the Conservator of Forests. If the Commissioner of Lands purports to alienate any part of a Forest without the consent of the Conservator, such an action will be void.<sup>413</sup>

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

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<sup>412</sup> Chapter 199 of the Laws of Zambia

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

<sup>414</sup> Personal visit as Commissioner of Lands to Chief Chipepo's Palace in Kapiri Mposhi District 20<sup>th</sup> May, 2006

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

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

#### **(f) Office of the Vice President**

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

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

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

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

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

### **Problems of institutional coordination**

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

Institutions operate within their statutory framework, and often without much

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

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

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

There are also various pieces of legislation dealing with land matters. The problem of land legislation is that it is a colonial remnant which introduced land related laws in a piecemeal fashion. The categorisation of land into customary and crown land also ensured that different laws were applied in these areas. To this day, the country does not have comprehensive human settlement and land development legislation. Numerous piecemeal statutes attempt to regulate the acquisition<sup>417</sup>, development and use of land under leasehold tenure. The statutes in place neither serve the present needs nor respond to changing conditions.

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

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<sup>417</sup> The Lands Act, Chapter 184 of the Laws of Zambia

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

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



## **CHAPTER 8**

### **CONCLUSIONS AND RECOMMENDATIONS**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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## APPENDIX

### THE LANDS (CUSTOMARY TENURE) (CONVERSION) REGULATIONS

#### **Title**

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

#### **Procedure on conversion of customary tenure into leasehold tenure**

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

### **Consideration of the application by the Council**

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

### **Conversion by council of customary tenure into leasehold tenure**

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

### **Requirement to pay ground rent**

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

### **Appeals**

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

(Regulations 2 and 3)

FORM I

(Regulation 2)

APPLICATION FORM FOR CONVERSION OF CUSTOMARY TENURE INTO  
LEASEHOLD TENURE

Particulars of Applicant

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

And granting leasehold to me will not affect these rights.

Signed:                      Date:

Note:

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

FORM II

(Regulation 2)

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

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

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

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

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

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

Signed:

Date:

FORM III

(Regulation 3)

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

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

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

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

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

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

Signed:

Date: