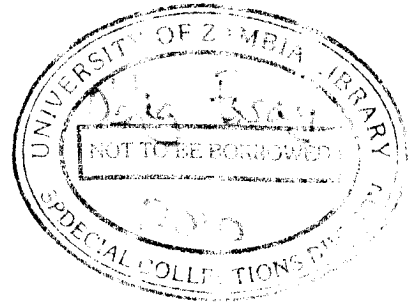


THE LEGAL AND INSTITUTIONAL FRAMEWORK FOR LAND ADMINISTRATION IN ZAMBIA: THE NEED FOR LAND REFORMS

By



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of the requirement for the award of the Bachelors Degree of Laws (LLB)

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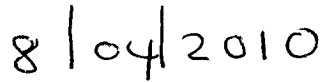
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DECLARATION

I SARA MULWANDA,(Computer number:22083316), DO HEREBY solely declare that the contents of this Directed Research entirely represent my own work and it has not previously been submitted for a degree at this or another University.



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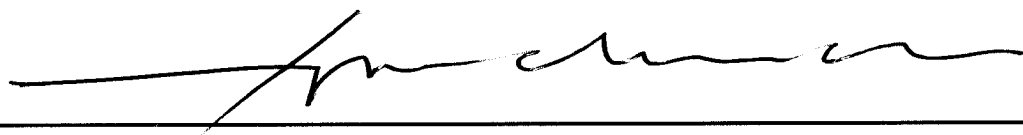
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MR.FREDRICK MUDENDA (SUPERVISOR)

Dated the 8th day of April 2010

ABSTRACT

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

Currently, there are several statutes that are dealing with land alienation and there are several government ministries and departments that play a role in land identification, planning, surveying and title registration. The challenge faced with this type of legal and institutional structure is that there is lack of co-ordination among land alienation institutions and there are conflicting regulations in certain instances. There is need for equitable access to land as well as secure land tenure for the people of Zambia in order to cope with the current demand for land.

This Obligatory Essay is the study of the Legal and Institutional framework for Land administration in Zambia in both state land and customary land. The study critically analyses the law governing land administration and evaluates the legal framework and institutions that are involved in land administration.

During the study, it has been revealed that land administration in Zambia has continued to be based on and influenced by the colonial forms of tenure introduced during the colonial rule that have little relevance to the needs of the country.

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

It is my sincere hope that the findings of this study will provide a contribution to the scholarly works on the legal and institutional frameworks for land administration in Zambia.

DEDICATION

This work is dedicated to my late mum Dorothy Mwila Chewe Mulwanda, my two children Mumba Chanda and Mapalo Chanda.

ACKNOWLEDGEMENTS

I wish to express my gratitude to my supervisor Mr Fredrick Mudenda for his co-operation, patience, keen interest and valuable time he spent going through my work as well as whose ideas, comments and suggestions made it possible for me to write this paper. The work would not have been successfully completed without his guidance.

My thanks go to my husband, Mumba Chanda for the time he spent with me during my study and for his unwavering support even in difficult times.

I wish to thank my friends in the Ministry of Lands who include L ynn Habanji, Chief Registrar Lands and Deeds, Majumo Khunga, Assistant Chief Registrar Lands and Deeds, Mary Harawa, Registrar Lands and Deeds, Agarthu Ntutuma, Registrar Lands and Deeds, Victoria Musonda, Lands and Deeds Officer, Helen Mwansa, Senior Lands Officer and also Kelvin Mpembamoto, Senior Economist, Zambia Revenue Authority for their corporation, their comments and above all their persistent encouragement to me during my study.

I wish to thank all the people who contributed to my successful completion of this study in many ways. Special thanks are due to Judge Philip Musonda, Judge of the High Court of Zambia and Frightone Sichone, Legal Counsel, Zambia Forestry Company.

I finally wish to convey my heartfelt thanks to all those who made comments on my work either positively or negatively as much made my work perfected.

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CHAPTER ONE

1.0 HISTORICAL BACKGROUND FOR LAND ADMINISTRATION IN ZAMBIA

1.1 INTRODUCTION

The rational allocation, planning, use and development, management and regulation of land are important to economic growth and poverty reduction in a country. Land plays a critical contribution to the economic, social and cultural development of any developing nation including Zambia. Land is an important economic asset in almost all societies and can contribute to economic development and sustainable growth. Therefore Land has a potential to contribute to poverty reduction especially in developing countries like Zambia. Providing poor people with access to land they occupy is central to reducing poverty and empowering poor people and communities¹.

Generally Land administration can be defined as processes of determining, recording and disseminating information about the ownership, value and the use of the land when implementing land management. Land Administration is meant the means whereby and the terms upon which land should be made available for use by individuals² In general, before colonization, the legal system including land law was based on customary law of a particular tribe or clan. Colonization introduced state law based on the law of the colonial powers which concerns the entire country. Concerning property, land law was often only applicable in urban areas i.e. Crown Land, Native Reserves and rural areas with high agricultural potential. In the remaining areas customary land law was still applicable. At independence in 1964, Zambia inherited Acts or Ordinances that had a bearing on Town and country Planning, Land

¹ Deininger .K, Land Policies for Growth and Poverty Reduction. Washington, World Bank,2003

² See Johnson Land Commission Report, 1967, Lusaka, Zambia, P.99.

survey and Land Registration among others. The uncertainties' in the countries land policies continued until 30th June,1975,when President Kaunda announced changes to the country's' land tenure system³.Among the changes made included the fact that all freehold farm land titles were converted to leasehold of 100 years, Land with Freehold titles in residential areas in cities and towns were converted to leasehold for 100 years effective from 1st July ,1975,all real estate agencies were closed down, local councils were to monitor and authorise buildings in the areas of their jurisdiction, individuals were banned from building houses for rent and the question of accommodation was left to government and above all bare land had no value. The question that still required governments redress was however, with regard to making land accessible in both land tenure systems with clear procedures and guide lines. As governments changed, there was a general expectation of the need for changes in the system of land administration in order for it to take into account the demands and expectation of the Zambian people.⁴

When Zambia returned to multi-party politics in 1991, the governments' political and economic policies were different from those of the second republic. The Movement for Multi-party democracy promised to attach economic value to undeveloped land, encourage private real estate agency business, promote the regular issuance of title deeds to productive land owners in both rural and urban areas and clear the backlog of cadastral surveys and mapping⁵.There was opposition and resistance mainly from the Traditional Rulers, opposition political parties and non-governmental organisations to the enactment of the New Lands Act. However ,it was enacted and the bill was assented into law on 6th September,1995.The

³ See Address by His Excellency the President Dr. K.D. Kaunda to the National Council of the United National Independency Party, Mulungushi Hall, Kabwe, 30th June-3rd July 1975 and his speech has since been known as the watershed speech.

⁴ Sichone F, Land Administration in Zambia, With Particular Reference to Customary Land. P.2, A paper presented at a seminar organised by Zambia Land Alliance held in the University of Zambia Senate Chamber, 28th June, 2008

⁵ See Paragraph M of the MMD Manifesto, 1991

objectives of the Act included continuation of leaseholds and leasehold tenure, continuation of vesting of the land in the President and alienation, to provide for conversion of customary tenure into leasehold, to establish a lands development fund and a lands tribunal and to repeal the following Land(Conversion of Titles) Act, The Zambia (Trust Land) Orders 1947 to 1964,The Zambia (Gwembe District) Orders 1959 to 1964,The western Province (Land and Miscellaneous) Provisions Act 1970⁶.

Under the current law, all land in Zambia is vested in the president on behalf of the people of Zambia⁷. The president has delegated his power to the Commissioner of Lands to make and execute grants on his behalf⁸. The Institutional set up for Land administration is at four levels, National, Provincial, District and local level. At national level Land administration is anchored in the Ministry of Lands which is the principal, whilst at the same level other ministries such as Ministry of Local government and housing, Ministry of Agriculture, Department of Resettlement under the office of the Vice President ,these perform functions of spatial planning, Land use management, valuation, revenue management and land allocation. At Provincial level, the Ministry of lands perform the function of land identification, land allocation, land surveys, geo-information and revenue collection of land related fees and charges. At District level land allocation is done by the local authorities while spatial planning is done by Municipal and city councils and the provincial planning authorities. In terms of identification and planning of agricultural land the function is carried out by the Ministry of agriculture and Cooperatives and the Department of Resettlement in the office of

⁶ The 1995,Lands Act, Chapter 184 of the Laws of Zambia

⁷ Section3(1) of the Lands Act, Chapter 184 of the laws of Zambia

⁸ Statutory Instrument No. 4 of 1989

the Vice President. At Local level, Chiefs identify and make recommendations to the commissioner of lands⁹

This paper will look at the Legislation that regulate Land Administration in Zambia, focussing on the different categories of land and the Institutions that are charged with implementation of developmental conditions in the categories of land, their current procedures, and the effectiveness of these institutions. The need for their effective decentralisation and harmonisation, the role that governance has played that has affected the whole process and the need for land reforms in Zambia.

1.2.0. HISTORICAL BACKGROUND

1.2.1. PRE- INDEPENDENCE DEVELOPMENTS

In understanding the current malaise surrounding the ineffective land administration, it is inevitable that this paper gives an evaluation of the path the land administration system has traversed in the past, starting with the colonial administration and through post independence reforms and legislation. Land holding and transactions’ were controlled by customs before the advent of the white settlers in Zambia. Most of the Land in Zambia was settled by tribes migrating from the Luba-Lunda Empire in the current DR Congo by the 18th century.

In 1911 the British South African Company (BSA) a company exploring for minerals, was given power by the king of the United Kingdom to administer land in the country. The company was empowered to apportion land to natives for their occupation. To the white settlers, land would be given on freehold or leasehold and such holdings were registered. However the natives were not allowed to get title¹⁰.The 1911 order in council required the company to assign to the Africans inhabiting Northern Rhodesia land sufficient for their

⁹ Land Policy Document , Ministry of Lands, Government Printers Lusaka:1996
¹⁰ Royal Charter of incorporation of the British South African Company, 29th October 1889.

occupation, whether as tribes or portions of tribes and suitable for their agricultural and pastoral requirements but expressly provided that it should not be lawful for any purpose to alienate from the chief and people of the Barotse the territory reserved from prospecting by virtue of the concessions from Lewanika to the company dated the 17th October, 1900 and 11th August, 1909¹¹.

No express power to make grants of Land to individuals were given by the order in council, but it was provided that a native may acquire, hold, encumber and dispose of land on the same conditions as a person who was not a native, but no contract for encumbering and alienating land or property of the native was considered valid unless the contract was made in the presence of a magistrate, is attested by him and bears a certificate signed by him stating that the consideration of the contract is fair and reasonable and that he is satisfied himself that that the native understands the transaction. No African was to be removed from any land assigned to for occupation except under full enquiry by and by order of, the administrator approved by the high commissioner¹².

The effect of the 1911 order as regards Land Administration was that the land was divided into two, namely land within the Barotseland and other land¹³. The 1911 order in council contained no provision on vesting of Land in the British South African Company but the company claimed to be the owner of three freehold areas in the part of the country formerly known as North Eastern Rhodesia by virtue of concessions approved by certificate of claim issued by Sir H.H Johnson in 1893.

The 1911 order in council was revoked by the Northern Rhodesia order in council of 1924 by which the administration of Northern Rhodesia was taken away from the British South

¹¹ See Johnson Commission Report, 1967, *supra*

¹² *Ibid*

¹³ Northern Rhodesia Order in Council of 1911, Government Printers, Lusaka, Zambia

African Company and entrusted to a governor appointed by the by the British Sovereign¹⁴. In 1924 the British Colonial Authority formally took over the administration of the country from the company. The governor of Northern Rhodesia was expressly empowered on behalf of the British sovereign in conformity with some order in council or law or with instructions, to make grants and dispositions of land within the territory other than Barotse land. There was no express provision for assignment of land for the occupation of Africans but for their protection against removal from land assigned to them was continued. The right of Africans to acquire and hold land on the same conditions as non Africans was preserved. The 1924 order in council did not contain any provision for vesting land in the British sovereign or the governor. Grants of land were made by the governor to non-Africans under the express power conferred upon him by the order. The order was amended from time to time and it was ultimately revoked in 1962 by the Northern Rhodesia (constitution) order in council 1962¹⁵.

The Northern Rhodesia (crown lands and native reserves) order in council 1928 gave effect to the recommendations of the native reserves commission which was appointed in 1924 to inquire into what land should be set aside for the African occupation in the Fort Jameson(now known as Chipata) and Petauke Districts¹⁶. By the order land (other than land in Barotseland, the three freehold areas vested in the British South African Company and land alienated by the company before 1st April, 1924 and 22nd March, 1928) was divided into Crown lands and Native reserves¹⁷. All rights of the British sovereign in or in relation to Crown lands was vested in and made exercisable by the governor who was empowered, subject to the provisions of any law and of any directions given to him by the secretary of state, to make grants and dispositions of crown land. Native reserves were vested in the secretary of state

¹⁴ Northern Rhodesia Order-In-Council,1924,Government Printers, Lusaka, Zambia

¹⁵ See Johnson Land Commission Report *supra*

¹⁶ Ibid

¹⁷ Northern Rhodesia Order-In Council,1928,Government Printers, Lusaka, Zambia

and set apart in perpetuity for the sole and exclusive use and occupation of the natives of Northern Rhodesia. The governor was required to assign land within each native reserve to Africans, whether as tribes or as portions of tribes and the removal of an African from the native reserve into land not forming part of a native reserve was made dependent upon the approval of the secretary of state. The 1928 order in council was supplemented in 1929 when the Northern Rhodesia (Crown Lands) supplemental order in council 1929 and the Northern Rhodesia Crown Lands and Native lands (Tanganyika District) order in council 1929 additional areas were set aside as Native reserves. These orders in council were amended in detail from time to time and ultimately consolidated by the Northern Rhodesia (Crown lands and Native Reserves order in council 1963. As consolidated they were substantially of the same effect as the original orders¹⁸.

The remainder of the country was called Crown land was for the occupation of the white settlers only. This was vested in and administered by the governor using English law. This was done due to governments change in policy for providing natives with sufficient land to meet the expanding population. In 1942 the land policy of the then government was announced by government Notice No.416 of 1942¹⁹. In that notice government was met to clarify the position and to come to a decision regarding the amount and location of land which should on one hand be retained with a view of future alienation to non-Africans and on the other hand should be made available to satisfy agricultural requirements of Africans, and it was proposed to introduce legislation establishing the following principles in relation to all land in the territory which had not already been alienated or set aside for the reserves. Such land was to be divided into two, Crown land and Native Trust land.

¹⁸The Order-In-Council as read with the British Extension Act, Chapter 10 of the Laws of Zambia and the English Law (Extent of Application) Act, Chapter 11 of the Laws of Zambia

¹⁹ Government Gazette Notice No.416 of 1942 dated 29th July, 1942

In order to meet problems arising from the construction of the Kariba Dam and the inundation of portions of reserves and Native Trust Lands an order, the Northern Rhodesia (Gwembe District) order in council 1959²⁰, was made applying to the Gwembe Administrative District. The order authorised the inundation of land and conferred upon the governor special powers relating to the making of grants of land, fishing rights and the making of regulations applicable only to the Gwembe Administrative District which powers were subject to the approval of the secretary of state.

1.2.2. POST INDEPENDENCE DEVELOPMENTS

The 1962 constitution²¹ provided that no law or instrument made by the governor and the legislative council after the commencement of the constitution that was inconsistent with, inter alia, the provisions relating to land of certain concessions and agreements made with the Litunga or his predecessors should come into operation unless the Litunga and the council signified consent in writing to its having effect in the protectorate and that it should not be lawful for any purpose whatsoever, except with the consent of the Litunga of Barotseland and with the approval of the secretary of state, to alienate from the Litunga and the people of the protectorate any part of the protectorate. By Northern Rhodesia (constitution) Order in council 1963²², the 1962 constitution was replaced by the 1963 constitution which contained similar provisions as regards land in the Barotseland and on the 24th October, 1964, the day that Zambia became independent, the before mentioned concessions and agreements ceased to have effect. The Barotse agreement 1964²³ provides in relation to land,

²⁰ Northern Rhodesia (Gwembe District) Order-In-Council, 1959

²¹ Northern Rhodesia (Constitutional) Order, 1962

²² Northern Rhodesia (constitution) Order, 1963

²³ Zambia (Trust Land) Order 1964

“The Litunga and the National council of Barotse land have always worked in close cooperation with the central government over land matters in the past and agreed that the central government should use land required for public purposes and have adopted the same procedures as applied to leases and rights of occupancy in reserves and Trust land areas where applicable.

At independence Northern Rhodesia (Crown Lands and Native Reserves) orders in council 1928-1963, the Northern Rhodesia (Native Trust lands) orders in council 1947 to 1963 and the Northern Rhodesia (Gwembe District) order in council 1959 were not revoked when Northern Rhodesia became independent, the Zambia independence order 1964, provided however, that they would be construed with such modifications, adaptations, qualifications and exceptions as might be necessary to bring them into conformity with that order. The 1964 order²⁴ vested the land in the president of the republic of Zambia and all powers conferred upon the governor were given to the president.

1.2.3. LAND REFORMS IN THE SECOND REPUBLIC

After independence, the land categories changed, Crown Land became known as state land while the other categories remained the same. All rights in or in relation to crown lands or other immovable property in Northern Rhodesia that were vested in the British Sovereign, all Native Reserves that were vested in the Secretary of State immediately before independence were vested in the President of the Republic of Zambia under the Zambia (State land and Natives Reserves) Order, 1964.²⁵ The Zambia (Gwembe District) Order 1964, conferred upon the president of Zambia the powers formerly administered by the governor of the territory under the Northern Rhodesia (Gwembe district) Order 1959²⁶. At independence, Zambia retained both the colonial categorisation of land and the dual land tenure system. In 1975, all freehold estates were abolished and all interests in land were abridged to statutory leases of 99 years duration. All land transactions required the consent of the president and sale of bare

²⁴ Zambia (Trust Land) Order 1964

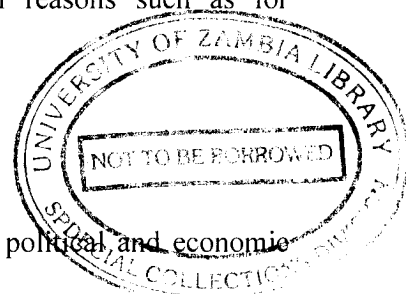
²⁵ Zambia (State lands and Reserves) Order of 1964

²⁶ Zambia (Trust Land) Order, 1964

land were forbidden. Land was seen as a gift from god as such it was not to be sold. Only un-exhausted improvements on it could be sold. This led to the enactment of the Land (Conversion of Titles) Act which formed the basis of Land Administration in Zambia. The Act was prompted by the exorbitant prices in sale of vacant state land²⁷. With change in Government; where there was a general expectation of the need for changes in the system of land Administration in order for it to take into account the demands and expectations of the Zambian people. In the administration of the Land (Conversion of titles) 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 Lands²⁸. In terms of procedure on land alienation, the Land (conversion of titles) Act was silent. On qualification to own land in Zambia, the land (conversion of titles) Act did not make specific provision. However, later on in 1985, Government introduced an amendment to the Land (Conversion of Titles) Act which disqualified non-Zambians from holding land except for special reasons such as for investment and promotion for investment in the country²⁹.

1.2.4. LAND REFORMS IN THE THIRD REPUBLIC

In 1991, Zambia returned to multi-party politics, the governments' 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 the liberalised economy. The Movement for Multi-party Democracy (MMD), the party which formed government in 1991, had indicated in its manifesto the relevance and the need to review the land policy in view of the new political dispensation³⁰. In order to address the changes to the land Administration system, government decided to revisit the law



²⁷ Mvunga M.P, The Colonial Foundation of Zambia's Land Tenure System. Neczam, Lusaka:1980

²⁸ Gazette Notice No. 1345 of 1975

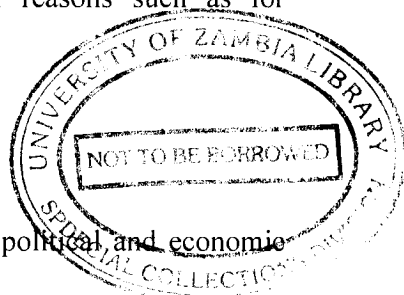
²⁹ Land (Conversion of Titles)(Amendment) Act No. 2 of 1985

³⁰ See paragraph M of the MMD manifesto, 1991.

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²⁷ Mvunga M.P, The Colonial Foundation of Zambia's Land Tenure System. Neczam, Lusaka:1980

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²⁹ Land (Conversion of Titles)(Amendment) Act No. 2 of 1985

³⁰ See paragraph M of the MMD manifesto, 1991.

governing land alienation. The Lands Act was enacted to provide legal machinery through which the land alienation system would be governed. The terms of reference that were considered during the enactment of the lands Act were;

-review of the land tenure system in Zambia and its suitability to developments in the Third Republic.

-review of systems of land allocations in Zambia

-review of the legal framework relating to land transactions, for example, property taxation, licensing, land surveys and registration and make suggestions on legal reform³¹

A wide diversity of people ranging from government officials, members of the political parties, legal scholars, chiefs, members of the farmers' Union, to ordinary citizens attended the conference³². The key recommendations of the conference were,

-That all land was to be vested in the president to hold on behalf of the Zambian people. However, all land (including virgin land) was to have value and was to be saleable commodity. Hence, the Lands (Convention of Titles) Act (as amendment) was to be repeated³³.

-That land should be held under a leasehold tenure rather freehold (which was advocated for by certain quarters of society).The lease period was to be for 99 years and automatically renewable. This would provide the security of tenure enjoyed under freehold, yet at the same time ensure government control through covenants on the lease.

-That a holder of customary land should have direct access to the commissioner of lands if he/she wishes to obtain title to such land³⁴.To this extent, it was recommended, it was recommended that non-holders may be alienated in customary areas by the president upon consultation with the chief³⁵.

-That a development Fund was to be created for the purposes of 'opening up' new areas, that is, funds raised would be available to local authorities for use in development of their areas.

³¹ Ng'andwe A, 'Report on the National Conference on Land Policy and Legal Reform in the Third Republic of Zambia, Lusaka: Unza Centre for Continuing Education,1993,p.1

³² National Conference on Land Policy Reform in the Third Republic of Zambia, Mulungushi International Conference Centre,Lusaka,1993

³³ Mushota L, "The MMD and its manifesto provisions on land law and policy reforms in the third republic of Zambia', pp12-13

³⁴ Hansusungule M and Mwansa T.K,'Land Tenure Reform in Zambia-Another Review-A paper submitted during the land policy Conference of 1993 held at Mulungushi International Conference Centre,1993

³⁵ Khan A.M, "Land Registration systems in Zambia"-A paper submitted during the land policy conference of 1993 held at Mulungushi International Conference Centre.

1.3.0 PROBLEM STATEMENT

Access to land and security of tenure are necessary for people to raise and stabilise their incomes as well as contribute to economic development and growth. This is also an essential prerequisite for diverse land-based livelihoods, sustainable agriculture, poverty reduction³⁶. However access to land and security of tenure are not readily available to the majority of Zambians who depend on land for their survival due to a number of constraints which include lack of knowledge on land allocation procedures, bureaucratic processes in Land Administration, corruption, lack of political will and governance among others.

Access to land can only be achieved with a good and transparent legal and institutional framework for land Administration in place which is supported by comprehensive information and education campaign that enables a large majority of the citizens to appreciate the processes, procedures and regulations governing access to land. In order for government to come up with such a framework; we have to consider the past legal and institutional frameworks and see what gaps or weaknesses are there to improve the citizens' access to land.

The European Union³⁷ has maintained that due to diversity, there can be no blueprint approach to land reforms; the objectives, political choices they reflect and the legal and institutional options chosen are highly dependent on the specific economic, social, political context and its historical background. Land policies and laws must build on local concepts and practice, rather than importing one-size fits all models. It is important to look at the historical background of Land Administration, how has it changed through the years and what needs to be done to improve on.

³⁶ Oxfam, Copper belt Land Workshop, Mindolo Ecumenical Foundation, Kitwe, 3-5 October, 2002

³⁷ The United Nations Economic commission for Europe, London, 2004

Good governance and the rule of law are closely correlated with successful implementation of processes to improve access to land³⁸. Good governance is an essential (though it has frequently lacked in the previous land reforms in Zambia) element of equitable and transparent land administration. Land issues are profoundly political in nature. Land administration involves complex processes which require understanding and responses which adopt long-term perspective. In Zambia, land reforms have focussed on short term perspective as most of the major reforms have been announced by politicians in order to cure an existing short term problem; however there is need to look at the long term perspective as land is a sensitive issue and affects everyone and the generations to come.

1.4.0. STUDY OBJECTIVES

To identify weaknesses in the current legal and institutional framework for land administration and suggest ways of how it can be strengthened.

1.5.0. RESEARCH QUESTIONS

1. Is the current legal and institutional framework for land administration adequate to address the needs of all Zambians?
2. To what extent has it failed to address their needs?
3. To what extent has governance affected the implementation of a good legal and institutional framework?
4. What steps are being taken by government to come up with a good framework for land administration?

³⁸ Mathieu,FAO's approach and principals in working on Land Tenure Issues. Paper for conference on Land, Property, Social Justice and Development, Institute for social studies, The Hague,9-14 January,2006

1.6.0. JUSTIFICATION

The research will do a comparative study of the legal and institutional framework for land Administration in Zambia from colonial era to date. In order to understand why we need land reforms; we need to look at the historical developments. It will also look at the major legal and institutional impediments that have made land administration in Zambia a failure and also suggest ways of how this can be improved. This paper will investigate why land administration has remained controversial regardless of the reforms that have taken place.

1.7.0 METHODOLOGY

This research is a qualitative one though it will involve desk research mainly on the comparative study of the legal and institutional frameworks for Land Administration from the colonial era to date. This will involve collection of primary data which will involve interviews with relevant officials like commissioner of Lands, surveyor General, Chief Registrar of Lands and Deeds where need arises. The essay will therefore try to involve both primary and secondary data. Secondary data will involve literature reviews through Acts of parliament, various circulars on land, reports, books, journals, newspapers and other relevant publications.

CHAPTER TWO

2.0.0 LEGAL FRAMEWORK FOR LAND ADMINISTRATION IN ZAMBIA

There are various pieces of legislation in Zambia, which have a direct or indirect impact on the administration of land in Zambia. The Ministry of Lands administers and discharges several functions in accordance with various statutes. There are two categories of land in Zambia: State leasehold (Statutory land law) and Customary (Customary land law), both recognized by the Lands Act No. 27 of 1995. Customary area means notwithstanding section 22, the area described in the schedules to the Zambia State Lands and Reserves)Orders;1928-1964 and the Zambia (Trust land) Orders 1947-1964. In the administration of state land, statutory law, the common law of England and the Doctrine of equity apply to this category of land. In terms of the Zambian legislation, the following statutes apply; the Town and Country Planning Act³⁹, the Lands Act⁴⁰, the Land Survey Act⁴¹, the Lands and Deeds Registry Act⁴² and the Housing and statutory and Improvement) Areas Act⁴³.

Apart from the statutes, there are administrative guidelines provided in the Land circular on Land Alienation. The Circular⁴⁴ provides for administrative procedures on Land alienation and 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 commissioner of Lands for Approval. However it is important to note that the circular is merely an administrative document with no force of law.

³⁹ Chapter 283 of the Laws of Zambia

⁴⁰ Chapter 184 of the Laws of Zambia

⁴¹ Chapter 188 of the Laws of Zambia

⁴² Chapter 185 of the Laws of Zambia

⁴³ Chapter 194 of the laws of Zambia

⁴⁴ Circular No.1 of 1985

2.1.0 THE LANDS ACT

The legal framework, principally the Lands Act, 1995 as an enabling law, is a significant improvement on earlier legislation. It would have been much more effective if the regulations to the Act had been drafted. The Land Circular No.1 of 1985⁴⁵ dealing with the conversion of customary land to leasehold or stateland, covers only a small part of what is required in terms of regulations. The absence of prescribed regulations gives too much discretionary powers to commissioner of Lands and generates work for well-informed attorneys.

2.1.1. VESTING OF LAND IN THE PRESIDENT AND LAND

ALIENATION OF LAND

Section 3 of the Lands Act provides for vesting and alienation of land in the Head of State. The president can alienate land to any Zambian or Non Zambian. A Non Zambian can be granted land if the person is a permanent resident, an investor, has prior written presidential consent or is a registered company with 75% shares being Zambian, a charitable organisation, or a registered commercial bank⁴⁶. On the other hand companies with 75 percent Zambian Shareholders and 25 percent Foreign Shareholders are given Land, this has also been used as a shell in most cases⁴⁷, companies are formed on this shareholding ratios just for the purpose of owning land and after land has been acquired the share holding ratios change and the law does not say anything when this happens. In a nut shell, the law as regards investors owning land is not comprehensive and hence there is need to revisit these lacunas in the law and try and harmonise them. In Kalyoto Muhalyo Paluku v Granny's Bakery Limited, Ishaq Musa, Attorney General and Lusaka City Council⁴⁸, the supreme court held that since the entry

⁴⁵ Land Circular No.1 of 1985, Procedure on Land Alienation, Government Printers, Lusaka, Zambia

⁴⁶ Section 3(3)(d),(g),(j) of the Lands Act, Chapter 184 of the Laws of Zambia

⁴⁷ Personal interview with Mr Kachamba Fortune, Commissioner of Lands, Ministry of Lands, 25th January, 2005

⁴⁸ (2006) ZR 119

permit was issued to the appellant on 2nd July,1999 and he registered an assignment to purchase stand No.19218 Lusaka in the lands and deeds registry on the 10th of July,2000.barely one year or so of his stay in Zambia, the Appellant did not qualify to be an established resident. The appellant failed to satisfy one of the conditions under Section 3(3) of the Lands Act for a non Zambian to own land in Zambia.

It follows that the provision of section 3(3) of the Lands Act are disjunctive meaning that a person need only establish any one of the eleven provisions in order to qualify for ownership of land in Zambia.

The president can alienate Land to any Zambian or non-Zambian, however the president cannot alienate any land held under customary tenure without consulting the responsible chief, affected person or if the applicant has not obtained prior approval of the chief and the local authority⁴⁹. All state land in Zambia is subject to the lands Act but no land can be alienated under for a term exceeding 99 years. Under section 3(4)(c) of the Lands Act, there is need to consult any person or body whose interest might be affected by the grant or conversion,section3(4)(d) of the Act provides for the need for an applicant for leasehold title under customary area to obtain prior approval of the local authority.

In Village Headman Mupwaya and another v. Mbaimbi⁵⁰,it was held by the Supreme Court,inter alia, that failure to consult any person whose interest may be affected by the grant as required under section 3(4)(c) of the Lands Act was fatal. This was an appeal against the Lands Tribunal's decision that the piece of land in issue belongs to the respondent and his family. In arriving at its decision the court relied on the case of Siwale v Siwale⁵¹, where the

⁴⁹ Section 3(4) (b)-(c) of the Lands Act ,Chapter 184 of the Laws of Zambia

⁵⁰ Supreme Court of Zambia Appeal No. 41 of 1999

⁵¹ Siwale v Siwale (1999) ZR 84

supreme court had the occasion to interpret Section 3(1) and 3(4) (c) of the Lands Act and it was held that the appellants were affected by the grant of title deeds to the respondent and were not consulted before the grant of the land in issue and therefore the Lands Register would be rectified by the inclusion of the appellants on the certificate of title.

The Lands Act does not establish the office of Commissioner of Lands however Statutory Instrument No.4 of 1989 delegates the powers of the President under the Act to the Commissioner of Lands. The powers of Commissioner of Lands are very wide such that they are prone to corruption⁵²,for example there is no laid down procedure for the Commissioner of Lands as far as his duties are concerned, there only administrative measures which have been developed by the office overtime which varies from one commissioner to another. The Land circular No.1 of 1985,though it is not a statute or statutory Instrument, provides guidelines to local authority to make Land available and leave the aspect of planning to the city councils, Municipal councils and Provincial planning Authority⁵³.This is 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. this situation has lead to people building their structures with no roads and they have ended up with boreholes on almost all newly allocated plots which situation posses a future serious health risk in these areas. 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 stands are not serviced, the District council is supposed to give reasons to the applicants of Land for its inability to provide the necessary services before the recommendations for allocation can be

⁵² Personal Interview with Frightone Sichone,Former Commissioner of Lands,18th December,2009

⁵³ Paragraph A (i) of the Land Circular No.1 of 1985

considered by the Commissioner of Lands⁵⁴, this in reality is not the case as members of the public have ended up paying for service charges charged by the local authorities and no services in most cases have been provided in those areas. Most of our local Authorities in the country have no capacity to provide services in their localities. In the absence of any provision for the procedure in the Lands Act on land alienation, both Ministry of Lands and the Local Authorities have continued relying on Land circular No. 1 of 1985 which is an outdated document and merely an administrative document on procedures for Land alienation and has no force of law. Hence, there is need to amend 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 a force of Law.

The absence of clear conditions or qualifications to be considered by the local Authority or the Ministry when selecting successful applicants for Land has lead to the application of different terms and conditions to be satisfied by the applicants of Lands. For example the circular says that they may advertise the Land for suitable applicants, it does not make it mandatory, they can either chose to advertise or not, thereby disadvantaging the poor in society. On the actual selection of suitable applicants, the tests are likely to be subjective in that a recommended person that can be considered appropriate e.g. someone who is able to produce a payslip that he is in formal employment or has a fat bank accounts.

2.1.2 OCCUPATION OF VACANT LAND

A person shall not without lawful authority occupy or continue to occupy vacant land and any person occupying such land is liable to eviction⁵⁵. However the law does not provide

⁵⁴ Paragraph B (i) of the Land Circular No. 1 of 1985

⁵⁵ Section 9 of the Lands act, CAP 184 of the laws Of Zambia

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⁵⁵ Section 9 of the Lands act, CAP 184 of the laws Of Zambia

appropriate machinery for enforcing this regulation. For Customary land, this authority may be a chief's permission since the chief is a recognised institution under the constitution.

However, in practice squatters have taken advantage and they have now resorted to settling on idle pieces of land and using political pressure on government in order to be given title. An example would be the famous SOS land in Lusaka which is a forest reserve, people have squattered upon idle land and politicians are now moving in to mount political pressure⁵⁶. There is no law which provides for what they are doing but this is what happens in reality, laws may be there but our institutions have failed us.

2.1.3 GROUND RENT

The president under Section 4 of the Lands Act is allowed to set ground rent, which each lessee should pay. If the rent is not paid on the date it is due (i.e. 30th September of each year) the lessee is liable to pay a penalty of Twenty Five percent of the rent due. The rent is paid annually and the initial amount per year is indicated on the lease document which is subject to review through a statutory instrument issued by the Minister responsible for Lands. Recently ground rent has been reviewed under Statutory Instrument No. 110 of 2009 which is effective 1st January; 2010. Failure to pay ground rent may result in Commissioner of Lands repossessing your land. It is one of the grounds for re-entry which stated in the lease agreement. Ground Rent is a form of tax that enables government to raise money for its various functions.

2.1.4 RE-ENTRIES

Section 13 of the Lands Act provides for the right of re-entry. Where the lessee breaches a term or condition of covenant, the president may notify the lessee within three months of his

⁵⁶ Personal Interview with Mr Kachamba Fortune, Commissioner of Lands, Ministry of Lands, 25th January, 2010

intention to cause a certificate of re-entry to be entered in the register for the land in question. The certificate of re-entry may be registered if the lessee fails to justify his cause of breach. However the Act is silent on properties that are on offer and it does not specify the mode of service of the notice where the last known address is no longer operational. There is needed to look at this comprehensively.

On re-entry, the Supreme Court in Goswami v Commissioner of Lands⁵⁷, The court held that the appellant was entitled to compensation to then the current market value of the property of K35 million Kwacha as compensation by the government, as the property which was repossessed from him was developed partially at least the erection of developments were not less than the Twenty Thousand Kwacha lease covenant requirement. As provided for in Section 3(2) of the Lands Act, the mode of service of the notice of intention to re-enter to cause a certificate of re-entry to be entered in a register for breach of covenant in a lease is cardinal to that validation of the subsequent acts of the Commissioner of Lands in disposing of the land to another person. If the notice is not 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 enabled to make representations, under the law, to show why he could not develop the land within the period allowed under the lease. If the land is eventually taken over despite the warnings from the Commissioner of Lands, the registered owner cannot successfully challenge the action to deprive him of the land. On the other hand if the notice is not properly served and there is no evidence to that effect, as was the case here, there is no way the lessee would know so as to make meaningful representation as the notice was served on the watchman and the owner was out of the country and could not make meaningful representations to the commissioner of lands. It follows that repossession effected

⁵⁷ (2001) ZR 31

in the circumstances where the 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 valid repossession. On these grounds the Supreme Court found that the Commissioner of Lands action not justified in making the land available to another developer.

In practice, there are a lot of problems that arises in administering re-entries, where the most common is the process of service of re-entries and the subsequent allocation of land to other applicants. 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 Act⁵⁸. The rule is that notices of intention to re-enter are served on the lessee personally. Usually notice is served by posting by registered mail to the last known address of the registered lessee and posted in a prepaid registered envelop. Where service under this rule is made by registered post, the time at which the document is delivered shall be considered as the time of service. Further, where personal service of any notice or written communication is required and it has failed for a number of reasons, the Commissioner of Lands has on many occasions resorted to substituted service through public advertisement in the newspapers.

In practice, most of the registered lessees do not receive their notices on 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 Act⁵⁹ is not sufficient as most of the notices are delayed between the office of Commissioner of Lands and the Postal office before they reach the lessee⁶⁰. In light of the above there is need to revisit our laws on service of re-entries, probably increase

⁵⁸ Order X of the High Court Act, Chapter 27 of the Laws of Zambia

⁵⁹ Section 13 of the Lands Act, Chapter 184 of the laws of Zambia

⁶⁰ Personal observation as a Lands Officer in the Ministry of Lands (2004_date)

the period within which one needs to make representations to commissioner of Lands and that lessees should resubmit their addresses annually to enhance effective service of notices which will in turn reduce on the number of complaints and litigation in matters of this nature.

2.1.5 LANDS TRIBUNAL

The Lands Act establishes a Lands Tribunal⁶¹ which is a land disputes handling mechanism whose jurisdiction is limited to the decisions of the Minister, The Commissioner of Lands and the Chief Registrar of Lands and Deeds. This mechanism does not apply to disputes under customary tenure or unplanned settlements. It has also been decided by the supreme court in Mwangela and Another V Ndola City Council⁶² and many other similar cases that the Lands Tribunals Jurisdiction is limited to the Lands Act and therefore it has no authority to deal with titles issued by the Registrar under the Lands and Deeds Registry Act, it can only recommend to commissioner of Lands and only the High court can deal with matters on title. It would be recommended that in amending the lands Act, the Lands Tribunal's jurisdiction should be strengthened and harmonised with the other laws on Land Administration and that it should also deal with land under customary tenure and statutory improvement areas and at the same time it should be at the same level as the high court to reduce on the congestion in the courts of law. The tribunal is still operational but to a large extent very toothless because most of the controversial cases are on title. In an attempt to sort out the issue of jurisdiction and appeals, a committee was set up to look into these issues and make the necessary recommendations. There were two schools of thought, one was that the tribunal should be made into a specialised court like the Industrial Relations Court but it was argued that this will depart from the original intention of the tribunal. It will bring in a lot of issues on procedure, more expensive and slow and this will bring it at par with the High Court. The

⁶¹ Section 20(1) of the Lands Act, CAP 184 of the Laws of Zambia

⁶² (2000) ZR 131

other school of thought was that the tribunal be refined but the Lands Act, Survey Act, Lands and Deeds Registry Act should be amended to harmonise the Acts with the Jurisdiction of the tribunal. It was even suggested that they increase the number of legal representation on the bench. The committee on Lands Tribunal has since made recommendations to cabinet and is still waiting for government approval.⁶³

2.1.6 LAND DEVELOPMENT FUND

The Lands Act under section 16 establishes the Land Development Fund to assist councils in opening up new areas for development through the provision of infrastructure such as roads, electricity, water, sanitation etc. It also provides that 75% of consideration fees and 50% of ground rent goes towards Land development Fund and in addition, parliament should set aside moneys for this cause. In 2008, the following councils received the land development funds, Itezhi-itezhi District councils which received a total of K800,000,000.00, Serenje District Council which received K300,000,000.00 for opening up of roads and grading, Kabompo District Council which received K446,000,000.00.⁶⁴ As can be seen from the figures given above, there is need to increase funding and also look at more District councils which has generally been a challenge for the Ministry.

2.1.7. CUSTOMARY LAND AND THE LANDS ACT

Section 7 (1) of the Lands act recognises customary holding. The recognition of customary tenure does not bring about the registration of ownership rights. It is just meant for the protection of use and occupancy rights. However it may be appropriate to incorporate some essential elements of customary law in amending the Lands Act 1995 just as Botswana did in the Tribal Lands Act of 1968 which provided for administration of land under Customary

⁶³ Personal Interview with Mrs Lynn Habanji, Chief Registrar Lands and Deeds, Ministry of Lands, 1st February, 2010

⁶⁴ Personal Interview with Mr Sindano Mutengo, Senior planner Ministry of Lands on 13th January, 2010

Land, through creation of the land boards and its functions⁶⁵. This would prevent selling of customary land by chiefs and make them more accountable, but at the same time recognise their essential role in Land Administration. Amendments should provide for common law leases which should be held on customary land without converting the land parcel to state land outside the control of the chief.

In terms of section 8(1) of the Lands Act, a holder of land under customary tenure may convert it into leasehold tenure not exceeding ninety nine years on application. The conversion of rights from customary tenure to leasehold tenure shall have effect only after the approval of the chief and the local authority in the area where the land is to be converted⁶⁶. This leaves the chief with much discretionary powers which are prone to abuse. Subsection 3 of section 8 of the Lands Act, further provides that 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 confirmed by the chief and a lease granted by the president. This is also prone to abuse because it lacks clarity as to the role of the chiefs as custodians of customary land and lacks provision for formal registration of customary tenure, thereby disadvantaging the indigenous citizens of their rights. In practice there have been situations where Chiefs have claimed not to have given consent to the issuing of title deeds however the truth of the matter is that no land under customary tenure can be given title without the chiefs consent unless there is a mix-up as to which category of land is being issued with a certificate of title, the Act recognises customary holdings. The procedure for converting of Land from Customary Tenure to Leasehold Tenure is provided in the land circular No 1 of 1985 which is just an administrative document and has no force of law⁶⁷.

⁶⁵ Section 13(1) of the Botswana Tribal Lands Act

⁶⁶ Section 8(2) of the Lands Act, CAP 184 of the laws of Zambia

⁶⁷ Land Circular No.1 of 1985

2.2.0 LAND SURVEY ACT

The Land survey Act⁶⁸ provides for the manner in which surveys are carried out and the subsequent method in which diagrams and plans are prepared. The Act provides for the protection of survey beacons and other survey marks. The statute is in two parts, the framework called the Land Survey Act and the statutory instrument called the Land Survey Regulations. The Act specifies what should be done; while the regulations provide the technical specifications of how something should be done. The Act defines a Land surveyor as a person holding a licence to practice cadastral surveying. In practice all surveys in the country follows the Act or regulations. The Office of Surveyor General ensures that this is done through the Examination Section in the Survey Department under the Ministry of Lands. All cadastral work done has to pass through this section and it examines whether the cadastral work done is in line with the laid down regulations⁶⁹. The Act provides for the Surveyor General to supervise all surveys, to preserve all survey records and to generally administer the provisions of the Act⁷⁰. The Act also provides for the establishment of the survey control board, chaired by the Surveyor General, to regulate the practice of the survey profession, to conduct examinations and trial surveys for purposes of licensing surveyors, to maintain a register of Land surveyors and to hear complaints against Land Surveyors⁷¹. Surveyor General through the survey control board ensures that private practitioners follow the correct procedure and that they do not put the profession in disrepute⁷². In this Regard, the Survey Department keeps a list of qualified surveyors which is available to the members of the public to give them guidance. When the Survey Control Board discovers that someone is

⁶⁸ Chapter 188 of the Laws of Zambia

⁶⁹ Personal Interview with Mr Mwana lushi, Assistant Surveyor General in his office at Ministry of Lands on Friday 22nd January, 2010

⁷⁰ Section 4(1) a of Chapter 188 of the Laws of Zambia

⁷¹ Section 6(1) of Chapter 188 of the Laws of Zambia

⁷² Section 6(2) of Chapter 188 of the Laws of Zambia

doing wrong things, the board can revoke the licence. Recently one Surveyors' licence was revoked on 24th November, 2009 due to some anomalies regarding his work⁷³. A registered surveyor is supposed to give a list of people working under him with samples of their handwriting, if they are not licence, so that the Survey Control Board is aware⁷⁴. In practise the Surveyor General is not liable because he only verifies the papers and not the actual cadastral work done in the field. Only in very rare circumstances does he request for field verifications only where he is suspicious with the figures submitted⁷⁵.

The Act is not consistent with survey and mapping technologies, methods and professional practices in use. The Act prescribes survey standards and accuracies that are too stringent thereby depriving the public and people in rural areas of simpler, quicker and affordable survey services. The public perceives that prescribed survey fees and charges are unaffordable⁷⁶. There is concern by the profession over the extent of state versus self-regulation of profession survey practice. The Act has extensive provision for cadastral surveys and to a less extent for non cadastral and geo-information services.

2.3.0. LANDS AND DEEDS REGISTRY ACT

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 importance 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 'overriding

⁷³ Personal interview with Mr Mwanalushi, Assistant Surveyor General Ministry of Lands, 22nd January, 2010

⁷⁴ Ibid

⁷⁵ Ibid

⁷⁶ Mulolwa A, Integrated Land Delivery; Towards Improving Land Administration in Zambia, DUP, 2002

*interest' as defined in statute, the formal title sheet is determinative of title. In most cases, title, once issued, is indefeasible*⁷⁷

Land registration provides the means for recognising formalised 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 and fraud. It can also be used as evidence in support of a claim to a property interest. Registration of a document gives public notice that a property transaction has taken place and the time of registration provides a priority claim⁷⁸.

Section 3(1) of the Act⁷⁹, provides for the establishment and constitution of the Lands and Deeds Registry. The section provides that for the registration of documents required or permitted to be registered under part II of the Act or by any law, there shall be an office styled the registry of Deeds in Lusaka and any other district Registry in such a place that the Minister may by gazette notice direct.

2.4.0. OTHER STATUTES INVOLVED IN LAND ADMINISTRATION

This Agricultural Lands Act⁸⁰, in line with land administration, was enacted for designation of farming blocks or tenant farms for agricultural development. The Act provides for the establishment of the agricultural Lands Boards and prescribes the composition and membership, its powers and functions⁸¹. In practice, this Act ceased to function but in the old day's government would first put infrastructure and control development but this no longer happens and the agricultural lands board is inactive.⁸²

⁷⁷ Dale P and John M, Land Administration, op.cit.p36

⁷⁸ Section 7(1) of the Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia

⁷⁹ Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia

⁸⁰ Chapter 187 of the Laws of Zambia

⁸¹ Agricultural Lands Act, Chapter 187 of the Laws of Zambia

⁸² Personal Interview with Mr Kachamba, Commissioner of Lands, Ministry of Lands, 25th January, 2010

The Common Leasehold Act⁸³ allows the registration of horizontal, rights (strata titles) for high-rise buildings and semi-detached buildings. This Act thus allows for the division of land and buildings into units with separate titles by means of common leasehold schemes⁸⁴.

This Environmental Protection and Pollution Control Act⁸⁵ establishes the environmental Council and prescribes function and powers of council and provides for matters connected with or incidental in the foregoing. The Act provides for the establishment and review of land use guidelines, monitoring and inspection of Land uses and natural resources⁸⁶. Generally speaking, environmental impact assessment is done where there is proposed large scale development⁸⁷.

Under the Zambia Development Agency Act, investments 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 from the state.’⁸⁸. The law as it relates to land holding 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 Zambian⁸⁹. In practice the intended objective has not been met, instead foreigners use this to benefit their own interests.

The Forest Act⁹⁰ provides for the establishment and management of National Forests and Local Forests. It also provides for the conservation and protection of forests and trees, for the licensing and sale of forest produce and for matters connected with or incidental to the foregoing. The Act provides for state reservation and acquisition of land for conservation and

⁸³ Chapter 208 of the Laws of Zambia

⁸⁴ Common leasehold Act, Chapter 208 of the Laws of Zambia

⁸⁵ Chapter 2304 of the Laws of Zambia

⁸⁶ Environmental Protection and Pollution Control Act, Chapter 204 of the Laws of Zambia

⁸⁷ Personal Interview with Mr Kachamba, Commissioner of Lands, Ministry of Lands, 25th January, 2010

⁸⁸ Section 2 of the Zambia Development Agency Act No.11 of 2006

⁸⁹ Section 3(3) of the lands Act, Chapter 184 of the Laws of Zambia

⁹⁰ Chapter 199 of the Laws of Zambia

protection forests and trees and their exploitation. Land which is under conservation under this act cannot be allocated unless it is de-gazetted.

The Housing (Statutory and Improvement Areas) Act⁹¹ provides for the control and improvement of housing in unplanned settlements areas and for matters connected with or incidental thereto. It deals with land in the jurisdiction of a local authority. The Town and Country Planning Act, Lands and Deeds Registry Act and the Land Survey Act does apply in these areas. It is through this act that government recognises and legalises the unplanned settlements.

The Land (Perpetual Succession) Act⁹² gives corporate status and provides for perpetual succession to land to a community or association of persons establishment for religious, educational, literary scientific, socio or charitable purpose or any other which in the opinion of the minister is for the benefit or welfare of the inhabitants of Zambia or any part thereof. In practice, it is given to religious bodies, political parties, on-profit making organisations which involve a section of the community etc.

The Lands Acquisition Act⁹³ provides for the compulsory acquisition of land and other property and for matters incidental to or connected with the foregoing. The Act empowers the president to compulsorily acquire land whenever he is of the opinion that it desirable or expedient in the interest of the public and it provides for compensation where such land is acquired using market values to determine compensation.

The Zambia Wildlife Authority Act⁹⁴ provides for the establishment, control and management of National Parks and for the conservation and protection of wildlife and objects

⁹¹ Chapter 194 of the Laws of Zambia

⁹² Chapter 186 of the Laws of Zambia

⁹³ Chapter 189 of the Laws of Zambia

⁹⁴ Chapter 201 of the Laws of Zambia

of aesthetic, prehistoric, historical and scientific interests in national parks; to provide for establishment of game management areas, and provide for matters connected with and incidental to the foregoing.

The Mines and Minerals Development Act⁹⁵ makes provision with respect to prospecting for and mining minerals and to provide for matters connected with or incidental to the foregoing. The definition of land includes minerals, when it comes to acquisition of mineral rights, the definition excludes this and this becomes a source of conflict in the administration of land. In practice, there is a conflict between surface rights and underground rights and there is need to harmonise the two. In case of conflicts underground rights should be left to take precedence in order to allow economic development.⁹⁶

The Property Transfer Tax Act⁹⁷ provides for the charging and collection of a tax based on the value realised from the transfer of certain property in the Republic and to provide for matters connected with or incidental to the foregoing

The Town and Country Planning Act⁹⁸ makes provision for the appointment of planning authorities, for the establishment of the Town and Country Planning Tribunal, for the preparation, approval and revocation of developmental plans, for the control of developmental and subdivision of land, for the assessment and payment of compensation in respect of planning decisions, for the preparation, approval and revocation or modification of regional plans and for matters connected with and incidental to the foregoing.

⁹⁵ Chapter 213 of the Laws of Zambia

⁹⁶ Personal interview with Mr Kachamba, Commissioner of Lands, Ministry of Lands, 25th January, 2010.

⁹⁷ Chapter 340 of the Laws of Zambia

⁹⁸ Chapter 294 of the Laws of Zambia

CHAPTER THREE

3.0.0 INSTITUTIONAL FRAMEWORK FOR LAND ADMINISTRATION IN ZAMBIA

The process of Land Alienation under state and customary land is dealt with by various institutions. These include the Ministry of Lands, Local Authorities and the Department of Physical planning under the Local government and Housing, Department of Resettlement in the Office of the Vice President, Land –use planning Department under the Ministry of Agriculture and Co-operatives and the Zambia Wildlife Authority. We will now discuss these institutions involved in land administration and the roles they play.

3.1.0 THE MINISTRY OF LANDS

The Ministry of Lands is one of the government ministries mandated to administer land in Zambia. The functions of the Ministry of Lands are⁹⁹ (1)Formulation of Land policy (2)Land Administration,(3)Land Surveys and Mapping,(4)Cadastral survey and exploration(5)Control of unauthorised settlements(6)Registration of Land

In terms of operational structure, the Ministry of Lands has three Departments namely; the Lands Department, the Survey Department and the Lands and Deeds Registry Department. Each of these departments play specific roles ranging from the provision of policy guidelines in land administration, the identification and allocation of land as well as surveying and registration of rights and interests in land¹⁰⁰.

3.1.1 THE LANDS DEPARTMENT

⁹⁹ Zambia Gazette Notice No.547 of 2004.

¹⁰⁰ Mudenda F, Land Law in Zambia, Cases and Materials, UNZA press, Lusaka, Zambia:2007

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 Departments Offices established

in the nine provinces, however there are no lands offices at District level¹⁰¹.

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. The Authority is specifically bestowed on the Commissioner of Lands by the president through delegation under the statutory Functions Act.¹⁰² By virtue of the provisions of the Statutory Function Act; the president has delegated his powers and functions of land alienation, through a statutory Instrument¹⁰³, to a public officer for the time being holding the office of Commissioner of Lands. The statutory instrument has delegated the day to day administration of land matters in Zambia to the 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 and general directions of the Minister responsible for Land¹⁰⁴. 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. These provisions entail that Commissioner of Lands performs land alienation functions on behalf of the president subject only to specific or general directions of the Minister of Lands. In this regard, Provincial lands Officers are established to perform the functions of granting and disposing of land subject to the directions, supervision and control of Commissioner of Lands. By this statutory

¹⁰¹ 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

¹⁰² Section 5 of the Statutory Functions Act, Chapter 4 of the Laws of Zambia

¹⁰³ Statutory Instrument No.7 of 1964

¹⁰⁴ Ibid

instrument, the functions of the Ministry of Lands were to be decentralised to the Provincial and District levels. However District lands Officers have not been established.

There is no statute in place defining the authority, jurisdiction and powers of the Commissioner of Lands. The establishment and functions of Commissioner of Lands are derived from statutory Instrument No.4 of 1989. In view of this lacuna in the Law, the Mung'omba Constitutional Review Commission proposed the establishment of the Lands Commission whose function would include the holding, alienating and management of any land in Zambia.¹⁰⁵ The Commission further recommended the re-establishment of the office of 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 individual¹⁰⁶. 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 Commissioner of Lands as a constitutional office with functions and powers to be prescribed under an Act of Parliament¹⁰⁷.

3.1.2 THE SURVEY DEPARTMENT

The Department is established pursuant to the provisions of the Land Survey Act¹⁰⁸. 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

¹⁰⁵ The Mung'omba Constitutional Review Commission, Government Printer, Lusaka:2004, P.780

¹⁰⁶ Government of the Republic of Zambia Interim Report on the Constitutional Review Commission 2005,p.779

¹⁰⁷ Government of the Republic of Zambia Interim Report of the Constitutional Review Commission,2005

¹⁰⁸ Chapter 188 of the Laws of Zambia

public officer. In terms of 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 purpose of registration*
- b) *Take charge of land and preserve all records appertaining to the survey parcels of land which have been approved;*
- c) *Direct and supervise the conduct of such trigonometric, 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 the Act.*¹⁰⁹

Similarly the department deals with the demarcating of reserves such as Forest Reserves and National Parks. By law, surveys are carried out by 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 in service delivery.

3.1.3 THE LANDS AND DEEDS DEPARTMENT

This Department is created under Section 3 of the Lands and Deeds Registry Act¹¹⁰. 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 the notice mentioned. The Department is headed by the Chief Registrar. The Act provides for the registration of documents shall be performed by the Registrar appointed under this Section. Pursuant to this section, the Minister

¹⁰⁹ Section 4(2) (a)-(f) of Chapter 188 of the Laws of Zambia

¹¹⁰ Chapter 185 of the Laws of Zambia

responsible for land matters has established the Registry at Ndola and Livingstone¹¹¹. The Department deals with registration of documents, the issue of provisional certificate of titles and certificates of titles; the registration of transfer and transmission of registered land and generally register documents as required under section 4 of the Lands and Deeds Registry Act. In this regard, failure to register any document required to be registered by law renders the document null and void¹¹².

Considering the fact that Land Registries are only in Lusaka, Ndola and Livingstone (which is partially operational as there is no registrar), a lot of people find it difficult to register their rights and interests in Land.

3.2.0 LOCAL AUTHORITIES

Local authorities play the role of land identification and planning in their respective districts. Local authorities are established under the local government Act¹¹³ 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 the district councils should participate in the process of land alienation at district level. This meant that all local authorities were responsible for processing of applications, selecting of suitable applicants for land and recommend them to commissioner of Lands for approval. This was viewed as a way of improving inefficiency in land alienation considering that the Ministry of Lands had no structure at District level. Following this development government did not make any amendment to the Land (Conversion of titles) Act but instead, issued General policy guidelines through the circular¹¹⁴ regarding the procedure on land alienation and the role which all local authorities were expected to perform in the alienation

¹¹¹ Section 3 of the Lands and Deeds Act

¹¹² Section 6 of the Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia

¹¹³ Chapter 281 of the Laws of Zambia

¹¹⁴ Land Circular No.1 of 1985, p.1

of land. Local authorities have continued to exercise the role of identifying land and making it available to the public subject to the Commissioner's 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 considered¹¹⁵ The requirement for the provision of services by local authorities is premised on the assumption that local authorities have sufficient resources or can collect service charges as demanded by local authorities in most cases the required services are not provided. Most of these local authorities in the country have no technical capacity to provide services in their localities.

3.2.1 PLANNING AUTHORITIES

Planning authorities are appointed under the town and Country Planning Act¹¹⁶, the functions of the planning authority are carried out in 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 where functions are stipulated under the Town and Country Planning Act. The Director is in charge of Town and Country 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

- a) Exercise such 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

¹¹⁵ Paragraph Ai of the Land Circular No.1 of 1985

¹¹⁶ Chapter 283 of the Laws of Zambia

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¹¹⁵ Paragraph Ai of the Land Circular No.1 of 1985

¹¹⁶ Chapter 283 of the Laws of Zambia

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

'The Minister may by statutory Instrument in writing 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, 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 Minister has designated the Director as the strategic planning authority to exercise such functions as the Minister may delegate and to exercise such other functions as the Minister may prescribe¹¹⁷.

The Minister may by Statutory Instrument and subject to such conditions, directions and 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. 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, Eastern Provincial Planning Authority. In addition all City and Municipal Councils in the country have been appointed as planning authorities accordingly¹¹⁸

Physical planning is performed by the Minister or the Director of Physical Planning and Housing, the role of Commissioner of Lands does not enquire into the technicalities of planning but merely to check the records in the folio and ascertain whether encroachments would result if he went ahead to number the plot. This arrangement is a serious lapse in the system of Land alienation in that the Commissioner of Lands should have the responsibility to ensure that the land being alienated is properly planned and alienated for the intended purpose.

¹¹⁷ Section 5 of the Town and Country Planning Act, Chapter 283 of the Laws of Zambia

¹¹⁸ S.I No. 192-The Town and Country Planning (Appointment of planning Authorities and Delegation of functions) Regulations, 1996

3.3.0 THE INSTITUTION OF THE CHIEF

It is well established that land in Zambia is vested in the President, however, for land under customary tenure headman or chiefs play a very significant role in land alienation. The chiefs play an important role in ensuring that the land in their localities is administered for the benefit of their subjects. The chiefs and headmen have authority to administer unwritten customary law based on their respective tribal customs and traditions. The specific powers and authority of the chiefs in land matters are not defined under the Lands Act except for instances when one intends to convert land from customary to leasehold. The institution of the chief is established pursuant to the Chiefs Act¹¹⁹, which provides the for the chiefs function 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*¹²⁰.

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 law¹²¹. It can be said from the above observations that chiefs have no statutory role to play in land alienation, however under the Lands Act, chiefs have a statutory role to play by giving consent to the conversion of customary tenure to leasehold.

¹¹⁹ Chapter 287 of the Laws of Zambia

¹²⁰ The Chiefs Act Chapter 287 of the Laws of Zambia

¹²¹ Section 10 (1) of the Chiefs Act

3.4.0 ZAMBIA WILDLIFE AUTHORITY

The alienation of land in National Parks and Game Management Areas is equally well regulated by the Zambia Wildlife Act.¹²² There is a problem with institutional coordination in the alienation 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 functions in Game management areas because the governing statutes clearly states that the management of game management areas is preserve of the Zambia Wildlife Authority. The law is silent on how to resolve problems of land alienation .An example of an area with such problems is the Mambwe District in Eastern Province, where most of the land in the District lies in the Game management area bordering Luangwa National Park which is managed by Zambia wildlife authority. There are several chiefs in the area who administer the same land and contend that the land in the area is customary land. Due to these misunderstandings, land alienation is slow and development is hindered¹²³.

3.5.0 THE DEPARTMENT OF FORESTRY

The Forestry Act¹²⁴ 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 Commissioner of Lands purports to

¹²² Act No. 12 of 1998

¹²³ Mr Sichones' report on the official visit as Commissioner of Lands to Mambwe District 8th August, 2006

¹²⁴ Chapter 199 of the Laws of Zambia

alienate any part of the forest without the consent of the conservator, such action will be void¹²⁵.

3.6.0 THE OFFICE OF THE VICE PRESIDENT

The role of the department of resettlement under the Vice Presidents' office was originally designed to be carried out by the Ministry of Lands. However this category of land does not fall under any statute, most of the resettlement schemes are established under customary land. 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.

The problems in the system of land alienation in Zambia can be attributed 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 coordination among them and their line ministries¹²⁶. Institutions operate within their statutory framework and often without much co-ordination and cooperation and often with overlapping powers, functions and jurisdictions. There is need to restructure the different institutions and departments responsible for land alienation in order to have an efficient land alienation system. There is need to clarify the roles and responsibilities amongst the institutions involved in the land alienation process and policy.

¹²⁵ Robert Chimambo, Rhidah Mung'omba and Adam Pope v. Commissioner of Lands, Safari Zambia Limited, Environmental Council of Zambia and Fingus Limited 2005/HP/0564

¹²⁶ Roth, M(ed) Land Tenure, Land Markets and Institutional transformation in Zambia, Madison, opt, cit, p.24

CHAPTER FOUR

4.0.0 SHORTCOMINGS OF THE LEGAL AND INSTITUTIONAL FRAMEWORK FOR LAND ADMINISTRATION AND THE NEED FOR LAND REFORMS IN ZAMBIA

There is no doubt that we have made progress both globally and in the sub Sahara in regard to moving the land agenda forward. However we still have a number of shortcomings in the legal and institutional framework which needs to be addressed. While Europeans did dominantly influence and imposed their own conception of land law in Zambia, the local usage did have substantial impact on some aspects of the final tenure system. We will now look at the legal and institutional framework shortcomings and also the need for land reform.

4.1.0 SHORTCOMINGS ON THE LEGAL FRAMEWORK

4.1.1 THE LANDS ACT NO.29 OF 1995

The lands Act has a number of shortcomings which we will be discussed in this paper:

The Act does not establish the Office of Commissioner of Lands and his functions though this was done through statutory Instrument No.4 of 1989 but no functions of Commissioner of lands were outlined apart from the broad function of Land alienation. The lack of clear guidelines in the office of Commissioner of Lands has lead to a lot of uncertainties leading to abuse of authority of office and corruption allegations. The Act recognises customary land¹²⁷, however it does not give effect to registration of its ownership rights. Instead section 8(1) provides for the conversion of customary tenure to leasehold tenure and there is no provision for the converse. This is a clear indication that one tenure system (i.e. state land) is

¹²⁷ Section 7 of the Lands Act, Chapter 184 of the Laws of Zambia

held in higher esteem than the other. With this provision it means that one day we will have all land under state land and where will this leave an ordinary villager.

Even though the Act under section 3(4) (c) of the lands Act says that there is need to consult any person or body whose interest might be affected by the grant or conversion This is not the case for most land under customary holdings due to the fact that the chief has no clear guidelines on land alienation and partly because the interest of the people under customary holdings is not secured therefore making the people more vulnerable to abuse.

The Lands Act equates the high court to the Lands tribunal, and therefore its appeals are supposed to be referred to the Supreme Court. This was an anomaly which needs to be harmonised for the tribunal be able to function effectively as a fast truck court which was the initial intention of government. In order to rectify this there is also need to amend the lands and Deeds Registry Act by providing that the court referred to in this Act includes the Lands Tribunal.

The Lands Act under section 16 provides for the establishment of a Lands development fund; however the Act does not provide for mechanisms of how the Ministry should ensure that the money given out is put to the correct use by the local authorities. According to the Auditor General's report¹²⁸, it was found that the money disbursed as land development to local councils were either lying idle in the accounts and attracting bank charges or in some cases were used for different purposes like payment of allowances for workshops. Therefore there is need to put mechanisms in place to make sure that funds are put to the correct use and penalties for failure to do so within a specified period of time.

¹²⁸ Report of the Auditor-General on the Accounts for the Financial year ended 31st December, 2008. page 209-210

4.1.2 LANDS AND DEEDS REGISTRY ACT

The Act does not provide for registration of rights under Customary Tenure. This promotes insecurity of tenure for people holding land in these areas,

Bearing in mind that fraud cases have increased in the last 2 to 5 years, there is need to look at section 21 which provides that registration does not cure defect and section 59 which provides that no liability on bonafide purchaser for value and see how we reconcile the two in order to address the this problem at hand¹²⁹.

4.1.3 SURVEY ACT

The Survey Act does not provide for current survey practices, this is because the Survey Act is a technical legal legislation which needs to conform to certain standards such as the use of the global positioning system(GPS) and the global navigation satellite system(GNSS).It lacks specifications for these instruments and therefore in case of any error or sub-standard cadastral surveys, it can be difficult to enforce .

There is need to also have a self regulatory professional body independent of government in order to ensure that disciplinary actions been taken are free and fair.

4.1.4 OTHER STATUTES

Common Leasehold Act-there is need to correct the anomaly where architects and Quantity surveyors are allowed to do surveys for sectional titles.

Zambia Wildlife Authority Act-There is need to clearly outline the procedure for obtaining of title in a game management area.

¹²⁹ Personal Interview with Majumo Khunga, Assistance Chief Registrar, Ndola Office, Ministry of Lands, 18th February, 2010

Mines and Minerals Development Act - The major weakness of this Act is that no compensation is paid to land which has not yet been alienated by the president¹³⁰. Another weakness is that without the written consent of the legal owner of the land the holder of a mining right cannot do anything on the piece of land¹³¹.

Town and Country Planning Act-The main shortcoming of this Act is that planning under this Act does not extend beyond state land, in other words it does not include customary areas except under section 3(2)¹³² of the Town and Country Planning Act, where the president extends the case which is somewhat a difficult situation. The minister has power under this Act to declare an area a statutory improvement area and once he does this the area ceases to be administered by the Ministry of Lands.

4.2.0 SHORTCOMINGS ON THE INSTITUTIONAL FRAMEWORK

According to the United Nations (1996)¹³³, land policies consist of a whole complex of socio-economic and legal prescriptions that dictates how land and benefits of land are to be allocated. However in Zambia, the land policy is still in draft form from about 1993 when they started working on it.

4.2.1 MINISTRY OF LANDS

The function of the Ministry such as the formulation of the land policy is actually a very big challenge. You need the political will to have the policy finally adopted by cabinet, without which it will still remain in draft form.

¹³⁰ Section 61(a) (ii) of the Mines and Mineral Development Act

¹³¹ Section 56(1)(b) of the Mines and Mineral Act

¹³² Chapter 183 of the Laws of Zambia

¹³³ United Nations, Land Administration guidelines-with special reference to countries in transition, 1996

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¹³² Chapter 183 of the Laws of Zambia

¹³³ United Nations, Land Administration guidelines-with special reference to countries in transition, 1996

Surveying is perceived by the public as an expensive exercise especially considering the fact that almost seventy percent of the Zambian population consist of poor people and therefore this service is not accessible to most of these people.

Registration of rights and interests under customary areas remains a challenge as there are no legal provisions and no policy guidelines though nothing can stop you from registering them under the miscellations register.

The core function of the ministry is Land alienation and identification which has no specific policy guidelines on how this should be done.

4.2.2 LOCAL AUTHORITIES

The Local Authorities lack policy guidelines on how land identification and allocation should be done. These authorities are also supposed to provide for services such as roads and water¹³⁴ however this has been hindered by the local governments' lack of investment in infrastructure. Advertising of Stands before allocation is not mandatory and also the conditions for selecting the suitable candidates are not stipulated in the lands Act or the Land Circular No. 1 of 1985.

4.2.3 PLANNING AUTHORITIES

Lands Act has lease conditions that give you 18 months in which to develop the property failure to which it is reposed. This is quite frustrating as building plans take as long as 3 years for them to get approved and meanwhile its illegal to build without your plan being approved. In this vein there is need to look at how the planning authorities can be well coordinated with the lands department.

¹³⁴ Paragraph 4 (b) i of the Land Circular No.1 of 1985

Under the Town and country planning Act, the Commissioner of Lands is not required to enquire into the technicalities of planning which is a serious lapse in the system of land alienation because in alienating land the Commissioner of lands has a responsibility to ensure that the land being alienated is properly planned and used for the intended purpose. In practice planning and alienation of land cannot be divorced from each other.

4.2.4 INSTITUTION OF THE CHIEF

The Chief allocates land to its subjects and investors in line with their customs and traditions as long as it is not against our constitution. The functions are quite broad and there are no specific guidelines on how this should be done. In most cases the chief according to most patrilineal or matrilineal customs in Zambia would give land to more men or more women which are against the thirty percent affirmative action on the gender policy. Another weakness is that the chief makes a unilateral decision whether to issue land or not to a particular person which may be subject to abuse and corrupt tendencies. The chief never advertises land to inform members of the public and would be investors. The issuing of land under these customs is not documented and the procedures are not consistent. The coordination between the chief, the local authority and commissioner of Lands is very poor and subject to abuse.

4.2.5 ZAMBIA WILDLIFE AUTHORITY

Game management areas are situated in customary areas and therefore, conflicts between villagers, chiefs and Zambia Wildlife Authority often arise. There is need to give policy guidelines on land with such conflicts should be resolved and which institution prevails in case of any conflict.

4.2.6 THE 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 institution itself. The category of land for resettlement is not a creature of the statute and these are established in customary areas and thereby creating a conflict of interest. There is a serious 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. This creates confusion and therefore there is need to absolutely do away with this or rather transfer it as a department under the Ministry of Lands and give policy guidelines on how land under this area should be alienated.

4.3.0. TENURE REFORMS IN SOUTHERN AFRICA

4.3.1. SOUTH AFRICA:

The Land Rights Bill (DLA, 1998) aims to provide for far-reaching tenure reform in the rural areas of the ex-homelands by repealing the many and complex apartheid laws relating to land administration, by recognizing customary tenure systems and by bringing tenure law into line with the Constitution. Rights would be vested in the people, not in institutions such as traditional authorities or municipalities. The proposed law would recognize the value of both individual and communal systems and would allow for the voluntary registration of individual rights within communal systems. The envisaged law would be neutral on the issue of traditional authorities, supporting them where they were popular and functional and allowing people to replace them elsewhere. The law would address the apartheid legacy of

over-crowding, overlapping rights and increasing land-related conflict by providing for additional land as well as dispute resolution in the event of overlapping rights¹³⁵.

4.3.3 BOTSWANA

The tribal land act of 1968 transferred the authority over land from the chiefs to land boards, with the aim of reducing discrimination between tribes. Tribal land belongs to the people; individuals are granted rights to use some parts of the land. It may be held by land boards, or individuals or groups as customary grants or under leasehold. The land may also be allocated to the state for public purposes. The functions of the boards include the allocation of land, imposing restrictions on the use of the land, authorizing change of use and transfer and the resolution of land disputes. Freehold titles, originally granted by the protectorate government to European farmers, were excluded from the jurisdiction of the land boards. The land policy that has been pursued by Botswana may be described as one of careful change, responding to particular needs with specific tenure innovations¹³⁶.

4.4.0. THE NEED FOR LAND REFORMS IN ZAMBIA

Having seen the shortcomings in the legal and institutional framework and also having seen what is prevailing in some countries in South Africa and Botswana, it can be said that there is need for land reforms in Zambia. In line with this government has shown positive trends towards this though there is need to look at this comprehensively. Government in its Fifth National Development Plan¹³⁷ had promised to streamline the land delivery system to facilitate economic activities as one of the goals of government. In the development plan government vision is to have a secure, fair, equitable access and control of land for sustainable socio-economic development of the people by the year 2030.

¹³⁵ Economic Commission for Africa (2003) Land Tenure Systems and Sustainable Development in Southern Africa, Southern Africa Office, Lusaka, Zambia

¹³⁶ Ibid

¹³⁷ 2006-2010, Lusaka: government printers, December, 2006, page 57

However the reforms should take a participatory approach. The 2006 Draft land policy was rejected by the civil society on the basis that members of the public did not participate in coming up with the draft document instead technocrats did draft it for the Zambian people. The rationale behind this is the fact that since these are issues that will affect members of the public they should be involved or their representatives.

Many governments talk of agrarian reform, decentralization, land tenure reform and investments in building systems of land administration. Yet, as noted by Martin Williams¹³⁸, ... *'in an attempt to do everything, governments often do little or nothing.'* Reforms do need the political will for them to be implemented effectively, this is supported by the case of Namibia where the Agricultural (Commercial) Land reform Act was hurried through shortly before the general elections in 1995¹³⁹, similarly the Lands Act No.29 of 1995 was hurried through with so many mistakes as has been seen from the number of shortcomings that we have identified. It can be safely said that land reform cannot be done without the political will. In most cases this has led to serious lack of implementation for example in Namibia, the Communal Land Bill touches on the number of issues that are sensitive among the large and powerful constituency including traditional leaders and the Ovambo people which gives the ruling SWAPO support and hence they have failed to implement it¹⁴⁰. Similarly in Zambia the Land policy has been in Draft since 1993 and we need the political will to have this implemented in order to provide guidelines on how land should be allocated in line with the United Nations guidelines on Land alienation.

A close look at the land administration of Botswana and South Africa, has shown that they have all opted to Land Boards at local level as opposed to the institution of the chief which we have in Zambia. This is because it is less subject to abuse and corrupt tendencies, less

¹³⁸ Economic Commission for Africa, Land Tenure Systems and Sustainable Development in Southern Africa, Lusaka, Zambia, 2003

¹³⁹ Ibid

¹⁴⁰ Ibid

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¹³⁸ Economic Commission for Africa, Land Tenure Systems and Sustainable Development in Southern Africa, Lusaka, Zambia, 2003

¹³⁹ Ibid

¹⁴⁰ Ibid

discriminatory and provides a more fair and equitable access to land. There is need for us to consider the same as the current system is more prone to abuse and corrupt tendencies, subject to gender and tribal discrimination.

There is also need to recognize customary land rights and have them registered. However for this to be done we will need the political will. It is critical to recognize these rights in order to secure rights under customary tenure.

The whole land administration in Zambia needs a serious examination. There has been a number of cases of corruption in land allocation, delays in the production of title deeds, double allocation of plots, unavailability of plots in all towns and many other problems. These issues have to be brought out in the land policy, the legal and institutional framework. There are practical problems that impede governments' (including Zambia) ability to implement land reform and land tenure reform beyond inadequate legal frameworks, in particular lack of implementation and overly centralized bureaucracies¹⁴¹. In a nutshell our institutions are over centralized and have failed us and therefore there is need to look at a more coordinated and decentralized institutional framework in land administration in order to address the needs of every Zambian.

¹⁴¹ Southern African Regional Poverty Network ,Integrating Land Issues and Land Policy with Poverty Reduction and Rural Development in Southern Africa,SARPN publication,2008

CHAPTER FIVE

5.0.0. CONCLUSION AND RECOMMENDATIONS

5.1.0 CONCLUSION

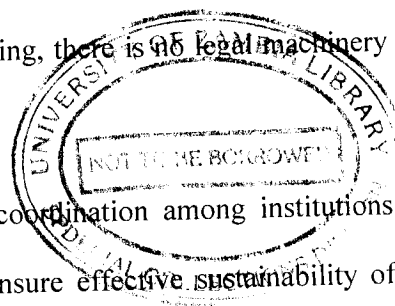
The Zambian Land Administration is severely constrained due to a number of challenges in the legal and Institutional frameworks. There is need to have an efficient and effective legal and institutional framework within which land alienation system would promote people's access to land.

This study has revealed under Chapter One that the Introduction of the dual land tenure system in the territory by the colonial administration. The colonial administration had categorised land into crown land and Reserves so that the white settlers (now known as State Land) could live separately from the natives. Land under Reserves, now customary land has not received adequate attention in terms of infrastructure development since independence. The changes in the land policy and administration in Zambia had been precipitated by a number of factors ranging from political, economic, social and also change of governments to mention but a few.

The major problem that has led to these changes has been making land available to the Zambian citizens. In addressing this problem we have made partial changes without really considering the impact on the other parts of the legal and institutional framework. It has been noted that in most cases these changes have been done in a hurry and hence the need to comprehensively look at the legal framework and see how it can be harmonised in order to administer land efficiently and effectively.

It has been observed under Chapter Two that in ensuring that land alienation is improved, there is need to address the problems associated with the legal framework. It has been

observed that there are just too many pieces of legislation dealing with different aspects of land which potentially have become difficult to manage. It has also been observed that although customary tenure is a recognised form of land holding, there is no legal machinery in place to administer it.



Chapter three indentified the need for corroboration and coordination among institutions dealing with land administration in statutory reserves to ensure effective sustainability of natural resources. One of the many challenges facing the institutional framework is that there are too 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 coordination among them.

Chapter Four discussed a number of challenges in the legal and institutional framework. One of them is lack of coordination amongst the various institutions involved in the land alienation process. It has also been noted that serious challenges in the system of land alienation exist and that we have too many statutes dealing with alienation of land .We also looked at some counties in South Africa and Botswana and compared it with our Zambian situation. Finally, it touched on why we need the land reforms.

Central governments are responsible for systematic change by championing reforms in policy, institutional, legislative and financial frameworks. Without the political will, commitment and support of central government, systematic change in land administration will not be effected. Local authorities coordinate and direct the growth and development of urban areas. Local needs and specificities are best identified by creating an enabling an consultative environment. Civil society embodies the needs of citizens for the quality of life they aspire. Access to land can only be achieved through concerted efforts by all

stakeholders, which will lead to an effective and efficient land administration system in Zambia.

5.2.0. RECOMMENDATIONS

The following are the recommendations that have been indentified in this study;

- 1) The 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
- 2) State land be increased by curving out some of the land under customary tenure in order to meet the current demands on state land.
- 3) Government to alleviate the problem of institutional framework 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 the institutions to deal with the functions of physical planning, survey valuation, land allocation, resettlement and title registration. This will streamline and simplify the system of allocation of land..
- 4) A comprehensive review, harmonisation and updating of various land related laws in order to provide a clear regulatory framework for policy implementation.
- 5) National land policy should be formulated to provide guidance on how land should be alienated.
- 6) Government should preserve, protect and strengthen the customary land rights by recognising the interests of customary land owners.

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