

**AN EVALUATION OF THE PROCEDURE ON ALIENATION OF CUSTOMARY
LAND IN ZAMBIA**



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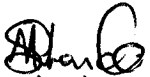
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Being a Directed Research essay submitted to the University of Zambia Law Faculty in partial fulfillment of the requirements for the Award of the Bachelor of Laws (LLB) Degree.

DECLARATION

I, MUTETE S KHONDE do hereby declare that this Directed Research Essay is my authentic work and to the best of my knowledge, information and belief, no similar piece of work has previously been produced at the University of Zambia or any other Institution for the award of Bachelor of Laws Degree. All other works in this essay have been duly acknowledged. No part of this work may be reproduced or copied in any manner without the prior authorisation in writing to the author.


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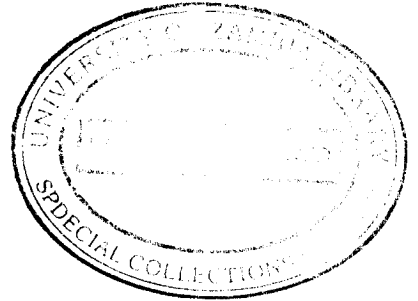
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ABSTRACT

Zambia enjoys a dual form of land tenure namely, customary and statutory tenure. This position is a product of the factors emanating from pre-colonial times through the colonial period ending with the post-independence era. The objective of the study was to evaluate the procedure on customary land alienation in Zambia. The study examined the nature of interests subsisting under customary land tenure. The study also investigated the weaknesses inherent in these interests. Moreover the research went on to analyse the legal and institutional framework regarding customary land tenure and alienation procedures. In order to achieve this it became imperative to similarly examine the relevant case law.

The methodology used involved analyzing published and unpublished sources based on desk research through collecting, analyzing and processing data on the procedure of customary alienation in Zambia. The materials used included text books, statutes, journals, theses and reports. The study also conducted interviews of officials in the Ministry of Lands and the House of Chiefs. From this the research findings revealed that contrary to popular belief that individual interests in land are non-existent under customary tenure this was not so. They existed side by side with communal interests in land. However, alienation procedures were largely uncodified and varied from one tribal custom to another. This problem was compounded by the fact that the existing legal regime was silent the alienation procedure within the context of customary land tenure save for the mere guideline on the conversion of customary land tenure into statutory land tenure.

The study revealed the fact that while alienation procedures within statutory land tenure were clearly established within the existing legal regime, it was not so within customary land tenure. What was further interesting to note was that conversion of customary land tenure into statutory land tenure was well provided for in Zambia's legal system, but not the alienation procedure within customary land tenure itself. The study also found that the institutions engaged in alienating customary land were as diverse as the practice itself was uncodified.

The study concluded by emphasizing the need to put in place a well codified piece of legislation spelling out clear land alienation procedures within customary tenure, in order to foster economic development in the vast tracts of customary land available in Zambia. The study recommended that the institutions dealing in land matters should be restructured so that only institution alienates land in Zambia and the role of chiefs in land alienation should be clearly defined by amending the Chiefs Act. Furthermore, a statutory procedure should be enacted that takes into account common customary rules on land alienation. A predictable customary land alienation procedure would mark an advancement in the existing legal regime, as well as extinguish doubts in the stability of interests of land held under customary tenure and passed on from one individual to the other.

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I would like to convey my deep gratitude to various persons and institution who contributed generously to the production of this work. I particularly remain indebted to the following individuals.:

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To all those who contributed in many ways that I cannot recount either positively or negatively as such made my work perfected.

I finally wish to thank God for his grace and guidance.

DEDICATION

This is dedicated to my parents Hilda and Fred Khonde who gave all the support I needed to accomplish this study. My elder sister Mwila for her timely encouragement.

TABLE OF STATUTES

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

Northern Rhodesia (constitution) Order,1963

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The Chiefs Act Chapter 287 of the laws of Zambia

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The Lands Act Chapter 184 of the Laws of Zambia

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CHAPTER ONE

1.0. INTRODUCTORY CHAPTER

1.1. Introduction

The English land tenure system in Zambia was introduced by the British Colonialists in the late 1890s. Before the introduction of English law, land in the territory was administered according to African customary law. The customs and traditions upon which land was administered varied from chiefdom to chiefdom due to the multiplicity of tribes in the Territory. When the colonialists entered the Territory, they introduced English law to regulate the system of land administration. They either misunderstood the existing African tribal tenure system or disregarded it altogether and, therefore, transplanted the tenure system based on English law or statutory tenure since that was what they understood and believed could fully protect their interests. The current dual land tenure system in Zambia is therefore a result of the colonial history which brought with it Western tenure concepts.¹

During the colonial era, there was no clear land policy or law to promote land alienation to Africans. Crown Lands were established for the occupation of the White settlers. Crown land was for non-native settlement and for mining development. It included land certified as a result of geological survey to be suitable for European development, and all land known to contain potential mineral resources.”²

¹ Frighton Sichone . “ Land Administration in Zambia with particular reference to Customary Land.” ,paper presented at a Seminar organised by the Zambia Land Alliance, at the University of Zambia senate Chambers June 28,2008 (Lusaka: 2010), 1

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

In most of British Africa, colonial authorities drew a political and tenurial distinction between areas of white settlement and 'tribal' areas. On the one hand rural African subjects were governed by chiefs and custom and lived on spatially distinct communal lands. On the other hand, citizens (whites and other urban dwellers) were governed by modern civil law and owned or rented private property.³ The colonial authorities demarcated as crown lands those areas most appropriate for European settlement and all land known to contain mineral resources. Land was held as freehold or leasehold and its use and conveyance was governed by common law. Settlers and resident Africans living in these areas were directly administered by the colonial governor and a legislative council under British law.⁴

The colonial authorities divided the remainder of Northern Rhodesia into two other tenure categories: native reserves and trusts. Native reserves were carved out on the edges of white farming areas to provide a home for the sixty thousand indigenous people who had been displaced by the demarcation of crown lands and to provide a ready supply of labour⁵. In 1947, the colonial government established a new category of customary land: native trusts. Trusts were created from unutilised crown land and the large swathes of land that had been uncategorised by the demarcation of crown lands and reserves. These trusts, encompassing fifty-seven per cent of the colony, were set aside for 'the use or common benefit direct or indirect of the "natives"'. Restrictions were placed on alienating reserve and trust lands to Europeans or other non-indigenous people. In reserves, five-year renewable 'rights of occupancy' could be granted to 'non-natives' at the behest of the chief and the central government. In trusts, the governor could grant Europeans and other non-indigenous people 'rights of occupancy' for a period of ninety-

³ Mohammed Mandani, "Citizen and subject: Contemporary Africa and the legacy of late colonialism", (Princeton: Princeton University Press, 1996) 30

⁴ ibid

⁵ Taylor Brown, "Contestation, Confusion and Corruption: Market-based land reform in Zambia".(ACCRA,2005) 86

nine years. These lands, however, could not be converted to crown land and remained under customary tenure.⁶

A critical element of the British system of indirect rule was the recognition and codification of 'customary' communal land tenure within tribal areas. In drafting land policy, most administrators assumed that African land tenure systems were characterised by communal, not individual, rights to land. Colonial administrators tended to assume that vacant land was the communal property of tribes and that chiefs held administrative authority over these lands.⁷ The colonial regime therefore granted chiefs a great deal of control over the use and allocation of land and natural resources in their domains, and treated customary land tenure and judicial processes as a fixed in precedent and practice.

1.2. Land tenure from 1964 to 1991

The 1962 constitution⁸ 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 1963⁹, the 1962 constitution was replaced by the 1963 constitution which contained similar provisions as regards

⁶ Ibid.

⁷ Ibid.

⁸ Northern Rhodesia (Constitutional) Order, 1962

⁹ Northern Rhodesia (constitution) Order, 1963

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.

In the two and a half decades that followed independence in 1964, Zambian land tenure policy was characterised by economic socialism and nationalism. In 1964 following independence, all crown lands were renamed state lands and vested in the President rather than the British sovereign. 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, 1964.¹⁰ 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 1959¹¹. The Kaunda regime maintained the distinction between state lands and trust and reserve lands. In customary areas, the government maintained many aspects of indirect rule and explicitly recognised the role of Chiefs in allocating trust and reserve lands. The government, however, took a very direct role in the administration of state lands. In 1969, the Zambian constitution was amended to allow the acquisition of undeveloped and unutilised lands by the state, particularly those lands held by absentee landowners. This led to the enactment of the now repealed Land (Conversion of Titles) Act¹² which formed the basis of Land Administration in Zambia. The Act was prompted by the exorbitant prices in sale of vacant state land¹³. With change in Government in 1964, 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

¹⁰ Zambia (State lands and Reserves) Order of 1964

¹¹ Zambia (Trust Land) Order, 1964

¹² Act of 1975

¹³ Mphanza, Patrick, Mvunga, The Colonial Foundation of Zambia's Land Tenure System. (Neczam: Lusaka, 1980) 43.

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 Lands.¹⁴ In terms of procedure on land alienation, the repealed (Land Conversion of titles) Act was silent. In 1975, the state abolished freehold tenure and converted it to statutory leasehold (The Land (Conversion of Titles) Act 1975). Through this legislation, the state suppressed the market for land and instead sought to administer directly all leasehold land transfers. Land was deemed to have no intrinsic value and only improvements on land (such as buildings or agricultural infrastructure) could be bought and sold. 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 country.¹⁵

1.3. The 1995 Lands Act

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 dispensation¹⁶.

¹⁴ Gazette Notice No. 1345 of 1975

¹⁵ Land (Conversion of Titles)(Amendment) Act No. 2 of 1985

¹⁶ Lemmy Mushota L, "The MMD and its manifesto provisions on land law and policy reforms in the third republic of Zambia", (Lusaka: 12-13).

The MMD sought to break with Kaunda's socialist policies and to instigate wide-ranging market reforms. A market-based land policy was deemed to be an essential component of these reforms, as the MMD's election manifesto highlights:

The MMD shall institutionalise a modern, coherent, simplified and relevant land law code intended to ensure the fundamental right to private ownership of land To this end, the MMD government will ... bring a more efficient and equitable system of tenure conversion and land allocation in customary lands; land adjudication legislation will be enacted and coordinated in such a way that confidence shall be restored in land investors.....The MMD shall attach economic value to undeveloped land [and] promote regular issuance of title deeds to productive land owners in both rural and urban areas.¹⁷

In order to address the changes to the land administration system, government in mid 1993 decided to revisit the law governing land alienation and convened a National Conference on Land Policy and Legal Reform. Subsequently the Lands Act was enacted to provide legal machinery through which the land alienation system would be governed.

What are the key provisions of the 1995 Land Act? First, the Act has significantly strengthened the property rights of titleholders on state land. By repealing the 1975 Land (Conversion of Titles) Act, the 1995 Act has made it possible for land per se – not just improvements on land – to be bought and sold. Land remained vested in the President, but the 1995 Act has made it much more difficult for the state to repossess undeveloped land now. Moreover, the bureaucratic

¹⁷ Taylor Brown, "Contestation, Confusion and Corruption: Market-based land reform in Zambia".(ACCRA,2005) 86

hurdles to acquiring and transferring titles (such as presidential consent for all land transactions) have been reduced to mere formalities.¹⁸

A second aspect of the Land Act is that it has eased restrictions on land-ownership by foreigners. The Act has made it possible for investors, foreigners who are Zambian residents or foreigners who have received personal presidential consent to acquire title to land.

Thirdly, the Act has made both minimal and substantive changes to the administration of customary land tenure. The categories of reserve and trust lands have been amalgamated into a new category known as customary areas.¹⁹ The Act explicitly recognises existing rights to land in customary areas. The Act, however, has made it easier for both outside investors and indigenous Zambians living on customary lands to acquire private title to customary land. Under the provisions of the Act, investors (whether foreign or domestic) can convert land in customary areas to leasehold. The Land Act has also made it easier for indigenous Zambian to acquire title to their land. The 1995 Act outlines the procedures through which any person who holds land under customary tenure could convert their landholdings to leasehold tenure²⁰.

1.4. Statement of Problem

The provisions regarding the procedure on land alienation from customary tenure to statutory leasehold tenure are clear.²¹ However the provisions regarding the procedure on land alienation within customary land are not clear hence the absence of prescribed regulations gives too much discretionary powers to Chiefs and headmen.

¹⁸ Supra note 5

¹⁹ Section 1 and 35 of the Lands Act of 1995

²⁰ Ibid

²¹ The Lands(Customary Tenure)(Conversions Regulations-Statutory Instrument No. 89 of 1996.

This necessitates the entrenchment of the customary land alienation procedure in a substantive Act of Parliament spelling out the jurisdiction of the Chiefs, stakeholders or subjects, local authorities and indeed the Ministry of Lands, Environment and Natural Resources in the conversion of customary tenure into statutory leasehold tenure. Perhaps the confusion is no better illustrated than in the landmark case of Mpongwe Development Company Ltd and Francis Kamanda and 51 Others²² where parties could not point to a clear legislative provision on alienation of land within customary land in the subject matter that was before the Court.

But it is not apparently clear as regards transmission of ownership from one individual to another within the customary tenure in Zambia. But it is worth of note that in jurisdiction such as Botswana alienation of customary land is well defined under a well codified system²³ In Zambia the existing pieces of legislation relating to land are silent on alienation procedure on land held under customary tenure. It would appear therefore that alienation of customary land is subject to local customs and procedures for instance it be submitted that the Lozi's may have there own and the Ngoni's on the other hand also have there own.²⁴ Moreover under customary law there appears to be no institution to which such interests are registrable.²⁵ The implication of this is that records are kept orally thus a land owner under customary tenure may suffer the insecurity of not knowing whether he can pass on his land to another without the knowledge of the chief or the traditional ruler who is often the custodian of land held by the local community.²⁶ It is therefore important that the law and structures governing customary land are clear or are

²² Supreme Court Judgement No. 14 of 2010 (reported)

²³ Rachael Knight. "Statutory Recognition of Customary Land Rights in Africa: An Investigation into Best Practices for Lawmaking and Implementation." FAO Legislative Study No. 105 (2010): 50-70

²⁴ Akuffo Kwame, "The concept of Land Ownership in African Customary law and Its Implications for Development." African Journal of International and Comparative Law. Volume 17, 61-69.

²⁵ Frighton Sichone. "THE SYSTEM OF LAND ALIENATION IN ZAMBIA; Acritical analysis of the Legal and Institutional Framework." (Master thesis, University of Zambia , Zambia, 2009), 196

²⁶ Ibid

sufficiently clear as regards alienation procedures to make them more certain and predictable for persons wishing to transmit land within the ambit of customary land tenure.

A study of this nature is therefore critical in highlighting the weakness or loopholes in the existing legal and administrative framework so as to encourage the enactment of a law on the procedure on alienation within customary land, by codifying the various local customs into a one national code. It is felt that in this way it will encourage ownership of customary land. In this way it is bound to contribute significantly to the economic development of the country as well as improving the existing legal regime on land alienation procedures.

1.5. Study Objectives

1. To identify weakness in the current procedure on alienation of land in customary land and suggest ways of how it can be strengthened.
2. To analyse the legal and institutional framework for land alienation in Zambia
3. To examine the effect of judicial decisions on the procedure on alienation regarding customary land
4. To make recommendations appropriately based on the findings of the research.

1.6. Research Questions

1. To what extent has the legal provisions affected the implementation of an equitable procedure on alienation of land under customary tenure?

2. Are steps being taken by government to come up with a good framework on the procedure on customary land alienation?

1.7. Justification

There is an urgent need of codifying the procedure of land alienation in customary land. Normally problems occur when one system does not recognize the other as valid. However, it is trite that Zambia practices a dual form of land tenure vis-à-vis statutory leasehold tenure and customary land tenure, recognized under our jurisprudence. In this way, not only will rights of land held under statutory leasehold tenure be recognized in the national legal system but also local, customary land rights.

The study will further show that there are benefits in amending to the current law by adopting laws that strengthen the land claims of the poor; find efficient, cost-effective models for rural land management; and foster national growth and economic development.

It is notable that other jurisdictions like Botswana have undertaken measures to adopt laws that take cognizance of the customary land rights. It must be submitted that Botswana has also codified the customary practices of the Tswana, and elevated their customary land rights and practices up into national legislation which includes alienation procedures²⁷. In this way, our study will demonstrate that Zambia has therefore a lot to gain if it were to codify local customary land rights as regards alienation procedures into a nationally recognized system regulating land held under customary tenure.

²⁷ Rachael Knight. "Statutory Recognition of Customary Land Rights in Africa: An Investigation into Best Practices for Lawmaking and Implementation." FAO Legislative Study No. 105 (2010): 3-4

1.8. 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 alienation 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, House of Chiefs. The essay will therefore try to involve both primary and secondary data. Secondary data will involve literature reviews through Acts of parliament, various reports, books, journals, newspapers and other relevant publications.

1.9. CONCLUSION

Chapter one has examined the historical developments by showing that the colonial authorities drew a political and tenurial distinction between areas of white settlement and 'tribal' areas. On the one hand rural African subjects were governed by chiefs and custom and lived on spatially distinct communal lands. They recognised and codified customary communal land tenure within tribal areas.

After gaining independence in 1964 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.

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. Therefore the government decided to revisit the law governing land alienation. The Lands Act was enacted to provide legal machinery through which the land alienation system would be governed.

This chapter also shows the need to legislate the procedure on alienating land under customary land so that a tenure system could be introduced that promotes the livelihood interests of rural households and at the same time promotes the concept of individual tenure that facilitates mobility of land and attracts investment. In conclusion, this historical account of the development of land tenure is meant to provide a context for this study on customary land alienation.

CHAPTER TWO

2.0. The Nature of Customary Tenure under Customary Land in Zambia

2.1. Introduction

This chapter examines the nature of interests that exists under customary tenure in Zambia. The nature of interests under customary land includes individual, concurrent and communal rights. Furthermore, the chapter will examine the assumptions by colonialists as a general belief that Africans held land as tribes, and that land was owned by tribal chiefs. The chapter will show that individual ownership was and is still part of the Zambian customary tenure system and the common way of acquiring land under customary tenure by the tribesmen is by way of mere clearing of unoccupied land with the permission of the village headman or chief.

2.2. Nature of Interests under Customary Land in Zambia

Customary tenure in the context of land alienation in Zambia refers to land which was formally called Reserves and Trust Land.²⁸ The law governing land alienation in customary tenure is basically customary law which is based on rules, traditions and customs practised by different tribes. However, a person who owns or uses land in a customary area may convert it into leasehold tenure as provided under the lands Act.²⁹ In this process Chiefs play significant roles.

Land tenure is an institution, i.e., rules invented by societies to regulate behaviour. Rules of tenure define how property rights to land are to be allocated within societies.³⁰ They define how access is granted to rights to use, control, and transfer land, as well as associated responsibilities and restraints. In simple terms, land tenure systems determine who can use what resources for

²⁸ Section 1 and 35 of the Lands Act of 1995

²⁹ Section 8(1) of the Lands Act of 1995

³⁰ Maxillio Cox. "Fao Land Tenure Studies 3 Land Tenure and Rural Development". (2002): 7

how long, and under what conditions.³¹ Land tenure is an important part of social, political and economic structures. Land tenure is multi-dimensional, bringing into play social, technical, economic, institutional, legal and political aspects that are often ignored but must be taken into account.³² Land tenure relationships may be well defined and enforceable in a formal court of law or through customary structures in a community.³³ Alternatively, they may be relatively poorly defined with ambiguities open to exploitation. Land tenure thus constitutes a web of intersecting interests³⁴.

According to Mvunga³⁵ there are basically three main types of rights in customary land namely:

- Individual ownership
- Concurrent interests, and
- Communal interests

Individual ownership means the landlord has more rights in the land than any other person.³⁶ The individual owns the land for as long as he/she wishes. The rights can only be terminated by absolute transfer, e.g. by way of gift, to another party, by death and abandonment of the land. Where death occurred, an individual's rights could be transmitted to an heir.³⁷ For example, within a community, individual families may have exclusive rights to residential parcels, agricultural parcels and certain trees. Other members of the community can be excluded from using these resources without the consent of those who hold the rights³⁸.

³¹ Ibid

³² Ibid

³³ Ibid

³⁴ Ibid

³⁵ Mphanza Mvunga, "Land Law and Policy in Zambia" (Ph. D Thesis, University of London, 1982), 382.

³⁶ Ibid

³⁷ Maxillio Cox. "Fao Land Tenure Studies 3 Land Tenure and Rural Development". (2002): 7

³⁸ ibid

Concurrent interests refer to parallel interests in the same piece of land. This may occur, for instance, where other persons have access to wild fruits or, after harvest, can graze animals on another person's field. The exercise of these interests does not the person in whose field the cattle are grazing ceases to be owner. This is an important facet of traditional tenure that may be confused with communal tenure.³⁹

Communal refers to a right of commons which may exist within a community where each member has a right to use independently the holdings of the community. For example, members of a community may have the right to graze cattle on a common pasture.⁴⁰

2.3. Acquisition of Land and the Misconception on Ownership under Customary Land

The common way of acquiring land under customary tenure by the tribesmen is by way of mere clearing of unoccupied land. Where land is vacant and a person moves onto such land, he establishes ownership and control over such land. White has made this observation-

An individual establishes rights by opening up land over which no prior individual has already established rights. The rights of the individual, once established, remain permanent unless the individual transfers them to another, extinguishes them by abandonment or terminates them by his own death. Rights over fallow or resting land are therefore normal and regular.⁴¹

³⁹ *ibid*

⁴⁰ *ibid*

⁴¹ C M N White "Factors Determining the Content of African Land Tenure Systems in Northern Rhodesia" cited in African agrarian systems, D. Biebuyck (ed), (Oxford University Press, 1963),364

However, the question of actual ownership of land under customary tenure has been highly debated.⁴² One school of thought propounds that no individual person hold land under customary tenure as all land is communally held.⁴³ The other school of thought suggests that there is individual land ownership in customary areas. It has been observed that land ownership under customary tenure vary from one community to another and this is largely accounted for by the unique historical development of political groupings and the consequent variation of legal and institutional structures in different polities.⁴⁴

Furthermore, some early writers could not grasp the cluster of rights and claims which may be involved in any given situation in customary tenure endeavoured to make the distinction that customary tenure involved the use or usufruct of land in contrast to ownership.⁴⁵ The understanding of landholding under customary land was that the idea of individual ownership of land was foreign to African customary tenure. There was no registered title in land available to any one person and occupation of land was done by family units and therefore, communal ownership of land was implied.⁴⁶

The notion that land ownership in Africa is group or communal was propounded by Viscount Haldane in the case *Amodu Tijan v The Secretary Southern Nigeria*⁴⁷, where he thus observe that:-

“the fact which it is important to bear in mind in order to understand the native land law is that the notion of individual ownership is quite foreign to

⁴² Patrick M. Mvunga ,(1980) *The Colonial Foundations of Zambia’s Land Tenure System*(Lusaka: Neczam,1980),7

⁴³ *ibid*

⁴⁴ Kwamena Bentsi-Enchill, “Do African Systems of Land Tenure Require a Special Terminology?” *Journal of African Law*, Vol 9 No.2 at p. 115(1965). Cited in Fredrick Mudenda, *Land Law in Zambia: Cases and Materials*. (University of Zambia: UNZA Press, 2007) .779.

⁴⁵ *ibid*

⁴⁶ *ibid*

⁴⁷ [1921] AC 399.

native ideas. Land belongs to the community, the village or the family, never to the individual.”

The principal view expressed in the case was that Africans under customary tenure had no individual right of ownership over land and they merely exercised user rights. The assumption was that since chiefs were traditional rulers, land rights were owned by the chief.⁴⁸ Thus Viscount Haldane in *Amodu Tijani* case also observed that:

“A very usual form of native title is that of a usufructuary right, which is a mere qualification of or burden on the radical or final title of the sovereign where that exists. In such cases, the title of the sovereign is a pure legal estate, to which beneficial, rights may or, may not be attached.”⁴⁹

This view was later affirmed in the case of *Sobhuza II v Miller and Others*.⁵⁰ Were the Judicial Committee of the Privy Council observed that:-

“The notion of individual ownership is foreign to native ideas. Land belongs to the community and not the individual. The title of the native community generally takes the form of a usufructuary right, a mere qualification of a burden on the radical or final title of whoever is sovereign.”⁵¹

⁴⁸ Frighton Sichone. “THE SYSTEM OF LAND ALIENATION IN ZAMBIA; Acritical analysis of the Legal and Institutional Framework.” (Master thesis, University of Zambia , Zambia, 2009),115.

⁴⁹ Ibid

⁵⁰ [1926] AC 518.

⁵¹ Ibid

In Northern Rhodesia, the colonialist's view of indigenous tenure in the territory was that land was a tribal property vested in the chief to be allocated by him in accordance with the needs of the tribesmen.⁵²

Elias has sneered at the idea that people under African land holding or ownership held land communally⁵³. He thus observes:

“The fallacy of so describing the African mode of land holding arises, partly from the greater fallacy underlying the doctrine of “primitive communism,” and partly from an imperfect appreciation of the exact nature of the concept in African legal categories”.⁵⁴

Elias went on to further observe that:-

“Again, the individual's holding does not come to an end at his death; it is heritable by his children to the exclusion of all others. In short, he is a kind of beneficial part-owner, with perpetuity of tenure and all but absolute power of disposition”.⁵⁵

It can therefore be stated that individual ownership of land under customary tenure actually exists and that the chief merely exercises the right of control while actual ownership vests in the individual land users⁵⁶. A pre-independence judge in Nyasaland described the system of landholding in customary areas as being exercised by individuals and not the chiefs. In the case of *Cox v The African Lakes Corporation Limited* (otherwise known as the *Kombe case*)⁵⁷

Nunan, J. observed that:

⁵² Report of the Land Commission consisting of three members-S. Gore-Brown(member of the Legislative Council representing African interests), J.S. Moffat (government officer) and L.W.G. Eccles(Commissioner for Lands, Mines and Surveys) 1945

⁵³ Fredrick Mudenda, *Land Law in Zambia; Cases and Materials* (Lusaka:UNZA Press, 2007) 766

⁵⁴ Olawale T Ellias, *The Nature of African Customary Law*(Manchester :University Press, 1956)64

⁵⁵ *Ibid* at page 166.

⁵⁶ *Supra* note 27 p.103

⁵⁷ (1901) unreported, cited in Mvunga P.M, *Land Law and Policy in Zambia*, opt. cit. p.103

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

Sichone argues that the interpretation that can be attributed to this passage is that the chief’s authority pertains more to his subjects than over the lands.⁵⁸ A chief can therefore not be conceived as landlord or as a person in whom land is vested. A chief is therefore in no sense to be considered the landlord of the land in which he exercises jurisdiction over the natives of his tribe. Even under the native law of the tribal systems, he would not have been considered the sole proprietor⁵⁹

Furthermore in agreeing with Justice Nunan’s view, Mvunga has argued that

“.....it appears that in Nyansaland, Nunan, J. would have been disturbed to learn that the chief as sovereign had a radical or final title which was burdened by beneficial interests of various individuals Justice Nunan refused to conceive the chief as a landlord and stated that the chiefs’ jurisdiction as sovereign was purely personal”⁶⁰

⁵⁸Frighton Sichone. “THE SYSTEM OF LAND ALIENATION IN ZAMBIA; Acritical analysis of the Legal and Institutional Framework.” (Master thesis, University of Zambia , Zambia, 2009), 118

⁵⁹Mphanza Mvunga, “Land Law and Policy in Zambia” (Ph. D Thesis, University of London, 1982), 385

⁶⁰Ibid

2.4. Security of Tenure

In most cases in fact, there is no requirement to consult or get permission from a chief before a person occupies land in his own village.⁶¹ The chief is not an institution that alienates land to its subject since mere cultivation of land not previously held by any person confers rights and is equivalent to absolute ownership to an individual.⁶² As noted by Mvunga, this view was endorsed by the United Nations Report on Customary or Tribal Tenure, which Report observed that:-

“the security of tenure provided under tribal customary laws is almost equivalent to the security of tenure provided under freehold. Any individual who establishes his residence in a village can acquire customary rights over land, although nobody can lay claim to land over which another individual has established rights.”⁶³

2.5. Allocation Procedure

There is a simple procedure for land allocation. A person seeking land applies verbally to the Chief of the area where land is located, in most cases through the village headman. The chief then considers the application and informs the applicant of his decision. He may also need to consult his indunas before coming up with a decision. If the application is successful the applicant immediately occupies the land.⁶⁴ However, in most cases, an application is only

⁶¹ N M C White, “Terminological confusion in African Land Tenure” in Patrick M Mvunga, **Land Law and Policy in Zambia**, op. cit. p.103

⁶² *ibid*

⁶³ Report of the UN/ECA/FAD Economic Survey Mission on the Economic Development of Zambia, Ndola, United Nations, 1964 paras.44 and 46 at p.54, cited in Mvunga M.P, **Land Law and Policy in Zambia**, op. cit. p.100

⁶⁴ Gracillia Chipulu, “The Nature of Interests and the Roles Played by the Chiefs in Customary Land” (Obligatory Essay, University of Zambia, 2007).15

necessary for land, which is not virgin, that is, land occupied before but later abandoned.⁶⁵ Where land is virgin, a person may acquire rights by simply clearing a piece of land which has no prior rights of other people. He may later inform the either the chief or headman but he is not obliged. This right is strictly and mostly restricted to members of the village with strong roots.⁶⁶ Therefore a stranger can not acquire land in any village without showing proof of having stayed for a certain period of time and his allegiance to the chief and the village at large. Another condition attached to acquiring land in a certain village is that the applicant must exhibit good moral character. If the conduct of the applicant later become unacceptable to the Chief and the whole community, he may expelled from the village and his land rights will be automatically extinguished.⁶⁷

2.6. Conclusion

This chapter has examined the nature of interests and classes of ownership under customary tenure in particular individual ownership, concurrent interests and communal ownership. All these constitute the various aspects of Zambian customary tenure. Furthermore, the chapter has highlighted that there is simple procedure of allocation of land and a common way of acquiring virgin land under customary tenure by the tribesmen is by way of mere clearing of unoccupied land and with the consent of the village authority. However, regarding the stranger the mode of acquisition of land is done through the chief or headman upon satisfying the preconditions. The chapter has also examined the misconception on ownership under customary land regarding individual ownership of land and the role of Chiefs in land alienation. It has also refuted earlier

⁶⁵ *ibid*

⁶⁶ *ibid*

⁶⁷ *ibid*

views especially those of colonial authorities that individual ownership did not exist and the assumption that the chief owned land when in essence the latter possessed regulatory powers.

CHAPTER THREE

3.0. The Legal and Institutional Framework on Land Alienation under Customary Land in Zambia

3.1. Introduction

In understanding the current situation surrounding the unclear procedure on how land must be alienated within customary land, it is expected that this chapter will give an evaluation of the current legal framework and the institutions that are reposed with the power to alienate land both by de jure and by de facto. An analysis of the current legal and institutional arrangements and practices are evaluated with a view to identifying the inherent strengths and weaknesses on the procedure of customary land alienation in Zambia.

3.2. Institutions with Powers of Land Alienation under Customary Land in Zambia

3.2.1. The Institution of the Chief

Land under customary tenure, as the case is with state land, is vested absolutely in the President who holds it in perpetuity for and on behalf of the people of Zambia.⁶⁸ 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

⁶⁸ Section 3(1) of the Lands Act, Chapter 184 of the Laws of Zambia

to convert land from customary to leasehold.⁶⁹ The institution of the chief is established pursuant to the Chief's Act⁷⁰, which provides the for the chiefs function in section 10(1) 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 law⁷¹.

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 law⁷².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.⁷³

3.2.2. Local Authorities

Local authorities are involved in the alienation of land in both state land and customary land.⁷⁴

With regard to customary land, the Lands Act puts emphasis on the President to consult local authorities whenever the President alienates land in a customary area.⁷⁵ There involvement in the alienation of customary land is justified on the basis of the procedure on conversion of customary tenure into leasehold tenure. The procedure is that any person who has a right to the

⁶⁹ Section 8(2) of the Lands Act of 1995

⁷⁰ Chapter 287 of the Laws of Zambia

⁷¹ Section 10(1) of The Chiefs Act.

⁷² Mung'omba Report of the Constitution Review Commission (2005) 564

⁷³ Frighton Sichone. "THE SYSTEM OF LAND ALIENATION IN ZAMBIA: A critical analysis of the Legal and Institutional Framework." (Master thesis, University of Zambia, Zambia, 2009).124

⁷⁴ Ibid p.204

⁷⁵ Section 3(4)(b) and (d) of the Lands Act, chapter 184 of the Laws of Zambia

use and occupation of land under customary tenure may apply to the Chief for authority to convert such holding into leasehold tenure.⁷⁶ The local authority receives Form II⁷⁷ from the Chief indicating that the Chief has consented to the conversion. The local authority is then required to consider whether or not there is a conflict between customary law of that area and the Act before making a recommendation to the Commissioner of lands⁷⁸

3.2.3. Zambia Wildlife Authority

The alienation of land in Game Management Areas is well regulated by the Zambia Wildlife Act.⁷⁹ The Game Management Areas are situated in customary areas and therefore, conflicts between villagers, chiefs and the Zambia Wildlife Authority regarding the jurisdiction, powers and boundaries of state land and customary land often arise.⁸⁰ Local authorities also face difficulties in the course of performing land alienation functions in Game management areas because the governing statutes clearly state that the management of game management areas is the preserve of the Zambia Wildlife Authority.⁸¹ The law is silent on how to resolve problems of land alienation where the interests of the villagers, the District Council, the Chiefs and the Zambia Wildlife Authority are at variance⁸². There are several chiefs in the Game management 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 hindered⁸³. It is note

⁷⁶ Section 8(2) of the Lands Act of 1995

⁷⁷ Regulation 2 of the Land(Customary Tenure)Conversion Regulation-Statutory Instrument No.89 of 1996.

⁷⁸ Frighton Sichone. "THE SYSTEM OF LAND ALIENATION IN ZAMBIA; Acritical analysis of the Legal and Institutional Framework." (Master thesis, University of Zambia , Zambia, 2009) 205

⁷⁹ Act No. 12 of 1998

⁸⁰ Section 3(4) of the Lands Act of 1995

⁸¹ Section 5(a) of the Zambia Wildlife Act of 1998

⁸² Frighton Sichone. "THE SYSTEM OF LAND ALIENATION IN ZAMBIA; Acritical analysis of the Legal and Institutional Framework." (Master thesis, University of Zambia , Zambia, 2009) 207

⁸³ Mr Sichones' report on the official visit as Commissioner of Lands to Mambwe District 8th August,2006

worthy that under section 7 of the Zambia Wildlife Act, impliedly empowers the board⁸⁴ to allow people to settle in the game management area provided they are adhering to the set conditions.

3.2.4. The Department of Forestry

The Forestry Act⁸⁵ 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.⁸⁶ If Commissioner of Lands purports to alienate any part of the forest without the consent of the conservator, such action will be void⁸⁷.

3.2.5. The Office of the Vice President

The department of the resettlement established under the office of the Vice President is charged with the responsibility of setting aside land for resettlement schemes.⁸⁸ However, this resettlement land does not fall under any statute, most of the resettlement schemes are established under customary land.⁸⁹ The department has a policy to alienate land in order to make available farm land for the resettlement of the unemployed, retrenched and retired persons who wish to engage in agriculture as a means of livelihood.⁹⁰

⁸⁴ Section 6 of the Zambia Wildlife Act

⁸⁵ Chapter 199 of the Laws of Zambia

⁸⁶ Section 22 of the Forests Act, Chapter 199 of the Laws of Zambia

⁸⁷ Robert Chimambo, Rhidah Mung'omba and Adam Pope v. Commissioner of Lands, Safari Zambia Limited, Environmental Council of Zambia and Fingus Limited. (2008) Z.R. 1 Vol. 1 (S.C)

⁸⁸ Frighton Sichone. "THE SYSTEM OF LAND ALIENATION IN ZAMBIA; A critical analysis of the Legal and Institutional Framework." (Master thesis, University of Zambia, Zambia, 2009)206

⁸⁹ Ibid

⁹⁰ Ibid

3.3. Legislation dealing with Land Alienation under Customary Tenure

3.3.1. The Lands Act

The Lands Act of 1995 recognises the continuation of customary tenure. It provides that-

“...every piece of land in a customary area which immediately before the commencement of the Lands Act was vested in or held by any person under customary tenure [Reserves and Trust land] shall continue to be so held and recognised and any provision of the Lands Act or any other law shall not be so construed as to infringe any customary right enjoyed by that person before the commencement of the Lands Act.”⁹¹

This means that although customary tenure appears informal in most respects, it is a legally recognised system of landholding in Zambia. The law further provides that-

“...the rights and privileges of any person to hold land under customary tenure shall be recognised and any such holding under the customary law applicable to the area in which a person has settled or intends to settle shall not be construed as an infringement of any provision of this Act or any other law except for a right or obligation which may arise under any other law.”⁹²

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

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.⁹³

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

⁹¹ Section 7(1) of the Lands Act of 1995

⁹² Section 7(2) of the Lands Act of 1995

⁹³ Maxillio Cox. “Fao Land Tenure Studies 3 Land Tenure and Rural Development”. (2002) 13

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 converted⁹⁴. This leaves the chief with much discretionary powers which are prone to abuse therefore the procedure on approval must be reviewable by an independent committee. 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.⁹⁵ 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.⁹⁶

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; 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 authority.⁹⁷ 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

⁹⁴ Section 8(2) of the Lands Act, CAP 184 of the laws of Zambia

⁹⁵ Frighton Sichone. "THE SYSTEM OF LAND ALIENATION IN ZAMBIA; A critical analysis of the Legal and Institutional Framework." (Master thesis, University of Zambia , Zambia, 2009)122

⁹⁶ *ibid*

⁹⁷ Section 3(4)(c) of the Lands Act of 1995

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. Mbaimbi*,⁹⁸ 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 Siwale*⁹⁹, where the Supreme Court had the occasion to interpret Section 3(1) and 3(4) (c) of the Lands Act and held that the appellants had as much right to the land as the respondents and further that in terms of section of section 3(4), they were persons who were affected by the grant of title deeds to the respondent and therefore, were supposed to have been consulted. The Appeal was allowed.

3.4. Conclusion

The chapter has examined various legislations which have a direct or indirect impact on the alienation of customary land in Zambia. The institution that is directly involved in the alienation of customary land is Chiefs. 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 other institutions involved in customary land alienation are the Local Authorities, Zambia Wildlife Authority and the Office of

⁹⁸ Supreme Court of Zambia Appeal No. 41 of 1999

⁹⁹ (1999) ZR 84

the Vice President. The chapter has also discussed the legal framework for alienation of customary land.

CHAPTER FOUR

4.0. AN EVALUATION OF THE PROCEDURE ON ALIENATION IN CUSTOMARY LAND IN ZAMBIA

4.1. Introduction

Chapter three outlined the legal provision and institutions empowered to alienate land under customary land. Therefore the essence of this chapter is to build upon the theoretical framework laid so far. This chapter will combine the theory with the research findings from various primary sources outlined in chapter one. The data collection methods employed were personal interviews conducted with relevant officials and reports were inspected and studied at the Ministry of Lands, Natural Resources and Environmental Protection and the House of Chiefs.

4.2 Research Findings from Documentary Evidence

4.2.1. Draft Land Policy

In a quest to administer land for poverty reduction and economic growth, Government has decided to come up with a Land Policy.¹⁰⁰ Among other issues addressed in the policy is that there is need to collaborate with traditional authorities and other land stakeholders to review, harmonise and streamline customary land practices, usages and legislation on land holding.¹⁰¹ Secondly the policy will ensure that no chief shall recommend land for alienation without consulting his/her subjects and continue to sensitise the public on the advantages of individual ownership of land through leasehold or customary tenure to improve the security of

¹⁰⁰ Draft Land Policy (2006)

¹⁰¹ Paragraph 4.3.3 of Draft Land Policy(2006) p.13

investments.¹⁰² Thirdly, the policy provides the need to continue to sensitise the public on the advantages of individual ownership of land through leasehold or customary tenure to improve the security of investments.¹⁰³

While the government of Zambia is encouraging land allocation for investment in customary areas, it is cognisance of the rights of the indigenous people. Government has no doubt that land owners in customary areas will continue to enjoy their rights and therefore there is need to provide a definite procedure on how land must be alienated by the chiefs or headmen.

4.2.2. Customary Land Alienation in Botswana

The Botswana's Tribal Land Act of 1968 transferred the authority over land from the chiefs to land boards, with the aim of reducing discrimination between tribes.¹⁰⁴ Tribal land belongs to the people therefore individuals are granted rights to use some parts of the land. Land 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.¹⁰⁵ 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 innovations¹⁰⁶.

¹⁰² *ibid*

¹⁰³ *ibid*

¹⁰⁴ Economic Commission for Africa (2003) Land Tenure Systems and Sustainable Development in Southern Africa, Southern Africa Office, Lusaka, Zambia p. 5

¹⁰⁵ *ibid*

¹⁰⁶ *ibid*

A close look at the land administration of Botswana 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.¹⁰⁷ This is because it is less subject to abuse and corrupt tendencies, less discriminatory and provides a more fair and equitable access to land.¹⁰⁸ 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.¹⁰⁹

4.3. Research Findings from Interviews

4.3.1. How can a local resident acquire land under customary land?

In response the Committee of Clerks at the House of Chiefs contended that to answer the question, two scenarios had to be compared. The first being a village situated in less populated and second village was one that was located in a densely populated area. Where a resident for instance in Kamena(Mungwi district in Northern Province) desired to acquire unoccupied land within village territories, he had a general right to cultivate vacant land. In Kamena fifty percent (50%) of crop fields were acquired through direct clearing of uncultivated land by way of cut and burn shifting cultivation (*chitemene*).¹¹⁰

However, the situation was different in St. Joseph(Kalulushi district in the Copperbelt province) which was more populated and in close proximity to town markets and had formal

¹⁰⁷ Rachael Knight. "Statutory Recognition of Customary Land Rights in Africa: An Investigation into Best Practices for Lawmaking and Implementation." FAO Legislative Study No. 105 (2010): 48

¹⁰⁸ *ibid*

¹⁰⁹ *Ibid*

¹¹⁰ Interviewed on 3rd April 2012

establishments like schools, a health centre and a Catholic Mission which were an attraction to people looking for land to settle. In St. Joseph sixty percent (60%) of the crop fields were acquired through the chief or headman. This is the most prevalent way of land acquisition where land is relatively scarce. Therefore he stated that to avoid clashes over arable land, allocation by traditional authorities was the common way of acquiring crop fields. In Zambia in general allocation or showing of vacant land by traditional authorities (chiefs or headmen) was also the most common way of land acquisition in village communities

It is noteworthy that in both Kamena and St. Joseph the methods of land acquisition (direct clearing of vacant land and allocation by chief or headman), are cost free reflecting the relative abundance of land in the two areas. These cost free methods of acquiring land also reflect the social security characteristic of customary tenure, which guarantees even the poor (*abalanda / abapengele*) and newcomer's access to land for cropping and building sites.

4.3.2. Do the Chiefs or headmen have a procedure on how land was to be allocated to both local and outsiders to the community?

In response the Committee of Clerks at the House of Chiefs stated that most customary authorities had no defined procedure on how to alienate customary land. Therefore, the choice to allocate land was solely repose in the chief or headman and it was not open to challenge. Similarly the Commissioner of Lands agreed with the Committee of Clerks that customary authorities lacked a defined procedure as this was exhibited in disputes regarding double allocation.

However, he stated that Cheftainess Nkomeshya had put in place a system of how land was to be allocated within customary land. Her royal Highness had instituted a committee that sat to

approve the applications from the headmen before it went for final approval to the former. The Committee mainly dealt with applications by strangers to the communities. Where a resident of the village desired to acquire land, such a one had to go through the headman who later forwarded the application to the chieftainess for approval or rejection.

In response the Commissioner of Lands opined that the lack of statutory procedure on how land is alienated under customary land by the Chief or headmen had posed a number of challenges such as allocating land investors without taking into account the needs of the community.¹¹¹ He stated that the whole process of alienation lacked transparency as the chiefs or headmen solely determined the fate of the application. There was no mechanism to check how the chiefs or headmen approved the land alienation, resulting in the system being open to abuse and corruption by the customary authorities.

One of the main issues emanating from lack of procedure which he explained and boldly cleared was the issue to do with vesting of land in the President. He stated that conflicts arose from the fact that all land in the country was vested in the President and yet, the Lands Act presupposed that the President could not alienate land in a customary area without the chief's approval

The lack of formal procedure and a register for land allocation had caused chiefs and headmen not to take cognisance of the policy for women which stated that women should be granted thirty percent(30%) share of all land allocation.

4.3.3. What is the extent of land under customary land?

In response the Commissioner of Lands stated that the lack of actual demarcation on the boundaries between customary land and state land has caused some chiefs or headmen alienate

¹¹¹ Interviewed on the 9th of April 2012

land which was a subject of title. Disputes relating to boundaries among chiefdoms had become common because land was becoming scarce and economically valuable. There was evidence of increase of these disputes in the country. The undefined boundaries of chiefdoms were a seriously emerging problem arising from non-survey of customary areas. Disputes and threats of bloodshed were now being heard among traditional leaders. All these boundaries were are a creature of colonial subjugation and indoctrination which may lead to internal divisions among Zambians if not timely addressed.¹¹²

4.3.4. Does the current law on land provide how land in customary area will be alienated? In response the Legal Officer at the Ministry of Lands stated that although the Lands Act¹¹³ recognised customary land, yet it had not put in place a clear procedure on how land would be alienated within customary land by the chiefs or the headmen.

4.4. Conclusion

This Chapter has evaluated the research findings on the procedure of alienating customary land in Zambia. The Lands Act¹¹⁴ has recognised customary land tenure, however it has failed to provide for procedure on customary land alienation. This lack of procedure is reflected in the drafting of Land policy as the framers of the policy did not see it expedient to include a defined procedure on customary land alienation.

It is noteworthy that in Botswana customary land customs were formalised through the Tribal Act of 1968 which also included a procedure on customary land alienation.¹¹⁵ The alienation is

¹¹² *ibid*

¹¹³ Section 7 of the Lands Act, Chapter 184 of the Laws of Zambia

¹¹⁴ Chapter 184 of the Laws of Zambia

¹¹⁵ Rachael Knight. "Statutory Recognition of Customary Land Rights in Africa: An Investigation into Best Practices for Lawmaking and Implementation." FAO Legislative Study No. 105 (2010): 48

done by the Land Boards. The Chapter also distinguished the Botswana customary land alienation and the Zambia situation. The Botswana has opted to have Land Boards at the local level as opposed to the institution of the chief which is found in Zambia.

Finally the chapter captured the interviews by the Commissioner of Lands and the Committee of Clerks on the need for a procedure on customary land alienation that will be common for all the tribes in Zambia. The interviews revealed that the codification or formalisation of the tribal rules on customary land alienation in Zambia will reduce the abuse as the decisions of the chiefs or headmen could be reviewed.

CHAPTER FIVE

5.0. CONCLUSIONS AND RECOMMENDATIONS

5.1. CONCLUSIONS

The chapter concludes by giving an overview of each preceding chapter, shortcomings of the legal and institutional framework and other the objectives have been achieved. The study has established that a clear and predictable procedure on customary land alienation is feasible when there is an efficient and effective legal and institutional framework. It has also been established in this study that a number of challenges ranging from land tenure, legal and institutional framework impede the effective alienation of customary land in Zambia.

The study under Chapter one has disclosed that the introduction of the dual tenure system in the territory by the colonial administration has continue to influence land administration in Zambia. 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.

Chapter two aimed to review literature on the African concept of land ownership and the nature of interests under customary land which are individual, concurrent and communal rights. Individual rights can exist concurrently with other rights and an individual can have at the same time rights to communal resources. Furthermore, the chapter examined the assumptions by colonialists as a general belief that Africans held land as tribes, and that land was owned by tribal

chiefs. The study has shown that chiefs did not own land but their function is limited to being regulators on how land is being used equitably.

The literature reviewed furnished adequate evidence to support the view that chiefs are only custodians of customary land. Therefore, the decision to alienated land must not be done arbitrary without due regard to the people they govern.

Chapter three assessed the legal and institutional for customary land alienation in Zambia. The assessing of legal framework involved the Lands Act.¹¹⁶ The institutional framework involved examining institutions with power to alienate customary land such as the institution of the Chief, Local Authorities, Zambia Wildlife Authority, department of Forestry and the Office of the Vice President. The objective of this chapter was to determine whether the legal provisions and the institutions under customary land alienation had adequately provided for the procedure of alienating customary land.

Chapter four evaluated the procedure on customary land alienation by reviewing documentary evidence and interviewing officials from Ministry of Lands and the House of Chief. The chapter revealed a number of impeding factors on the effective and efficient alienation of customary land alienation in Zambia. This chapter sought to show from the research findings the weaknesses found on the current procedure on customary land alienation and whether the legal and institutional framework had addressed the definite procedure on customary land alienation.

¹¹⁶ Chapter 184 of the Laws of Zambia

From our examination of the legal provisions and institutions with the power to alienate customary land in Zambia under chapter three certain shortcomings need to be conveyed by way of conclusion as discussed hereunder.

5.1.2. Institution of the Chief

The Chief's Act¹¹⁷ has not provided for the role of Chief to alienate land within customary land. Therefore the Chief allocates land to its subjects in line with their customs and traditions provided it is not against the Constitution. The functions are quite broad and there are no specific guidelines on how this should be done. 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 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.

5.1.3. Local Authorities

Local authorities are involved in the alienation of land in both state land and customary land.¹¹⁸ However the local authority capacity to effectively participate in customary land alienation is hindered by the fact that there is lack of human resource to carry out the function.

5.1.4. Zambia Wildlife Authority

Game management areas are situated in customary areas and the Director of Zambia Wildlife Authority is reposed with the power to alienated land. It should be noted that during alienation conflicts between villagers, chiefs and Zambia Wildlife Authority often ensue as a result of

¹¹⁷ Chapter 287 of the Laws of Zambia

¹¹⁸ Ibid p.204

inadequate consultation. Resolving of conflicts on the alienation procedure is not provided for in the Lands Act,¹¹⁹ therefore it becomes difficult to make a decision on which interest prevails in case of any conflict.

5.1.5 The Department of Forestry

The Forestry Act¹²⁰ adequately covers the conditions of alienation of land in a forest reserve. It is presumed that forests fall under State land but this argument is often disputed by some Chiefs who state that the forest reserves were within their boundaries therefore, they could alienate land.¹²¹ This shows that the law has not clearly stipulated the functions, jurisdictions and the interests of the chiefs and the department of Forestry in land alienation.

5.1.6. The Office of the Vice President

The department of the resettlement established under the office of the Vice President is charged with the responsibility of setting aside land for resettlement schemes. However, this resettlement land does not fall under any statute, most of the resettlement schemes are established under customary land. This has raised the problem of who has jurisdiction as the Provincial planning Authorities and the Department of Resettlement believe that resettlement schemes fall under state land. While chiefs contend that schemes fall under customary land therefore, subject to their management.¹²²

¹¹⁹ Section 8(2) of the Lands Act of 1995

¹²⁰ Chapter 199 of the Laws of Zambia

¹²¹ Interview with Commissioner of Lands on 5th April 2012

¹²² *ibid*

5.1.7. The Lands Act of 1995

We noted under Chapter three that the Act recognises customary land.¹²³ 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 held in higher esteem than the other.

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.

Conclusions from chapter four on documentary evidence examined are such that Zambia currently does not have a codified system in so far as customary land alienation is concerned. This is further evidenced by the Lands Act which has taken cognisance of customary land but is silent on customary land alienation.

It must be recalled that the research set out objectives to find a solution to the lack of procedure on alienation within customary land. The first objective was to identify weakness in the current procedure on customary land alienation and the second was to analyse the legal and institutional framework for customary land alienation in Zambia.

The conclusion on the first objective is that there are weaknesses on the procedure on alienation within customary land. The procedure to allocate land to local residents or strangers by the chief

¹²³ Section 7 of the Lands Act, Chapter 184 of the Laws of Zambia

is not is not documented as he relies on the oral customs. The Chief may or not consult the Indunas on whether the applicant should be allocated land. This lack of consultation may lead to local residents being denied land in favour of an investor who may influence the Chiefs decision by gifts. The alienation of land by the Chief too anyone without being guided by any set procedure is likely to breed corruption and abuse and such a decision is not subject to review by anyone. The chief may plead the defence of oral custom if questioned on what procedure was used in alienating the land. Therefore this study has revealed that there are no set procedures on customary land alienation in Zambia.

Furthermore, the second objective on legal and institutional framework has revealed that the procedure customary land alienation has not been adequately addressed. The institutions reposed with the power to alienate customary have no clear roles and responsibilities in alienating customary land. The institutions do not co-ordinate or co-operate among themselves leading to overlapping of powers, functions and jurisdictions.

The legal provision revealed that although customary tenure is a recognised form of land holding, the Lands Act has not specifically provided how to administer alienation within customary land. By default the Act grants the responsibility to alienate to chiefs who also lack the statutory authority to deal in land matters. Therefore, the Lands Act has not addressed what procedure should be used when alienating land within customary land. This lack of procedure perpetuated corruption and the whole system lacks transparency.

Finally, the third objective on judicial precedent has revealed that there has been no specific case law interrogating the concept of procedure on land alienation within customary land. Therefore,

lack of specific case law on land alienation within customary land has perpetuated the power of chiefs to alienate land without a due regard to the people on the ground.

Lastly we proceed to make recommendations based on the conclusion

5.2. RECOMMENDATIONS

- (a) Statutory procedure should be enacted which takes into account the common customary rules on land alienation.
- (b) The legal framework should be amended so that the procedure on customary land alienation system is predictable. Similarly, it is equally important that institutions are reformed so that the power to alienate customary land is transferred to one institution.
- (c) The role of chiefs should be clearly defined in customary land alienation by amending the Chiefs Act.

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