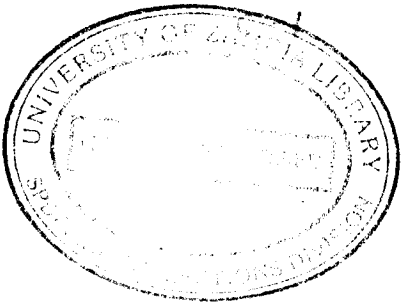


**AN EVALUATION OF THE EFFECT OF PRESIDENTIAL LEASE COVENANTS
ON THE DEVELOPMENT OF LAND ADMINISTRATION IN ZAMBIA**

By

MUNSAKA FLORENCE

(27024148)



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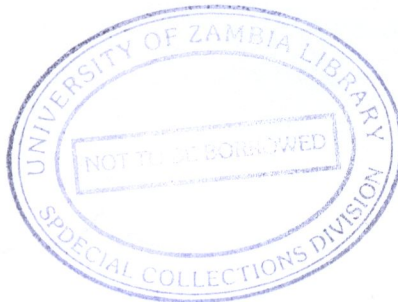
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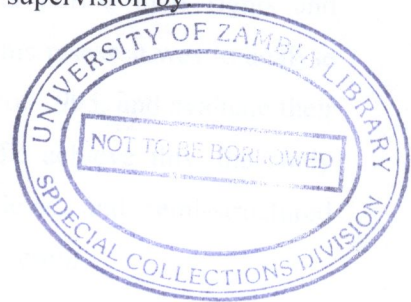
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ABSTRACT

A Covenant is an agreement between the landlord and the tenant that imposes a legal obligation to do or not to an act in relation to the land. Covenants in leases are intended to regulate the relation between the landlord and the tenant and define their rights and obligations regarding the use of the land. The main objective of this research was to analyse the covenants imposed in presidential leases under the Lands Act of 1995, and evaluate their effect on the development of land administration in Zambia. To achieve this, the study involved the use of existing literature on land laws and policies, and semi-structured interviews with selected officers directly involved in land administration.

The findings of the research were that covenants imposed in presidential leases under the Lands Act have not served their purpose of ensuring that land is put to good use. There is no proper administration and enforcement of the covenants regarding the use of land in Zambia. It was further found that the Ministry of Lands face huge challenges in enforcing the covenants under the Lands Act, the main challenges include; lack of updated book keeping systems, poor documentation, inadequate human resource and a general lack of the necessary machinery to monitor implementation of the covenants under Lands Act.

The paper concludes that there is no strict compliance of covenants regarding the use of land. This has retarded the development of a good land administration system because most of the land lay idle for a long time without being developed. The paper therefore recommends that there is need to strictly enforce the covenants regarding the use of land. The provisions relating to enforcement of breach of covenants under the Lands Act should be strictly followed. The paper further recommends that the institutions involved in enforcing covenants should be adequately funded to enable them to carry out routine checkups and inspections and ensure that lessees abide by the covenants in the lease. In this way the land will be put to good use which is beneficial to the entire community and consequently will enhance the development of a good and efficient land administration system in Zambia.

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I would like to thank Mr. Fredrick S Mudenda my supervisor who gracefully took the painstaking task of reading, correcting and offering valuable critic and suggestions on the content and character of the research. Mr. Mudenda read my work and criticised it in an intelligent and meticulous way. Thanks also to Professor M Munalula for the guidance on the standard requirement of research writing required by the university.

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My gratitude is also extended to my friends, Malawo Sakala, Sithle Muchiya, Situmbeko Masialeli, Womba silumbu, Namonje Sikombe, Choonga Simulyamana and my entire classmates. I also extend my gratitude to my roommates, more especially Tawonga Kaila for her support. Finally, I thank God for calling me to be a Lawyer and for the mercies and blessings extended to me during my academic life at the university.

DEDICATION

This is dedicated to my late parents who gave me all the support I needed in their entire life time, life without them has not been easy, I wish my parent would be there to see the great gift of all that I am and I will be, which today I offer as my greatest gift to God.

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CHAPTER ONE

1.0 INTRODUCTORY CHAPTER

1.1 INTRODUCTION

This chapter provides the basis and foundation of this research paper. It comprises of the Statement of the Problem, Objectives of the study, Significance of the study, Research Question, Research Methodology, and a conclusion.

Covenant is a term which has little use in everyday twenty-first century life.¹ The word covenant ordinarily means an agreement that is binding between the parties.² When used in relation to land covenants are called real covenants or land obligations. A real covenant is an agreement entered into in writing and under seal between the Landlord and the Tenant, which imposes a legal obligation to do or not to do something.³ A covenant may therefore be real or personal; The latter relates only to matters personal and does not concern the land while a real covenant is one which has for its object something annexed to, or inherent in, or connected with land.⁴

Lease covenants generally form the terms of the lease agreement, this is because the rights and duties of the landlord and tenant are normally determined by the provisions of the lease itself.⁵ A lease is created when an owner of an estate in land grants to another the right to possession of the property, retaining a reversionary interest.⁶ The relationship created

¹Wells J Williams, *Hill and Redman's Law of Landlord and Tenant* 14th Ed (London: Butterworth and Company, 1964), 139

²Lesser H Hiram, *Landlord and Tenant*. (Canada: Little brown and company, 1957), 177

³James F Libby, *Landlord and Tenant* (New York: Oceana Publications Inc, 1974), 44

⁴Hiram, *Landlord and Tenant*, 177

⁵Fredrick S Mudenda, *Land Law in Zambia: Cases And Materials* (Lusaka: UNZA Press 2007), 91

⁶Riddal, J.G, *Introduction to Land Law* 4th ed (London; Butterworth (1988), 255

between the parties is designated as lessor and lessee or landlord-tenant.⁷ Where the lease is silent certain covenants are implied by common law. Some implied covenants of the landlord include the covenant not to derogate from the grant and the covenant for quiet enjoyment. The implied covenants of the tenant include covenants to pay rent and not to cause any waste.⁸

Covenants therefore being the terms of the lease are created by agreement and so bind only the parties to the agreement. However, a real covenant descends to the heir; it is also transferred to a purchaser even if he was not a party to the agreement.⁹ A landlord may enforce an assumption agreement even against a third party even though he is not a party to the assumption agreement since the contract was made for his benefit.¹⁰

The case of **Lawrence V Fox**¹¹ established the right of a person for whose benefit a contract was made to enforce it. An assignee may assume the obligations of the original tenant but must do so clearly and expressly, creating thereby a contractual obligation between him and the original landlord. In other words, for a Covenant to be enforceable by or against a person who was not a party to the original contract, there must be a sufficiently close connection between the covenant and the leased land to justify the running of the covenant with the land.¹² The following covenants have been held to touch and concern the leased land; Covenant to pay rent; Covenant to repair; and Covenant not to assign without landlord's consent.¹³

⁷Hiram, *Landlord and Tenant*, 177

⁸Fredrick S Mudenda, *Land Law in Zambia; Cases And Material*, 91

⁹Libby, *Landlord and Tenant*, 44

¹⁰Libby, *Landlord and Tenant*, 44

¹¹(1859) 20 N.Y 268

¹²Robbert Megarry and Wade Williams, *The Law of Real Property* 6th Ed (London: Sweet & Maxwell, 2000), 16

¹³, Libby, *Landlord and Tenant*, 45

The lessee's covenants in general are intended to provide for the payment of rent, rates and taxes; for the maintenance and insurance of the premises; for any suitable restraint on the user of them; for the observance and performance of any statutory provision or regulations affecting the property or the user thereof; for restraint on assigning and subletting and for the yielding up of the premises at the determination of the lease.¹⁴ The landlord's covenants on the other hand provide for quiet enjoyment and, repair and fitness for habitation and for the payment of rates and for maintenance of the premises, so far as these obligations are to be borne by him.¹⁵ In addition, special covenants may require to be inserted to suit the particular nature or circumstances of the demised property. The conditions on the part of the Landlord include a power of re-entry on non-payment of rent or breach of covenants and provisions for renewal of the lease.¹⁶ The landlord's remedies for breach of covenant include the remedy of distress, damages for breach of covenant and forfeiture.

The tenant's remedies for breach of covenant are to sue for damages, to sue for an injunction to stop a continuing or threatened breach of a covenant, to sue for specific performance of the landlord's covenants, particularly the landlord's covenant to repair, to deduct the costs of carrying out the Landlord's repairs from future payments of rent.¹⁷

With reference to the above on covenants, it can be submitted that covenants in leases play an important role in the regulation and use of land, the full extent to which land can be enjoyed

¹⁴Williams, *Hill and Redman's Law of Landlord and Tenant*, 139

¹⁵Williams, *Hill and Redman's Law of Landlord and Tenant*, 139

¹⁶Williams, *Hill and Redman's Law of Landlord and Tenant*, 139

¹⁷ Martin Dixon, *Land law* (London: Cavendish Publishing Limited, 1994), 153

and developed to the best interest of both the landlord and tenant could not be realised without the imposition of leasehold covenants.¹⁸ Covenants are therefore, essential to a successful land development system. The need for covenants in any leasehold system cannot be overemphasised in that covenants in leases provide a mechanism that supports and enhances the management of real property.¹⁹

The concept of leasehold covenants has been extended to Presidential Leases. Land in Zambia has since independence remained vested in the President who holds it in trust for and on behalf of the people of Zambia.²⁰ In this sense the president could be likened to the overall Landlord who is holding a radical title to the land while Zambians merely own terms of years otherwise called Presidential Leases and the maximum being ninety nine years.²¹ As is the case with any Leasehold system the Lands Act of 1995 imposes certain covenants in Presidential Leases. These covenants play a fundamental role in the development of a good land administration and delivery system in Zambia. Research has shown that if these covenants were to be administered efficiently and effectively, there would be positive trends in land delivery and administration in Zambia; For instance more money would be obtained from ground rent to open up new areas for development of land, thereby making more land available to citizens.²²

However, the extent to which covenants imposed in presidential leases play a vital part in enabling the efficient operation of leaseholds and in preserving and enhancing the quality of

¹⁸Williams , *Hill and Redman's Law of Landlord and Tenant* ,138

¹⁹Mudenda , *Land in Zambia cases and materials*, 528

²⁰*Land Tenure Systems and Sustainable Development in Southern Africa* ECA/SA/EGM.Land/2003/2 , 4

²¹Chimembe, "*Land Law Use and Policy in Zambia*" (Obligatory Essay, University of Zambia 1983/84), 23

²²Chimembe "*Land Law Use and Policy in Zambia*" 23

life of the Zambian people is unknown. This paper evaluates the extent to which covenants imposed in Presidential Leases under the Lands Act of 1995 facilitate the development of a good land administration system in Zambia.

1.2 STATEMENT OF THE PROBLEM

When the Lands Act was enacted in 1995, economic development and efficient land administration was promised to the Zambian people.²³ Despite the changes in the law, today, the country has continued grappling with the same issues of land tenure reform.²⁴

Instead of facilitating development the covenants imposed in presidential leases under the Lands Act have proved to be an obstacle to development. The reasons hindering development can be attributed to the lack of proper enforcement of these covenants for instance the covenant to effect developments on the land and the covenant to pay ground rent. There is no proper administration of covenants imposed in Presidential Leases due to a number of shortcomings in the land delivery system.²⁵ It is therefore proper to submit that the inefficiency of enforcement of Presidential Lease covenants has an impact on the development of a good land administration and delivery system in Zambia.

²³Frighton Sichone. *Land Administration In Zambia With Particular Reference To Customary Land*: Paper presented at a Seminar Organised by the Zambia Land Alliance, University of Zambia Senate Chamber, 28th June 2008, 12

²⁴Sichone , *Land Administration In Zambia With Particular Reference To Customary Land*, 12

²⁵Fredrick S Mudenda , *Land Law in Zambia: cases and materials*, 528

1.3 OBJECTIVES OF THE STUDY

1.3.1 Main Objective

The main objective of this research is to analyse the covenants imposed in presidential leases under the Lands Act of 1995, and evaluate the extent to which they have enhanced the development of a good land administration system in Zambia.

1.3.2 Specific Objectives

- To analyse the provisions relating to leasehold covenants under the Lands Act of 1995
- To highlight the challenges faced by the Ministry of Lands in ensuring adherence to the covenants by lessees
- To review the extent to which the covenants under the Lands Act of 1995 have enhanced the development of a good land administration system in Zambia.
- To propose the appropriate measures to be taken by the Commissioner of Lands to ensure actual enforcement of covenants.

1.4 RESEARCH QUESTIONS

1. What roles do lease covenants play in land administration?
2. What are some of the lease covenants imposed in a presidential lease under the Lands Act?
3. What are the consequences of breaching the covenants in presidential leases under the Lands Act?
4. What is the procedure of enforcement for breach of lease covenants under the Lands Act and what are the major challenges to implementation of these procedures?

5. What changes need to be made in the present law to improve land policy system to a level that will ensure effective land use and administration?

1.5 SIGNIFICANCE OF THE STUDY

The significance of this research is that it will give an insight on the covenants imposed in presidential leases under the Lands Act of 1995, and the extent to which they enhance the development of a good land administration system. The challenges noted will be of great help in proposing measures to be taken into account to ensure strict and effective enforcement of these covenants. This research will be of relevance as land reforms have become the agenda of most governments in Africa and Zambia in particular, efforts have been made to include; covenants in leases that facilitate the development of a good land administration system in the country.²⁶

This research will be of great use to the Ministry of Lands as it will highlight the defects in the land administration system. This research will be of assistance in the identification and improvement of the weaknesses of the Zambian land delivery system.

1.6 RESEARCH METHODOLOGY

The research methodology will involve the use of qualitative techniques which will include; interviews with selected key informants from relevant government ministries and with civil society groups and NGOs. It will mainly involve review of research on existing literature on land policies, land laws and other related documents from the Ministry of Lands, the

²⁶Land Tenure Systems and Sustainable Development in Southern Africa ECA/SA/EGM.Land/2003/2 P; 4

University of Zambia Library, United Nations documents, journals and various relevant materials.

1.7 CONCLUSION

This chapter has given a general overview of the study. It has illustrated that Covenants imposed in leases play an important role in the regulation and use of land. It has further highlighted the extent to which land can be enjoyed and developed to the best interest of the Landlord and Tenant. The chapter has highlighted the Statement of the Problem, the Significance of the Study, the Research Questions and the Research Methodology. The next chapter discusses the historical background of Lease Covenants under English Land Law and how the English doctrine of land tenure was incorporated in Zambia.

CHAPTER TWO

2.0 HISTORICAL BACKGROUND OF LEASE COVENANTS UNDER ENGLISH LAND LAW AND THE BASIS OF PRESIDENTIAL LEASE COVENANTS UNDER THE LANDS (CONVERSION OF TITLES) ACT OF 1975

2.1 INTRODUCTION

This chapter gives a brief history of lease covenants under English land law and how the concept of presidential lease covenants was adopted in Zambia. The chapter further discusses the background to presidential lease covenants in Zambia before 1995 with particular reference to the repealed Lands (Conversion of Titles) Act of 1975 and finally gives a conclusion.

2.2 BRIEF DEVELOPMENT OF COVENANTS UNDER THE ENGLISH LAND LAW SYSTEM

Lease covenants can be traced back to the 16th century when the Leaseholds were brought into the estate system.²⁷ The doctrine of tenure and estates is therefore of fundamental importance in the development of lease covenants. According to the doctrine of tenure; all land in England is held of the crown, either directly or indirectly on one or other of the various tenures.²⁸ The doctrine of estates provides that a subject cannot own land, but can merely own an estate or interest in it, authorizing him to hold it for some period of time.²⁹ This is in view of the fact that all land in England is held of the crown.³⁰ Individuals in

²⁷George W Thompson. *Commentaries on the Modern Law of Real Property*; Vol 3, (The Bobb Merrill Company Inc 1959), 377

²⁸ Riddal, *Introduction to Land Law*, 3

²⁹ David Hayton, *Megarry's Manual of the Law of Real Property*, 6th Ed, (London: ELBS, 1982), 23-27

³⁰HowarthWilliam, *Land Law*, 3rd Ed, (London: Sweet and Maxwell, 1994) 6.

England cannot own land but can merely own an estate or interest in land for certain duration, which could either be freehold estates or estates less than freehold or leasehold. A freehold estate is one whose duration though fixed is uncertain whereas an estate less than freehold or leasehold is one for a period whose duration is fixed or is capable of being fixed.³¹

The early lease was actually considered as a demise of possession for a fixed period of time; as such it was ordinarily used for unimproved agricultural land.³² There was no need for any additional agreements between parties. However, as the minds of the parties focused more to the use for which the land was being put, taking into consideration the care which modern agricultural practice require of farming ground and the increasing buildings on the property,³³ some restraint was needed in the manner of use of the property demised. A more closely knit meeting of the minds of the parties was required over and above the mere delivery of possession and the fixing of the price thereof.³⁴

Property law shaped no fixed concepts to cover regulations in the use, management and maintenance of the property hence the parties were forced to resort to personal promises or agreements to regulate their relationships.³⁵ It therefore became necessary for the parties to agree as to the treatment of the property demised. These agreements were binding only between the parties. The common law could not however tolerate the ideas of one being able to avoid his promises with respect to land by transferring either the reversion or the leasehold

³¹ Mudenda, *Land Law in Zambia: Cases and Materials*, 12

³² Thompson *Commentaries on the Modern Law of Real Property*, 377

³³ Thompson *Commentaries on the Modern Law of Real Property*, 377

³⁴ Thompson *Commentaries on the Modern Law of Real Property*, 377

³⁵ Thompson *Commentaries on the Modern Law of Real Property*, 378

to another.³⁶ Hence the concept developed that the burden of an obligation incurred with respect to a lease passed along with a transfer of either the reversion or the leasehold. But it did not progress to the point where one could transfer the beneficial effect of such a promise on his parting with his interest.³⁷ This historical situation formed the foundation of the law governing leasehold covenants. Covenants were further given more recognition by leases being under seal; hence promises in leases were covenants and not simple agreements.³⁸

2.3 INCORPORATION OF ENGLISH LAND LAW SYSTEM IN ZAMBIA

The English land law and its concepts were imported into Zambia by the colonial administration.³⁹ While African customary law regulated land under customary tenure, the land which was set aside for white settlements was regulated by English land law.⁴⁰ At independence land was vested in the President to be held by him on behalf of the people of Zambia. The Zambia Independence Order, 1964, which provided for the establishment of the new republic, expressly stated that land in Zambia was to be held of the President in perpetuity for and on behalf of the people of Zambia. The concept of vesting of land in the President placed the President in the position of landlord of all land in Zambia. Individuals in Zambia who own land on which English law applies or otherwise called state land merely own estates or leases or interest in land, (presidential lease) for a period of 99 years subject to renewal.

³⁶Libby, *Landlord and Tenant*, 56

³⁷Williaws, *Hill and Redman's Law of Landlord and Tenant*, 100

³⁸Williams, *Hill and Redman's Law of Landlord and Tenant*, 100

³⁹ Chileshe. A "Land Tenure and Rural Livelihood in Zambia." (Thesis University of the Western Cape 2005), 96

⁴⁰ Mundenda, *Land law in Zambia cases and materials*, 234

The Zambia Independence Order further recognized estates, rights and interests in land as created in the various Orders-in-Council.⁴¹ This meant that the categories of land remained the same: Crown Land became State Land, Native Reserves became known as Reserves and Native Trust Land became Trust Land⁴². This period shortly after independence did not witness fundamental changes to the land tenure system.⁴³

2.4 BACKGROUND TO THE LANDS CONVERSION OF TITLES ACT OF 1975

The policy in the land tenure system which existed prior to independence was meant to favour the interests of the white settlers and not the indigenous blacks and was not compatible with the socialist society.⁴⁴ James observed that;

*“When one looks first at the history of real property and at the social and political conditions of this country the paradoxes and contradictions become apparent. English law ordinarily developed in a feudal society and so received a strong impress of feudalism. The feudal system having been evolved to meet the objectives of a military and oligarchical class, could hardly serve the needs of a democratic and socialist society. The contents of English law developed to serve a society whose objectives are in direct opposition to the ARUSHA DECLARATION and are inimical to the socialist aspiration of Tanzanian society as defined in that manifesto.”*⁴⁵

It is this thinking that influenced President Kaunda to make drastic changes to the land tenure system shortly after independence. In Zambia the changes were made in an effort to cure the historical injustices in the management and distribution of land by the colonial masters. And to cure the problem of speculation of bare land which had become so rampant shortly after independence.⁴⁶ In line with UNIP’s ideology of Humanism President Kaunda announced new land reform measures on 30 June 1975 in his “watershed speech” which was made at the

⁴¹ Zambia Independence Order Act section 4(1)

⁴² Mphanza P Mvunga, *Land law and Policy in Zambia*. (Gweru: Mambo Press, 1982) ; 17

⁴³ Chileshe, *Land Tenure and Rural Livelihood in Zambia*, 96

⁴⁴ Chileshe, *Land Tenure and Rural Livelihood in Zambia*, 96

⁴⁵ Rudolph W James, *Land Tenure and Policy in Tanzania* (Dar- es lam: East African Literature Bureau, 1971), 60

⁴⁶ Chileshe, *Land Tenure and Rural Livelihood in Zambia*, 96

Mulungushi Rock of Authority in Kabwe. The measures came into effect on July 1975. The Land (Conversion of Titles) Act brought about radical changes to the land policy of Zambia. All land held under freehold title was converted into leasehold title for 100 years. All commercial farms were included and unutilised tracts of such land were to be taken over by the State. This measure also covered freehold land in residential areas of cities and towns. All vacant and undeveloped parcels of land in cities and towns were to be taken over by the local government or Central Government. All sales of vacant lands were prohibited with an exception on developments. In this regard real estate agencies were closed down.

2.5 COVENANTS IMPOSED IN PRESIDENTIAL LEASES UNDER THE LANDS CONVERSION OF TITLES ACT

It was observed in the preceding chapter that the concept of lease covenants only comes into play where the relationship of landlord and tenant or lessor and lessee exist, in that covenants generally form the terms of the lease agreement.⁴⁷ The concept of vestment of all land in Zambia in the President who holds the land in perpetuity for and on behalf of the people of Zambia puts the President in the position of landlord. As such the president makes grants of land to persons who own interest or estates in land of a defined duration. These grants of land made by the president are called presidential leases.

A lease agreement concluded between the president and the lessee contains certain covenants regarding the use of the demised land. A presidential lease covenant is an

⁴⁷Chileshe, *Land Tenure and Rural Livelihood in Zambia*, 96

agreement under deed between President herein referred to as the Lessor and the individual granted a lease from the President herein referred to as the lessee regarding the use of the demised property. The Lands (Conversion of Titles) Act of 1975 imposed certain covenants to lessees these covenants and condition were mainly contained in Part III of the First Schedule to the Lands Conversion of Titles Act Regulations, 1975 as amended by the Land (Conversion of Titles) (Amendment) Regulations, 1976. The lease covenants included;

2.5.1 COVENANT TO PAY RENT

There was an obligation on the part of the lessee to pay rent or consideration for the demised property. But there was no requirement to pay a ground rent as land was deemed to be of no value. However the lease agreement provided that a lessee of agricultural land was required to pay a yearly rent.⁴⁸ The UNIP government identified the area of provision of rent as a field where there was extensive exploitation of the common man. The question of accommodation was to be left to the State, with its institutions like the Party, Central Government, Local Government, Parastatal Organisations and Co-operatives.⁴⁹

2.5.2 COVENANT TO ALLOW THE LANDLORD TO VIEW THE PREMISES IF HE IS LIABLE TO REPAIR

A fundamental covenant on the part of the lessee to allow the landlord to view the premises if he is liable to repair was contained in the lease agreement. That the lessee shall permit during the statutory term the lessor or any person or persons authorized by the lessor to enter on the land at any reasonable time during the day for the purpose of inspection or to lay or have

⁴⁸ First schedule to the Lands(Conversion of Titles) regulations, 1975 as amended by the Lands (Conversion of Titles) (amendment) Regulations, 1976

⁴⁹J Lungu,. "*Land Tenure and Agriculture Development in Zambia.*" (Unpublished PHD Thesis. Aberdeen: University of Aberdeen, 1994). 47

access to water mains, drains, sewer pipes, telegraph or telephone wires and electric mains of all description whether the same or any of them be overhead or underground. Provided that just and fair compensation shall be paid by the lessor to the lessee for any loss or damage occasioned thereby.⁵⁰

2.5.3 OBLIGATION NOT TO COMMIT WASTE

Since the question of accommodation was left to the state most of the demised premises were furnished, for this reason the covenant not to commit waste was strictly enforced. It was therefore provided in the lease agreement that the lessee shall maintain all improvements effected on the land by himself or his predecessor in title and shall cultivate and develop the land in accordance with the principles of good husbandry and so as not to injure or deteriorate the same or any part thereof⁵¹.

2.5.4 COVENANT TO EFFECT IMPROVEMENTS ON THE LAND

It was also covenanted that the lessee shall not allow land to remain idle for a period of more than three years except with the written consent of the lessor.⁵² The effect of this covenant was to discourage speculation of bare land which had become so rampant after independence to take for example the case of Solar Investment Limited and DBZ. The case involved the sale of a vacant plot of land. The parties to the transaction were Solar Investments (Z) Limited and DBZ. By a conveyance dated 3rd April 1975, one George Louis Lipschild of Lusaka sold to Solar Investments Limited three plots, each less than a quarter of an acre, at a total consideration of K150,000. On the same day, 3rd April 1975, by another conveyance

⁵⁰First schedule to the Lands(Conversion of Titles) regulations, 1975 as amended by the Lands (Conversion of Titles) (amendment) Regulations, 1976

⁵¹First schedule to the Lands(Conversion of Titles) regulations, 1975 as amended by the Lands (Conversion of Titles) (amendment) Regulations, 1976

⁵²First schedule to the Lands(Conversion of Titles) regulations, 1975 as amended by the Lands (Conversion of Titles) (amendment) Regulations, 1976

made between Solar Investments and DBZ one of the three plots was sold for the sum of K100, 000 to DBZ.

2.5.5 COVENANT NOT TO SUBDIVIDE, SELL, TRANSFER, ASSIGN, SUBLET OR MORTGAGE THE DEMISED PREMISES WITHOUT PRIOR CONSENT OF THE PRESIDENT

The covenant to obtain prior consent of the president for any dealing in land, gave effect to the party's philosophy of humanism that the land should remain the property of the state. Section 4 of the Lands (Conversion of Titles) Act provided that all land in Zambia shall vest absolutely in the President and shall be held by him in perpetuity for and on behalf of the people of Zambia. The effect of this provision was that no land could be sold without the consent of the president. To give effect to this section 13 (1) provided that;

Notwithstanding anything contained in any other law, or in any deed, instrument or document, but subject to the other provisions of this Act, no person shall subdivide, sell, transfer, assign, sublet, mortgage, charge or in any manner whatever encumber, or part with the possession of, his land or any part thereof or interest therein without the prior consent in writing of the President.

In granting consent, the President could attach any condition and terms as he thought fit to be binding on all persons and in doing so he could not be questioned in any court or tribunal.⁵³ As trustee owner and landlord of all land in Zambia. The President could fix the maximum amount that could be received, recovered or secured in any land transactions.⁵⁴ These included an amount of debt or advance in respect of a mortgage or charge to be created on the land.⁵⁵ And in determining this amount there was a proviso

⁵³ Lands (Conversion of Titles) Act Cap 289(repealed) Section 13 (2)

⁵⁴ Lands (Conversion of Titles) Act Cap 289(repealed) Section 13 (3)

⁵⁵ Lands (Conversion of Titles) Act Cap 289(repealed) Section 13 (2)

that provided that; no regard shall be had to the value of the land apart from unexhausted improvements thereon.⁵⁶

2.5.6 COVENANT TO YIELD UP THE PREMISES AT THE DETERMINATION OF THE LEASE

The covenant to yield up the premises was contained in section 7. And it was further provided in the lease agreement that;

Without prejudice to the right of renewal of the lease contained in section 7 of the Act upon the expiration or sooner determination of the statutory term the lease shall peaceably surrender and yield up possession to the lessor of the land with all buildings erected or being erected thereon together with all permanent fixtures in good and tenable repair and in accordance with covenants on the part of the lessee herein contained. Provided just and fair compensation shall be paid by the lessor in respect of all unexhausted improvements.

This meant that in an instance where the lease was not renewed the lessee could only be compensated for the unexhausted improvements. The Act clearly provided that no “...regard shall be had to the value of the land apart from the unexhausted improvements...”⁵⁷ Thus when an estate was on sale, improvements were valued and sold, but the land itself transferred was without compensation. This implied that it was the improvements that were being sold and not the land itself. Thus, virgin land was deemed to have no value.⁵⁸

⁵⁶Lands (Conversion of Titles) Act Cap 289(repealed) Section 7 (2)

⁵⁷Lands (Conversion of Titles) Act Cap 289(repealed) Section 7 (2)

⁵⁸ Lungu, *Land Tenure and Agriculture Development in Zambia*, 47

2.5.7 BREACH OF COVENANT

The lease agreement in respect to breach of covenant provided that if there shall be any breach of any of the covenants or conditions herein contained and such breach shall not have been remedied within six months after notice to the lessee from the lessor requiring such breach to be remedied then and in any event of such event the lessor may without payment of compensation re-enter upon the land or any part thereof in the name of and thereupon the lease shall determine but without prejudice to any right of action or remedy of the lessor in respect of any prior breach of covenant or condition on the part of the lessee⁵⁹.

2.6 WEAKNESSES OF THE COVENANTS UNDER THE (LANDS CONVERSION OF TITLES) ACT OF 1975

The covenants that were imposed in presidential leases under the repealed Lands (Conversion of Titles) Act of 1975, especially the requirement for presidential consent for all dealings in land enabled the President as the Landlord of all Land in Zambia to monitor transaction in Land. However, the objectives that the Lands (Conversion of Titles) Act intended to achieve mainly to stop speculation in Land were not fully realized. Land speculation was still possible even after the Act was passed due to the shortage of serviced land.⁶⁰ Since there were no open sales of land, black marketing was possible. In theory speculation was stopped, but in practice it was still possible for a land owner to subdivide his land, and then ask prospective developers to erect structures under the guise that it was the landlord who has done so and then sell the land. Therefore consent of the President will be sought provided there are improvements on the land consent will be granted almost automatically. Rather than stopping

⁵⁹ First schedule to the Lands(Conversion of Titles) regulations, 1975 as amended by the Lands (Conversion of Titles) (amendment) Regulations, 1976

⁶⁰Chimembe, “*Land Law Use and Policy in Zambia*,” 36

speculation the Act encouraged dubious, secret and illegal transactions involving land. This was unheard of before the Act.⁶¹ Furthermore, the President was not adequately equipped to carry out the volume of work assigned to him under the Act and could not for instance carry out routine checks in order to ensure compliance with the covenants in the lease.⁶²

The 1975 Lands Act had a number of weaknesses, the notion that bare land had no value and the fixing of the prices by the President for sales of land led to the restriction of the operation of the market, driving high property values, and hindering property investment.⁶³ Furthermore, the Act affected development in that Local authorities could not drive their revenue from rates charged on the land. Rate income before the Act came into force was based on charging a levy on the value of the land and the value of the improvements. This was so in order to encourage developers to improve their land without incurring heavy rates on properties. After the Act came into force land lost its previous value because bare land was declared to be of no value. In spite of this local authority still needed to raise their levy this was done by increasing the levy on the property.⁶⁴ This measure is said to have stifled the land market. In addition to these radical measures, stricter conditions were introduced in order to control ownership of land by foreigners.⁶⁵

⁶¹ Chimembe, "Land Law Use and Policy in Zambia" 36

⁶² Gear.M Kajoba, The landmarks of Zambia's land tenure system: from protectionism to empowerment. *Proceedings of the international conference on land tenure in the Developing World with a focus on Southern Africa.* (University of Cape Town;1998).

⁶³ Lungu, "Land Tenure and Agriculture Development in Zambia"47

⁶⁴ Chimembe, "Land Law Use and Policy in Zambia" 37

⁶⁵ Lungu, "Land Tenure and Agriculture Development in Zambia"47

The delay in obtaining consent from the President caused hardships to developers who were required to pay the loan from the day the loan is effective and not when consent was granted.

Mulimbwa submits that the defects in relation to Section 13 of the Act were:

*the lack of regulations governing the determination of prices, premiums or rent, absence of an appellate system, such as a land tribunal to which aggrieved parties could appeal decisions of the Commissioner of Lands whose office had delegated authority to exercise the powers of the President in matters pertaining to land, the absence of enforcement provisions for contravening the section, as with the rest; a administrative delays in processing applications for consent*⁶⁶

These reasons and a few more prompted the new Movement for Multiparty Democracy (MMD) government to repeal the Act when it took power in 1991; the philosophy of Humanism was abandoned in 1991.

2.7 CONCLUSION

The chapter has traced the historical background of lease covenants from the English feudal system of land law and has showed the basis of presidential lease covenants. It has further discussed some of the covenants that were imposed in presidential leases under Lands (Conversion of Titles) Act and weaknesses of such covenants. The next chapter will discuss the covenants imposed in presidential leases under the Lands Act of 1995.

⁶⁶A.C. Mulimbwa, “Land Policy and Economic Development in Zambia”, in Zambia Law Journal, Special Edition,(1998).85.

CHAPTER THREE

3.0 THE EFFECT OF PRESIDENTIAL LEASE COVENANTS ON DEVELOPMENT OF LAND ADMINISTRATION UNDER THE 1995 LANDS ACT

3.1 INTRODUCTION

This chapter gives the background to the Lands Act of 1995 and discusses the covenants imposed in presidential leases under the said Act and their impact on development. In order to effectively achieve this, the chapter will consider and evaluate the relevant sections of the Lands Act and finally give a conclusion.

3.2 BACKGROUND TO THE LANDS ACT OF 1995

The Lands Act of 1995 repealed the Lands (Conversion of Titles) Act of 1975. In 1991, the Movement for Multi-Party Democracy (MMD) government under the leadership of President Chiluba came into power.⁶⁷ This political change also brought about a move from the UNIP government land policies based on the socialist principles of Humanism. The MMD as a liberal democratic government set about the task of effecting a land policy, which embraced private property in land in a free market economic environment.⁶⁸ In its election manifesto the MMD stated:

The MMD shall institutionalize a modern, coherent, simplified and relevant Land law code intended to ensure the fundamental right to private ownership of land as well as to be an integrated part of a more efficient land delivery system. In order to bring about a more efficient and equitable system of tenure conversion and allocation in customary land; land adjudication legislation will be enacted and coordinated in such a way that confidence shall be restored in land investors. The MMD shall attach value to undeveloped land and promote the

⁶⁷Chileshe, "Land Tenure and Rural Livelihood in Zambia" 96

⁶⁸Chileshe, "Land Tenure and Rural Livelihood in Zambia." 96

*regular issuance of title deeds to productive land owners in both rural and urban areas.*⁶⁹

In order to effect their manifesto pronouncements on land, the MMD government introduced the Lands Bill in 1994. The MMD government introduced the Lands Bill in the National Assembly, but Members of Parliament from all sides of the House refused to support it, fearing popular opposition and possible defeat in the House, the government withdrew the bill to allow for consultation.⁷⁰ In some parts of the country, government officials including the Minister of Lands were threatened with beating if the bill went ahead. But in 1995 the Lands bill was reintroduced in Parliament and duly enacted into law. Hansungule eludes that MMD Members of Parliament were called to a caucus meeting at which the President asked them to vote in favour of the Act, failure to do so would result in them being expelled from the MMD party.⁷¹

This was followed by the enactment of the Lands Act No. 29 of 1995. To this day the legitimacy of the Lands Act of 1995 continues to be questioned by traditional authorities, opposition parties and the civil society because of the undemocratic way in which it was drafted and enacted into law.⁷² The objective of the 1995 Lands Act is to liberalise Zambia's land tenure system, specifically, it provides for a land market and issuance of land title. Under the repealed 1975 Act, the land market was a controlled or regulated one. The economic liberalization pursued by the MMD Government, also entailed the liberalization of the land market or less interference by the State in the land market.⁷³ This in turn required that all the obstacles to a free land market embedded under the 1975 Act had to be dropped.

⁶⁹Mudenda, *Land Law in Zambia: Cases and Materials* (Paragraph M [under Socio Economic Perspective] of the Manifesto for the Movement for the Multi-party Democracy,1990) 243

⁷⁰ Hansungule, *Report on Land Tenure Insecurity on the Zambian copperbelt*; 1998, 18

⁷¹ Hansungule, *Report on Land Tenure Insecurity on the Zambian Copperbelt*; 1998, 18

⁷² Hansungule, *Report on Land Tenure Insecurity on the Zambian copperbelt*; 1998, 18

⁷³ Mudenda, *Land Law in Zambia: Cases and Materials*, 287

These obstacles, as pointed out in the preceding chapter, included the notion that bare land had no exchange value, and fixing of maximum consideration for various transactions or dealings in land.⁷⁴

The Lands Act of 1995 has repealed the 1975 Land (Conversion of Titles) Act and consequently, puts in place a market for bare land. The categories of Reserves and Trust Lands are combined into the land category referred to as Customary Areas. The Act continues to recognise customary tenure and to vest all land in the President, who has the right to alienate land to both Zambians and non-Zambians under certain conditions. The instances under which the President may alienate land to non-Zambians have been increased.⁷⁵ The Lands Act has further established a Lands Tribunal. Unlike under the 1975 where the decision of the president was final; there is now an institution in place to deal with disputes arising from the exercise of power by the President under the Lands Act. The land development fund has been established for the development of new areas.

3.3 VESTING OF TITLE (OBLIGATIONS OF THE PRESIDENT AS LESSOR)

The concept of vesting of land in the President places the President in the position of the landlord or lessor and gives him the authority to alienate land to Zambians and non-Zambians and the power to impose covenant in leases granted by him. The Lands Act vests all land in Zambia in the President to be held by him in perpetuity for and on behalf of the people of Zambia.⁷⁶ It is enacted in section 3 (5) that land is to be administered and controlled by the

⁷⁴ Mudenda, *Land Law in Zambia: Cases and Material*, 287

⁷⁵ Mudenda, *Land Law in Zambia: Cases And Materials*, 287

⁷⁶ Lands Act Chapter 184 of the Laws of Zambia Section 3(1)

President for use or common benefit, direct or indirect of the people of Zambia. This entails that the President is not the owner of the land.⁷⁷ The position of the President is not comparable to the crown's position in England; whereby the ownership of all land in England is in the crown alone and everybody else holds his land as a tenant of the crown.⁷⁸ In Zambia although individuals holding land under statutory tenure own merely estates or interest in land from the President, the President has no beneficial and proprietary interest in the land. The Mungomba Constitution Review Commission observed that:

*The Lands Act, vests all land in the president who holds the same in perpetuity for and on behalf of the people of Zambia. This holding is for the purpose of administration and control by the president for the use and common benefit direct or indirect of the people of Zambia. This vesting quite clearly does not mean that the president is the owner, but rather that he/she is the trustee and the administrator of the land. The president does not therefore own beneficial and proprietary interest. What the president has are powers of regulation and administration.*⁷⁹

3.4 LAND TO BE ADMINISTERED FOR THE BENEFIT OF ZAMBIANS

The foundation of the relationship of lessor-lessee or landlord and tenant created through the concept vesting title in the President is that the people vest the land in the President on behalf of the state because they trust that the President will protect the land. Trust is the foundation behind the concept of vestment.⁸⁰ There is an implied duty, not only to protect but to use the land for the purpose of promoting and advancing the interest of the people.⁸¹ Similarly under the same trust relationship government when granting land rights to non-Zambians especially

⁷⁷ Lands Act Chapter 184 of the Laws of Zambia Section 3(4)

⁷⁸ Megarry and Wade. *The Law of Real Property*, 6

⁷⁹ Mudenda, *Land Law in Zambia: Cases and Materials* (Interim Report of the Constitutional Review Commission, Government Printer Lusaka at 766.) 486

⁸⁰ Fred M'membe, "The Zambian Land Tenure System and the Process of Land Alienation: The need for Reform in Zambia," (Obligatory Essay, University of Zambia, 2005) 20

⁸¹ M'membe, "The Zambian Land Tenure System and the Process of Land Alienation: The need for Reform in Zambia" 21

to investors must ensure that water for instance to the local people is not interfered with.⁸² The trust doctrine through the concept of vestment is intended to ensure the survival and welfare of the local people. It is a solemn duty, a special duty that the government through the President must never betray.⁸³

The government through the President is the fiduciary of the land resources on behalf of the people which means that whenever it is dealing with land. It must act with utmost good faith and utter loyalty to the best interest of the local people. To ensure this, there is urgent need to have an explicit law on land that reflects specific tasks on the part of this duty.⁸⁴ This is necessary so that various ethnic groups that feel short changed by the President in the manner their resources have been used or granted to non-local people or investors can sue government for the mismanagement.⁸⁵

All land in Zambia is required to be administered and controlled by the President for the use and common benefit direct or indirect of the people of Zambia. In achieving this, the Lands Act contains provisions that restrain the President from alienating land in certain circumstances which are not to the benefit of Zambians. Thus the President is restrained from alienating land for a term exceeding ninety-nine years unless the alienation has been approved by two thirds majority of the National Assembly.⁸⁶ This is a good feature provision worth noting as it can be used to check the powers of alienation of land by the President to

⁸² M'membe, "*The Zambian Land Tenure System and the Process of Land Alienation: The need for Reform in Zambia*" 21

⁸³ Land Tenure Systems in Southern Africa in Sustainable in Southern Africa ECA/SA/EGM.L AND/2003/2; P;15

⁸⁴ M'membe, "*The Zambian Land Tenure System and the Process of Land Alienation: The need for Reform in Zambia*" 21

⁸⁵ Land Tenure Systems in Southern Africa in Sustainable in Southern Africa ECA/SA/EGM.L AND/2003/2; P;15

⁸⁶ Section 3(6) of the Lands Act

ensure that it is for the use and common benefit of Zambians. It also ensures involvement of the people's representation in the process.⁸⁷

Furthermore, in alienating land the President is required to take such measures as necessary to control settlements, methods of cultivation and utilization of land as may be necessary for the preservation of the natural resources on that land; and set aside land for forest reserves and game management areas and national parks and for the development and control of such reserves, game management areas and national parks.⁸⁸ The Act also makes it mandatory for the President to renew the lease at the expiry of 99 years unless the lessee is in breach of his obligations under the lease agreement.⁸⁹

3.5 LESSEE'S COVENANTS UNDER THE LANDS ACT OF 1995

The Lands Act of 1995 imposes certain obligations to the lessee of a presidential lease, some of the covenants are contained in the lease agreement concluded between the President as lessor and the person who has been granted a lease from the President referred to as the lessee. The obligations or covenants that were imposed in presidential leases under the 1975 Act reflected Kaunda's philosophy of Humanism that land should remain the property of the state and should not be sold. Land in itself was not a commodity to be sold only unexhausted improvements on the land were sold, and the price was fixed by the President. The covenants under the current Lands Act, reflect the MMD's philosophy of a liberal and free market

⁸⁷Francis Ngoma "Constraints in the System of Land Dispute Resolution in Zambia: A critique of the lands Tribunal" (Obligatory Essay, University of Zambia, 2005)27

⁸⁸ Lands Act Chapter 184 of the Laws of Zambia Section 7 (a) (b)

⁸⁹ Lands Act Chapter 184 of the Laws of Zambia Section 10

economy in which land has value and the price being determined by the parties to the transaction and not the state.

3.5.1 COVENANTS TO PAY RENT

Recognizing that land *per se* has value, section 4(1) of the Lands Act states that the President shall not alienate any land without receiving any consideration, in money for such alienation and ground rent for such land, except where the alienation is for a public purpose. The instances of public purpose are listed under section 4(2) of the Act and it further provides that no consideration shall be paid where a person has the right of use and occupation of land under customary law and wishes to convert such right into leasehold tenure.⁹⁰ The Act imposes an obligation on the lessee to pay consideration for alienation and a ground rent. Under the 1975 Act a lessee was not required to pay a ground rent because land was considered to have no value.

The introduction of the requirement for ground rent is therefore an important achievement as it provides a source of revenue for the Ministry of Lands. Ground rent is payable annually by any lessee holding a lease from the president. It is a tax on the land recognizing the fact that land *per se* has value.⁹¹ Land administration through the taxes on land plays a significant role in raising revenue for public finances; the potential significance of ground rent is considerably high especially in a developing country like Zambia.⁹² Ground rent remains an important source of revenue for the Ministry of Lands this is because monies realized from ground rent is meant to develop new areas. However, in most instances the Ministry of Lands

⁹⁰ Lands Act Chapter 184 of the Laws of Zambia Section 4 (2)

⁹¹ Ngoma, “ *Constraints in the System of Land Dispute Resolution in Zambia. A critique of the lands Tribunal*” 27

⁹² Good governance in Land Tenure and Administration, (UN FAO. 2007) 27

usually does not get adequate funds from ground rent because, most of the lessees fail to meet their obligations to pay ground rent, and usually the President does not hurriedly repossess the land from such lessees due to lack of adequate funds to compensate such lessees.⁹³ The 1995 Lands Act established a Land Development Fund⁹⁴ and section 16 (2) of the Act states that the fund shall consist of all moneys appropriated by Parliament for the purposes of the fund, seventy-five per centum of the consideration paid under section four and fifty per centum of ground rent collected from all land.

The fund is vested in the Minister responsible for finance and is managed and administered by the Minister responsible for land.⁹⁵ The fund is required to be applied to the opening up of new areas for development of land⁹⁶. A council that wishes to develop any area in its locality may apply to the fund for money to develop the area.⁹⁷ The Minister has made regulations relating to the fund⁹⁸ and it has been observed that in order to develop the land administration system there should be transparency and accountability in the use such monies.

The problem with this fund is abuse of the fund which has been more pronounced because the Act does not adequately provide for the use of the fund.⁹⁹ The idea of a fund in a country is not just to open up new areas for development of land as the Act provides. It is more than that; this is the money which can be used to meet the cost of land reparations¹⁰⁰. Government

⁹³ Interview with the estates and valuation officer, Mr Mabuchi Ministry of Lands; at 16 hours 10th April 2012

⁹⁴ Lands Act Chapter 184 of the Laws of Zambia Section 16(1)

⁹⁵ Lands Act Chapter 184 of the Laws of Zambia Section 17(1)

⁹⁶ Lands Act Chapter 184 of the Laws of Zambia Section 18(1)

⁹⁷ Lands Act Chapter 184 of the Laws of Zambia Section 18(2)

⁹⁸ Land Development Fund Regulations - Statutory Instrument No. 88 of 1996.

⁹⁹ M'membe, "The Zambian Land Tenure System and the Process of Land Alienation: The need for Reform in Zambia" 21

¹⁰⁰ M'membe, "The Zambian Land Tenure System and the Process of Land Alienation: The need for Reform in Zambia" 21

can use this money to invest in social services. It has also been observed that the idea of vesting the fund in the minister of finance makes it subject to the whims of political decisions regarding the allocation of funds at the Ministry of Finance.¹⁰¹ This makes it a weak instrument to steer development.

3.8 COVENANT TO OBTAIN PRESIDENTIAL CONSENT

Since the nineteenth century, there has been some form of statutory control over the landlord's ability to restrict his tenant's rights of disposition.¹⁰² The requirement for consent to sell, transfer or assign any land is intended to allow the president as the landlord of all land in Zambia to monitor the transactions in land.¹⁰³ To make sure that the land that is subject to sell is free from any encumbrances and that the person dispossessing off the land has the legal title to do so. Section 5(1) provides that a person shall not sell, transfer or assign any land without the consent of the President and shall accordingly apply for that consent before doing so. This is a positive trend in that unlike section 13 of the 1975 Act, which required presidential consent for any transaction or dealings in land, section 5(1) of the 1995 Act only requires presidential consent in cases of sell, transfer, or assignment of land.¹⁰⁴ In presenting the Bill in the National Assembly the then Minister of Lands, the late Dr. Shimaponda, said thus in justifying the new innovation:-

*To reduce the delays in allocation of land by abolishing numerous requirements for state consents to land transaction such as to mortgage, sublet, subdivide and to charge and by retaining the only requirements- state consent to sell, transfer and assign*¹⁰⁵

¹⁰¹ Frank M Sikazwe, "Land administration in Zambia, an appraisal of the efficacy of the Lands Act of 1995" (Obligatory essay, University of Zambia 2005) 24

¹⁰² Williams, *Hill and Redman's Law of Landlord and Tenant*, 139

¹⁰³ Chimembe, "Land Law Use and Policy in Zambia" 16

¹⁰⁴ Mudenda, *Land Law in Zambia: Cases and Materials*, 248

¹⁰⁵ Hansard (11th August, 1995) 418.

The Lands Act provides that where a person applies for consent and the consent is not granted within forty-five days of filling the application, the consent shall be deemed to have been granted¹⁰⁶. Where the President refuses to grant consent within thirty days, he shall give reasons for his refusal. This is an improvement when compared to the 1975 Act where no time limits within which to grant consent were prescribed and where the President was under no legal obligation to give reasons for refusal to grant consent.¹⁰⁷

A person aggrieved with the decision of the President to refuse consent may within thirty days of such refusal appeal to the Lands Tribunal for redress¹⁰⁸. This is an improvement when compared to the 1975 Act, where the President's powers or decisions in relating to the grant of consent could not be challenged in any court or tribunal. The above practice of deemed consent denies the President the opportunity to monitor transactions in land, and ensure that the person who wishes to assign the land has the legal title to do. This provision has the potential of increasing corruption in land dealing especially by persons who purport to sell land without having the legal rights to do so. To curd this problem consent is usually obtained before any sell notwithstanding the Act providing that consent is deemed to be granted after 45 days of making the application.¹⁰⁹

3.9 COVENANT TO RENEW THE LEASE

The Lands Act under Section 10 guarantee the lessee's right to have his lease renewed upon expiry for a further 99 years, where the President is satisfied that the lessee has complied with

¹⁰⁶ Lands Act Chapter 184 of the Laws of Zambia Section 5(2)

¹⁰⁷ Mudenda, *Land Law in Zambia: Cases and Materials*, 248

¹⁰⁸ Lands Act Chapter 184 of the Laws of Zambia Section 5(4)

¹⁰⁹ Interview with the legal officer Mr Paul Kachimba of the Lands Department at Ministry of Lands, April 10th 2012

or observed the terms, conditions or covenants of the lease and the lease is not liable to forfeiture. The covenant to renew the lease provides security of tenure to lessees by providing that their lease will always be renewed unless they breach a covenant in the lease. In the event that the President does not renew the lease, the lessee is entitled to compensation for the improvements made on the land, unlike in the 1975 Act where a person was required to be compensated only for unexhausted improvement.¹¹⁰ The Lands Act has widened the meaning of improvements to include;

“anything resulting from expenditure of capital or labour and includes carrying out of any building, engineering or other operations in, on, over or under land, or the making of any material change in the use of any building or land and charges for services provided and other expenses incurred in the development or towards the development of land.”¹¹¹

It has been argued that taking into account that bare or virgin land has value under the 1995 Act compensation arising out of non-renewal of the lease should include the market value of land and should not be restricted to improvements.¹¹²

3.10 COVENANT TO EFFECT IMPROVEMENTS ON THE LAND

The lessee is required to effect improvements on the land within the period of 18 months.¹¹³ The covenant to effect improvements on the lands is not expressly provided for in the Lands Act but it is contained in the lease agreement. This covenant is intended to ensure development of land.¹¹⁴ However, it has been observed that most of the land lay idle without

¹¹⁰Lands (Conversion of Titles) Act Cap 289 (repealed) Section 7 (2)

¹¹¹ Lands Act Chapter 184 of the Laws of Zambia Section 2

¹¹² Mulimbwa, “Land Policy and Economic Development in Zambia” 91-92.

¹¹³ Lease agreement L/F/1 Stocked by Ministry of Lands

¹¹⁴ M'membe , “The Zambian Land Tenure System and the Process of Land Alienation: The need for Reform in Zambia” 37

any improvements being effected on it within the required eighteen months period.¹¹⁵ In most cases the Ministry of Lands through the office of the Commissioner of Lands does not repossess the land from such lessees who fail to effect improvements on the land and it can be said that the developmental clause in the lease agreement is not strictly enforced. There is therefore, urgent need to ensure that the development clause in the lease agreement is strictly enforced. Failure to use the land as prescribed in the development clause in the lease should attract re-entry proceedings and subsequent forfeiture of the lease.¹¹⁶

It has been observed that the failure by most of the lessees to effect improvements on the land has been as a result of the huge tracks of land that are allocated to them which they eventually fail to manage.¹¹⁷ As a result they subdivide the land and resell. The Mungomba Commission observed;

*That as a result of lack of legal restriction on the number of hectares that an individual can acquire in Zambia, some of the land allocated (both to Zambians and non-Zambians) remain undeveloped for a long period of time and that subsequently the owners resort to selling the undeveloped large tracts of land which they originally got at a token fee from Government.*¹¹⁸

The Commission was of the view that this promoted speculation of land and as such it was abuse of the land tenure system. The Commission further observed that the practice of assigning or subdividing undeveloped land led to speculation on land and has been abused and has created critical shortage of land in Towns and Cities. The Commission was of the view that there is need to regulate the speculation and subdivision of undeveloped land.¹¹⁹

¹¹⁵ M'membe, "The Zambian Land Tenure System and the Process of Land Alienation. The need for Reform in Zambia" .37

¹¹⁶ Mudenda, *Land in Zambia: cases and materials*, 528

¹¹⁷ Mudenda, *Land Law in Zambia; Cases and Materials* (Interim Report of the Constitutional Review Commission, Government Printer Lusaka at p.766) P; 278

¹¹⁸ Interim Report of the Constitutional Review Commission, Government Printer Lusaka at p.766

¹¹⁹ Interim Report of the Constitutional Review Commission, Government Printer Lusaka at p.766

3.11 COVENANT TO OBTAIN PLANNING PERMISSION BEFORE EFFECTING ANY IMPROVEMENTS ON THE LAND

The lease agreement further provides that the lessee is required to obtain planning permission from the relevant local authorities before effecting any improvements on the land.¹²⁰ This requirement of obtaining planning permission is intended to ensure that all land is put to the use which is best from the point of view of the community.¹²¹ One cannot for example start building on state land without permission from local authorities and when permission is granted, occupation use and management of the land should strictly conform to the prescribed rules.¹²²

3.12 CONCLUSION

The chapter has examined and considered the impact of presidential lease covenants under the Lands Act of 1995 on development of land tenure. It has been noted that the lessee's covenant to pay ground rent, effect improvements on the land within eighteen months, obtain planning permission are intended to ensure development of land tenure, although some of these covenants are not strictly implemented due to the defects in the land delivery system. It has also been observed that the president as the lessor has the obligation to administer land for the good and common benefit of the people of Zambia. The next chapter will look at the enforcement of presidential lease covenants under the Lands Act.

¹²⁰ Lease agreement L/F/1 Stocked by Ministry of Lands

¹²¹ Mudenda, *Land Law in Zambia Cases and Materials*, 448

¹²² M'membe, "The Zambian Land Tenure System and the Process of Land Alienation: The need for Reform in Zambia" 21

CHAPTER FOUR

4.0 ENFORCEMENT OF PRESIDENTIAL LEASE COVENANTS UNDER THE LANDS ACT OF 1995

4.1 INTRODUCTION

This chapter discusses the procedure in the enforcement of lease covenants under the Lands Act of 1995, and the challenges faced by the institutions responsible for enforcement of presidential lease covenants in enforcing such covenants and finally give a conclusion.

4.2 ENFORCEMENT OF PRESIDENTIAL LEASE COVENANTS

Covenants generally form the terms and conditions of the lease.¹²³ Covenants, being the terms of the lease agreement gives the parties to the lease agreement rights and obligations under the lease such that in the event of breach of a term of the lease the aggrieved party has the right take legal proceedings against the party in breach. However, since a real covenant descends to the heir; and it is also transferred to a purchaser even if he was not a party to the agreement.¹²⁴ A landlord may enforce the covenant even against a third party even though he is not a party to the original agreement.¹²⁵ Sections 11 of the Lands Act envisage this common law position by providing that;

(1) notwithstanding severance of a reversionary estate, ground rent and the benefit of every covenant or provision in a lease or any Act of parliament having reference to the subject matter of the lease shall be annexed and incidental to, and shall go with, the revisionary estate in the land or in any part of the estate immediately expectant on the term granted by the lease.

¹²³Williams, *Hill and Redman's Law of Landlord and Tenant*, 139

¹²⁴Libby, *Landlord and Tenant*, 44

¹²⁵Libby, *Landlord and Tenant* , 44

(2);the obligation under a condition of a covenant entered into by the President or contained in any Act of Parliament having reference to any subject matter of the lease shall be annexed and incidental to and shall go with the reversionary estate, or the several parts of that estate, notwithstanding severance of that estate and may be enforced by the person in whom the term is vested by assignment, transfer, devolution in law or otherwise.

Presidential lease covenants may therefore be enforced even against subsequent lessees who do not acquire the lease directly from the president, and even though they were not parties to the original agreement. This is because the presidential lease covenants go with the revisionary estate in land; they attach to the land itself. The Lands Act gives both the president as lessor and the lessee the right to take legal action in the event of breach of a covenant in the lease. Section 13 of the Lands Act states that;

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

(2) If the lessee does not within three months make the representations required under subsection (1), or if after making representations the President is not satisfied that a breach of a term or a condition of a covenant by the lessee was not intentional or was beyond the control of the lessee, he may cause the certificate of re-entry to be entered in the register

(3) A lessee aggrieved with the decision of the President to cause a certificate of re-entry to be entered in the register may within thirty days appeal to the Lands Tribunal for an order that the register be rectified.

4.3 INSTITUTIONS INVOLVED IN THE ENFORCEMENT OF LEASE COVENANTS

The current institutional arrangement places responsibility on the Ministry of Lands to formulate and co-ordinate the implementation of statutes related to land administration and

management in Zambia.¹²⁶ The Ministry of Lands is divided into four departments namely; Human and Administration, Lands, Survey, and Lands and Deeds.¹²⁷ The Ministry of Lands under the Lands Department is responsible for the administration and enforcement of covenants on behalf of the President. The Lands Department is headed by the Commissioner of Lands. The Ministry of Local Government is another institution involved in the enforcement of lease covenants. The Lands Act establishes a Lands Tribunal as an institution to settle disputes between the President and the lessee.¹²⁸

4.3.1 THE ROLE OF THE OFFICE OF THE COMMISSIONER OF LANDS IN THE ENFORCEMENT OF PRESIDENTIAL LEASE COVENANTS

The President has delegated his powers to the Commissioner of Lands to make and execute grants and disposition of land subject to special or general directions of the Minister of Lands.¹²⁹ The mandate to enforce presidential lease covenants including the power of re-entry and repossession of the land has been delegated to the Commissioner of Lands. Section 13 of the Act provides for the procedure the Commissioner of Land is required to follow in enforcing the covenants where the lessee is in breach of a covenant under the lease agreement.

The Lands Department is divided into three sections namely; the Lands Administration, Legal, and Estates and Valuation Sections.¹³⁰ The three sections under the Lands Department

¹²⁶ The draft land policy, government of the republic of Zambia, ministry of lands, October, 2002 P;17

¹²⁷ The draft land policy, government of the republic of Zambia, ministry of lands, October, 2002 P;17

¹²⁸ Lands Act Chapter 184 of the Laws of Zambia Section 13(3)

¹²⁹ The draft land policy, government of the republic of Zambia, ministry of lands, October, 2002 P;17

¹³⁰ Ministry of Lands Annual Report, Ministry of Lands, Lusaka, 2011

work hand in hand in the enforcement of the above section on re-entry. The Estates and Valuation section is primarily responsible for carrying out inspections on land leases to ensure that the lessee abide by the covenants under the lease agreement, most importantly the covenant to effect improvements on the land within the period of eighteen months.¹³¹ If after the inspections it is found that some improvements have not been effected on the land within the given time period, the estates and valuation section will notify the Legal Department which in turn issues a notice of intention to re-enter.¹³²

The said notice will be sent to the lessee's well known address and if the address is not known the notice of intention to re-enter is advertised in the public newspapers.¹³³ After 90 days of postage of the notice of intention to re-enter the Commissioner of Lands can lawfully repossess the land from the lessee. However, within the ninety days period the lessee can appeal to the Commissioner of Lands and make representations as to why a certificate of re-entry should not be entered in the register.¹³⁴ If after making the representation to the Commissioner, the Commissioner is satisfied that the breach of a covenant or condition was not intentional the land is not repossessed.¹³⁵

It has been observed from a number of cases decided by the Lands Tribunal that in most instances the Commissioner of Lands fails to follow the laid down procedure for issuing

¹³¹ Interview with the estates and valuation officer, Mr Mabuchi Ministry of Lands; at 16 hours 10th April 2012

¹³² Interview with the estates and valuation officer, Mr Mabuchi Ministry of Lands; at 16 hours 10th April 2012

¹³³ Interview with the legal officer Mr Paul Kachimba of the Lands Department at Ministry of Lands, April 10th 2012

¹³⁴ Lands Act Chapter 184 of the Laws of Zambia Section 13(2)

¹³⁵ Lands Act Chapter 184 of the Laws of Zambia Section 13(2)

notice of intention to re-enter. In the case of *Kabwe and Another v Daka and Others*,¹³⁶ which involved an application to the tribunal on the basis that the lessee did not receive the notice of intention to re-enter and as a result the subsequent repossession by the Commissioner of Lands was illegal. It was held on appeal to the Supreme Court that;

Section 13(2) of the Lands Act, is cardinal to the validation of the subsequent acts of the Commissioner of Lands in disposing of the land to another person.... It follows that repossession effected in the circumstances where a lessee is not afforded an opportunity to dialogue with the Commissioner of Lands, with a view to having an extension of period in which to develop the land, cannot be said to be a valid repossession. In our view, the Commissioner of Lands cannot be justified in making the land available to another developer.

In another case of *Gordon Frank Bwalya and the Commissioner of Lands*¹³⁷ in which the applicant was in breach of the lease agreement, specifically the covenant to pay an annual ground rent and to erect a building on the land to the approval of the local authority. The Lands Tribunal held that the effect of the notice of intention to re-enter is three fold, firstly it is intended to remind the appellant of the standing breaches and for him to remedy them, secondly it is to give more time to the lessee to develop the land in excess of the statutory eighteen months period, Thirdly to allow for any representation during the substance of the notice. The tribunal therefore found that the Commissioner of Lands was justified in repossessing the land. Since, the lessee having received the notice of intention to re-enter could not make any representations as to why the certificate of re-entry should not be entered in the register and the representation made after two years of issuing the notice was out of the reasonable time.

¹³⁶ (2006) ZR 12

¹³⁷ LAT/1/1996

4.3.1.1 THE CHALLENGES OF PROOF OF POSTAGE OF NOTICE OF INTENTION TO RE-ENTER

The challenge of notice of intention to re-enter is fundamental to the development of a good land administration system; it has been the basis on which most of the re-entry proceedings by the Commissioner of Lands have been challenged. Most of the lessees claim that they never receive the notice of intention to re-enter even when the notice was sent to them.¹³⁸ This problem is due to the fact that there is poor book keeping at the Ministry of Lands which makes it difficult to prove postage of the notice of intention to re-enter.¹³⁹ Furthermore the lessee's addresses are not updated and the lessee's do not communicate the change of address.

The legal officer in the Lands Department therefore recommended to the Commissioner of Lands that there is need to improve the booking keeping services at the Ministry of Lands.¹⁴⁰ Currently, there is no proper storage and accountability of the documents at the Ministry of Lands, leading to documents getting lost from time to time. This presents a challenge to the Legal Department to take enforcement mechanisms against those in breach of the legal requirement as there is no evidence.¹⁴¹ With particular reference to the problem of proof of postage the legal officer recommends that there is need for the Lands Department to engage private companies in the delivery of the notice of intention to re-enter. Private companies

¹³⁸ Interview with the legal officer Mr Paul Kachimba of the Lands Department at Ministry of Lands, April 10th 2012

¹³⁹ Interview with the legal officer Mr Paul Kachimba of the Lands Department at Ministry of Lands, April 10th 2012

¹⁴⁰ Interview with the legal officer Mr Paul Kachimba of the Lands Department at Ministry of Lands, April 10th 2012

¹⁴¹ Interview with the legal officer Mr Paul Kachimba of the Lands Department at Ministry of Lands, April 10th 2012

have more reliable and efficient information storage facilities such that one can obtain any information from them even after twenty years.¹⁴²

4.3.1.2 PROBLEMS WITH REGARD TO COMPENSATION FOR REPOSSESSION OF LAND

It is stated in the Act as shown above that if the notice of intention to re-enter is served on the lessee and the lessee does not make any representations or if after making representations the Commissioner of Lands is not satisfied that a breach of a term or a condition of a covenant by the lessee was not intentional or was beyond the control of the lessee, he may cause the certificate of re-entry to be entered in the register and lawfully repossess the land from the lessee. The question is what happens to the lessee, Should he or she be compensated or not? The Lands Act is however silence on the issue of compensation after repossession of the land. The Supreme Court considered this issue in the case of *Goswami v Commissioner of Lands*.¹⁴³ The Supreme Court held that Compensation, was payable to the dispossessed owner of land whether the re-entry was for good or for bad cause. This is in view of Article 16 of the Constitution which provides for protection against deprivations of property. Therefore, a lessee who has been dispossessed of his or her land ought to be compensated for the deprivation of his property.

¹⁴² Interview with the legal officer Mr Paul Kachimba of the Lands Department at Ministry of Lands, April 10th 2012

¹⁴³ (2001) ZR 31

The estates and valuation officer at the Ministry of Lands submitted that even in instances where the lessee is in breach of a covenant under the lease agreement.¹⁴⁴ It is difficult for the Commissioner of Lands to re-enter the land, as the ministry has no money to compensate those dispossessed of their land due to its failure to generate money from taxes on land like ground rent and make sure that the land is put to good use and there is no penalty for those who fail to pay ground.¹⁴⁵ There is therefore urgent need for the Office of the Commissioner to be funded adequately so that it can have funds to compensate lessees whose property is subject to forfeiture.¹⁴⁶

In order to curb the problems of compensating the lessee dispossessed of their land, the Commissioner of Lands has the discretion to give the land to another person. This person is required to pay the compensation to the person who has been disposed of the land, however in certain instances the lessee who has been dispossessed of his land may not be compensated there and then. The person granted the land is therefore required to send the money to the Ministry of Lands. The idea is to send the money to the Ministry of Finance so that should the lessee come back and claim their compensation they would be able to get their money as compensation for the repossession.¹⁴⁷

¹⁴⁴ Interview with the estates and valuation officer, Mr Mabuchi Ministry of Lands; at 16 hours 10th April 2012

¹⁴⁵ Interview with the estates and valuation officer, Mr Mabuchi Ministry of Lands; at 16 hours 10th April 2012

¹⁴⁶ Interview with the estates and valuation officer, Mr Mabuchi Ministry of Lands; at 16 hours 10th April 2012

¹⁴⁷ Interview with the legal officer Mr Paul Kachimba of the Lands Department at Ministry of Lands, April 10th 2012

4.3.1.3 THE CHALLENGE OF HUMAN RESOURCE

The Lands Department whose main mandate is to administer land in Zambia on behalf of the president is starved with human resource.¹⁴⁸ The department is not adequately equipped to carry out the volume of work assigned to it under the Act and cannot for instance carry out routine checks in order to ensure compliance with the covenants in the lease because of lack of manpower.¹⁴⁹ In order for the Lands Department to effectively monitor compliance with covenants and conditions under the lease agreement, there is need to improve or enhance the capacity of the Lands Department especially in terms of transport.¹⁵⁰ In most instances the Ministry of Lands has no way of knowing which land is developed and undeveloped, there are few officers under the estates and valuation department who are responsible for carrying out inspections to ensure that the lessees abide by the covenants in the lease. There is need to set up a land use section within the Lands Department with the mandate to constantly monitor land use.¹⁵¹

4.3.2 THE MINISTRY OF LOCAL GOVERNMENT'S ROLE IN THE ENFORCEMENT OF COVENANTS

It was felt that Local Authorities should participate in the process of land alienation and administration at district level since the Ministry of Lands has no structure at that level.¹⁵² The Lands Department is centralized in Lusaka where its principal Office is found. There are however, Lands Department offices established in all the nine Provinces, although there are

¹⁴⁸M'membe, " *The Zambian Land Tenure System and the Process of Land Alienation: The need for Reform in Zambia*" 37

¹⁴⁹Interview with the estates and valuation officer, Mr Mabuchi Ministry of Lands; at 16 hours 10th April 2012

¹⁵⁰Mudenda, *Land in Zambia cases and materials*, 528

¹⁵¹ Mudenda, *Land in Zambia cases and materials*, 528

¹⁵² The Draft Land Policy, Government of the Republic of Zambia, Ministry of Lands, October, 2002 P;17

no departments at district level.¹⁵³ The Ministry of Local Government and Housing is largely involved in the enforcement of presidential lease covenants. All the District Councils act as the agents of the Ministry of Lands in enforcing presidential lease covenants.¹⁵⁴ The district councils carry out inspections in their areas on behalf of the Ministry of Lands to ensure that the lessee abide by the provisions of the lease by effecting developments on the land within the required time. After these inspections the council sends detailed report to the Ministry of Lands. If the report indicates that the lessee is in breach of a covenant then the Commissioner of Lands issues a notice of intention to re-enter, this mechanism is in view of the fact that the Ministry of Lands is not decentralised.¹⁵⁵

The reliance by the Ministry of Lands on several other Government institutions and agencies (which inevitably leads to difficulties in co-ordination) does result into considerable delay and confusion.¹⁵⁶ Reliance on the local authorities for provision of reports on inspections carried by the local authorities is one problem facing the Ministry of Lands. This reliance on the staff of other Ministries means that the Ministry of Lands lacks control over the rate of land delivery.¹⁵⁷

¹⁵³ Interview with the legal officer Mr Paul Kachimba of the Lands Department at Ministry of Lands, April 10th 2012

¹⁵⁴ Interview with the Legal Officer Mr Paul Kachimba of the Lands Department at Ministry of Lands, April 10th 2012

¹⁵⁵ Interview with the Legal Officer Mr Paul Kachimba of the Lands Department at Ministry of Lands, April 10th 2012

¹⁵⁶ Roth, Michael (Ed), "Land Tenure, Land Markets, and Institutional Transformation in Zambia," prepared by the Land tenure centre- University of Wisconsin – Madison, September 1994, p 59.

¹⁵⁷ Roth, Michael (ed), "Land Tenure, Land Markets, and Institutional Transformation in Zambia,P59

4.3.4 THE LANDS TRIBUNAL

The 1995 Lands Act establishes a Lands Tribunal.¹⁵⁸ The Tribunal was created as a forum for speedy adjudication of land disputes as well as a way of reducing the cost of litigation in land matters.¹⁵⁹ There is however a new Act on the Lands Tribunal that repealed Section 20 of the Lands Act.¹⁶⁰ The Lands Tribunal is a dispute resolution mechanism in which the lessor and the lessee can resolve their disputes.

Section 13 (3) provides that a lessee aggrieved with the decision of the President to cause a certificate of re-entry to be entered in the register may within thirty days appeal to the Lands Tribunal for an order that the register be rectified.

The Lands Tribunal Act was enacted mainly to widen the jurisdiction of the tribunal so that the tribunal could not only hear disputes arising under the Lands Act but also other Acts that govern Land.¹⁶¹ However, from the time that the Lands tribunal Act was passed, it has not been functional due to the administrative procedures which are supposed to be put in place before the institution starts operating.¹⁶² Lessees therefore who are aggrieved with the decision of the President under section 13 are supposed to appeal to the Lands Tribunal but since the tribunal is not functional direct appeals to the High Court can be allowed.¹⁶³ Most under-privileged persons are unable to access the Lands Tribunal as the work of the tribunal is unknown to the public. The tribunal is also starved of funds that it is unable to perform its functions.¹⁶⁴

¹⁵⁸ Lands Act Chapter 184 of the Laws of Zambia Section 20(1)

¹⁵⁹ Sikazwe, “*Land administration in Zambia, an appraisal of the efficacy of the Lands Act of 1995*” 35

¹⁶⁰ Land tribunal Act Number 1 of 2010

¹⁶¹ Interview with Mrs Virgina Chiile Personal Assistant to the Registrar of the Lands Tribunal at Kariba House 11th April

¹⁶² Interview with Mrs Virgina Chiile Personal Assistant to the registrar of the Lands Tribunal Kariba House 11th April

¹⁶³ Interview with the legal officer Mr Paul Kachimba of the Lands Department at Ministry of Lands, April 10th 2012

¹⁶⁴ Sikazwe, “*Land administration in Zambia, an appraisal of the efficacy of the Lands Act of 1995*” 24

4.4 CONCLUSION

The chapter has examined and considered the enforcement of covenants under the Lands Act. It has highlighted the institutions responsible for the enforcement of presidential lease covenants and the challenges faced by such institutions in enforcing such covenants. These institutions include; The Ministry of Lands, the Ministry of Local Government and Housing and the Lands Tribunal. The main challenges highlighted include lack of updated book keeping systems, poor documentation, inadequate human resource and a general lack of the necessary machinery to monitor implementation of the covenants under Lands Act. The next chapter gives a conclusive summary of the research and the recommendations.

CHAPTER FIVE

5.0 RECOMMENDATION AND CONCLUSION

5.1 INTRODUCTION

The main objective of this research is to evaluate the extent to which presidential lease covenants contained under the Lands Act of 1995 enhance the development of land administration in Zambia. Chapter one gave the general introduction to the research by discussing the general nature of lease covenants, it further highlighted the statement of the problem, the objective of the study, the significance of the research, the research questions and the research methodology. Chapter two gave a historical background of lease covenants from the English land law system, and showed how the concept of leasehold covenants was incorporated in Zambia. The chapter further showed the basis of presidential lease covenants, and highlighted some of the covenants that were imposed in presidential leases under the Lands (Conversion of Titles) Act of 1975. It further considered the weaknesses of such covenants, which in turn motivated the MMD government to repeal the 1975 Lands Act. Chapter three evaluated the impact of presidential lease covenants on development. It discussed the salient provisions of the Lands Act of 1995 that relate to covenants, by assessing whether such covenants have an impact on the development of land administration. It was discovered that unlike the under the 1975 Lands Act, covenants imposed in presidential leases under the Lands Act of 1995 have a more positive impact on development of Land tenure in Zambia. Chapter four looked at the enforcement of presidential lease covenants, it was found that although the covenants imposed in presidential leases have a positive impact on development, there is poor enforcement of presidential lease covenant in Zambia, due to the defects in the land delivery system; in this regard the chapter highlighted some of the challenges faced by institutions involved in the enforcement of lease covenants.

Finally this chapter gives a conclusive summary based on the entire discussion and proposes recommendation as observed from the findings.

5.2 CONCLUSION

The aim of the research paper is to evaluate the extent to which covenants imposed in presidential leases under the Lands Act of 1995 facilitate the development of a good land administration system in Zambia. In achieving this, the paper considered the salient provisions of the Lands Act of 1995.

The paper evaluated the impact on development of the covenant to pay rent, covenant to renew the lease, covenant to obtain Presidential consent, and the covenants contained in the lease agreement mainly the covenant to obtain planning permission and to effect improvements on the land. In so doing the paper noted that the covenants imposed in presidential leases under the said Act, although fundamental and helpful in the development of a good land administration system, there are some weaknesses both in the legislative framework, and enforcement mechanism of covenants.

For instance there is no covenant that limits the number of hectares of land that an individual can own in Zambia, hence the problems of speculation of land. There is no strict compliance of covenants regarding the use of land. It has been observed that most of the land lay idle without any improvements being effected on it within the required eighteen months period. Furthermore, most of the lessees fail to meet their obligations to pay ground rent, and usually the President does not reposess the land from such lessees due to lack of adequate funds to

compensate such lessees. It was further observed that fifty per cent of the money collected as ground rent is directed to the land development fund. The fund provides a source of revenue for the Ministry of Lands and is supposed to be applied for development of new areas. It was however observed that the fund is greatly abused, and this abuse has been more pronounced because the Lands Act does not adequately provide for the use of the fund.

Furthermore, it has been observed that the idea of vesting the fund in the Minister of Finance makes it subject to the whims of political decisions regarding the allocation of funds at the Ministry of Finance. It has further been observed that by virtue of vesting of land in the president, land has been abused, as the President does not take into account the interest of the people of Zambia in administering land, land has been alienated to investors at the detriment of the citizens.¹⁶⁵ It has further, been noted that the Commissioner of Lands who has been delegated with the powers to administer and manage land on behalf of the President faces huge problems in implementing the covenants under the Act due to a number of shortcoming in the land administration system and these include; shortage of human resource to carry out inspections on land and ensure that lessees comply with the covenants, challenges in proof of delivery of notice of intention to re-enter due to the lack of proper booking keeping systems which eventually enable the lessees to challenge the repossession, lack of adequate funding .

It was observed that the Ministry of Lands use Local Council as their agents in enforcing Presidential lease covenants, this mechanism bring out the problem of coordination of the two institutions and lack of control by the Ministry of Lands over the rate of land management.

¹⁶⁵ Land Tenure Systems in Southern Africa in Sustainable in Southern Africa ECA/SA/EGM.L AND/2003/2,15

Looking at the findings presented in the study, the following recommendations can be made:

5.3.1 RECOMMENDATIONS

5.3.1 VESTING THE LAND IN PRESIDENT

The idea behind the vesting land in the president is in good faith. This vestment of land in the President is for the common good and benefit of the people of Zambia. It is intended to safeguard it from misuse, it being the most important resources. The Lands Act gives powers to the president to dispose land to any Zambian or non-Zambian, and in most instances these powers have been abused by the president for selfish reasons.¹⁶⁶ In some countries, to safeguard against possible abuse of this power by the president, land has been vested in the state rather than the President or state officials. The State being an institution while the President being an identifiable person is more trusted to look after the resource more carefully than the latter; the researcher proposes therefore that the Lands Act should be amended to vest all the land in the State and not the President.

5.3.2 THE OFFICE OF THE COMMISSIONER OF LANDS

The President as the Landlord of all land in Zambia delegated his powers of administration of land to the Commissioner of Lands.¹⁶⁷ The Commissioner is therefore an appointee of the President and his office is not provided for in the Constitution and does not enjoy security of tenure.¹⁶⁸ This is a compromise on the office of the Commissioner of Lands and as such makes the institution vulnerable to political interference; more accountability and transparency is needed in this office, because of the vast functions the commissioner is

¹⁶⁶M'membe, "The Zambian Land Tenure System and the Process of Land Alienation: The need for Reform in Zambia." 37

¹⁶⁷ Interim Report of the Constitutional Review Commission, Government Printer Lusaka, 766

¹⁶⁸Sikazwe, *Land administration in Zambia, an appraisal of the efficacy of the Lands Act of 1995*, 24

required to perform.¹⁶⁹ Following recommendations made by the Mung'omba Constitution Review Commission there is need for reform in the area of the law in order to provide for security of tenure by making the office a constitutional office.¹⁷⁰

5.3.3 NEED TO IMPROVE OR ENHANCE THE CAPACITY OF THE LANDS DEPARTMENT IN TERMS OF HUMAN RESOURCE AND TRANSPORT

The Lands Department is fully constrained in terms of human resource; the department is not adequately equipped in terms of human resource to carry out the volume of work assigned to it, for instance carrying out routine check-ups to monitor implementation of covenants in leases. Further the Ministry of Lands lacks the necessary machinery, in terms of transport. There is no adequate transport that can be used to insure routine checks with lessees and issue that they comply with the covenants in the lease agreement, for instance ensuring that lessee effects the necessary improvements on the land. There, is therefore need to enhance the capacity of the Lands Department in terms of human resource and transport.¹⁷¹

5.3.4 NEED TO FOLLOW THE PROVISIONS OF THE ACT ON RE-ENTRY

Breach of a covenant entitles the President to issue a notice of intention to re-enter; however, most of the provisions on re-entry are not followed by the Commissioner of lands.¹⁷² There is urgent need for the Lands Department under the Commissioner of Lands office to strictly enforce the covenants regarding the use of land. Security of land tenure should be dependent

¹⁶⁹ Interim Report of the Constitutional Review Commission, Government Printer Lusaka. 766

¹⁷⁰ Interim Report of the Constitutional Review Commission, Government Printer Lusaka . 766

¹⁷¹ Mudenda, *Land Law in Zambia: Cases And Materials*, 525

¹⁷² Mudenda, *Land Law in Zambia: Cases and Material*, 527

upon proper use of land.¹⁷³ The development clause in the lease agreement should be strictly enforced. Failure to use the land as prescribed in the development clause in the lease should attract re-entry proceedings and subsequent forfeiture of the lease. The book keeping systems at the ministry should be improved, to ensure that all documents relating to prove of notice of intention to re-enter are not lost. This can be done by introducing a new book keeping system and training the staff. The Ministry can therefore reduce challenges from lessees on the ground of non-delivery of notice of intention to re-enter as there will be proper records. Furthermore, there is need for the Commissioner to insure that the notice of intention to re-entry is properly served by utilising the private courier services which return notices if undelivered. This will assist in finding alternative means of serving the notice.

5.3.5 NEED TO SETUP THE LAND USE SECTION WITHIN THE MINISTRY OF LANDS

There is also agent need to set up a land use section within the Ministry of Lands to be responsible for administering land use in the country and ensure that the land is put to use and that the lessees abide by their obligations in the lease agreement.¹⁷⁴ Currently there is no land use section in the Ministry of Lands, the inspections on the land to ensure compliance with the covenants are done by the estates and valuations Section which is also under staffed and do not effectively carry out the inspections. Hence the ministry from time to time depends on the councils under the Ministry of Local Government to carry out these inspections and provide them with reports. This reliance on the staff of the Ministry of local government means that the Ministry of Lands lacks control over the rate of enforcement of Presidential lease covenants. The author recommends that a land use section should be established within

¹⁷³ Mudenda, *Land Law in Zambia: Cases And Materials*, 527

¹⁷⁴ Sikazwe, *Land administration in Zambia, an appraisal of the efficacy of the Lands Act of 1995*, 24

the Lands department, with the mandate to monitor compliance with covenants in presidential leases. The author further recommends that the Ministry of Lands should be decentralised in order to have an efficient land delivery system as they will eliminate the dependency on the Ministry of Local Government.

5.3.6 INADEQUATE FUNDING OF THE MINISTRY OF LANDS

As all sectors dealing with land administration face constraints largely due to inadequate resources and funding, there is need for adequate budgetary provisions from the treasury to the Ministry of Lands and other stakeholders. Revenue collection needs to be improved through periodic review of statutory fees, ground rent and charges for various land, and the lands development fund needs to be effected to assist in land development.¹⁷⁵ There is need for the government to increase the funding to the Ministry of Lands to enable it to discharge its functions to a level that will ensure development of land tenure in Zambia.

¹⁷⁵Interview with the legal officer Mr Paul Kachimba of the Lands Department at Ministry of Lands, April 10th 2012

BIBIOLOGRAPY

BOOKS

Dixon, Martin. *Land law*. London: Cavendish Publishing Limited, 1994

Hayton, David. *Megarry's Manual of the Law of Real property*, 6th Ed, ELBS, London. 1982

Hiram, H. Lessar. *Landlord and Tenant*. Canada; Little Brown and Company ,1957

James, R. William. *Land Tenure and Policy in Tanzania Dar- es lam*; Dar- es lam: East African Literature Bureau 1971

Libby, F. James. *Landlord and Tenant*. New York: Oceana Publications Inc, 1974

Megarry, Robert, and Wade, Williams. *The Law of Real Property* 6th Ed London: Sweet & Maxwell 2000

Mudenda, S. Fredrick. *Land Law in Zambia: Cases and Materials*. Lusaka; UNZA Press 2007

Mvunga, p. Mphanza. *Land law and Policy in Zambia*. Gweru: Mambo Press, 1982

Riddal, J. G, *Introduction to Land Law*, 4thEd London: Butterworths, 1988

Thompson, W. Goerge. *Commentaries on the Modern Law of Real Property*.vol 3, The BobbMerril Company Inc 1959

William, Howarth. *Land Law*, 3rd Ed London: Sweet and Maxwell, 1994

Williams, Wells. *Hill and Redman's Law of Landlord and Tenant* 14thEd London: Butterworth and Company 1964

DISSERTATION AND THESIS

Chileshe. A. Land Tenure and Rural Livelihood in Zambia. Thesis, University of the Western Cape 2005

Chimembe, Joseph. Land Law Use and Policy in Zambia, Obligatory Essay, University of Zambia, 1983/84

Lungu ,. Land Tenure and Agriculture Development in Zambia. Unpublished PhD thesis. Aberdeen: University of Aberdeen (1994)

M'membe, Fred. The Zambian Land Tenure System and the Process of Land Alienation: The need for Reform in Zambia, Obligatory Essay, University of Zambia, 2005

Ngoma, Francis. Constraints in the System of Land Dispute Resolution in Zambia: A critique of the lands Tribunal, Obligatory Essay, University of Zambia, 2005

Sikazwe M. Frank. Land administration in Zambia, an appraisal of the efficacy of the Lands Act of 1995, Obligatory essay, University of Zambia. (2005)

JOURNAL ARTICLES

Mulimbwa, A .C. "*Land Policy and Economic Development in Zambia*", in Zambia Law Journal, Special Edition, 1998

REPORTS AND OTHER DOCUMENTS

Hansungule. Michelo, Report on Land Tenure Insecurity on the Zambian Copperbelt, 1998

Interim Report of the Constitutional Review Commission, Government Printer Lusaka

Kajoba, M. Gear. The landmarks of Zambia's land tenure system: from protectionism to empowerment. *Proceedings of the international conference on land tenure in the Developing World with a focus on Southern Africa*. University of Cape Town; 1998

Lease agreement L/F/1 Stocked by Ministry of Lands

Land Tenure Systems in Southern Africa in Sustainable in Southern Africa ECA/SA/EGM.L

Ministry of Lands Annual Report, Ministry of Lands, Lusaka, 2011

Roth, Michael (Ed), "*Land Tenure, Land Markets, and Institutional Transformation in Zambia*," prepared by the Land tenure center- University of Wisconsin – Madison, September 1994

Sichone, Frightone. *Land Administration in Zambia With Particular Reference To Customary Land*: Paper presented at a Seminar Organised by the Zambia Land Alliance, University of Zambia Senate Chamber, 28th June 2008

The Draft Land Policy, Government of the Republic of Zambia, Ministry of Lands, October, 2002