

IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

APPEAL NO. 104/2020
CAZ/08/064/2020

21 APR 2022

BETWEEN:

**MOLOSONI CHIPABWAMBA AND 12
OTHER DISPLACED VILLAGE OWNERS**

APPELLANTS

AND

**YSSEL ENTERPRISES LIMITED
KAITE JOHN KAKUNGU
BLUE VEIN INVESTMENTS LIMITED
BILLIS FARM LIMITED
ABRAHAM LODEWIKUS VILEOEN
SERENJE DISTRICT COUNCIL
THE ATTORNEY GENERAL
THE COMMISSIONER OF LANDS**

**1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT
4TH RESPONDENT
5TH RESPONDENT
6TH RESPONDENT
7TH RESPONDENT
8TH RESPONDENT**

Coram: Makungu, Sichinga and Siavwapa, JJJA

On the 17th November, 2021 and 21st day of April, 2022

*For the Appellants: Mr. C. M. Sianondo & Ms. M. Siansulo of Messrs
Malambo & Co. and Mr. B. Siachitema of Lusitu
Chambers*

For the 1st to 3rd Respondents: No appearance

*For the 4th & 5th Respondents: Ms. J. R. Mutemi of Theotis Mutemi Legal
Practitioners*

For the 6th Respondent: No appearance

For the 7th & 8th Respondents: Ms. B. Kafunya of Attorney General's Chambers

J U D G M E N T

MAKUNGU, JA delivered the Judgment of the Court.

CASES REFERRED TO:

1. *Sailas Ngowani & Others v Flamingo Farms Limited SCZ Appeal No. 15 of 2019*
2. *Duncan Silembo v Roman Shaloomov CAZ Appeal No. 44 of 2018*
3. *Village Headman Mupwaya & Another v Mbaimbi SCZ Appeal No. 4 of 1999*
4. *Pastor K. Akinlolu Akinduro v Alhaji Idris Alaya S.C. 296/2002*
5. *Trevor Limpic v Rachel Mawere & Others SCZ Judgment No. 121 of 2006*
6. *John Chisenga Kapabila & Others v Niko Nkalonga - Cause No. 2017/HP/2088*
7. *Julius Chilipamwawo Sinkala v Bornface Simbule & Others SCZ Appeal No. 153 of 2016*
8. *Socote International Inspection (Zambia) Limited v Finance Bank Zambia Limited SCZ Appeal No. 149 of 2011*
9. *Gilbert Kabwe v Wireless Chibuye - Cause No. 2018/HP/2083*
10. *Abdul Rigwara Simwaya v Commissioner of Lands & Others CAZ Appeal No. 92 of 2017*
11. *Mwananshiku & Others v Kemp & Mwananshiku (1990 - 1992) Z.R. 42*
12. *Henry Mpanjilwa Siwale & Others v Ntapalila Siwale (1999) ZR*
13. *Still Waters Limited v Mpongwe District Council & Others SCZ Appeal No. 90 of 2001*

LEGISLATION REFERRED TO:

1. *The Constitution of Zambia Chapter 1 of the Laws of Zambia*
2. *The Lands and Deeds Registry Act Chapter 185 of the Laws of Zambia*
3. *The Lands Act Chapter 184 of the Laws of Zambia*
4. *The Lands (Customary Tenure) (Conversion) Regulations, Statutory Instrument No. 89 of 1996*
5. *The Lands (Acquisition) Act Chapter 189 of the Laws of Zambia*
6. *The High Court Act Chapter 27 of the Laws of Zambia*

Other works referred to

1. *Halsbury's Laws of England Vol. 16, 4th edition.*

1.0 INTRODUCTION

- 1.1 This appeal is against the judgment of S. Kaunda Nawa J of the High Court, dated 30th April, 2020 in which she held that the conversion of the land in dispute was null and void but that it would not be in the public interest to cancel the Certificate of Title. The lower court deemed the conversion as compulsory acquisition of land but ordered the 7th and 8th respondents to grant the appellants (Petitioners in the Court below) alternative land, and the 6th respondent to meet the relocation costs.

2.0 BACKGROUND

- 2.1 The background to this appeal is that the appellants were villagers who had settled in an area called Luombwa in Chief Muchinda's Chieftom, Serenje District. There was evidence that some villages had existed as far back as 1969, but that the area was in 1997 designated as a farm block. On 22nd January,

1996, the 1st respondent applied for the land in dispute and was granted a 14-year right of occupancy of F/9597, Serenje District on 29th May, 1998. On 30th July, 1998, a Certificate of Title No. L 5161 was issued in favour of the 1st respondent.

2.2 The 1st respondent later sold the land in dispute to the 2nd respondent, who in turn sold it to the 3rd respondent. The 3rd respondent subsequently sold the land to the 4th respondent, who acquired a Certificate of Title No. 148726 with a 99-year lease from 1st August, 2009. The extent of the land acquired was 2071.35 hectares. The 4th respondent, through the 5th respondent, its Manager, began developing the land by establishing a commercial farm. The appellants were forced to vacate the land and they went and settled in the Musangashi Forest Reserve under very difficult living conditions.

2.3 The appellants filed a Petition in the court below on 15th December, 2017, claiming the following reliefs:

- i. *An order and a declaration that the taking over of the Petitioners' customary land without following the required procedure is unconstitutional and is therefore null and void.*

- ii. *A declaration and an order that the Petitioners are to continue enjoying their land in accordance with the customary law of the area and its attendant rights.*
- iii. *An order directed at the 3rd and 5th Respondents to cancel any allocation, assignment or Certificate of Title that was issued to the 1st and 2nd respondents, which covers the land that is occupied, used, and enjoyed by the Petitioners under customary tenure.*
- iv. *An order for the restoration of the land back to the Petitioners of the same extent that they had historically enjoyed.*
- v. *An order and a declaration that the taking, destruction of houses, fields, crops, fruit trees, forests and closing of the roads used by the Petitioners violates their rights to dignity, life, personal liberty, protection from torture, inhuman and degrading punishment or treatment, property, not to be subjected to entry by others on their premises, freedom of association, freedom of movement and residence and not to be treated in a discriminatory manner.*
- vi. *A declaration that Section 33 of the Lands and Deeds Registry Act is unconstitutional as it results in the diminishment or termination of customary land rights without the provision of adequate compensation.*
- vii. *A declaration that Sections 33, 34 and 35 of the Lands and Deeds Registry Act are unconstitutional as they discriminate against the*

rural communities occupying, using and enjoying customary land rights and interests.

- viii. An order and declaration that Sections 33, 34 and 35 of the Lands and Deeds Registry Act are incompatible with Section 7 of the Lands Act and are therefore invalid.*
- ix. An order and declaration that the land was acquired or obtained under fraud, mistake, and /or misrepresentation and thus null and void and should be cancelled.*
- x. In the alternative, a declaration that Sections 33, 34 and 35 of the Lands and Deeds Registry Act have been repealed by the Lands Act.*
- xi. An Order for damages and compensation for the destroyed properties, houses, crops and fruit trees (both planted and from nearby forests) and for depriving the Petitioners and their families and households, access and use of their customary land for the period the 4th and 5th Respondents have been in possession and use of the property, contrary to Article 16 of the Constitution and Section 7 of the Lands Act.*
- xii. An order for damages and compensation for all the suffering that the Petitioners have been unlawfully and unjustifiably subjected to, pursuant to Articles 8,12,13,15,17,22,23,28,256 and 266 of the Constitution of Zambia.*
- xiii. An order of mandatory relief requiring the 4th and 5th Respondents to undertake reasonable and necessary remedial action in relation to the*

environment and other damages to land, air, water and other environmental aspects of the Petitioners' natural resources, or alternatively, damages in lieu of the same.

xiv. Costs.

xv. Further or other relief that the court may deem fit.

3.0 DECISION OF THE COURT BELOW

3.1 The lower court, upon considering the evidence before it, found that the land in dispute was in fact State land as it was in a farm block. That, there was therefore no need to follow the procedure for the conversion of land from customary to statutory tenure. However, upon examining some government topographical maps dated 1969 and 1983, the court found that some villages existed long before the 1st respondent was granted a right of occupancy for 2040 hectares in July, 1998 for which he obtained a Certificate of Title. RW3 testified that a right of occupancy is issued to a person who acquires a Certificate of Title to land held under customary tenure and is equivalent to a lease.

3.2 The trial judge considered **section 3(4) of the Lands Act Chapter 184 of the Laws of Zambia, and The Lands (Customary Tenure) (Conversion) Regulations, Statutory Instrument No. 89 of 1996** which provides for the procedure to be followed in the conversion of customary land into statutory tenure. She found as a fact that the statutory procedure was not followed when the 1st respondent applied for the land in issue as consent from the area chief had not been obtained, and yet the Serenje District Council went ahead to approve and ratify the allocation. Further, that the Commissioner of Lands proceeded to alienate the land without consulting the persons likely to be affected by the alienation process.

3.3 On the authority of the case of **Sailas Ngowani & Others v Flamingo Farms Limited** ⁽¹⁾, the lower court found that besides fraud, irregularity in the acquisition of a Certificate of Title or impropriety in its acquisition, would render null and void the allocation of land. The lower court found that the 4th and 5th respondents had notice of the appellants' interests in the disputed land because the 5th respondent even provided transport to move the appellants. Further, that the 4th and 5th

respondents were affected by the irregularity in the procedure adopted to alienate the land.

- 3.4 That the issuance of the Certificate of Title to the 1st respondent rendered the appellants squatters on the land, which was a violation of their rights under **section 7 of the Lands Act**.
- 3.5 With respect to infringement of the appellants' constitutional rights, the court below found that irregular alienation of the land to the 1st respondent resulted in the appellants being denied access to housing, education and health facilities, as well as their ability to practice their Lala custom and earn decent livelihoods from cultivating the land. That the infringement made them internally displaced persons.
- 3.6 The lower court considered **Article 16(2) of the Constitution** and found nothing in the law that prohibits the conversion of land held under customary tenure into statutory tenure as there were adequate protections, including resettlement and compensation, for persons affected by the alienation. On this basis, the claim that **sections 33, 34 and 35 of the Lands and Deeds Registry Act** are unconstitutional or inconsistent with **section 7 of the Lands Act** was rejected.

- 3.7 The "*petitioners*" had also argued that the taking over of their land held under customary tenure amounted to compulsory acquisition of land and therefore violated **Article 16 of the Constitution** and **sections 3, 5, 6, 7 and 25 of the Lands (Acquisition) Act Chapter 189 of the Laws of Zambia**.
- 3.8 The learned Judge considered the procedure for compulsory acquisition of land set out in **sections 4 – 6 of the Lands (Acquisition) Act** and found that there was no intention to compulsorily acquire the land in dispute. However, she found that farm blocks were created in the area as per the maps produced in court. Further, that the dispute arose when the land was converted from customary to statutory tenure in line with government policy to create farm blocks.
- 3.9 The court noted that, the 1st respondent did not apply for conversion of the land, but for alienation of State land. The application was subsequently approved without following the procedure with respect to third parties living on the land. Consequently, the learned Judge found that the alienation and subsequent conversion of the land tenure was null and void.

3.10 The trial judge opined that, taking into account the fact that the 4th respondent had settled as a commercial farmer on the land in furtherance of government policy to create farm blocks, it would not be in the public interest to cancel the Certificate of Title to F/9597 held by the 4th respondent.

3.11 Applying the principles of equity, the court below deemed the conversion of the land in dispute as compulsory acquisition, considering that the 8th respondent was in dereliction of his duty when he approved the conversion of the land. The lower court then ordered the 7th and 8th respondents, in consultation with the area Chief, to grant the petitioners land not exceeding the value of the disputed land, in the area where the appellants can enjoy their cultural and traditional rights as Lala people by tribe, subject to such land being available.

3.12 The 6th respondent was ordered to meet the costs of relocation, while the 4th respondent was ordered to compensate the appellants for their properties which were destroyed during their eviction.

3.13 The 7th respondent was ordered to pay the appellants compensation for the violation of their rights as a result of the

eviction. The compensation was to be assessed by the Registrar in line with the provisions of **The Lands (Acquisition) Act**.

4.0 GROUNDS OF APPEAL

4.1 The appeal is based on five grounds framed as follows:

1. *The learned trial Judge erred in law when she did not cancel the Certificate of Title for Farm F/9597, Central Province, having made a finding that the conversion of the land was null and void;*
2. *The learned trial Judge erred in law and in fact when she held that it would not be in the public interest to cancel the Certificate of Title for Farm F/9597, Central Province;*
3. *The learned trial Judge erred in law and in fact when she deemed the conversion of the land as a compulsory and/or lawful compulsory acquisition having made a finding that the evidence on record showed no intention to compulsorily acquire the land in dispute;*
4. *The learned trial Judge erred in law and in fact when she applied equity when no claim in equity or for equitable relief was raised or pleaded by the respondents; and*

5. The learned trial Judge erred in law and in fact when she did not grant the petitioners alternative relief in the event that the 8th respondent failed to secure them alternative land.

5.0 APPELLANTS' ARGUMENTS

- 5.1 The appellants' heads of argument were filed on 26th June, 2020. Grounds one and two were argued together; the appellants submit that the consequence of the failure to follow the mandatory procedure for conversion of customary land to statutory tenure, particularly the failure to obtain the chief's consent and to consult any person whose interest might be affected during the conversion, renders the conversion null and void and, consequently, the Certificate of Title obtained must be cancelled. Reliance was placed on the cases of **Duncan Silembo v Roman Shaloomov** ⁽²⁾ and **Village Headman Mupwaya & Another v Mbaimbi** ⁽³⁾.
- 5.2 Counsel submitted that in *casu*, the decision of the lower court not to cancel the Certificate of Title issued through a conversion process that was null and void on the basis that the 4th

respondent had settled as a commercial farmer on the land in dispute in furtherance of government policy to create farm blocks, which are beneficial for national development, was speculative. This is because it was not clear that a farm block had been created and there was no evidence to show that the conversion was done in the national interest.

5.3 The appellants further contend that the lower court's finding that Chief Muchinda only signified his consent to the creation of the farm blocks in 2002, long after the land had been converted and alienated to the 1st respondent, shows that the conversion of the land is not linked to the creation of the farm blocks.

5.4 That no good title passed from the 1st to the 4th respondent because the 1st respondent's title was tainted by the failure to follow procedure prescribed by statute. For this reason, the lower court ought to have ordered cancellation of the Certificate of Title. We were urged to order cancellation of the Certificate of Title relating F/9597, Serenje, Central Province and direct that the appellants return to their land and continue utilizing it.

5.5 Grounds three and four were also argued together. It was submitted that the finding by the lower court that there was no intention to compulsorily acquire the land in dispute and then proceeding to deem the conversion which it found to be null and void as a compulsory acquisition, was an attempt to validate or legalise the conversion of the land. That this is untenable at law and warrants the intervention of this Court.

5.6 We were referred to **sections 3, 5 and 7 of the Lands Acquisition Act** which outline the procedure for compulsory acquisition. The appellants submit that the State cannot compulsorily acquire property, or an interest in or over property, without giving the prescribed notice of its intention to do so and a notice to yield possession. That where land is compulsorily acquired by the State, adequate compensation must be paid for the acquired property. In any case, the land in issue was taken from the appellants and allocated to a private entity, the 1st respondent, for private use.

5.7 In this regard, the appellants contend that the remedy available to them is repossession of the land as opposed to compensation.

5.8 With respect to the lower court deeming the conversion to be a compulsory acquisition in line with the principles of equity, it is contended that this was made in the absence of a claim for equitable relief by the respondents and therefore the relief was baseless and the court lacked jurisdiction to grant such a relief. As authority, we were referred to the case of **Pastor K. Akinlolu Akinduro v Alhaji Idris Alaya** ⁽⁴⁾, a Nigerian Supreme Court judgment.

5.9 Ground five, is an alternative to the other four grounds of appeal. It is submitted that **section 13 of the High Court Act Chapter 27 of the Laws of Zambia** requires that matters before the court be determined with finality so as to avoid a multiplicity of actions.

5.10 In this vein, it is submitted that the court below should have given a duration within which the 7th and 8th respondents were to secure land for the appellants and attach a sense of urgency in removing the appellants from their current plight. That the appellants' ability to meet the necessities of life such as food, clothing and shelter has continued to be jeopardized because they are squatting in the Musangashi Forest Reserve, where

they are not allowed to undertake economic activities to sustain their livelihoods.

5.11 Therefore, alternative relief ought to have been ordered by the lower court in the event that the 8th respondent failed to secure alternative land for the appellants. It is submitted that cancellation of title ought to have been ordered in case the 8th respondent fails to secure land for the appellants. For these reasons, we were urged to allow ground five.

6.0 4TH AND 5TH RESPONDENTS' ARGUMENTS

6.1 Only the 4th and 5th respondents filed heads of argument, and the same are dated 7th April, 2021. The other respondents did not file any arguments. The 4th and 5th respondents argued grounds one, two and three together as follows: that the said grounds raise the collective issue of the lower court's power to disregard a rigid application of the law and apply equity, and whether it would be in the public interest.

6.2 The 4th and 5th respondents contend that the court below was exercising its inherent equitable jurisdiction as it has the authority to order that the Certificate of Title obtained without

following the mandatory procedure for conversion of customary tenure to statutory tenure stands as the justice of the case may require. That the land in issue is located in the Luambwa Farm Block in Serenje District of Central Province and we are invited to take judicial notice of the fact that the Zambian Government introduced the Farm Block Development Programme in 2002 to facilitate private sector investment, rural development and to foster growth of the agricultural sector. Under this programme, huge tracts of land were earmarked for the creation of farm blocks.

6.3 According to the 4th and 5th Respondents, the property in issue has been developed into a commercial farm where various crops are being cultivated on a large scale by the 4th respondent, and jobs have been created. They contend that under the circumstances, cancellation of the Certificate of Title would harm not only them but also the general public. That for this reason, the lower court, while recognizing that the procedure for compulsory acquisition was not followed, deemed the conversion as a compulsory acquisition in order to do justice and award the appellants an alternative piece of land.

6.4 Cancelling the certificate in issue would entail the 4th respondent losing the developments thereon and the appellants being unjustly enriched as they cannot compensate the 4th respondent for the loss of assets. Therefore, the lower court was on *terra firma* to apply the principles of equity. We were referred to **Article 118(2) (a) and (c) of the Constitution of Zambia** which provides:

(2) In exercising judicial authority, the courts shall be guided by the following principles:

(a) justice shall be done to all, without discrimination;

(b) ;

(c) adequate compensation shall be awarded, where payable;

6.5 It was submitted further, that by awarding the appellants adequate compensation, the lower court adhered to **Article 118(2) (c) of the Constitution**. That according to **Article 118(2)**, the court should not be fettered by a rigid application of the law, but should freely exercise its equitable jurisdiction. Similarly, **section 13 of the High Court Act** empowers the court to administer law and equity concurrently in the exercise of the jurisdiction vested in it.

6.6 That the court ought to call equity in aid where the law would offer an unjust remedy as did the Supreme Court in the case of **Trevor Limpic v Rachel Mawere & Others** ⁽⁵⁾, wherein the Supreme Court found it to be unjust enrichment to allow the respondents to take the property in issue which had massive improvements made by the appellant, saying that equity would not allow it. The Supreme Court ordered that the value of the improvements be assessed and that the appellant be compensated by the respondents.

6.7 The respondents' counsel referred us to **Halsbury's Laws of England Vol. 16, 4th edition para. 657** which reads:

"When claims on property had once come within the jurisdiction of a court of equity, whether in the ground of trust or otherwise, the court applied its own doctrines in order to adjust the party's rights in accordance with the intention of the settlors and testators or to prevent injustice.

And at **para. 658** the authors state as follows:

"In certain matters which were ordinarily the subject of jurisdiction at law, equity exercised a concurrent jurisdiction.

This was based on various circumstances:

- (1) That the legal remedy was not available;*
- (2) That the equitable remedy was more efficient; or*
- (3) That the procedure in equity afforded advantages which were not attainable at law"*

6.8 It was therefore submitted that, the court can administer equity where an equitable remedy is more befitting and is a workable solution in the circumstances of the case. That the lower court opted to exercise its equitable jurisdiction in light of the fact that cancelling the Certificate of Title would prejudice the 4th respondent, and the public at large.

6.9 The respondents' counsel further submitted that the lower court did not make a finding that it was not clear whether the farm block was created. The court observed and stated that the evidence of RW2 was not clear as to whether the farm block was created. In its judgment, the learned trial judge relied on the maps produced in evidence to arrive at the conclusion that the farm blocks had been created.

6.10 We were also invited to take judicial notice of the fact that farm blocks were created in the area as evidenced by the case of **John Chisenga Kapabila & Others v Niko Nkalonga Cause No. 2017/HP/2088** ⁽⁶⁾.

6.11 As regards the appellants' reliance on the cases of **Sailos Ngowani & Others v Flamingo Farms** ⁽¹⁾ and **Julius Chilipamwawo Sinkala v Bornface Simbule & Others** ⁽⁷⁾, the

respondents submit that these are distinguishable from the facts of this matter as follows: In those two cases, the properties subject of the dispute were not earmarked for the creation of farm blocks in accordance with government policy as is the case herein. Therefore, the application of the law and treatment should be distinct. The case of **Socote International Inspection (Zambia) Limited v Finance Bank Zambia Limited** ⁽⁸⁾ was called in aid to show that each appeal should be dealt with on its own merits.

6.12 Additionally, it is the respondents' contention that the appellants, in paragraphs 18, 19 and 20 of the Petition claimed that the conversion of the land in dispute amounted to a compulsory acquisition. Thus, it is shocking that the appellants have appealed against the lower court's determination that it was indeed a compulsory acquisition.

6.13 In ground four, the respondents submit that the appellants' submission is misguided as the court can, pursuant to **section 13** of the **High Court Act** administer equity even where it is not pleaded. The fact that the parties did not specifically plead equitable relief, does not preclude the court from administering

equity. It was contended that the facts of the case necessitated the application of equity on the court's own volition.

6.14 In opposition to ground five, the respondents submit that the alternative relief sought by the appellants was that **sections 33, 34 and 35 of the Lands and Deeds Registry Act** had been tacitly repealed by the **Lands Act**. That the main claim to cancel the Certificate of Title failed and therefore, this court cannot grant the failed claim as an alternative remedy.

6.15 The respondents further contend that the lower court did not fail to grant alternative relief to the appellants in the event that no land was available in the area where the appellants could enjoy their cultural and traditional rights as Lala persons by tribe. That the alternative remedy was for the appellants to be granted land in a different area.

6.16 We were therefore urged to dismiss the appeal with costs.

7.0 APPELLANTS' ARGUMENTS IN REPLY

7.1 On 12th November, 2021, the appellants filed heads of argument in reply. In reply to grounds one, two and three, the appellants submit that the cases cited by the respondents in which the

court was invited to take judicial notice that farm blocks were as a matter of fact created in Serenje District pursuant to government policy, do not show that farm blocks were created in 2002.

7.2 That in all the cases, like in the present, there were no pleadings both by the petitioners and respondents relating to the creation of farm blocks but relating to conversion of land from customary to statutory tenure. Counsel pointed out that the respondents' evidence on the creation of farm blocks was objected to as it was not pleaded.

7.3 As regards judicial notice, the appellants agree with the respondents that courts can take judicial notice of their own records and of another court, and went on to urge us to take judicial notice of the case of **Gilbert Kabwe v Wireless Chibuye - Cause No. 2018/HP/2083** ⁽⁹⁾. That the conclusion that we should arrive at is that the Certificate of Title issued in respect of the land in dispute should be cancelled.

7.4 That the case record in **Cause No. 2017/HP/2088** ⁽⁶⁾ indicates that it was never the intention of government, pursuant to its policy of creating farm blocks, to displace any settlers located

within the farm block. Further, that the map at page 414 of Volume 1 of the record of appeal shows that wherever there was a village, no provisional farm number was given.

- 7.5 Further, that the court cannot take judicial notice of the creation of Luombwa Farm Block as the date of its creation is disputed, neither is there evidence that the farm blocks were validly created. There is no evidence that the 1st respondent acquired the land in furtherance of government policy to create farm blocks, and so it was not done in the public interest but for private purposes.
- 7.6 The appellants contend that public interest has never been an issue to be considered when determining whether a Certificate of Title should be cancelled for failure to follow the prescribed mandatory procedure under the **Lands (Customary Tenure)(Conversion) Regulations**. That public interest considerations only come into play when the State intends to compulsorily acquire a parcel of land pursuant to the **Lands Acquisition Act**.
- 7.7 Citing the case of **Abdul Rigwara Simwaya v Commissioner of Lands & Others** ⁽¹⁰⁾, the appellants submitted that a Certificate

of Title can be cancelled even if the respondent is a bona fide purchaser for value, and that the Commissioner of Lands can still be condemned in damages.

7.8 With respect to ground four, the appellants' reply is that in terms of the case of **Mwananshiku & Others v Kemp & Mwananshiku** ⁽¹¹⁾ the concurrent administration of law and equity only applies where there is a conflict between the rules of common law and equity. They contend that since this action was founded on statute and not common law, the lower court cannot invoke the principles of equity pursuant to **section 13 of the High Court Act** to strike a balance between the principles of common law and equity.

7.9 The appellants pray that the appeal be upheld and that the Certificate of Title be cancelled. Further, that the appellants be granted re-possession of the land.

8.0 DECISION OF THIS COURT

8.1 Having considered the whole record of appeal and learned counsels' written and oral submissions, our analysis and determination is as follows:

8.2 In grounds one, two and four, the decision of the lower court not to cancel the Certificate of Title is being challenged. The effect of the failure to follow the prescribed procedure in the conversion of customary tenure to statutory tenure is that the Certificate of Title issued after the conversion ought to be cancelled. The law is settled in this respect. In interpreting **section 3(4)(c) of the Lands Act**, the Supreme Court has guided in the case of **Henry Mpanjilwa Siwale & Others v Ntapalila Siwale** ⁽¹²⁾ that persons who would be affected by a grant of title deeds should be consulted.

8.3 Further, in the case of **Sailas Ngowani & Others v Flamingo Farms Limited (1) and Still Waters Limited v Mpongwe District Council & Others** ⁽¹³⁾, the Supreme Court held that land held under customary tenure can only be alienated if consent is obtained by the traditional chief from those whose interests may be affected by such allocation. The apex court further guided that impropriety or failure to follow the procedure outlined in the **Lands (Customary Tenure)(Conversion) Regulations, 1996**, could render the

whole land acquisition process null and void and the Certificate of Title liable to cancellation.

- 8.4 We uphold the lower court's finding that the procedure stipulated in **section 3(4) of the Lands Act and Lands (Customary Tenure) Conversion Regulations** was not followed in that the interests of the appellants who were likely to be affected by the conversion of the land had not been taken into account by the chief. The 6th respondent proceeded to make recommendations to the 8th respondent without even inspecting the land in issue to ensure that no interests of the occupants would be adversely affected.
- 8.5 Having found that the 7th and 8th respondents alienated the land to the 1st respondent without following procedure, the lower court cannot be faulted for nullifying the conversion.
- 8.6 We hold that having found that the conversion of the land was null and void, the lower court ought to have cancelled the Certificate of Title issued to the 4th respondent in respect of F/9597 Serenje District, Central Province.
- 8.7 We are alive to the fact that the 4th respondent has invested heavily in the land to turn it into a commercial farm. However,

since the acquisition of the land was a nullity, the losses and gains shall lie where they have fallen.

8.8 However, the question that has arisen is whether the lower court was on *terra firma* to apply the principles of equity and deem the conversion of the land as a compulsory acquisition. Our view is that equity follows the law. There is a prescribed statutory procedure under the **Lands Acquisition Act** by which land may be acquired by the State compulsorily in the interests of the Republic. That procedure was not followed in this case. The conversion of the land by the 1st respondent from customary tenure to statutory tenure was neither by the State nor in the interest of the Republic to be deemed a compulsory acquisition.

8.9 In addition to what we have stated above, we hold that the lower court misdirected itself in deeming the conversion of the land in dispute as a compulsory and/or lawful acquisition in the absence of evidence of an intention to compulsorily or otherwise acquire the land by the State. The lower court's findings complained of in ground three were indeed contradictory. Therefore, ground three has merit.

8.10 We accept the respondents' submission that the case of **Mwananshiku and Others v Kempe Mwananshiku** ⁽¹¹⁾ guides that the administration of law and equity only applies where there is a conflict between the rules of common law and equity. That this action, having been based on statute law and not common law, should not have been determined using the principles of equity pursuant to **section 13** of the **High Court Act**. Further, the lower court erred to grant an equitable relief which was not pleaded.

8.11 For the foregoing reasons, we find merit in grounds one, two, three and four.

8.12 Due to the position we have taken on the other grounds, ground five becomes otiose.

8.13 Following the cases of **Duncan Silembo v Roman Shaloomov**⁽²⁾ and **Village Headman Mupwaya & Another v Mbaimbi** ⁽³⁾, we hereby order that the Certificate of Title Number 148726 issued to the 4th respondent be cancelled. The import of this is that the land reverts to customary tenure.

9.0 CONCLUSION

All in all, the appeal succeeds for the foregoing reasons. Costs are awarded to the appellants and may be taxed in default of agreement.

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C. K. Makungu
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C. K. Makungu
COURT OF APPEAL JUDGE

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D. L. Y. Sichinga
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D. L. Y. Sichinga, SC
COURT OF APPEAL JUDGE

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M. J. Siavwapa
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M. J. Siavwapa
COURT OF APPEAL JUDGE

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