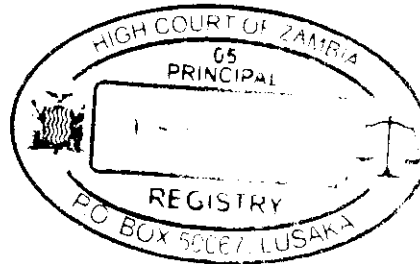


**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2014/HP/0476

BETWEEN:

SALIM BUX



PLAINTIFF

AND

**LUSAKA CITY COUNCIL
THE ATTORNEY GENERAL
TOMBWE PROCESSING LIMITED**

**1ST DEFENDANT
2ND DEFENDANT
3RD DEFENDANT**

***Delivered in open Court by the Hon. Mr. Justice Mathew L.
Zulu, at Lusaka the 1st day of October, 2020***

For the Plaintiff:	Mr. L. Mwamba, Messrs. Simeza, Sangwa & Associates.
For the 1 st Defendant:	Mrs. Y.N.C. Muwowo, Council Advocate
For the 2 nd Defendant:	Mr. P. Kachimba, Principal State Advocate, Attorney General's Chambers
For the 3 rd Defendant:	Mrs. M.B. Mutuna, Mesdames Mweshi Banda & Associates

JUDGMENT

Cases referred to:

- 1. General Musengule v. Attorney General(2009) Z.R. 359**
- 2. Corpus Legal Practitioners v. Mwandandi Holdings Ltd(S.C.Z.
Appeal No.134 of 2010)**

3. *Moore Stephens v. Stones Rolls Ltd [2007] EWHC 1826*
4. *Admark Zambia Limited v. Zambia Revenue Authority(2006) Z.R. 43*
5. *Rachael Shankwaya v. Lubinga Dimetria Nang'adu and two others (S.C.Z. Appeal No.8 of 2013)*
6. *Atlantic Bakery Ltd v. ZESCO Ltd (selected Judgment No. 61 of 2018)*
7. *Kangwa and others v. Enviromental Management Agency of Zambia and others (Appeal No. 40 of 2012)*

Legislation referred to:

1. *The Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia*
2. *The Town and Country Planning Act Chapter 283 of the Laws of Zambia*

This is an action by the Plaintiff against the Defendants for the following reliefs.

- i. **A declaration that the Second Defendant's decision to cancel the Plaintiff's title to stand 38149 Lusaka is wrongful and was made in bad faith;**
- ii. **A declaration that the enforcement notice issued by the First Defendant against the Plaintiff over stand 34149 Lusaka is irregular and null and void ab initio;**

- iii. An order of injunction to restrain the First Defendant from enforcing or implementing the enforcement notice issued against the Plaintiff's property stand No. 38149, Lusaka;**
- iv. Alternatively, damages against the First Defendant for expenses incurred by the Plaintiff in developing stand 38149 Lusaka following the grant of planning permission and consolidation of titles;**
- v. Further and other reliefs;**
- vi. Costs.**

The Plaintiff commenced this action on 27th March, 2014 by way of writ of summons and statement of claim. The case pleaded by the Plaintiff is that on 10th March, 2010, he applied to the 1st Defendant to consolidate his properties; Stand 33303 and 9526 to include a road reserve which was not being used by the neighboring properties. The application was initially unsuccessful. The Ministry of Local Government and Housing then wrote to the 1st Defendant informing them that officials from that Ministry had inspected the properties and established that the neighboring properties used different roads to access their properties. The latter recommended

that the Plaintiff's application for extension be positively reconsidered as it was not in violation of any planning rules or regulations.

Consequently, the Plans, Works and Development Committee at the 1st Defendant council convened a meeting on 4th April, 2011 and resolved that planning permission to extend stand 33303 and 9526 onto the road reserve and consolidation be granted. This recommendation was considered and adopted at a full council meeting held on 6th June, 2012. A certificate of title was subsequently issued to the Plaintiff. However, on 6th August, 2013, the 1st Defendant wrote to the Plaintiff informing him of its decision to cancel stand 38149, Lusaka. The Plaintiff also received a letter from the 2nd Defendant on 11th September, 2013 inviting him for a meeting to resolve the issue of encroachment involving his stand. At the end of the meeting, the 2nd Defendant directed the Plaintiff to surrender his certificate of title for cancelation. Consequently, the 1st Defendant issued an enforcement notice against the Plaintiff's property giving the Plaintiff 7 days' notice to open what used to be the access road. The Plaintiff claims that he has obtained loans and

incurred expenses in obtaining development plans for the oil refinery factory to be built on his property.

On 24th April, 2014, the Plaintiff obtained an *ex parte* order of interim injunction restraining the 1st and 2nd Defendant from demolishing the structures built on his property and restraining the former or their servants and agents from trespassing by passing and re-passing on the property. The interim injunction was confirmed on 12th June, 2014 and varied on 17th March, 2015. On 4th June, 2014, the Attorney General applied to strike out the Commissioner of Lands who was the 2nd Defendant from the proceedings which application was granted on 5th December, 2014.

The 2nd Defendant entered appearance and filed into court his defence on 13th March, 2015. The 2nd Defendant admits that a meeting was convened to resolve an issue of encroachment regarding the Plaintiff's property and that the Plaintiff was directed to surrender his certificate of title for cancellation because it was issued in error. He states that the cancellation was preceded by a full council meeting on 18th June, 2013 and was done in accordance with the Lands and Deeds Registry Act. The State

asserts that additionally, the cancelation was done for planning purposes to give access to stand 10025, which had been closed due to the consolidation of the Plaintiff's properties. He states that the cancellation was legally done in good faith.

In his reply dated 17th March, 2015, the Plaintiff joined issue with the 2nd Defendant on his defence.

The 1st Defendant in its defence filed into court on 11th June, 2015 admits that it received an application from the Plaintiff for the extension of stand 33303 and 9526 and that the same was initially unsuccessful. It states that the consultations that were made regarding the nonuse of the road reserve by the neighboring properties were inadequate. It further admits that its Plans Works and Development Committee convened a meeting and recommended the extension and consolidation of the Plaintiff's two stands and that the full council meeting later accepted the cancelation of Stand 38149 to open the access road to Stand 10025 off Katanga Road. The 1st Defendant states that it communicated this to the Plaintiff and justified the said action on the basis that it

had received an application from the 3rd Defendant who had not been consulted on the closure of the access road.

The 1st Defendant claims that the planning permission was lawfully withdrawn under Chapter 283 of the Laws of Zambia and the procedure was followed. It states that it issued the enforcement notice when the Plaintiff failed to heed to the withdrawal of the planning permission and that he is not entitled to any of the claims. On the 16th of January, 2018 after trial had commenced, the 1st Defendant applied to join Tombwe Processing Limited to the proceedings. The application was granted on 23rd July, 2018 and it was joined to the proceedings as the 4th defendant. However as the Commissioner of Lands was removed from the proceedings, Tombwe Processing is now the 3rd Defendant.

The 3rd Defendant filed into court its defence on 2nd November, 2018. It states that it became aware of the Plaintiff's application for extension in October, 2010 when the 1st Defendant sought its position on the application. It states that it was in attendance at the meeting at which the 2nd Defendant directed the Plaintiff to surrender his certificate of title for cancellation. It avers that it owns

stand 10025 which is accessed directly through the road reserve off Katanga Road which was consolidated into the Plaintiff's property; stand 38149. The 3rd Defendant states that the consolidation was authorized by the 1st Defendant despite its objection. It claims that access cannot be restricted to Mungwi Road as it is in the process of constructing additional Tobacco sheds that can be more easily accessed through Katanga Road and that stand 19827 through which the Plaintiff wants it to access its stand is not registered in its name.

At trial, the Plaintiff testified on his own behalf as the only witness and he was PW1. He told the court that he was the registered owner of stand 33303 and 9526 and that after he successfully consolidated the two, they were renumbered. PW1 testified that his initial application was unsuccessful because the area was reserved for storm drainage. He appealed to the Permanent Secretary Local Government and Housing to be given a portion of the road reserve. The team from Local Government carried out an inspection, and the Permanent Secretary wrote to the Town Clerk in which he expressed that he was not objecting to the granting of the road

reserve as the neighbors were using different routes and storm drainage had been created.

PW1 testified that following the letter from the Permanent Secretary, the 1st Defendant informed him that his application was considered at a full council meeting. He collected the plans and submitted them to the Ministry of Lands and was issued with an offer. He was subsequently issued with a certificate of title after paying the necessarily fees. PW1 testified that he constructed a wall fence and extra storm drainages and started the process to obtain a loan for the developments. He was surprised to receive a letter from the 1st Defendant in 2013 to the effect that they were cancelling his plot in order to open the access road for the neighbors. He then appealed to the Town clerk and later got a letter from the Ministry of Lands to attend a meeting. He testified that he objected to the intention to cancel his title and that after the meeting, the 1st Defendant wrote to him directing that he demolishes the structures within 7 days. PW1 testified that he wanted the land to be left to him to develop it as he had planned.

When cross examined, PW1 confirmed that he did not comply with the instruction to open the access road and that the 1st Defendant sent him the enforcement notice after he failed to heed to their instructions. PW1 confirmed that he did not inform his neighbors but he had a chat with one of them and they had no objection. He maintained that he only learnt of the 3rd Defendant's objection through his lawyers.

This marked the close of the Plaintiff's case.

The 1st Defendant called two witnesses in its defence. The first witness was Wanki Musavi and he was DW1. He testified that he is a Senior Lands Officer at the Ministry of Lands and that he has worked in this position for 17 years. He testified that the Plaintiff owned stand 33303 and 9526 which were consolidated in 2011 following a recommendation from the 1st Defendant and renumbered as stand 38149. The Plaintiff was issued with a certificate of title for the new number. They later received a recommendation from the 1st Defendant to cancel the title because it had caused the access road to stand 10025 to be blocked.

The 1st Defendant's second witness was Seith Wilateke and he was DW2. He testified that he is a town planner at the 1st Defendant council where he has worked for two years. It was his evidence that he was aware of this case by virtue of his employment and that he had a site visit on the land in dispute. DW2 explained that when a person makes an application for an extension or a subdivision, a site visit is conducted and if the application is viable, they respond immediately. They then table the issue before the Plan, Works and Real Estate Sub-committee. After physical verification, the application is referred to the Plans Committee and after that it is referred to the full council if it is ratified. After the full council, if it is a subdivision, it is sent to the Surveyor General for numbering. DW2 testified that this procedure was followed and afterwards they communicated directly with the Plaintiff that his application was unsuccessful.

DW2 testified that the Plaintiff appealed to Ministry of Local Government and Housing. The Acting Director Physical Planning wrote to the 1st Defendant to reconsider its position. He testified that for such application to be approved, there must not be any

objection and the matter was sent to the Plans Committee who approved the application which was later ratified by the full Council and tabled before the Commissioner of Lands. DW2 testified that it later came to their attention that the Plaintiff's neighbour, the owner of stand 10025 had objected to the application and the matter was tabled before the Sub-committee on planning for possible cancellation of the proposed extension.

DW2 testified that the 3rd Defendant's objection was predicated on the basis that it was not consulted on the proposed extension and that they needed more than one access road. Also, that it had the right to this road reserve. After the meeting of the council that proposed the cancelation of stand 38149, it was observed that the Plaintiff had erected a barrier and a gate, and therefore an enforcement notice was issued directing the Plaintiff to open up the access road after he failed to yield to the Council's decision. DW2 testified that the procedure was followed and the council was right to issue the enforcement notice.

During cross examination, DW2 confirmed that according to the letter from the Ministry of Local Government, they had conducted a

site visit and discovered that all the neighbours used different access roads. He confirmed that the objection from the 3rd Defendant had already been received prior to the full council meeting at which the extension was approved. He maintained that this was not the first time the 1st Defendant had closed an access road and created an extension and that it has canceled titles to reinstate order. DW2 confirmed that there are certain planning principles they follow one of which is that access for the neighboring properties is considered. He confirmed that stand 10025 could be accessed through Katanga road. He confirmed that he didn't think the 1st Defendant would have permitted the cancelation of the road reserve if it knew that the 3rd Defendant did not own stand 19287. He also confirmed that according to planning principles, it is better for a property to have its own access road. DW2 testified that the 1st Defendant would not have reconsidered the Plaintiff's application in the absence of the letter instructing them to positively reconsider it. DW2 confirmed that the 1st Defendant will not make a recommendation for an application if there is an objection from everyone affected by the act.

He confirmed that the Acting Director of the Ministry of Local Government and his people carried out an inspection but the letter does not state whether his people interacted with the people on the neighboring properties. He testified that he did not know why the letter from the 3rd Defendant was not considered and that it would be erroneous on the part of the 1st Defendant if the letter was not considered. He maintained that the 3rd Defendant's letter came earlier and that the Plaintiff was aware of his objection but still proceeded.

This marked the close of the 1st Defendant's case.

The 3rd Defendant called Albert Vander Vinne, the Managing Director in the 3rd Defendant Company as its sole witness and he was DW3. He testified that the 3rd Defendant is a factory and it processes Tobacco and prepares it for use internationally. DW3 testified that sometime in 2009, the Plaintiff asked him if he was agreeable to the Plaintiff getting a portion of the disused railway and a piece of the access road to 10025. He agreed to the former request but refused the latter because they needed it to access the 3rd Defendant Company. It was DW3's evidence that the factory on

Mungwi Road is on title to a company called Tobacco Leaf Limited. He testified that access to the 3rd Defendant's plot is from Katanga Road and the other access is from Mungwi Road through Tobacco Leaf Limited.

DW3 testified that he and the Plaintiff reached an understanding where the Plaintiff promised to secure an agreement with Zambia Railways to give the 3rd Defendant a piece of the Railway siding and that the road reserve would remain as it was. The 3rd Defendant had a wall around its property and over the road reserve but around 2009, they had already built a steel gate and removed the wall in order to have access. DW3 explained that after the discussion between the Plaintiff and some personnel from the 3rd Defendant Company, about two days later, they received correspondence from the Plaintiff's advocates which showed that the road reserve had been put on title in favour of the Plaintiff. DW3 and the Chairman of the 3rd Defendant Company went to see the Commissioner of Lands who told them that it was impossible to change the road reserve because it made the 3rd Defendant's property inaccessible. In relation to the argument that they had not

used the road for 23 years, DW3 testified that stand 10025 was purchased in 1999 therefore, no one used the road. He denied the assertion that there was an agreement with the Plaintiff allowing the Plaintiff to acquire the road reserve on the condition that the Plaintiff would assist the 3rd Defendant obtain use of the railway siding. It was DW3's evidence that they purchased stand 10025 on the assumption that they needed more storage space and that they built the first building in 2003 and that they now have 7 sheds on the plot. He testified that there is a lot of traffic which could not pass through the factory hence necessitating the creation of the new access road. DW3 testified that they have been using the road for some years after the decision of the Commissioner of Lands.

After the site visit, DW3 was handed over for cross examination. He confirmed that their letter to the 1st Defendant was received on 12th October, 2020. He confirmed that the approval to consolidate and extend the Plaintiff's property was made on 30th May, 2011. He confirmed that the 1st Defendant was aware of his objection when they gave the approval. He confirmed that according to paragraph 2 of the 3rd Defendant's Bundle of documents, the 1st Defendant

sought their position on their application in October, 2010. He confirmed that before the consolidation, there were people that went to inspect the site. He maintained that he was not aware that there was a team that inspected the site in 2010 from the Ministry of Local Government.

This marked the close of the 3rd Defendant's defence.

The Plaintiff's advocates filed into court their written submissions on 17th July, 2020. The gist of the Plaintiff's submissions is that the action envisaged under **section 34 of the Lands and Deeds and Registry Act** is a court action and not an administrative action and that with the exception of a re-entry for breach of a covenant, under a state lease, possession or recovery of land against a registered proprietor can only be done by a court action. It is argued that the Commissioner of Lands has power to correct errors on the Lands Register by virtue of **section 11 of the Lands and Deeds Registry Act** but he has no power to cancel a certificate of title through an administrative decision. In aid of their submission, the Plaintiff relied on the cases of **General Musengule v. Attorney General**¹ and **Corpus Legal Practitioners v. Mwanandi Holdings Limited**².

The Plaintiff contends that the purported cancellation of his certificate of title was via an administrative action. It is argued that if the 3rd Defendant was aggrieved with the issuance of the certificate of title to the Plaintiff, it ought to have commenced an action and obtained a court order to that effect.

Counsel submits that the 3rd Defendant's objection was received by the 1st Defendant prior to it giving the approval for the consolidation and that to advance the argument that the decision to cancel the title was on the basis that it had since received an objection was a misrepresentation. It is therefore, argued that the 1st Defendant proceeded to give the approval being fully aware of the objection. It is further argued that it is too late for the 1st Defendant to revoke planning permission after the process of consolidation was completed. Reliance was placed on **section 30(2) (a)and(b) of the Town and Country Planning Act.**

Lastly, Counsel for the Plaintiff contends that the enforcement notice is irregular because according to **section 31 of the Town and Country Planning Act**, an enforcement notice can only be issued on two occasions: firstly, when the development or

subdivision is done without planning permission and secondly, the conditions stated in the permission have not been complied with. Counsel contends that the Plaintiff already had planning permission and the reasons given for the enforcement notice do not fall within the confines of **section 31**. Also, it is argued that the enforcement notice must have a notice period of not less than 28 days and in this case, it was 7 days.

The 3rd Defendant filed into court its ephemeral submissions on 31st July, 2020. The gist of the submissions is that it is pertinent for this court to note that the Plaintiff's application for consolidation was initially rejected and only approved after an appeal to the Ministry of Local Government and Housing and also that the 3rd Defendant objected to the consolidation prior to it being approved. Counsel contends that the Plaintiff misrepresented that the neighboring properties had no need for the road reserve in his appeal to the Permanent Secretary Ministry of Local Government and Housing. Consequently, the latter formed the erroneous belief that the approval would not violate any planning rules or regulations. It is submitted that the Plaintiff should not be allowed

to benefit from the consequences of its own doing; the misrepresentation. Counsel called the case of **Moore Stephens v. Stone Rolls Limited**³ in aid of its submission on this point.

The 3rd Defendant contends that the 1st Defendant's decision to revoke its decision to consolidate the road reserve into the Plaintiff's land and to recommend the cancellation of the Plaintiff's certificate of title was done in good faith to correct a decision that was wrong. Lastly, it is argued that the Plaintiff is debarred from relying on **section 34 and 11 of the Lands and Deeds Registry Act** as it did not plead these provisions and thus not in the contemplation of the 3rd Defendant as the case it had to meet at trial.

The 1st Defendant in its submissions filed into court on 19th August, 2020 contends that the Registrar has power to correct errors, omissions and mistakes under **section 11(1) of the Lands and Deeds Registry Act**. It is argued that the inclusion of the road reserve to the Plaintiff's Land was by mistake because the road that was mistakenly known as the access to the 3rd Defendant's Land was owned by another person, leaving the latter without an access

road. Counsel contends that the cancellation was not administrative but it was done pursuant to **section 11**.

In the alternative it is argued that even if the cancellation was administratively done, this court must exercise its discretion to determine issues not pleaded which were discussed to bring matters to finality. This court is therefore, invited to consider whether or not the certificate of title was supposed to be cancelled and if the answer is in the affirmative, it should order the cancellation of the same. On the issue of the enforcement notice, the 1st Defendant disputes that the same can only be issued on the two instances highlighted by the Plaintiff. Counsel contends that the Minister or the Local Government may issue an enforcement notice to discontinue the use of land or to remove a building in light of **section 31(2) of the Town and Country Planning Act**. It is argued that the enforcement notice in this case was issued pursuant to **section 31(2)**. On the notice period, counsel submits that the enforcement notice was not executed in 7 days and thus it does not make it irregular.

On the claim for compensation, the 1st Defendant contends that it can only pay compensation if the claim is made within 6 months beginning with the date of the planning authority as provided by **section 39(2) of the Town and Country Planning Act**. It is argued that the claim in this case was made about 9 months after the decision and that the appropriate mode of recourse is to appeal to the Tribunal. Lastly, counsel contends that this court should take judicial notice that quiet enjoyment of property includes good access to the property and thus this court should find that the cancellation was lawful in order to rectify an error.

The Plaintiff filed into court submissions in reply to the 4th Defendants submissions on 17th August, 2020. In a nutshell, in response to the argument that the Commissioner of Lands has no authority to cancel a certificate of title via administrative action, it is argued that the same is a point of law which can be raised at any point and counsel has adverted this court to the case of **Admark Zambia Limited v. Zambia Revenue Authority**⁴. It is also argued that the Plaintiff in his pleadings did plead that the cancellation of the certificate of title was wrongful and also that it was done at a

meeting and evidence was given by the Plaintiff to show that the decision was done at a meeting. It is therefore, argued that the 3rd Defendant's argument is devoid of merit.

On the issue of misrepresentation, the Plaintiff contends that the Plaintiff in his letter did not state that his neighbors were not using the access road but that they had use of other access roads. In any event, the Plaintiff advances that it is true that the Plaintiff has use of another access road and further, that the Ministry of Local Government carried out their own inspection.

I have considered the pleadings, the oral evidence of the parties, the bundles of documents and the submissions of counsel for which I am grateful. The first issue I shall determine is whether the 2nd Defendant's decision to cancel the Plaintiff's certificate of title to stand 38149 Lusaka was wrong and made in bad faith. It is not in dispute that the Plaintiff is the title holder of stand 38149 Lusaka and that the same is comprised of what were stand 33303 and 9526 and the road reserve connecting the 3rd Defendant' land, stand 10025 to Katanga Road. I also find that on 11th September, 2013 the Commissioner of Lands called the Plaintiff to a meeting and that

following the said meeting, he directed the Plaintiff to surrender his certificate of title to stand 38149 for cancellation. This fact is not in issue as it is admitted by the 2nd Defendant at paragraph 3 of its defence.

The Plaintiff in his pleadings is challenging the cancellation of his certificate of title on the basis that it is wrong and made in bad faith. At submission stage, the Plaintiff raised the argument that the Commissioner of Lands In fact had no power under **section 11 and 34 of the Lands and Deeds Registry Act** to cancel or order the cancelation of his title administratively without a court action. The first issue I shall therefore, determine is whether the Plaintiff can raise this argument at submission stage. It is not in contention that the Plaintiff did not specifically plead **section 11 and 34 of the Lands and Deeds Registry Act** and that the Commissioner of Lands has no power under the former sections to cancel a certificate of title through an administrative action. The Plaintiff contends that this is a point of law and that it can be raised at any stage while the 3rd Defendant opposes this and claims that this was not pleaded hence, it cannot be raised at the stage of submissions.

The Supreme Court has in a plethora of cases pronounced itself on the issue of when points of law may be raised; one of such cases is **Rachael Shankwaya and another v. Lubinga Demetria Nang'andu and others**⁵. In this case, the Appellant had in her submissions raised the issue that the High Court order which discharged the caveat placed by the Appellant was null and void on the grounds that it was registered out of time. The trial judge dismissed the argument on the premise that it was not pleaded. On appeal, the Supreme Court disagreed with the trial Judge because the argument raised was on a point of law based on the facts that were already before the court. They observed that it was not a departure from the evidence adduced during trial.

The Supreme Court referred to their decision in **Admark Limited v. Zambia Revenue Authority**⁴ which has been cited by Counsel for the Plaintiff where they agreed with the trial judge to allow a point of law to be raised in the submissions and observed that the effect of Order **18 Rule 11 of the White Book** is that if a party intends to raise a point of law, it is convenient and desirable to do so in the

pleadings as it would *inter alia* ensure that the issues in dispute are defined at the earliest stage. They however, guided that this requirement is not mandatory.

Having carefully considered the issue and the evidence adduced before me at trial, I am of the view that the argument on **section 11 and 34 of the Lands and Deeds Registry Act** is one on a point of law and thus can be raised even at submission stage as the Plaintiff has done. I am of the further opinion that the issue is based on evidence already before me as it is not in dispute that the Commissioner of Lands called the parties to a meeting after which he directed the Plaintiff to surrender his certificate of title for cancellation. I shall therefore, proceed to deal with this issue.

The Plaintiff buoyed by the case of **Corpus Legal Practitioners v. Mwanandani Holdings Limited**² which is binding on this court and the case of **Musengule v. Attorney General**¹ which is persuasive, contends that while the Commissioner of Lands has power to correct errors on the Register by virtue of **section 11 of the Lands and Deeds Registry Act**, he has no administrative power to cancel a certificate of title and that except for re-entry for breach of a

covenant under a state lease, a certificate of title can only be cancelled via a court order. I have considered the **Corpus Legal Practitioners**. The Supreme in that case stated:

In our view, Section 11 of the Lands and Deeds Registry Act is concerned with the process of correcting errors and omissions to entries made in the lands register by the Registrar of Lands and Deeds. It does not empower him to determine disputes which have the effect of determining the rights of the parties to any land or to cancel a Certificate of Title duly issued to the registered proprietor of the land to which it relates. In Anti-Corruption Commission Vs. Barnnet Development Corporation Limited⁴, we held that, under Section 33 of the Lands and Deeds Registry Act, a certificate of title is conclusive evidence of ownership of land by the holder thereof although it can be challenged and cancelled, for fraud or other reasons relating to impropriety, in its acquisition.

We further take the view that a person alleging fraud or any other impropriety, with regard to the issuance of a Certificate of Title, must challenge the same through a Court action and prove the allegations of fraud or other impropriety, as the case may be, to obtain a Court order for the cancellation of the affected Certificate of Title by the Registrar of Lands and Deeds.

The decision of the Supreme Court in the preceding case is categorical. While the Registrar of Lands has power to correct errors and omissions on the Land Register, he has no power to determine disputes which *inter alia* have the effect of cancelling a certificate of title duly issue to the registered proprietor. I am also persuaded by the decision of Mwanamwambwa J as he then was in the **Musengule case** above, that except in cases of re-entry for breach of a covenant, under a state lease, possession or recovery of land against the registered proprietor under **section 34 of the Lands and Deeds Registry Act**, can only be obtained through a court action and not administratively. On the facts of this case, there is no dispute that the Commissioner of Lands directed the cancellation of the Plaintiff's Certificate following a meeting. Also, there is further no evidence that the Plaintiff was in breach of the terms of the lease to entitle the Commissioner of Lands to re-enter the property. In the premise, I find the decision of the Commissioner of Lands directing the Plaintiff to surrender his certificate of title for cancellation erroneous because he has no power to do so without commencing a court action.

From a perusal of the pleadings, the Defendants only filed into court defences justifying the decision by the Commissioner of Lands directing the cancellation of the certificate of title. The defendants have not filed into court a counter claim challenging the Plaintiff's certificate of title or asking for any relief. The 1st defendant at paragraph 15 of its submissions submits that this court has power to determine issues not pleaded for purposes of bringing the matter to finality. Counsel entreats this court to order cancellation of the certificate of title to avoid possible future litigation. The Supreme Court in the case of **Atlantic Bakery Ltd v. ZESCO Limited**⁶ at page 36 stated the following:

Evidence can only be considered where a plea which that evidence supports has been put forward in the pleadings. A court is not to decide on an issue that has not been pleaded. Put differently, a court should confine its decision to the questions raised in the pleadings. In other words, a court has no jurisdiction to set up a different or new case for the parties.

This Court can therefore, only consider an issue that has been pleaded. However, on a careful perusal of the pleadings and the

evidence as well as the submissions of the parties, even though my finding that the Commissioner of Lands had no power to order the cancellation of the Plaintiff's certificate of title would essentially dispose of the matter, the issue of whether the consolidation of the Plaintiff's property was made in error and in bad faith still looms. The Plaintiff in his pleadings seeks a declaration that the decision of the Commissioner of Lands was wrong and made in bad faith and he has highlighted how his properties were extended to include the road reserve. The 1st Defendant in its defence claims that the 3rd Defendant was not consulted before the decision to consolidate the road reserve to the Plaintiff's properties was made. The 3rd Defendant states that the consolidation was done despite its objection and that its access cannot be restricted to Mungwi Road. Having listened to the evidence of the parties and considered their submissions, it is evident that the issue whether the consolidation of the Plaintiff's two existing properties and the road reserve was made in error and in bad faith has been canvassed by the parties in their pleadings, evidence and submissions. I am therefore, inclined to consider this issue so as to determine this matter to finality even if there is no counter claim, as it has not only been canvassed by

the parties in their pleadings, but in their evidence and submissions as well.

The 2nd Defendant in his defence contends that there was an error in approving the consolidation of the Plaintiff's property and that the cancellation was done to give the 3rd Defendant access to his property which had been closed. The 1st Defendant contends that after it approved the consolidation of the Plaintiff's property, it received an application from the 3rd Defendant who was not consulted against closing the road reserve thereby necessitating its decision to withdraw the Planning permission. At trial, DW2 confirmed that the 1st Defendant received the 3rd Defendant's objection prior to approving the Plaintiff's application for consolidation of his two properties and the road reserve.

Indeed, the 3rd Defendant's letter objecting to the consolidation was received by the 1st Defendant on 12th October, 2010 while the minutes of the Plans, Works and Development Committee approving the consolidation are dated 4th April, 2011. This is also confirmed by the 3rd Defendant at paragraph 7 of its defence where it states that the consolidation of the Plaintiff's property was approved by

the 1st Defendant notwithstanding its objection. I therefore, reject the 1st Defendant's averments at paragraph 6 of its Defence and DW2's evidence that the 1st Defendant only received the 3rd Defendant's objection after the consolidation was approved.

The 1st Defendant's in its defence in justifying the cancellation of the certificate of title states that it was informed that the 3rd Defendant was not consulted on its decision to close the access road. During cross examination, DW2 testified that a consolidation will not be approved if there is an objection and this evidence was unchallenged. He also testified that he did not know why the letter from the 3rd Defendant was not considered. DW2 testified that the report from the Ministry of Local Government did not reveal that the owners of the neighboring properties were consulted. He confirmed that he didn't think the 1st Defendant would have permitted the cancelation of the road reserve if it knew that the 3rd Defendant did not own stand 19287.

Counsel for the 3rd Defendant has in her submissions argued that the 3rd Defendant was not present at the inspection conducted by the Ministry of Local Government and that it was not consulted

prior to the consolidation. However, during cross examination, DW3 confirmed that according to paragraph 2 of the 3rd Defendant's defence, the 1st Defendant did seek the 3rd Defendant's position on the Plaintiff's application in October, 2010. This to me explain why the 3rd Defendant wrote the letter of objection in October, 2010. I therefore, reject the 1st and 3rd Defendant's argument that the latter was not consulted prior to the consolidation.

What is however, evident, is that the 1st Defendant proceeded to approve the Plaintiff's application despite the 3rd Defendant's objection and now seeks to rescind that decision. DW2 testified that the 1st Defendant will not make a recommendation for an application if there is an objection from everyone affected by the act. On a perusal of the documents before me, what is glaring is that there is no evidence that the 1st Defendant considered the 3rd Defendant's objection or addressed it before they proceeded to recommend the closure and consolidation of the access road to the Plaintiff's property. This is also confirmed by the evidence of DW2 who testified that he did not know why the letter from the 3rd Defendant was not considered.

The Supreme Court in the case of **Kangwa and others v. Enviromental Council of Zambia and two others**⁷ dealt with a challenge by the Appellants against the decision of the 1st Respondent allowing the 2nd Respondent to set up a cement plant in Makeni. One of the grounds advanced by the Appellants was the they were not consulted by the 2nd Respondent when it prepared the Environmental impact statement. The Supreme Court observed that the Environmental Protection and Pollution Control (Environmental Impact Assessment) Regulations required a developer to ensure that the views of all interested and affected people were taken into account. They found that the 2nd Respondent had neglected to consult some people and that as such, they could not expect that the project would not be suspended.

However, and most pertinent to this case, the Supreme Court expressed their disagreement with the notion that legitimate expectation and principles of natural justice are limited to the realm of judicial review as was argued in that case. They observed that there was a plethora of cases outside the realm of judicial review in which they applied the principles of natural justice. Reverting to

this case, even if the 3rd Defendant was consulted by the 1st Defendant on the issue of the consolidation, it is clear that the 1st Defendant did not consider the 3rd Defendant objection in coming up with its decision. This is because there is no evidence that it considered the 3rd Defendant's objection as highlighted in its letter. DW2 testified that he did not know why the 3rd Defendant's objection was not considered and that it was erroneous if it was not considered. I am of the considered view that rules of natural justice require fairness when making a decision and thus require that the person making the decision will hear the persons that will be affected by the decision. To me, implicit in this requirement is that the person making the decision will consider the case made by the affected parties when making its decision. DW2 testified that the 1st Defendant will not approve an application for planning permission where there is an objection. However, there is no evidence to show the reason the 1st Defendant proceeded to approve the consolidation despite the objection.

Further, DW2 testified that one of the principles in planning is that access for the neighboring properties is considered and that it is

better for a property to have its own access road. It is irrefutable that the road reserve in issue undoubtedly granted the 3rd Defendant direct access to and from its property to Katanga Road. On the unchallenged evidence, I also find that the Plaintiff does not own stand 19287 which is the only other access road it has been using to have access to its property through Mungwi Road. It is therefore, clear that the 1st Defendant's decision was contrary to the planning principles that it adheres to or is supposed to adhere to.

In the circumstances, I find that the decision by the 1st Defendant approving the annexing of the road reserve to the Plaintiff's Properties and the decision by the 2nd Defendant issuing a certificate of title to the Plaintiff was made in error. I am of the further view that justice will only be served if the certificate of title issued to the Plaintiff in so far as it includes the road reserve to Katanga Road is cancelled so as to restore the road reserve to what it was before the consolidation. I therefore, direct the Registrar of Lands and Deeds to accordingly rectify the register under **section 11 of the Lands and Deeds Registry Act.**

The next issue I shall determine is whether the enforcement notice issued against the Plaintiff over stand 38149 Lusaka is irregular and null and void. Counsel for the Plaintiff contends that the enforcement notice is irregular because according to **section 31 of the Town and Country Planning Act** an enforcement notice can only be issued on two occasions: firstly, when the development or subdivision is done without planning permission and secondly, the permissions stated in the permission have not been complied with. The 1st Defendant however, contends that the Minister or Local Authority may issue an enforcement notice to discontinue the use of land or to remove a building in light of **section 31(2) of the Town and Country Planning Act**. It is argued that the enforcement notice in this case was issued pursuant to **section 31(2)**.

I find the 1st Defendant's argument contradictory and contrary to the enforcement notice at page 9 of its Bundle of documents which shows that it was issued pursuant to **section 31(1) of the Town and Country Planning Act**. **Section 31(1)** relates to developments or subdivisions carried out without planning permission or developments carried out with planning permission or contrary to

conditions subject to which the permission was granted. From DW2's evidence, it is clear that the enforcement notice was issued after the Plaintiff refused to demolish the wall fence and gate, he had built over the road reserve following the decision by the Commissioner of Lands directing the cancellation of his certificate of title. The provision relied upon was therefore, inapplicable. However, as argued by the 1st Defendant under **section 31(2)(b)**, the Minister or the planning authority may issue an enforcement notice for the removal of a building or works. I however, do not consider the reference to the wrong section fatal as the Council nonetheless had the power to issue an enforcement notice for the removal of a building.

While I agree with the Plaintiff that the period of 7 days given in the enforcement notice was less than the mandatory minimum of 28 days after service of the notice, however, the mode of recourse against an enforcement order by an aggrieved person is by way of an appeal to the Town and Country Planning Tribunal. I therefore, dismiss this claim.

Lastly and in the alternative, the Plaintiff is claiming damages against the 1st Defendant for the expenses incurred in developing stand 38149 Lusaka following the grant of planning permission and consolidation. The enforcement notice in this case was made pursuant to **Section 31(1) of the Town and Country Planning Act**. However, I found above that this section was not applicable but the same power could have been exercised under **section 31(2)(b). Section 35(2) of the Town and Country Planning Act** provides:

(2)Where an order is made under subsection (2) of section thirty-one requiring any use of land to be discontinued or imposing conditions on the continuance thereof, or requiring any buildings or works on land to be altered or removed, then if, on a claim made to the Minister or the planning authority, as the case may be, it is shown that any person has suffered damage in consequence of the order by the depreciation of any interest in the land to which he is entitled or by being disturbed in his enjoyment of the land, the Minister or planning authority shall pay to that person compensation in respect of that damage.

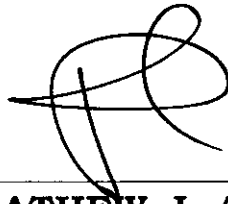
I am therefore, of the considered view that the claim for compensation following the revocation of the planning permission

should have been made to the minister or the planning authority. Similarly, **section 30** which provides for the revocation and modification of planning permission provides that any claim against the decision to revoke planning permission must be made to the minister or planning authority. I therefore, dismiss the claim.

In summary, the Plaintiff's claims fail in their entirety. I further discharge the interlocutory injunction that was granted to the Plaintiff. Each party shall bear its own costs.

Leave to appeal is granted.

Delivered at Lusaka the.....^{15th} day of October, 2020



MATHEW. L. ZULU
HIGH COURT JUDGE