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Molosoni Chipabwamba and 12 Other Displaced Village Owners v Yssel Enterprises Limited Appeal No.104/2020 (ZMCA) 2022

Mwami Kabwabwa¹

Facts

On 21 April 2022 the Court of Appeal of Zambia delivered a landmark decision in which the Court upheld the customary land rights of a community in Serenje District. The petitioners were villagers settled in chief Muchinda's chiefdom in serenje district of the republic of Zambia. In 1996 the 1st respondent applied for a farm area which application was approved by the relevant authorities for serenje district without the authorisation of the senior chief. In December of 1997 senior chief Muchinda subsequently gave his authorization for the 1st respondent to settle as a commercial farmer. In his authorization the chief delineated the piece of land given to the 1st respondent to settle as a commercial farmer. Originally, this delineated land did not include the customary land occupied by the appellants for several years. However, the certificate of title issued to the 1st respondent included the customary land occupied by the appellants.

The property in question passed through several hands of ownership until 2013 when the new title holder the 4th and 5th respondent evicted the appellants from the land. The appellants were evicted from land and settled in the Musangashi forest reserve compelling them to live under undignified conditions. In December 2017, the appellants commenced an action in the High Court for Zambia by way of petition challenging the forced eviction and the taking away of their customary land with no consultation or compensation. Among other things, the appellants sought the following reliefs from the High Court:

- 1) That the taking away of their customary land without adhering to the procedure was unconstitutional and therefore null and void;
- 2) An order that the affected community members be allowed to continue enjoying their land in accordance with the customary law of the area and its attendant rights;
- 3) An order that the certificate of title issued to the respondents covering the land occupied by the appellants under customary tenure be cancelled
- 4) An order that the destruction of the appellant's homes, crops and forests by the respondents violated the appellant's rights to dignity, life, personal liberty and protection from inhumane treatments and;
- 5) Damages and compensation.

The High Court held that the conversion of the disputed land from customary tenure to statutory tenure was null and void and that the issuance of the certificate of title to the 1st respondent rendered the appellant's squatters on the land and was a violation of their rights. The court further held that cancelling the certificate of title issued to the new owners would not be in the interest of the public because the new owners had settled on land in dispute as commercial farmers in furtherance of government policy to create farm blocks beneficial to national development.

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The appellants appealed the decision of the High Court to the Court of Appeal particularly the lower court's refusal to cancel the certificate of title issued to the 4th respondent. The appellants contended that the lower court should have cancelled the certificate of title to enable the displaced community members to return to the land having found that the conversion of land from customary tenure to statutory tenure was null and void.

Holding

The Court of Appeal agreed with the decision of the High Court that the conversion of the land in dispute from customary tenure to statutory tenure was null and void. However, the Court of Appeal further held that the certificate of title issued to the respondent should have been cancelled since it was concluded that the conversion of the land was null and void.

Significance

Over the years Zambia has become a leading destination for an assortment of foreign investment opportunities both from private individuals and countries seeking to acquire land for various purposes such as mineral exploration and agro investments and the state is willing to give such land concessions with the intention of fostering national development. However, the land in issue or subject of the concessions is land occupied by vulnerable customary communities who are not in the position to oppose the granting of such land concessions by the state. The vulnerability of these communities is reinforced by the fact that they hold the land under customary law of land tenure with no formal certificate of title to the land or any form of documentation to protect and or justify their claim. Furthermore, most Zambians are governed by customary law which subsequently affects salient rights such as customary land rights. The decision of the Court of Appeal to affirm the customary land rights of the displaced community members who sought the intervention of the courts is a significant and commendable move towards fortifying and developing customary law of land tenure and customary land rights in Zambia. This is particularly important because the potential of exploitation and non-compliance with the law is high when converting from customary tenure to statutory tenure.

Analysis

The Court of Appeal in its analysis concluded that the effect of the failure to comply with the prescribed procedure in the conversion of customary tenure to statutory tenure is that the Certificate of Title issued in respect of such conversion ought to be cancelled. In doing so, the court relied on the judicial precedents of the Supreme Court. While the position taken by the court effectively affirmed the customary land rights of the appellants, there was little engagement with fundamental issues surrounding the concept of customary land rights and customary tenure.

The nature of customary land tenure

It was important for the Court to discuss the nature of customary land rights within the context of customary law. The starting point was for the Court to acknowledge the fundamental distinction between customary land rights and common law land rights.² Acknowledging the distinctions between common law property rights and customary land rights would have made the Court alive to the fact that such distinctions have the potential to raise complications that may cause insecurity of customary land tenure.³ Furthermore, acknowledging that customary

² Pope 'The Constitution's conception of property goes beyond what is classified as property' *Acta Juridica* (2011).

³ *Ibid.*

land rights are distinct from common law land rights would have forced the court to engage with the customary law of land tenure. Learned author Okoth Ogendo submits that a better way of dealing with and understanding customary land rights is by ‘clarifying what constitutes property in land in the African Social context’.⁴ In practical terms, this imposes an obligation on the court to undertake an inquiry into how individuals within a community identify with the land, with each other and with the resources that come with the land.⁵

The Court in its analysis should have demonstrated that in contrast to common law land rights, access to land is not equivalent to control of the land under customary law and that access to land under customary tenure is based on belonging to a social unit.⁶ Furthermore, the Court ought to have demonstrated an understanding or acknowledgment that although it is difficult to fully determine the content of customary land rights, an imperative element to the understanding and protection of customary land rights is that because these rights are not written or codified, customary land rights are primarily established via the evidence and accounts of community members who have occupied and used the customary land for several years.⁷ In this case, it was not clear to what extent the court engaged with the testimonies of the occupants of the customary land to ascertain their rights or claim to the land.

The nature of decision making in customary law and customary communities

Customary law of land tenure and customary land rights cannot be discussed without a full understanding and or appreciation of the nature of decision making in customary law. The Court in its analysis of section 3(4)(c) of the Lands Act ⁸which sets the requirement of consulting individuals whose interests may be affected by the alienation of land held under customary tenure relied on the case of *Henry Mpajilwa Siwale and Others v Ntapalila Siwale*.⁹ According to this case, persons who would be affected by a grant of title deeds should be consulted.¹⁰ The Court did not go further into an analysis of what this consultation entails within the context of a customary community. In determining whether the requirement of consultation was indeed complied with, it was imperative for the Court to have discussed or considered how consultation process is linked to the decision-making practices and procedures of a customary community in accordance with its customary law and practice and thus ought not to be ignored when determining the issue of consultation.

In analysing the link between the nature of decision making in customary communities and the statutory requirement of consultation, the Court should have guided that access to customary land is often based on membership to a social unit while control is managed via administrative structures and political control.¹¹ Therefore, the decision making process within the context of customary law in customary communities with respect to both access and control of customary land is layered and not centralized hence consultation involves the chief, the local authority and the actual community members who will be affected by the alienation of the customary land. Drawing from customary law scholars such as Ogendo, it was important for the Court in its analysis of consultation to emphasize that the authority exercised by traditional leaders such as chiefs with respect to the management and control of customary land is not centred around

⁴ Claassens and Cousins *Land, Power and Custom*.

⁵ Ibid.

⁶ Cousins *Journal of Agrarian Change* (2007).

⁷ Barume *Land rights of Indigenous people of Africa*.

⁸ Chapter 184 of the Laws of Zambia .

⁹ 1999 ZR.

¹⁰ Ibid.

¹¹ Pope *Acta Juridica* (2011).

one person that person.¹² Rather traditional leaders must exercise this power subject to the interests and rules of the customary community. Thus, the Court should have engaged with the decision-making processes of the affected customary community in determining whether the respondents had complied with the statutory requirement of consultation as this is a crucial element in adjudicating issues around customary law of land tenure and customary land rights. This is also important if the Courts are to develop customary law.

The meaning of consent when dealing with customary land

Consent is another important issue when dealing with the alienation of land held under customary tenure. The court in its analysis did not say much regarding the issue of consent in the alienation process of customary land. It is important to note that consent must be given without coercion and must be given using procedures determined and directed by the affected community.¹³ The court should have provided the conditions precedent as to when a customary community would be deemed to have given valid consent. The United Nations guidelines on free, prior, and informed consent define consent as follows: ‘The collective decision made by the right holders reached through the customary decision-making processes of the affected peoples or communities’¹⁴

The above definition entails that consent is a fundamental element because it is at the center of a customary community’s right to meaningfully engage, negotiate and decide whether to give consent before the customary land can be alienated.¹⁵

Conclusion

The issue of customary land tenure and customary land rights is an important issue that has serious implications on customary communities that occupy land under customary tenure. Considering the raising demand of customary land by both local and international investors the courts play an important role in protecting the interests and rights of customary communities and ensuring that such communities are not exploited in the alienation process of customary land and in the procedures of converting from customary tenure to statutory where it is necessary and where the benefits of converting to statutory tenure outweigh the benefits of customary tenure. For this reason, it is imperative for the Courts to critically analyse customary issues in their entirety whenever they are the subject of adjudication. While the decision of the Court to affirm the customary land rights of the displaced community is a landmark and commendable precedent, the court could have done more in its analysis of the issues and provided the much need guidance for the development of customary law in Zambia. Furthermore, it was necessary for the Court to consider the process of analysis adopted by other jurisdictions when adjudicating issues relating to customary law of land tenure and customary land rights. This case was an opportunity for the court to employ the legislature to effect legislative reforms that around customary tenure and protection of customary land rights.

¹² Claassens and Cousin Note 4.

¹³ J Laughlin *UN-REDD Programme: Guidelines on Free, Prior and Informed Consent* (Working Final Version) (2013).

¹⁴ Ibid.

¹⁵ Ashukem (2016) *PER/PELJ* 4.