

# PROTECTING RURAL ZAMBIAN COMMUNITIES FROM DISPLACEMENT RESULTING FROM LAND-BASED INVESTMENT

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## Introduction

In Zambia, displacement of rural communities from their land, with little or no compensation, represents one of the negative impacts of land-based investments. This includes displacement of rural communities from the land they depend on for growing food, building shelters, fetching water, grazing their animals, and for accessing land-based resources. Investment resulting in displacements of rural communities without providing due compensation or leading to actual economic improvement is contrary to “alternative land-based” models of compensation. The Nairobi Action Plan on Large Scale Land-based Investment in Africa<sup>2</sup> resolved to promote land-based models that:

“[A]im to increase agricultural productivity, maximize opportunities for Africa’s farmers, with special attention to smallholders and minimize the potential negative impacts of large-scale land acquisitions, such as land dispossession and environmental degradation, in order to achieve an equitable and sustainable agricultural and economic transformation that will ensure food security and development.”<sup>3</sup>

When rural communities are displaced to pave the way for land-based investment, the main loss is their land, which is both a basic necessity and the primary basis for a sustainable livelihood.<sup>4</sup> The members of these communities become more vulnerable because of the new fragility of their livelihood.<sup>5</sup> Their agriculture productivity drastically decreases because of the loss of quantity or fertility of their land. The opportunity for smallholder farmers, the majority of whom are women, is significantly minimised and their poverty and food insecurity is substantially worsened. The future prospects for their school-going children become bleak as they relocate to new places without infrastructure or where basic services such as schools and clinics are far away.

In most cases, rural communities are not consulted before the decision leading to their displacement is made. It is often the case that they discover something is going on when they see government officials surveying their land or investors moving onto their land with construction, earth moving or exploration machines. They are only informed after they inquire that their land has been allocated for land-based investment and that they will have to be relocated or offered compensation. When

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<sup>2</sup> Adopted at the High Level Forum on Foreign Direct Investment in Land in Africa in Nairobi, Kenya (4-5 October 2011).

<sup>3</sup> *Id* 2.

<sup>4</sup> See *Mazarura v Kativhu* (HC 6416/12) ZWHHC 287 (2014).

<sup>5</sup> Zambia National Resettlement Policy (2015) 11.

the relocation or compensation offer is made, the poor and mostly uneducated communities do not receive independent advice concerning the terms of the resettlement or compensation. Frequently, by the time civil society organisations, mostly based in urban areas, learn about the displacements, communities have already given away their main asset and source of sustainable livelihood, with a thumb print, almost for free to the land-based investor or the government.

The aim of this paper is to illustrate how the rule of law and access to justice can be promoted and attained by using the courts and existing legal framework to protect the customary land rights of poor rural communities.

## Overview of the Relevant Legal Provisions on Customary Land Rights in Zambia

In Zambia, all land is vested in the President in trust for the people of Zambia.<sup>6</sup> This land is classified as State land or customary land.<sup>7</sup> Section 7 of the Lands Act<sup>8</sup> specifically provides for the recognition and continuation of customary land holdings, stating that:

- “(1) Notwithstanding subsection (2) of section thirty-two but subject to section nine, every piece of land in a customary area which immediately before the commencement of this Act was vested in or held by any person under customary tenure shall continue to be so held and recognised and any provision of this Act or any other law shall not be so construed as to infringe any customary right enjoyed by that person before the commencement of this Act.
- (2) Notwithstanding section thirty-two, the rights and privileges of any person to hold land under customary tenure shall be recognised and any such holding under the customary law applicable to the area in which a person has settled or intends to settle shall not be construed as an infringement of any provision of this Act or any other law except for a right or obligation which may arise under any other law.”

Clearly, the amended Constitution and the Lands Act recognise customary land rights. These rights, just like those applicable to State land, can only be taken away or lost to pave the way for land-based investments in accordance with the legal requirements set out by law. Statute, judicial precedents, common law,<sup>9</sup> principles of equity,<sup>10</sup> and customary law establish these requirements.

<sup>6</sup> See Lands Act (29 of 1995), section 3(1) “Notwithstanding anything to the contrary contained in any other law, instrument or document, but subject to this Act, all land in Zambia shall vest absolutely in the President and shall be held by him in perpetuity for and on behalf of the people of Zambia.”

<sup>7</sup> Article 254(1) of Zambia Constitution (Amendment)(2 of 2016).

<sup>8</sup> Lands Act (29 of 1995).

<sup>9</sup> See English Law (Extent of Application] Act (4 of 1963) section 2.

<sup>10</sup> See High Court Act (41 of 1960) section 13 “...in all matters in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail”; see also *Banda and Nyanje v Mudenda* (2010) HP/A39 (Unreported) Justice Dr P Matibini, SC: “[t]he second, and central question in this appeal is simply this: who is entitled to own the property in dispute: in answering this question I will provide the backcloth of the germane law. It is instructive to note that in terms of section 13 of the High Court Act, I am required to administer law, and equity concurrently. In this particular case, the resolution of the dispute at hand, largely imports principles of equity.”

## Failure to Follow Mandatory Procedure Requirements Renders Compulsory Taking of Customary Land for Land-based Investment Illegal and a Nullity

The taking of a property interest or property right by the State without the owner's consent amounts to a compulsory acquisition. In Zambia, compulsory acquisition is governed by Article 16(1) of the Constitution, and section 3 of the Lands Acquisition Act.<sup>11</sup> Article 16(1) of the Constitution reads:

“Except as provided in this Article, property of any description shall not be compulsorily taken possession of, and interest in or right over property of any description shall not be compulsorily acquired, unless by or under the authority of an Act of Parliament which provides for payment of adequate compensation for the property or interest or right to be taken possession of or acquired.”

Section 3 of the Lands Acquisition Acts provides “[s]ubject to the provisions of this Act, the President may, whenever he is of the opinion that it is desirable or expedient in the interest of the Republic so to do, compulsorily acquire any property of any description.” Further and most important, section 5 of the Land Acquisition Act provides that:

- (1) If the President resolves that it is desirable or expedient in the interest of the Republic to acquire any property, the Minister shall give notice in the prescribed form to the persons interested in such property and to the persons entitled to transfer the same or to such of them as shall be after reasonable inquiry be known to him.
- (2) Every such notice shall, in addition, invite any person claiming to be interested in such property to submit such claim to the Minister within four weeks of the publication of the Gazette notice in terms of section seven.”

Under sections 5 and 6 of the Lands Acquisition Act, the State cannot compulsorily acquire property, or an interest in or right over property, without giving the prescribed notice of its intention to do so in addition to the notice to yield possession. Before publication in the Gazette, the notice must be served either personally on the interested person, left at his usual place of residence or business, or with the current occupier of the property in the owner's absence.<sup>12</sup> If the acquisition moves forward, the State must pay adequate compensation for the acquired property.<sup>13</sup> For land in rural areas, compensation is payable if the land is used for agricultural or pastoral purposes because it is deemed developed and unitised.<sup>14</sup> The compensation may be paid in monetary form or in the form of alternative land.<sup>15</sup>

The State is required to strictly follow the law and procedure for compulsory acquisition of property set out above. This is illustrated in the case of *Mpogwe Farms Limited (in Receivership) and Others*

<sup>11</sup> Lands Acquisition Act (2 of 1970).

<sup>12</sup> *Id* section 7(1); see also *Wise v Attorney General* (1991) ZMHC 12 “the notices of intention to acquire property and to yield up possession...are irregular and unlawful and therefore nullified”.

<sup>13</sup> Lands Acquisition Act (2 of 1970), section 10.

<sup>14</sup> *Id* section 15(3).

<sup>15</sup> *Id* section 10.

*v Attorney General*,<sup>16</sup> in which the Court observed that “[t]he State itself passed the legislation and devised statutory procedure to govern compulsory acquisition of property. For whatever purpose such property is acquired, the State must follow that law and procedure. This is what the Rule of Law entails”.<sup>17</sup> In *Zambia National Holdings Limited and Another v Attorney General*,<sup>18</sup> it was held that the President’s decision to compulsorily acquire property could be challenged by the landowner both as to its legality and arbitrariness.<sup>19</sup> In the context of rural communities, “interested person” would include not only those in physical occupation but also those enjoying user and access rights to resources for sustainable livelihood.

Compulsory acquisition must be for a public purpose. The silence of the Land Acquisition Act on the question of purposes for which the State may compulsorily acquire property upon payment of compensation does not *per se* give the State a blanket right to compulsorily acquire property without recourse to such a “public purpose”. What constitutes public use usually depends upon the facts surrounding the subject.<sup>20</sup> When the facts of a case do not point towards public use, courts can protect rural communities by declaring acquisition lacking a public purpose as null and void. Allusions to employment or taxation generation are insufficient to justify such a lack of public purpose.

### Taking over of customary land without following the required procedure is unconstitutional

Courts have established that there can be a compulsory acquisition of property by the State even when it claims to not be acting under the Land Acquisition Act. For example, the State may justify a claim by its power to repossess undeveloped property under the Lands Act.

The case of *Lt General Musengule v Attorney General*,<sup>21</sup> in which the State attempted to repossess the land that was offered to the petitioner on the basis of irregularity, illustrates this. In that case, the Court held that the State’s bid amounted to a compulsory acquisition. The Court first reasoned that the acquisition of land could not be justified by possession or re-entry because the petitioner had committed neither fraud nor breached the lessee’s covenant. The Court then held that the State did not follow the prescribed procedure for a compulsory acquisition and that the compulsory acquisition was therefore null and void. Equally, the taking of customary land under the guise of an unrelated statutory power which does not even provide for adequate compensation can and should be challenged for being an unconstitutional and unlawful compulsory acquisition. This is because the Constitution only authorises the President to act “under the authority of an Act of Parliament which provides for payment of adequate compensation for the property or interest or right to be taken possession of or acquired”.<sup>22</sup>

16 2004/HP/0010.

17 *Id.*

18 SCZ Judgment (No. 3 of 1994) ZMSC 30.

19 *Id* 32, “the President’s resolve can...be challenged in the courts both as to legality and...arbitrariness”.

20 See *Wise v Attorney General* (1991) ZMHC 12, the Court held that the compulsory acquisition of two farms belonging to a private company and subsequent leasing of them to a different private company was not for a public purpose but undertaken with a clear profit motive.

21 (2009) ZR 359.

22 Article 16(1) of the Zambian Constitution 1991 (emphasis added).

### **Consent to compulsory acquisition must be free, prior and informed consent**

Where the State alleges that it obtained the consent of the rural community members to take away their customary land for investment, it must prove that the consent was legally valid and effective. Consent is only legally valid and effective when it is freely given with full knowledge on the part of the community members as to what their rights are and what the result of their consent would be.

In *Mercantile Credit Co Ltd v Cross*,<sup>23</sup> a British case concerning hire purchase agreements, it was held that consent must be full, free and informed. The Court dismissed the appeal after determining that the defendant had been fully informed of his rights and gave full and free consent.<sup>24</sup> This position is similar to that followed in South Africa where the Constitutional Court held that the onus is on the party relying on consent to establish that such consent was given freely, voluntarily and in full knowledge of the rights waived in consequence of the consent.<sup>25</sup>

The common law requirements for free, voluntarily and informed consent illustrated in the above cases is in consonance with the international requirement of “free, prior, informed consent” (FPIC) before disposing or appropriating community resources.<sup>26</sup> For example, in the case of *Mary and Carrier Dan v United States*,<sup>27</sup> the Inter-American Commission on Human Rights (IACHR) stated that the process of fully informed and mutual consent “requires at a minimum that all of the members of the community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives.”<sup>28</sup>

In *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of the Endorois Welfare Council v Kenya*,<sup>29</sup> the African Commission on Human and Peoples’ Right (ACHPR), after noting that the Endorois are “an indigenous community” and a “people”, stated that for “any development or investment project that would have a major impact within the Endorois territory, the State has a duty not only to consult with the community, but also to obtain their free, prior, and informed consent, according to their customs and traditions.”<sup>30</sup> Similarly, in its *Resolution on a human rights-based approach to natural resources governance*, the ACHPR has called on States to take all measures necessary to “ensure participation, including the free, prior and informed consent of communities in decision making related to natural resource governance”<sup>31</sup>. This is also in sync with the Committee on the Elimination of Discrimination against Women’s (CEDAW) General Recommendation No. 34 on the rights of rural women,<sup>32</sup> which requires State parties to:

23 (1965) 2 Q.B. 205.

24 *Id* 207.

25 *Mohamed and Another v President of the Republic of South Africa and Others* (2001) ZACC 18, paras. 62 to 64; see also *Laws v Rutherford* 1924 AD 261, 263.

26 See P Tamang “An Overview of the Principle of Free, Prior and Informed Consent and Indigenous Peoples in International and Domestic Law and Practices” PFII/2004/WS.2/8 (January 2005).

27 Report No. 75/02, Inter-Am. C.H.R. (2002).

28 *Id* para. 140.

29 Communication 276/03 (2009).

30 *Id* paras. 162 and 291.

31 ACHPR Resolution 224: Resolution on a Human Rights-Based Approach to Natural Resources Governance (2012).

32 CEDAW/C/GC/34.

“Obtain the free and informed consent of rural women prior to approval of any acquisitions or projects affecting rural lands or territories and resources, including as related to lease and sale of land, land expropriation, and resettlement. When such land acquisitions occur, they should be in line with international standards, and rural women should be adequately compensated”<sup>33</sup>

Thus, whenever the government alleges that it obtained the consent of the rural community before taking their customary land, it must prove that such consent was free, voluntarily given and after community members had received full information about their rights and the consequences of their consent. In other words, the government must have satisfied the international requirement of free, prior, informed consent. Implicit in this statement is an obligation to obtain consent from each member of the community, including women; not just the chief or headman. If the requirement of free, prior, informed consent, as established under both common law and international law, is not met, the court ought to declare the taking of the customary land a nullity for being a compulsory acquisition without following the required procedure.

#### Adequate compensation for taking customary land should go beyond the open market value in order to achieve justice

Article 16 of the Constitution guarantees the right to adequate compensation for deprivation of property. Section 10 of the Land Acquisition Act permits the President to give the person deprived of the land, in lieu of or in addition to any compensation, “a grant of other land not exceeding the value of the land acquired”. In *Goswami and Another v Commissioner of Lands*,<sup>34</sup> the Supreme Court of Zambia examined adequate compensation for State land. It held that “[o]ur constitution does not countenance the deprivation of property belonging to anyone without compensation”, and further stated:

“The right to compensation was clearly unarguable...the appellant was very clearly entitled to compensation in the sum of K35 million payable by the Government. This is the sum which more approximates the real value of the property and which meets the justice of this case.”

For customary land occupied and used by rural communities, only compensation that goes beyond the market value of the land deprived and is based on the totality of the rights and privileges extinguished or negatively impacted by the deprivation or displacement will be adequate and meet the justice of deprivation or displacement. This is in sync with Guiding Principles on Large Scale Land-based Investment in Africa,<sup>35</sup> a continental aspiration that states that:

“Rights holders need to be appropriately compensated if their rights are to be affected or lost. It is important for compensation to go beyond compensation for land lost to encompass rights and benefits which would have accrued to rights holders by reason of their landholding or customary use, whether individual or collective.”<sup>36</sup>

<sup>33</sup> *Id* para. 62.

<sup>34</sup> SCZ Judgment No. 3 of 2001.

<sup>35</sup> “Guiding Principles on Large Scale Land Based Investments in Africa” United Nations Economic Commission for Africa (2014) available at [http://www.uneca.org/sites/default/files/PublicationFiles/guiding\\_principles\\_eng\\_rev\\_era\\_size.pdf](http://www.uneca.org/sites/default/files/PublicationFiles/guiding_principles_eng_rev_era_size.pdf) (last accessed: 15 November 2016).

<sup>36</sup> *Id* 8.

Compensation should take into account the fact that land, especially for rural communities, is regarded:

“not simply as an economic or environmental asset, but as a social, cultural and ontological resource. Land remains an important factor in the construction of social identity, the organization of religious life and the production and reproduction of culture. The link across generations is ultimately defined by the complement of land resources which families, lineages and communities share and control. Indeed land is fully embodied in the very spirituality of society.”<sup>37</sup>

Because it is difficult to value the social and cultural aspects of the land making it unique and important to the rural communities, only compensation that goes beyond the market value of the land lost would be genuinely adequate and achieve justice. Compensation aimed at merely placing rural communities in a better position than they were before displacement may not be genuinely adequate and may not achieve justice if it fails to take into account the rights and benefits that would have accrued to rural communities by reason of their land holding or customary use. Besides, rural communities may have made a deliberate decision to not exploit their rich land-based resources to improve their quality of life in order to preserve their land-based resources for future generations.

## Courts Can Set Aside Unconscionable Agreements

Land-based investors wishing to use customary land require the consent and agreement of the rural communities occupying and using the land. This is an established position under common law, customary law, and international law. Land agreements entered into by rural communities in Zambia can be challenged under the equitable doctrine of unconscionable bargain if:

1. The rural community suffered from a bargain weakness due to poverty, inexperience and lack of independent advice;
2. The investor exploited the bargain weakness in a culpable manner; and
3. The rural community received no or inadequate compensation for giving up their customary land.

The English case of *Fry v Lane*,<sup>38</sup> which involved sales by ‘poor and ignorant’ persons at considerable undervalued rates and without independent advice is a foundational case examining unconscionable bargains and inequality of bargaining power. Kay J held that a court of equity could set aside the sale in those circumstances. He said:

“The result of the decision is that where a purchase is made from a poor and ignorant man at a considerable undervalue, the vendor having no independent advice, a Court of Equity will set aside the transaction... The circumstances of poverty and ignorance of the vendor, and absence of independent advice, throw upon the purchaser, when the transaction is impeached, the onus of proving, in Lord Selborne’s words, that the purchase was ‘fair, just, and reasonable.’”<sup>39</sup>

<sup>37</sup> “Framework and Guidelines on Land Policy in Africa - Land Policy in Africa: A Framework to Strengthen Land Rights, Enhance Productivity and Secure Livelihoods” United Nations Economic Commission for Africa (2010) section 2.5.1.

<sup>38</sup> (1885) 40 Ch. D 312.

<sup>39</sup> *Id* 322.

Lord Denning succinctly laid down the proposition in the case of *Lloyds Bank Ltd v Bundy*<sup>40</sup> when he said that:

“...the English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other.”<sup>41</sup>

In a similar fashion, *Clifford Davis Management Ltd v Wea Records Ltd*<sup>42</sup> held that there is a presumption of invalidity where an agreement, bargained between parties with unequal bargaining power and no independent legal advice, has terms that are manifestly unfair. This is the rule in many common law jurisdictions. In the Canadian case of *Saugstad v McGillivray*<sup>43</sup> the Supreme Court of British Columbia stated:

“Where a claim is made that a bargain is unconscionable, it must be shown for success that there was inequality in the position of the parties due to ignorance, need, or distress of the weaker, which would have him in the power of the stronger, coupled with proof of substantial unfairness in the bargain. When it has been shown a presumption of fraud is raised, and the stronger must show, in order to preserve his bargain, that it was fair and reasonable.”<sup>44</sup>

Australian courts have reached the same conclusion on the equitable principle of unconscionable bargains and inequality of bargaining powers. In *Commercial Bank of Australia v Amadio*,<sup>45</sup> the High Court of Australia set out the three requirements as follows:

“The jurisdiction is long established as extending generally to circumstances in which (i) a party to a transaction was under a special disability in dealing with the other party with the consequence that there was an absence of any reasonable degree of equality between them and (ii) that disability was sufficiently evident to the stronger party to make it *prima facie* unfair or “unconscientious” that he procure, or accept, the weaker party’s assent to the impugned transaction in the circumstances in which he procured or accepted it. Where such circumstances are shown to have existed, an onus is cast upon the stronger party to show that the transaction was fair, just and reasonable”.<sup>46</sup>

Kenyan courts have also set similar requirements for a claimant to succeed on the basis of unconscionable bargains or inequality of bargaining powers. In *LTI Kisii Safari Inns Ltd and Others v Deutsche Investitions-Und Entwicklungsgesellschaft (‘Deg’) and Others*,<sup>47</sup> the Court of Appeal for Kenya stated that:

“This is also an equitable doctrine. There are at least three prerequisites to the application of a doctrine, firstly, that the bargain must be oppressive to the extent that the very terms of the bargain

40 *Lloyds Bank Ltd v Bundy* [1975] Q.B. 326; this case’s treatment of undue influence was cited with approval by the Supreme Court of Zambia in *Nkongolo Farms Limited v Zambia National Commercial Bank Limited and Others* (SCZ No. 19 of 2007).

41 *Lloyds Bank Ltd v Bundy* [1975] Q.B. 326, 339.

42 *Clifford Davis Management Ltd v Wea Records Ltd and Another* (1975) 1 W.L.R. 61.

43 (1995) 51 A.C.W.S. 3d 550.

44 *Id* para. 4.

45 (1983) 151 CLR 447.

46 *Id* 474.

47 (2011) eKLR.

reveals conduct which shocks the conscience of the court. Secondly, that the victim must have been suffering from certain types of bargaining weakness, and, thirdly, the stronger party must have acted unconscionably in the sense of having knowingly taken advantage of the victim to the extent that behavior of the stronger party is morally reprehensible.”<sup>48</sup>

In Zambia, government officials initiate and negotiate most of the land agreements on behalf of investors. In some cases, such as the Farm Blocks program,<sup>49</sup> the government itself enters into agreements directly with impoverished and illiterate rural communities. These government officials, habituated to the significance and permanence of legal agreements, possess drastically unequal knowledge when compared with some members of rural communities who may be unaware of the binding and irreversible significance of an agreement with no material benefits to them whatsoever.

The agreements often provide for no or inadequate compensation. Unrepresented communities end up giving away their fertile and resource rich land, almost for free, and become landless, with serious negative impacts. They often feel their only option is to enter into the agreement because of threats of eviction by powerful and influential government authorities and their traditional chiefs. Most of these land deals should be challenged in courts on the basis of unconscionable bargains or inequality of bargaining powers.

## Restrictions on Alienation of Customary Land Should Be Strictly Followed

Although the Lands Act vests all land in the President and gives him all powers to administer and control land, including allocation of land,<sup>50</sup> some restriction are placed on alienation or allocation of traditional land held under customary tenure. Under section 3(4) of the Lands Act, the President has no authority to alienate any land held under customary tenure:

- “(a) without taking into consideration the local customary law on land tenure which is not in conflict with this Act;
- (b) without consulting the Chief and the local authority in the area in which the land to be alienated is situated, and in the case of a game management area, and the Director of National Parks and Wildlife Service, who shall identify the piece of land to be alienated;
- (c) without consulting any other person or body whose interest might be affected by the grant; and
- (d) if an applicant for a leasehold title has not obtained the prior approval of the chief and the local authority within whose area the land is situated.”

This section limits the powers of the President to alienate customary land. Protecting villagers and peasant farmers from displacements by wealthy applicants, such as large-scale land-based investors was clearly part of the legislative intent behind the inclusion of section 3(4) in the Lands

<sup>48</sup> *Id* para. 52.

<sup>49</sup> See *Farm Block Development Plan 2005-2007* Republic of Zambia Ministry of Finance and National Planning (2005) available at <https://www.oaklandinstitute.org/zambia-farm-block-development> (last accessed: 15 November 2016).

<sup>50</sup> See *Justin Chansa v Lusaka City Council* (2007) ZR 256, in which the Supreme Court held that the authority to consider applications for land allocation from members of the public is vested in the President of Zambia who has delegated this authority to the Commissioner of Lands.

Act. This is evidenced by the statements of the Minister of Land, Dr Shimaponda, during the Second Reading of the Lands Bill:<sup>51</sup>

"The fear expressed in this august House last year to the effect that upon the passage of that Bill, that villagers and peasant farmers would be displaced from the land by the wealth applicants has been taken care of. Sir by providing in sub-clause 4(c) of 3 that:

-the President shall not alienate any land situated in a district or area where land is held under customary tenure:

(c) without consulting any other person or body whose interest might be adversely affected

The President's powers to alienate are also limited by the obligation contained in Clause 3. Sub-clause 4(a) to take into account the local customary law on land tenure which is not in conflict with the Land Bill."<sup>52</sup>

Before a traditional Chief can give consent, they are required to consult and obtain consent from any person or anybody who might be affected by alienation or conversion of customary land. If they fail to do this, the alienation, allocation or conversion is null and void.<sup>53</sup>

In *Still Waters Limited v Mpungwe District Council and Others*,<sup>54</sup> the Chief allocated land to the appellant company after consulting the traditional councillors. The third and fourth respondents contended that they were interested in the land because it was adjacent to their farms and further to that the previous chief had already allocated it to them. However, the chief had neither consulted nor obtained consent from the third and fourth respondents before allocating the land to the appellant company. In delivering the judgment of the Supreme Court, Chibesakunda JS stated:

"Although we agree with Dr Sakala's forceful argument that Chiefs enjoy autochthonic powers over land held under customary tenure and especially undeveloped land nonetheless section 3(4) of the Lands Act is couched in such a way that it is mandatory for the 3<sup>rd</sup> and 4<sup>th</sup> respondent to have been consulted before allocating the land to the appellant company. Failure to do so results in the purported allocation to be null and void...In the *Siwale v Siwale*, the deceased who had been given land by the colonial authorities with the approval of the local Chief sometime in 1929, died intestate. The appellants who were his siblings objected to their last brother obtaining 'title' deeds to the land without their consent. This court agreed with them that under section 3(4) it was obligatory on the part of the traditional chief to seek their consent, as according to that section, their interest would have been affected by one of their brothers, obtaining title deeds of the land. This Court pointed out to the fact that land held under customary tenure can only be alienated if consent is obtained by the traditional chief from those whose interest maybe affected by such allocation. In the *Siwale* case the core contention was exactly the same contention as in the case before us. In this case before us the core question is whether or not the procedure adopted by the current chief in allocating to the appellant Company without consulting the 3<sup>rd</sup> and 4<sup>th</sup> respondents was a proper procedure. Our view is that the procedure adopted by the current chief was wrong and as such the allocation of the land to the appellant is null and void"<sup>55</sup>

51 *Official Verbatim Report of the Parliamentary Debates of the Fourth Session (Resumes) of the Seventh National Assembly* (25 July - 15 August 1995).

52 *Id* 416.

53 See *Siwale and Others v Siwale* (1999) ZR 84; see also *Village Headman Mupwaya and Another v Mbaimbai* SCZ Appeal No. 41 of 1999.

54 Supreme Court Appeal No. 90 of 2001.

55 *Id*.

Similarly, before customary land is alienated, allocated or converted for land-based investment, rural community members must be consulted and give their consent. Thus in *Village Headman Mupwaya and Another v Mbaimbai*,<sup>56</sup> the Supreme Court of Zambia held that failure to consult any person whose interest may be affected by the grant, as required under section 3(4)(c) of the Lands Act, was fatal.

**The required consultation should supply sufficient information and opportunity to the rural community to consent or object**

Although section 3(4) and the cases cited above provide no clear guidance on the extent of the required consultation, guidance can be sought from English decisions. In *Rollo v Minister of Town and Country Planning*,<sup>57</sup> before an area of land could be developed as a new township, Bucknill LJ held that:

“Consultation in the sub-section means that on the one hand, the Minister must supply sufficient information to the local authority to enable them to tender advice, and, on the other hand, a sufficient opportunity must be given to the local authority to tender that advice.”<sup>58</sup>

Similarly in *R v Secretary of State for Social Services, ex parte Association of Metropolitan Authorities*,<sup>59</sup> which dealt with the question of what amounts to sufficient consultation, it was held that:

“[T]he essence of consultation is the communication of a genuine invitation to give advice and a genuine receipt of that advice. In my view it must go without saying that to achieve consultation sufficient information must be supplied by the consulting to the consulted party to enable it to tender helpful advice. Sufficient time must be given by the consulting to the consulted party to enable it to do that, and sufficient time must be available for such advice to be considered by the consulting party. Sufficient, in that context, does not mean ample, but at least enough to enable the relevant purpose to be fulfilled. By helpful advice, in this context, I mean sufficiently informed and considered information or advice about aspects of the form or substance of the proposals, or their implications for the consulted party, being aspects material to the implementation of the proposal as to which the Secretary of State might not be fully informed or advised and as to which the party consulted might have relevant information or advice to offer.”<sup>60</sup>

Rural community members must be supplied with sufficient information and sufficient opportunity to enable them to consent or object to the alienation, allocation or conversion of their land. Failure to do so should be deemed as a failure to follow the procedure under section 3(4)(c) and should result in declaring the alienation, allocation, grant or conversion null and void.

Publishing a notice in the Gazette or newspaper would certainly not afford community members an opportunity to consent or object. It is self-evident that the majority of the people in rural communities do not have access to a Gazette Notice. In fact, sending a notice relating to land-based investment affecting a rural community through a Gazette or newspaper can amount to

56 SCZ Appeal No. 41 of 1999.

57 (1948) 1 All ER 13 (involving the duties of the Minister to consult local authorities under the New Town Act of 1946).

58 *Id.*

59 (1985) 17 H.L.R. 487.

60 *Id* 491.

discrimination against rural communities.

## Uncompensated Displacement of Rural Communities Violate Human Rights Guaranteed by International Law and the Constitution

Displacement of rural communities from their customary land without compensation can, in itself, constitute a gross violation of human rights. It can result in landlessness, homelessness and a number of negative social, economic and political impacts. These represent infringement on the right to property,<sup>61</sup> dignity,<sup>62</sup> life,<sup>63</sup> not be subjected to inhuman and degrading treatment,<sup>64</sup> and non-discrimination.<sup>65</sup>

### Displacement leads to violations of the right to not be subjected to inhuman and degrading treatment

Article 15 of the Constitution, states that “[n]o person shall be subjected to torture, or to inhuman or degrading punishment or other like treatment.” This right is so important that the framers of the Constitution did not allow any limitation whatsoever. Courts across the region have interpreted this right broadly; it encompasses more than freedom from torture. The Supreme Court of Zimbabwe held in *Mukoko v Attorney General*<sup>66</sup> that:

Degrading treatment is treatment which when applied to or inflicted on a person humiliates or debases him or her showing a lack of respect for or diminishing his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking the person’s moral and physical resistance. The relevant notions in the definition of degrading treatment are those of humiliation and debasement. The suffering and humiliation involved must go beyond the inevitable element of suffering or humiliation connected with a given form of legitimate or fair treatment.<sup>67</sup>

Like the Supreme Court of Zimbabwe, the African Commission in *Doebbler v Sudan*<sup>68</sup> emphasised that inhuman and degrading treatment includes not only actions that cause serious physical or psychological suffering, but also those that “humiliate or force the individual against his will or

61 See Universal Declaration of Human Rights (UDHR) article 17(1), “Everyone has the right to own property”; African Charter on Human and Peoples’ Rights (African Charter) article 13(3), “Every individual shall have the right of access to public property and services in strict equality of all persons before the law.”

62 See UDHR article 1 “All human being are born free and equal in dignity and rights”; see also the International Covenant on Economic, Social and Cultural Rights (ICESCR) Preamble; Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) Preamble; International Covenant on Civil and Political Rights (ICCPR) article 1; African Charter, article 5, “Every individual shall have the right to respect of dignity inherent in a human being and to recognition of his legal status”; and Women’s Protocol to the African Charter, article 3(1), “Every woman shall have the right to dignity inherent to a human being and to the recognition and protection of her human and legal rights”.

63 See ICCPR, article 6(1); African Charter, article 4, “Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.”

64 See ICCPR, article 7; African Charter, article 5, “All forms of exploitation and degradation of man particularly... cruel, inhuman or degrading punishment and treatment shall be prohibited”.

65 See Special Rapporteur on Adequate Housing “Basic Principles and Guidelines on Development-Based Evictions and Displacement” A/HRC/4/18, annex I (2007) para 7, “forced evictions intensify inequality, social conflict, segregation and ‘ghettoization,’ and invariably affects the poorest, most socially and economically vulnerable and marginalised sectors of society, especially women, children minorities and indigenous people.”

66 Const. Application No. 36/09 (2012) ZWSC 11.

67 *Id* (citations omitted).

68 ACHPR Comm. 236/00 (2003).

conscience.”<sup>69</sup> Communities who have occupied their land for generations have a special social, political and spiritual interest in that land. Their land is not only a fundamental asset and the basis of sustainable livelihood, but also a source of social identity where their ancestors are buried. Losing this land with no adequate compensation humiliates, causes anguish, and lowers the respect and worth of rural communities.

Human dignity, is one of the national values and principles of the Constitution.<sup>70</sup> In the South African Constitutional Court case of *S v Makwanyane*,<sup>71</sup> O'Regan J stated:

“Recognising a right to dignity is an acknowledgment of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the rights that are specifically entrenched in [the Bill of Rights].”<sup>72</sup>

The displacement of poor communities from their customary land without providing them with adequate compensation, whether monetary or alternative land, inevitably harms their self-worth and dignity. It does not treat rural communities as worthy of respect and concern. It is therefore a violation of their rights to not be subjected to inhuman and degrading treatment because it subjects them to a host of negative impacts and risks landlessness, homelessness, loss of access to common property, food insecurity, joblessness, social marginalisation, increased mortality, social disintegration, and loss of access to community services. The lives of the displaced families become more fragile.<sup>73</sup>

In the Indian case of *Mullin v Administrator, Union Territory of Delhi*,<sup>74</sup> the Supreme Court referred to Directive Principles in the Constitution as a means of interpreting the justiciable right to life. The Court declared that “the right to life includes the right to live with human dignity and all that goes with it, namely, the bare necessity of life such as adequate nutrition, clothing and shelter”.<sup>75</sup> Furthermore, the South African Constitutional Court explicitly connected this right to dignity with housing and property rights in *Sarrahwitz v Martiz N.O. and Another*.<sup>76</sup> The Court held that:

“Generally speaking, it is very difficult for a homeless person to keep her self-worth or dignity intact. She is at the mercy of any landlord, relative or friend who might be providing her with accommodation. And no vulnerable person who has tasted what it means to have a place they can truly call home should be deprived of it without justification.”<sup>77</sup>

Rural communities often lose the land they depend on for growing food, building shelters, fetching water, and pasturing their livestock, with no adequate compensation to pave the way for land-based investment. They become destitute and have to depend on neighbouring communities, relatives and, to a limited extent, the government for accommodation and land. They are perpetually at the mercy of those who offer them shelter or land. They lose the bare necessities such as housing,

<sup>69</sup> *Id* para. 36.

<sup>70</sup> Constitution of Zambia Amendment Act (2 of 2016) articles 8(d) and 9(1)(a).

<sup>71</sup> *S v Makwanyane* (1995) ZACC 3.

<sup>72</sup> *Id* para. 328.

<sup>73</sup> Zambia National Resettlement Policy (2015) 11.

<sup>74</sup> (1981) SCR (2) 516.

<sup>75</sup> *Id.*

<sup>76</sup> (2015) ZACC 14.

<sup>77</sup> *Id* para. 42.

nutrition and shelter, and with those, their dignity.

### **Displacement of rural communities disproportionately impacts on rural women**

Forced eviction indirectly discriminates against women. In the case of *R (on the applications of Baiai and another) v Secretary of State for the Home Department*,<sup>78</sup> Silber J stated:

“The difference between direct and indirect discrimination is that indirect discrimination results from a rule or practice applied equally to all individuals without differentiation but which has a proportionate and unjustified adverse impact on members of a particular group or minority.”<sup>79</sup>

Similarly, Zambian courts ought to take judicial notice that women are disproportionately affected by the land-based investments that results in displacements. As the UN Committee on Economic Social and Cultural Rights stated:

“Women in all groups are especially vulnerable given the extent of statutory and other forms of discrimination which often apply in relation to property rights (including home ownership) or rights of access to property or accommodation, and their particular vulnerability to acts of violence and sexual abuse when they are rendered homeless.”<sup>80</sup>

It is women who have to look after their families without shelter, food and crop-growing areas.<sup>81</sup> To make matters worse, once women lose their secondary rights to customary land, it is extremely difficult for them to acquire alternative land because they cannot be allocated land under customary law and they cannot afford purchasing statutory land or housing due to lack of income. Men do not look after children and can either migrate into urban areas or might be given land by other headmen or chiefs. Because women suffer disproportionately when compared to men, displacements or forced eviction of communities from customary land amounts to indirect discrimination.

## **Conclusion**

While land-based investments are necessary for economic development, they may lead to displacements of rural communities without their free, prior and informed consent and the provision of adequate compensation. Customary land is recognised in Zambia and rural communities' land rights can be protected by strictly applying the statutory procedure for compulsory acquisition, alienation or conversion of customary land. The common law and international principles of free, prior and informed consent, and the equitable principles of unconscionable bargains can be effectively applied to ensure rural communities retain or can claim back their land or receive adequate compensation. Land-based deals can also be challenged for violating the constitutional rights to life and not to being subjected to inhuman and degrading treatment and also for indirectly discriminating against women.

<sup>78</sup> (2006) EWHC 823 (Admin).

<sup>79</sup> *Id* para. 114.

<sup>80</sup> UN Committee on Economic, Social and Cultural Rights (CESCR) “General Comment No. 7: The right to adequate housing (Art.11.1): forced evictions” (20 May 1997) E/1998/22, para. 10.

<sup>81</sup> “Women in Human Settlements Development: Getting the Issues Right” United Nations Centre for Human Settlements (HABITAT) (1995) available at <http://collections.infocollections.org/ukedu/en/d/jh1559e/9.html#jh1559e.9> (last accessed: 15 November 2016).