

A hybrid system of Land Titles and Deeds registration as a new model for Zambia: A case study of the Lands and Deeds Registry Lusaka.

By

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Dedication

This thesis is dedicated to my mother, Zulekha Kassam Mandhu, who at the age of ninety-five still remains an inspiration for me.

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Ordinances

Lands and Deeds Registry Ordinance of 1914

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Abbreviations and Acronyms:

BC	Before Christ
CSC	Customer Service Centre
E-Conveyancing	Electronic conveyancing
E-Registration	Electronic registration
E- System	Electronic system
Law Com Report	Law Commission Report
LA	Lands Act – Zambia
LDRA	Lands and Deeds Registry Act – Zambia
LDRR	Lands and Deeds Registry Regulations – Zambia
LPA	Law of Property Act – England
LRA	Land Registration Act – England
MLEWD	Ministry of Land, Energy and Water Development
MMD	Movement for Multi-Party Democracy
UNFIG	United Nations: International Federation of Surveyors
UNIP	United National Independence Party

Abstract

Anywhere in the world land is the most important natural wealth for the country. The availability of land and its use are a vital part of human existence. Land records, therefore, are of great concern to every country's government as well as every individual who owns, occupies, uses or has an interest in a parcel of land. In relation to land a person will feel secured or safe with regards to land rights if she has security of tenure and security of tenure is a question of fact. This sense of security encourages the individual to invest in land thus fostering economic development in a given country.

This thesis argues that land registration systems do not create land rights but are used to regulate the rights that arise under property law. Land registration is not a modern phenomenon but has a rich history. In this thesis a very broad classification of the different types of land registrations systems is placed into two categories. Firstly, Deeds registration, and secondly, title registration or what became popularly known as the Australian Torrens System. The two systems with many local variations have been adopted by different countries all over the world. In comparison each system has its own advantages over the other but both have the same objective of providing an appropriate and unique system of land registration leading to security of tenure.

Title registration system has been termed as the positive system based on the mirror, curtain, and insurance principles. By using the case study approach and a comparative analysis, this research analyses the reflection of these three principles from titles registration into the deeds registration system. Furthermore, the comparative analysis is centred on the legislative structure providing for the two different land registration systems. The conclusion is that the two systems do not have the same reflection as far as the three principles are concerned. However, this does not make the titles registration system more advantageous when compared with the deeds registration system.

Finally, a hybrid system appropriate for land recordation and registration model is suggested for Zambia in this research based on a fusion of the two original systems. The proposed model will ensure that it is suitable for a developing country but also relevant in the twenty-first century and that it provides the much needed security to protect individual land rights.

CHAPTER ONE

LITERATURE REVIEW AND METHODOLOGY

1 Introduction

1.1 The Law of Real Property and Land Registration

Mudenda describes the law of real property as being concerned with land rights in or over land and the processes whereby those rights and interests are created and transferred (Mudenda, 2007). This definition divides law of real property into two distinct parts. The first being land law which principally deals with the substantive rights and liabilities of land owners and secondly, conveyancing, the system used to transfer those rights from one individual to another. Conveyancing is therefore procedural in nature. Land itself is referred to as property having two unique characteristics, the fact that it is immovable and secondly it is permanent (Hanstad, 1998). “Land’s permanence makes it peculiarly capable of lasting record” (Hanstad, 1998, p.64). Even though the major part of this research will centre on the second part of the definition of real property, which is conveyancing, and more particularly on the land registration system, it is important to understand the concepts of property which deal with the substantive land right and are analysed below in detail.

In relation to land, a person has security of tenure if he is secure or safe in his holding of the parcel of land. The main problem is how to regulate the transfer of rights in land in the best interest of the community so that each member feels secured. Originally, land had to serve its traditional role in the production of wealth and provision of shelter but now it has become an independent commercial commodity to be bought and sold like many other investments. Therefore the system of transferring rights in land has to be reliable and efficient to increase investments. The sense of security in holding real property will in turn encourage development and increase investment within areas of under-development in a given country. Land or real property is linked to the economic development of a country in several different ways. As indicated by O’Connor in her research, “The collective economic welfare is advanced when land is used as a factor in production, or as collateral for credit to finance new investment and business activity” (O’Connor, 2003, p. 1). Connecting land tenure security with development, the World Bank reports that land titling projects undertaken in most countries have been the basis for fostering a more efficient land market, making it easier for land to be purchased and sold as is the case in Latin America:

One of the pillars of neo-liberal thinking about the future of the agricultural sector is the need to provide security of tenure to producers to encourage investment and, hence, productivity and production increases. This is one of the main motivations behind land-titling projects and efforts to modernize cadastral systems and land registries. The other motivation is to foster a more efficient land market, making it easier for land to be purchased and sold. Almost every single Latin American country was undertaking land-titling programmes of some sort in the 1990s.....Once properties are measured and mapped and titles registered, land ownership will be more difficult to contest (World Bank Report, Policy Research Report: Land Policies for Growth and Poverty Reduction, 2003).

Neo-liberal thinking has become widespread during the last twenty years or so in some political and academic debates. Its basic ideology rests on economic liberalism that advocates for the state not to intervene in the economy and allow individuals to participate in free and self-regulating markets. This thinking of neo-liberalism is supported in Zambia especially as regards ownership of land and economic development. In 1991 in Zambia the single party rule under the United National Independence Party's (UNIP) was challenged by the incoming Movement for Multi-Party Democracy (MMD) whose support for democratic pluralism and neo-liberalism was clearly emphasised even in its manifesto as, "..... the MMD shall institutionalise a modern, coherent, simplified and relevant land law code intended to ensure the fundamental right to private property and ownership of land...." (MMD, 1991, p.7). The views of the political party confirmed further that economic value will be attached to undeveloped land to encourage real estate business and promote regular issuance of title deeds to productive land owners in both urban as well as rural areas. The support by the political party for neo-liberal approach was aimed to introduce legislation that would restore the confidence of investors in land and provide security of tenure.

Therefore security of tenure plays an important part in any land reform programme to make sure that property rights are clearly identified to achieve an efficient land market and foster economic development. Emphasising the role of updating the registration practices to resolve tenure security issues, Mostert argues in her article: "...this paper focuses only on a single issue within the broader tenure security debate: how updating registration practices could contribute to resolving some of the issues about tenure security in a reform paradigm" (Mostert, 2011, p.86). This research adds to the broader tenure security debate by outlining a new model for updating the registration practices by comparing the two different systems of titles registration and deeds registration as well as the comparative analysis of the legislative framework supporting the two systems. Additionally, the role of modernizing the land registries is the key component of the land titling projects being undertaken in many countries

around the world. “In most technologically advanced countries indices of land records are searchable online and actual deeds have been scanned and uploaded online to allow title searchers to view electronic versions of deeds on their own computers” (Pacht, 2010, p339). The availability of accurate land records that are easily accessible online is a positive sign of an efficient land registration system that can be achieved through the land reform paradigm.

On the other side of the coin, apart from tenure security, conveyancing and land registration are part of one complete system and must form the basis of a suitable land reform programme to encourage development in the country. Conveyancing procedure have lacked behind in the reform programmes and the age old art of drawing up the complicated documents still poses a challenge in the modern day. There is now a greater demand placed on the registration systems in this electronic age to achieve the end result of security for the person holding the rights in the property. The agreed objectives of the joint working group reporting on land registration for the twenty-first century in England, outlined the need to simplify the existing land registration systems and provide a good workable legislative structure to support the system in the following statement:

It was essential that any reform should simplify the existing system and establish a clear, workable and coherent body of law. The principles upon which land registration is based should be clearly articulated in the primary legislation. Any rules made pursuant to that legislation should merely provide the detailed working out of those principles (Great Britain, Law Commission, Land Registration for the twenty-first century, 1998, p.6).

An efficient system of conveyancing in any country is only possible if every piece of land is surveyed and represented on a diagram or a general plan and subsequently recorded at the lands registry. In other words, there is need for first or initial registration for each and every parcel of land in the country so that a complete records are available. Such records need to be an accurate reflection of the property and should be made available to the public to inspect by the land registry in the form of registers.

If these registers show an inaccurate record of the property transactions, the parties to the transaction will feel unsecured and as a result lose confidence in the system of land registration and conveyancing. This lack of confidence can be concluded from the recommendation suggested to tackle the problem that can be traced back to the middle of the nineteenth century when the government of South Africa was forced to appoint a committee of investigation due to public complainants about the unsatisfactory methods and delays in

the deeds office at Cape Town (Nel, 1991). Similar situations prevail even in developed countries like the United Kingdom where statutory intervention since 1925 provide for registration of property, but problems of unsatisfactory methods and delays continue to feature against the system. The land register in England has been in existence for over one hundred years, although even now it is a long way from covering each and every plot of land in the country (Riddall, 1988). The statutory provisions in England provide for a titles registry whose purpose would be to record the grant of title to the property and the subsequent registration of each parcel or unit of land.

Section 1 and section 9(9) of the Land Registration Act 2002 provides that:

.....there shall continue to be maintained a register of title kept by the registrar. The business of registration under the Act is carried out by an office termed her Majesty's Land Registry. The land registry consists of the Chief Land Registrar, who is appointed by the Lord Chancellor, and the staff appointed by the Registrar (Thompson, 2003, p.96)

The Land Registration Act 1925 which was replaced by the Land Registration Act 2002 (LRA) operated a paper-based or manual system of conveyancing and therefore delays and inefficiencies were common. One of the primary aims of the new legislation was to revolutionise the slow and elaborate conveyancing process by bringing in a faster and more reliable way of property dealings through electronic means. Cooke comments on the aim of the new legislation as pointing towards a gradual change by stating: "The new law will continue a process which can be seen to have taken place throughout the twentieth century, whereby land registration has gradually changed the nature of ownership of land" (Cooke, 2003 p.1).

Similar complaints like the ones outlined in South Africa and the United Kingdom continue to be labelled against the Ministry of Lands, Natural Resources and Environmental Protection under which the Lands and Deeds Registry in Lusaka, Zambia is situated in the 21st century (Zambia. Committee on Lands, Environment and Tourism in Parliament, 2012). The report presented by the Ministry to Parliament confirms that there is no Land policy in Zambia, administration of land has not yet been decentralised to district level and lack of information including accurate data on ownership of land, as the major problems faced in land administration in Zambia. The main concentration for this research is based on some of the challenges identified by the report with regard to land registration, stated as follows:

- a) lack of accurate statistics on the quantities of the various categories of land;

- b) lack of proper coordination between the many government agencies involved in the land allocation;
- c) lack of a decentralised system for processing title deeds;
- d) lean staffing and institutional structures;
- e) defective land Information Management Systems; and
- f) Out-dated laws and procedures that do not address present day land issues (Zambia, Committee on Lands, Environment and Tourism, National Assembly, 2012).

Presenting their views in Parliament, the stakeholders whose views the committees had collected clearly emphasised that the lack of statistics on the categories of land and records on title to land, including the fact that no land audit has ever been conducted in Zambia, is the main thrust of the problem of land registration in Zambia (Zambia, Committee on Lands, Environment and Tourism, National Assembly, 2012). This research will investigate the need to develop a suitable land registration system for Zambia to address the problem of land records and improve on the availability of land title data to provide security of tenure for land owners, thereby fostering economic development.

1.2 Conveyancing and its link to land registration

In order to appreciate the link between the conveyancing process and land registration, understanding what is meant by conveyancing plays a pivotal role. Historically, Conveyancing has evolved from a rich background and this has been traced in chapter two. Briefly, conveyancing has been defined in various ways to include the procedures as well as the practice of transferring real property. In law, conveyancing is the transfer of legal title of property from one person to another or the granting of an encumbrance such as a mortgage or a lien (Black's Law Dictionary, 1999). Words used to indicate conveyance, or words of conveyance include grant, devise, give and sell. Other definitions state that conveyancing is the legal procedure (performed by an attorney or licensed conveyancer) through which an ownership interest in land is created, transferred or extinguished (www.businessdictionary.com). The word conveyancing has also been defined as the branch of legal practice dealing with the conveyance of property or real estate (American Heritage Dictionary, 2009). On the other hand, conveyancing is also concerned with how rights in land may be created and transferred (Mudenda, 2007). The four different definitions of conveyancing provided above refer not only to real property, ownership, interest in land but the practice of conveyance of property or real estate. The approach adopted by this research is to consider the law of real property as providing the substantive rules and regulations that govern land and its ownership, while conveyancing as the practice and the procedures by

which ownership of the real property is transferred from one individual to another, signifying the transaction between the seller and the purchaser of land.

Conveyancing's rich historical perspective in terms of the original common law position as well as the statutory inventions that have improved upon the original system is the subject of discussion under chapter two in detail. In summary, it should be noted that there are several documents that are drafted and many official forms that must be submitted under the conveyancing process before steps can be taken to register the property in the name of the buyer. Registration as the tail part of the conveyancing process, takes place at the titles or the deeds registry according to the system adopted by the country. Registration of land includes the registration of real property attached to the land.

The definition of land from a legal perspective does not only include the surface of the earth but the subsoil under it and all the structures and objects attached to it like buildings, trees and minerals underneath the earth's surface. This is expressed as '*quic quid plantatur solo solo cedit*', meaning, whatever is attached to the soil becomes part of the soil. This definition of land has been broadened under statutory law and the Law of Property Act 1925 in United Kingdom defined land as:

'Land' includes land of any tenure, and mines and minerals, whether or not held apart from the surface, buildings or parts of buildings (whether the division is horizontal, vertical or made in any other way) and other corporeal hereditaments; also a manor, an advowson, and a rent and other incorporeal hereditaments, and an easement, right, privilege, or benefit in, over, or derived from land (Law of Property Act 1925 s 205(1)(ix)).

Therefore the statutory definition of 'Land' would extend to land that is covered with water (Land Registration Act 2002,s 132(1)).

In economics, land is any gift of nature which is not man-made and which is indestructible, tangible and intangible, including the climate, air, sky, trees, animals, minerals. Land therefore cannot be created or destroyed.

When comparing the conveyancing process with the process involving the sale of personal goods, the conveyancing process is much more complex due to the nature of real property being the subject matter of the transfer. Considering the comparison in earlier times, Megarry & Wade state that the distinction between real and personal property was vital, property was deemed 'real' if the courts would restore to a dispossessed owner the thing itself, the 'res'

and not merely give compensation for the loss (Megarry & Wade, 2000). As time evolved the distinction still remains relevant but it is only vital to determine what remedies a person is entitled to in the case of real property. While modern real estate conveyancing became more complex and interrelated, transactions involving acquisition, retaining and disposal of land and things attached to the land such as buildings were the order of the day. The law of real property governing certain interests, created over the land such as ownership, right to use and right to water or crops planted on the land, was improved upon through statutory inroads however, conveyancing procedures remained static. The increase and the complexities of the nature of the transactions involving land required not only an efficient system of conveyancing but more particularly, a suitable land registration system so that the purchaser receives a secured title to land when purchasing property. Thus establishing the link between conveyancing and land registration.

For the purposes of this research, the use of the words 'land' and 'property' will be interchanged since the transfer of land includes the buildings and structures attached to it and are classified as real property or estates. Conveyancing will be the process of transferring land, including property resulting in the registration of land. However, a deeper legal meaning of the word 'property' provided for under substantive land law and discussed below in the next part is relevant in presenting the concepts of ownership of land and security of tenure as they relate to the land registration systems.

Regard must be had of the fact that in some countries without land registration systems, the process of conveyancing and transfer of land is done without any public record and this is referred to as private conveyancing. Simpson's idea of the early development of the deeds registration system points out that the evidence of a land transfer in some communities was as follows:

In the days when communities were small and close-knit, and people knew their neighbours and all about their affairs, an oral declaration and the handing over of a turf or twig were sufficient evidence of the transfer of land. Some such symbolic act performed in the presence of witnesses upon the land itself was adequate to safeguard not only the purchaser but also any third party who might have an interest in the land. Therefore many early systems of law, including customary law in developing countries have regarded publicity alone as a sufficiently effective guarantee when land is sold (Simpson, 1976, p.13).

The system described by Simpson proved less successful as societies became more complex. Purchasers of land and other interested parties needed to inquire into a purported owner's

rights to land before risking the purchase of property. The purchaser had to make sure that the most important risk which had to be avoided was to purchase land from a seller who did not own the land or had already transferred the ownership to another person. The issue of having public records to prove ownership of land can be traced back to the reports of the Real Property Commissioners in the eighteenth century who expressed the problem of English land law and suggested solutions by stating:

In all civilised countries the title to land depends in a great measure on written documents, and the purchaser looks, and is empowered by the law to look, for proof of the seller's right beyond the fact of his possession. It is obvious that a documentary title cannot be complete, unless the party to whom it is produced can be assured, that no document which may defeat or alter the effect of those, which are shown to him, is kept out of sight. It follows, that means should be afforded by the law for the manifestation of all the documents necessary to complete the title, or for the protection of purchasers against the effect of any documents, which, for want of the use of such means, have not been brought to their knowledge; in other words, that there should be a General Register (Great Britain, Real Property Commissioners, second report, 1830).

The written documents used today in the conveyancing procedure and the use of the public register showing the record of title to land is the result of the suggested solutions provided by the Real Property Commissioners' report. Private conveyancing was proved not conclusive and therefore land registration through a public record became the acceptable method of transferring land rights in England.

As stated above, Land registration and conveyancing are two parts of the single legal process by which land is transferred from one individual to another. Private conveyancing as a separate system of land registration has not been discussed in detail for the reason that this research's concentration is the conveyancing procedure and its link to the two main registration systems, being the deeds and the titles registration.

For most purchasers and many sellers of properties, the purchase of a home is one of the most important legal transactions of their lives. It may involve investing their entire savings or obtaining a loan, thus creating a debt for purchasing a home. It is for this reason that this research has settled on developing a suitable land registration model for Zambia to secure the rights of these people who purchase residential properties or commercial properties and obtain title deeds for them. In other words, the land registration system being proposed is for statutory tenure in Zambia in particular, and its suitability for registering customary tenure rights is beyond the scope of this research. Other transactions such as mortgages and

registration of charges which are ancillary to the main transaction of conveying property, are also not within the scope of this research because they are single transactions for which a separate registration process is required, even though they may form part of the process of transferring the property. The main focus of this research remains the land registration system as it relates to security of tenure that forms part of the discussion under substantive property law.

1.3 The three dominant models of understanding property in land

In general terms, 'property' is mistakenly described as connoting the *thing* rather than the relationship which one has with a thing. Murphy J clarified the legal usage of the meaning of property in the case of *Dorman v Rodgers* as follows: "In legal usage property is not the land or thing, but is in the land or thing" (*Dorman v Rodgers*, 1982, p.365). It would therefore be correct to say that a person has property in a thing than declare that the thing is one's property. In English law the idea of property in land is based on what Gray and Gray called the 'ambivalent conceptual models of 'property'. According to these authors, the common law continues to debate on the ideal of property in land as a challenge of 21st century land law. The three dominant models of property in land identified under common law include property as a fact, property as a right and property as a responsibility. The authors express the ambiguity surrounding the term property within the three models as:

The common law word has never really resolved whether 'property' in land is to be understood in terms of empirical facts, artificially defined rights or duty-laden allocations of social utility. Although these three perspectives sometimes interact and overlap, it remains ultimately unclear whether the substance of 'property' resided in the raw data of human conduct or in essentially positive claims of abstract entitlement or in socially direct control of land use. In short, the idea of 'property' in land oscillates ambivalently between the behavioural, the conceptual and the obligational, between competing models of property as a fact, property as a right and property as a responsibility (Gray & Gray, 1998, p.3).

This research will approach the meaning of property using the three different models of, property as a fact, property as a right and property as a responsibility for a broader approach rather than its restrictive meaning under one model only. Property as a fact is an approach that considers what is happening on the ground rather than the theoretical or conceptual ideas surrounding ownership and concentrates on possession. Gray & Gray, describing this perspective, state that it identifies 'property' in land as a reality of life and not as an abstract theory. "Accordingly, the crude empiricism of this outlook leaves the recognition of 'property' to rest upon essentially intuitive perceptions of the degree to which a claimant

successfully asserts de facto possessory control over land” (Gray & Gray, 1998,p.4). The de facto possession is in fact the physical act of being on one’s property, referred to as the effective occupation principle.

Judicial interpretation of property as a right and property as a fact are based on a totally different focus and provides for a competing assessment of property in land as a bundle of defined jural rights. Jural rights mean rights established under law. Justice Rich refers to these rights as a bundle. “Property, in relation to land, is a bundle of rights exercisable with respect to the land” (Minister of State for the Army v Dalziel, 1944, per Rich J p.285). While English land law supports the judge’s interpretation of property as a bundle of rights, several legislative provisions also characterise property in land as a bundle of rights. The concept of property as a right and the theories as well as the legislative provisions supporting the concept under English, as well as Zambian land law, are examined in more detail in coming chapters. It suffices in the introductory part to simply distinguish between property as a fact and property as a right. The two theories of understanding property in land are interrelated but the difference lies in the emphasis on the physical thing or the abstract right. Gray & Gray refer to this overlap in the understanding of property as a fact and property as a right by stating:

All ‘property ’relationship with land are, accordingly, analysed as one remove – through the intermediary of an estate or interest in land. No citizen can claim that he or she owns the physical *solum*, merely that he or she owns some unitary jural right in or over that *solum*. One has ‘property’ in an abstract right rather than ‘property’ in a physical thing (Gray & Gray, 1998, p.11).

As correctly alluded to by Gray and Gray, each tenant under English land law as well as Zambian land law owned (and still owns) not land but an estate in land. This argument finds judicial support as elegantly stated in the cases Minister of State for the Army v Dalziel, per Latham CJ and in the case of Mabo v Queensland, per Deane and Gaudron JJ: “The ‘estate’ which a subject held in land as tenant was itself property which was the subject of ‘ownership’ both in law and in equity” (Minister of State for the Army v Dalziel, 1944 per Latham CJ p.277). The concepts of estate and tenure lie in the heart of land law and the land registration systems. They form the core discussion under chapter two of this research.

The third and final model that describes ‘property’ not in terms of an abstract estate or interest, but in terms of the use-power or utility constituting the elements of any interest in land. “.... this approach separates and identifies the many elements of utility which can

characterise relationships with land, and then concedes the label ‘property’ to each individual element in turn”(Gray & Gray, 1998, p.11). The elements are held in some sort of a balance combined with public responsibility. The analysis of the third model, as presented by Gray and Gray shows that property is more a bundle of individuated elements of land-based utility than a bundle of rights by asserting that:

On the present analysis, ‘property’ comprises not so much a bundle of rights as a bundle of individuated elements of land-based utility. The modern governmental role in regulating all land use is now so pervasive that these elements of utility are best seen as dispensed in various combinations by the state, subject only to occasional alternation either by private bargain or in accordance with supervening considerations of community policy. A plethora of regulatory controls, over matters ranging from urban planning to the conservation of natural resources, testifies to the constant engagement of the modern state in the constraint of land user for purposes of public amenity and welfare (Gray & Gray, 1998, p.11).

The three models and theories explained above have characterised how common law had and continues to perceive property in land. Common law is the basis of property law in Zambia and therefore the three models are relevant in the discussion of Zambian property law. The three models being property as a fact, property as a right and property as a responsibility are adopted by this research to clarify and understand the meaning of land as well as property in land, the subject matter of the land registration systems.

1.4 The concept of Property in land and land rights

Land can be described as property as per the explanation given above but it has two distinct features which are different from other property or goods such as a table. The first issue regarding land is that it cannot be physically transferred from one individual to another, in other words, it is immovable. The second issue is that land is permanent, meaning it cannot be increased, decreased or destroyed like other property or goods such as a table. It is this permanence that makes land unique and capable of lasting record as opposed to other property (Hanstad, 1998). The thesis of this research is land registration and when discussing land registration, it is important to state that it is not land that is registered under any system of registration but it is the title to or any deed affecting land that is registered (Noblejas, 2007). The different concepts being used in this research such as estates, tenures, titles and title deeds as they relate to land or property are elaborated in detail under chapter two of this work.

The importance of land and land rights including security of tenure have been given due consideration in research under law of land and real property but defining and documenting landowners legal rights has not been given its due importance. The relationship between land registration system, land rights and land markets remain unexamined (Wallace, 1999). O'Connor in her research agreeing with Wallace states that: "Theoretical as well as comparative perspectives have been underdeveloped in legal studies of LTR, despite a flourishing of theory in property law generally" (O'Connor, 2003, p. 13). The major work on land law and land registration system by Simpson establishes the importance of land registration and its relationship to land rights. Land tenure is closely linked with ownership of land. When land is regarded as a commodity capable of being bought and sold, the fact that it is immovable and permanent as explained above shows its special characteristics in relation to ownership. Therefore an owner of a piece of land cannot hand over or move the commodity from the buyer to the seller. At the same time every piece of land today remains the same piece of land which was in existence thousands of years ago. Simpson comments that: "This permanence not only makes land peculiarly capable of lasting record but it also makes such record specially desirable" (Simpson, 1976, p.6).

The aim of this research was to fill in this gap identified by O'Connor and Wallace as well as other writers by comparing two different land registration systems and giving it a modern twist due to the legislative changes taking place in the twenty-first century to Simpson's original work by recommending a suitable land registration system for Zambia and other developing countries. In modern times the main issue is that secured land tenure requires that legal rights to land are adequately defined and documented. Even though land registration is a system of record and not of land tenure, it can be adapted to any form of land tenure and thus provides for security of tenure.

Historically, official records of land ownership date back in time to 3000 B. C., in Egypt where the Egyptian rulers kept a Royal registry to record land ownership in order to collect taxes (Larsson, 1999). The Egyptians also kept a record of ownership of land in documentary form, so that land could be allocated accurately (Dowson & Sheppard, 1956). Cooke rightly observed that;

.....land registration is a feature of a state with a centralised bureaucracy; and one where settled civilisation is content to have ownership recorded and regulated by officialdom rather than by force. In its modern forms, it is a feature of a society where individuals own and trade land as a capital asset and so need their ownership to be

easily proved and efficiently transferable. Land registration is a means of achieving that end ... (Cooke, 2003, p.3).

Therefore land registration deals with ownership as well as rights to property in land as explained above under the three different models of property as a right, fact and responsibility.

1.5 Ownership of land

There is in fact no such thing as ‘ownership’ of land when compared to other property such as a table in an absolute sense under English Law. In England, the Crown is the owner of land and the individuals simply hold the land from the Crown under the different forms of tenures. Maitland has described the early feudal tenure system as a man holding land from the lord, the man’s service is a burden on the land, and the lord has an important right in the land (Fisher (ed.) 1911). The word tenure comes from the Latin *tenere* (to hold), stating that land is ‘held’ and not ‘owned’ under certain conditions from the Crown. The two different approaches to understanding ownership of land are based on common law and civil law systems. As noted by Merryman, the two different approaches would be described by using the metaphor of a ‘black box’ as:

The basic difference between Romanic ownership and the Anglo-American ‘estate’ or ‘interest’ in land can be illustrated by a simple metaphor. Romanic ownership can be thought of as a box, with the word ‘ownership’ written on it. Whoever has the box is the ‘owner’. In the case of complete, unencumbered ownership, the box contains certain rights, including that of use and occupancy, that to the fruits of income, and the power of alienation. The owner can, however, open the box and remove one or more such rights and transfer them to others. But, as long as he keeps the box, he still has the ownership, even if the box is empty. The contrast with the Anglo-American law of property is simple. There is no box. There are merely various sets of legal interests. One who has the fee simple absolute has the largest possible bundle of such sets of legal interests. When he conveys one or more of them to another person, a part of his bundle is gone. (Merryman, 1974, p.113)

This research will adopt the legal terminology used when describing ownership of land in two different ways. The one based on common law systems such as those prevailing in England and brought into Zambia by virtue of heritage from the colonizer, and the other under the civil law system or what has come through as Roman law. The reason for stating both definitions is to consider the understanding of ownership of land under different legal systems. The difference between the understanding of ownership of land under the civil law system on the one hand, and the common law system on the other hand has also been described by Cooke as

In the civil law systems, there is one owner of land, while others may have subordinate rights in it; in the common law, ownership is not a unitary concept, and it may be impossible to say that any one person is 'the owner' of a piece of land. In particular, land may be held upon trust, owned by one person for the benefit of someone else, and we say that both the trustee and the beneficiary have ownership rights in the land, the one legal and the other equitable (Cooke, 2003, p.3).

The distinction between the definitions of ownership of land under the two systems is important to any land registration system because the main aim of a land registration system is to make title to land more secured and easily provable. 'It is supposed, ideally, to set up a mirror of ownership' (Cooke, 2003, p.3). The mirror principle which is a product of the Torrens system named after Sir Robert Torrens, of South Australia the originator of title by registration is explained under the next heading.

A land registration system providing a record of the documents affecting the rights and interests in Land it is called registration of deeds. While a record showing title or ownership to land as opposed to rights and interest in land, the system is known as title by registration or the Torrens system. The distinction between the two systems as concluded by Maguire shows that:

Systems of registration in relation to land titles and transfer are divisible into two classes. In one, the ownership of the land is entered on the register; in the other various transactions which affect ownership are recorded separately, and from these and other facts the ownership may be deduced (Maguire, 1922, p.158).

A registered proprietor of land becomes the party named on the register as the holder of an interest in land. In this way, the registered proprietor has title to land and therefore ownership is vested in her. The land is described by a given folio of the register. As a registered proprietor, the individual is able to deal with the land as its owner. The owner can enter into a transaction to sell, lease, sub-lease and mortgage his interest in the land as regulated by legislation. Under a titles registration system, the registry is a written record of landholdings. Each folio (a Latin word '*folium*' meaning a leaf of a paper or parchment) outlines the details of the people holding interests in a particular parcel of land. Not all interests are recorded in the folios and the certificate of title that is issued regarding the land is essentially just a copy of the folio showing ownership of land. In summary, one system involves the registration of documents affecting land and in this case ownership is deduced through the documents, while the other registers title to land. Chapter two addresses the key differences between registration of title and registration of deeds.

1.6 The Torrens system of Land registration

1.6.1 Development of the Torrens system

The system of registering title to land is described as the 'Torrens system' named after its creator Robert Richard Torrens who was assisted by a German Lawyer, Hubbe when developing the registration system. What had intrigued Torrens was the explanations given to him by the German Lawyer of a 600 year old similar system of land titles registration operating in Hamburg. So in 1858, Torrens introduced title by registration into Southern Australia backed by legislation to support the operation of the system (Esposito, 2003). In introducing the registration system to land, Torrens had used a comparison between the method of registration of ships and the English system of registration of deeds, and the result was an easier method of title by registration. The system registered not only the ownership of land and interests in land, but also recorded transactions dealing with land undertaken by those who held the interest in that land (Mills, 1999). When introducing the new system, Torrens had decided to resolve two major problems affecting land registration. It was Townsend who described the two problems relating to land registration which Torrens set out to resolve by stating that they were based on facility and security. He rightfully asserted:

Sir Robert Torrens, the father and author of the modern system of title registration, has stated that these were the two problems he sought to solve in the plan formulated by him. As Commissioner of Customs in South Australia, he was impressed with the facility and security with which transfers of undivided shares in vessels were effected under a system of registration provided by certain statutes known as the Merchant Shipping Statutes. Afterwards, as Registrar of Deeds, realizing the defects and uncertainties of the then existing method of transferring title to land, he formulated a plan for the registry of land titles along the lines laid down in the Merchant Shipping Statutes, and this plan was finally adopted, and became a law in South Australia in 1857-8 (Townsend, 1896, p.607).

The need to improve security of title and at the same time facilitate the transfer of interests in land, using a simpler system provided the basis of the reform to the land registration system for Torrens. He had been impressed with the facility and security with which transfers of undivided shares in vessels were carried out under a regulatory statute which was not evident in land transaction and he wanted to see how that could be imported into land titles registration. Secondly, in the register of deeds he realised the defects and uncertainties of the deeds registration in transferring title to land that could be overcome by titles registration.

In introducing the procedural changes which title by registration required, Torrens had to make changes to the substantive law of real property. Citing Hogg in his article, Stein rightfully refers to the changes in the law as follows:

It may be conceded that the intentions of the framers of the original Torrens Statutes were merely to facilitate conveyancing transactions, but in order to do this to the extent desired changes had to be made in the method of transferring and encumbering land which certainly might well be called drastic, if not revolutionary. The desired simplification of procedure necessarily involved – perhaps not changes in substantive rights of property – but certainly changes in the methods of securing and enforcing those rights; some of those changes are of such a nature that the Statute introducing them cannot be regarded ‘as a conveyancing Act only, and as a mere expedient for registering dealings (Stein, 1983, p.275).

The vision of the English solicitors more than 150 years ago in England were similar to Torrens objective to see a land registration system in which land transactions are quickly and smoothly registered in the same manner as securities are transferred on the stock exchange (Sandberg, 2009). Before the introduction of the Torrens system in Australia, there was a General law title system that consisted of a chain of title deeds, all of which had to be in place to enable a property to be transferred (Australia, Department of Sustainability and Environment, 150 years of Torrens title in Victoria 1862-2012, 2012) Under that system, there had to be proof of an unbroken chain of deeds back to the original grant. The chain consisted of all the documents involved in every sale, resale or transaction affecting a piece of land. Referring to the chain of transactions for a parcel of land, Cooke describes this form of tracing ownership as:

Accordingly, ‘the deeds’ of a property become an almost sacred sign of ownership; title is proved genealogically by the production of documents which trace ownership back to the present, showing a chain of entitlement made up of legitimate links....In theory that chain goes back to the beginning of the relevant legal system, but invariably law or custom prescribes a convenient limit (Cooke, 2003, p.5).

The legally accepted starting point from which the tracing of ownership should commence to the present day was called ‘root of title’ and the process under conveyancing was called ‘deducing title’, a term discussed in the diagram 2.1 in chapter two. Cooke further describes ‘root of title’, under the English conveyancing system as:

Conveyancing, in this context, is the ancient deeds-based system, whereby title is proved by the production of a heap of deeds. In theory the chain of ownership goes back to 1066, but the law requires documents to be produced only as far back as a ‘good root’ of title. This is a document which deals with the whole of the legal and equitable interest in the land, describes the property fully and casts no doubt on the

title. Statute sets out the required age of the root of title (in 1925 it was 60 years, and it is now 15); the length of time prescribed is intimately connected to the limitation period (Cook, 2003, p23).

Therefore, it can be seen that under the deeds registration system in England, title had to be deduced by tracing ownership through the deeds initially up to 1066, and then under the statutory requirement of 60 years and finally for the period of 15 years. It was this deeds registration system which was replaced by title registration in England and the Torrens system in Australia. Both systems share the same genealogical term of land titles registration. In conclusion, there continue to be three principal systems of land tenure and transfer in use in the Commonwealth countries, and according to Ruoff, these are:

- (1) The system of private conveyancing
- (2) Systems of deeds registration
- (3) Systems of registration of title, whether derived from the Torrens system, the English system, or from other systems. (Ruoff, 1957, p5).

The concentration of this research is on the second system which is the deeds registration currently used in Zambia and the third system which is the Torrens system from which the principles of titles registration are being tested. However, the comparison drawn in this research is between the legislative structure of titles registration in England and the deeds registration in Zambia to achieve the objective of this research, which is to compare the two legislative frameworks supporting the land registration systems. Private conveyancing remains beyond the scope of this research and will not be used in describing the processes of land transfer.

1.6.2 The principles of the Torrens system

There are certain general features that characterise systems of registered title to land, whether Torrens or English as Ruoff indicates:

The essential features of every system of registered title are that the State authoritatively establishes title by declaring, under a guarantee of indemnity, that it is vested in a named person or persons, subject to specified incumbrances and qualification. Anterior defects of title are cured, and thenceforth all investigation of the history of how the named owner came to be entitled is ruled out for ever and all future transactions are carried out by simple forms and simple machinery (Ruoff, 1957, p8).

The Torrens system as a titles registration system is the development of a registration scheme that dispenses with the necessity of looking behind the register because of the conclusive

nature of the register. The system revolutionised the titling system of land and it spread across the world. The success or otherwise of a system of registration adopted in a particular state, according to Ruoff is dependent on the local laws and the administration systems that support its implementation and that these should be established in accordance with certain fundamental principles (Ruoff, 1957). For the Torrens system, he identified the three fundamental principles as:

- (1) A reliable register: the mirror principle
- (2) A simple register: the curtain principle
- (3) A guaranteed register: the insurance principle (Ruoff, 1957).

Ruoff' further elaborates the three principles including the 'mirror principle' involving the proposition that the register reflects accurately and completely the current facts material to land title. Secondly, the 'curtain principle', which provides that the register is the sole source of information for a purchaser of property who should not be concerned with interests that lie behind the curtain. Finally, the 'insurance principle or principle of compensation', which calls on the registry to compensate any party suffering damages as a result of mistakes in the register (Ruoff, 1957, and Rowton, 1976). These three original principles can be contrasted with what is termed the modern perspective of the Torrens system. As indicated by the UN-FIG conference presentation that the uniqueness of the Torrens system as a form of land registration remains, but reports that its three distinguishing features in the modern context are that the register creates title, the system creates a simple transaction procedure and the final one is the reversal of the effect of Forgery (Australia, UN-FIG, A Methodology to Review Torrens Systems and Their Relevance to Changing Societies from a Legal Perspective. Conference on Land Tenure and Cadastral Infrastructure for Sustainable Development, 1999). Therefore the reliable register as the original principle became, the register creates title under the modern context, the simple register was broadened to the system creating a simple transaction procedure, and the guaranteed register was narrowed to the reversal of the effect of forgery on a land transaction. The research adopts these three principles as a testing criteria for deeds registration system currently being used in Zambia.

Under the Torrens system, title to land cannot in its legal context exist without the register creating it. Registration is the source of legal title under this system as opposed to the registration of a mere transaction as provided by the deeds registration system. The modern version of the Torrens system did remove the legal and technical formalities of the land transaction by substituting it with a simple, signed and witnessed document containing basic

information which can be drafted by people who are not legally trained. The reversal of the law of forgery under the Torrens system is based on the fact that a forgery cannot pass a title. The Torrens system does permit a registered forgery to pass ownership in land. However, the person relying on the forgery in good faith obtains title to land while the person who loses the land is paid its value and this is provided under the principle of insurance or assurance, meaning a guaranteed register. In summary, as Townsend concludes, the modern context of understanding the Torrens system still relies heavily on the three original principles formulated by Rouff and the modern features of the Torrens system still remain within the context of those original principles (Townsend, 1896).

Furthermore, the basic principles of the Torrens system continue to remain the same in the twenty-first century, even though the methods of land titles registration have been modernised:

The Torrens title system works on three principles:

1. The land title registers accurately and completely reflects the current ownership and interests about a person's land.
2. Because the land titles register contains all the information about the person's land, it means that ownership and other interests do not have to be proved by long complicated documents, such as title deeds.
3. Government guarantee provided for compensation to a person who suffers loss of land or a registered interest. (Australia.150 years of Torrens title in Victoria 1862-2012, Department of Sustainability and Environment, 2012).

The qualities of the Torrens system as highlighted by Holstein and Williamson point towards the same three original principles as well:

1. The title document must give an unambiguous record of the following three items of title:
 - (a) The parcel (s) of land affected:
 - (b) The nature of the rights of the proprietor and others with interests over that parcel; and
 - (c) The persons involved with the title, estates and interests.
2. The title depends on the act of registration of a dealing or instrument and not upon the documentary instrument itself. The dealings only support the title until they are superseded.
3. An efficient records system must be maintained and kept up-to-date, secure and purged of dead material. This applies not only to the title documents and dealings but also to the mapping of the land parcels in question.
4. The system should be controlled by central government, though its day-to-day activities may be decentralised.
5. It is an advantage, though not essential, that the state guarantees the contents of the title document.

6. The administrative processes of bringing land into the system should be kept separate from the running of the system (Holstein and Williamson, 1984, p.3).

The original objective of the Torrens system was to provide a system of authenticating land title through a reliable, simple, cheap, speedy and a process that meets the needs of the community. Judicially, the object of the Torrens system was formulated by Lord Watson as:

The object is to save person's dealing with registered proprietors from the trouble and expense of going behind the register in order to investigate the history of their author's title and to satisfy themselves of its validity. This end is accomplished by providing that everyone who purchases, in bona fide and for value, from a registered proprietor, and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title (Gibbs v Meser, 1891, p.254).

The above objectives of land titles registration remain the same for any twenty-first land registration system adopting title registration that has evolved from the original Torrens system (Hogg, 1905).

This research answers the important question of the suitability of a land registration system by testing the three original principles of the Torrens system of title by registration as stated above with the recordation of deeds system used in Zambia. From a modern perspective, in summary, the three principles remain basically the same but have been restated as the three distinguishing features of the Torrens system. Firstly, the register creates title by making registration the source of the legal title as opposed to the transaction leading to registration. Secondly, the system has simplified the conveyancing transactions. The third feature is the systems' reversal of the law of forgery. In other words, the Torrens system does not confer protection on a person who registers a forgery in a land transaction. The research also addressed the question of whether the presence of the qualities identified in the Torrens system and the principles of the Torrens system are reflected in the deeds registration system in Zambia. The three principles are analysed below.

1.6.2.1 A reliable register: the mirror principle

The first principle of the Torrens system is that the register book, which is the complete possible record, reflecting all facts material to an owner's title to land should be complete and accurate. Judicial interpretation states that the information shown on the register is deemed to be complete and accurate (Registrar of Title (Vic) v Paterson, 1876, p.117). By virtue of the mirror principle, the intention is that the owner's paper title should be absolute and is held

free from all except what is specified as incumbrances, rights, estates and interests shown on it. In practice, it should be noted that even though the register is correct and completed, it is never perfect in either respect. An example of one such imperfection is the case of fraudulent acquisition. In this case, the register book does not mean what it shows. Ruoff broadly describes the relief granted by the courts in cases of wrong entries on the register, citing two decided cases (*Campbell v Jarrett*, 1881 and *Barry v Heider*, 1914), in support of incorrect entries:

It is broadly true to say that if a transaction would be void or voidable under the general law, the mere act of registering a transfer will not affect the personal equities subsisting between the parties to it, so that if the registered estate is put into the name of a wrong person, the rightful owner has a personal equity against him, which the Court will enforce, to compel the removal of the blot and if, for example, title is acquired by undue influence, the Court will order the grantee to re-transfer to the grantor (Ruoff, 1959. p.18).

In certain countries, statutory inroads have been made where the Torrens land titles registration system is in place and the restrictions on the landowner's powers to sell or lease the land have shown to become a serious interference with the mirror principle. The proposed solution for this interference with the mirror principle was provided by the Property Law Revision Committee's report in 1954. Considering the numerous statutes that impose obligations on land which are effectual even though they are not mentioned on the register book, the committee recommended that every such obligation, in order for it to be enforceable should be registered or notified on the register book (New South Wales, The Property Law Revision Committee report, 1954). In other words, the reliable register should be a complete record of the owner's title to land, thus upholding the mirror principle.

1.6.2.2 A simple register: the curtain principle

The original aim of Torrens, when creating a new system of land registration, was to simplify conveyancing and set up official machinery that would be easy and fast. Torrens proposed the idea that ease and efficiency in the administration of a titles office could be attained by adopting the tested business methods such as the use of modern apparatus and methods of filing and indexing (Ruoff, 1959). To ensure simplicity, the proper application of the curtain principle was required and this has been described judicially as: "The register was not to present a picture of legal ownership trammelled by all sorts of equitable rights in others, which those who dealt with the registered proprietor must take into account" (per Rich and Evatt, JJ., in *Wolfson v R.-G. Of New South Wales*, 1934, p.308). In addition as already alluded to, "...the main object of the Act...is to save persons dealing with registered

proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and satisfy themselves of its validity"(per Lord Watson in *Gibbs v Messer*, 1891, p. 254). In conclusion, the system draws a curtain over interests which do not appear on the register so that the register is entirely reliable with some exceptions. For the purposes of this research, the exceptions are beyond its scope. The curtain principle will maintain the concept of a simple register.

1.6.2.3 A guaranteed register: the insurance principle

The third pillar of the Torrens system states that if the mirror of title gives an incomplete reflection, and loss occurs, the state will compensate the parties. Judicial interpretation of this principle is that the legal rights are converted into monetary terms and the person deprived is put in the same situation, so far as money can do it (*Registrar of Titles v Spencer*, 1909). Summing up the proper understanding of the insurance principle, Ruoff remarks that:

However, the insurance principle, properly understood and fully carried out, involves far more than that an owner's title, that is known to be reasonable sound, is guaranteed by the State. In the widest sense it means not only that registration will be carried on literally as an insurance undertaking but also that it is the privilege of the Registrar, or the Commissioner, or other responsible officer, on bringing land under the Act, to cure the title of known defects so far as he possibly can. It implies that the whole business of registration ought to be conducted with such an economy of public manpower, public time and public money that the saving which is achieved far outweighs any payment of compensation for errors or omissions which may become necessary from time to time (Ruoff, 1959, p.34).

Under the Torrens system, the insurance component is not market-driven, and the premiums are not related to risks and this can be contrasted with the American methods of title assurance that are based on the principles of an insurance business. This research will consider the insurance principle as defined under the Torrens system or the narrower analysis of the concept.

1.6.3 The Torrens system as compared with other systems of land registration

A comparison of the Torrens system with other systems of registration using the Torrens foundation of title by registration concept has led to the conclusion that there are several versions of the system operating in many parts of the world. J E Hogg, the best comparative scholar of land title registration systems in the common law world, once observed that, as well as the Australian Torrens system, "there is now an English Torrens system, a Canadian Torrens system and an American Torrens system" (Hogg, 1905, p.1). Hogg was using the

term "Torrens system" to mean a system of land registration in which it is the title itself, and not just the documentary evidence of title, that is registered. However, the distinction being drawn in this research is between the deeds registration as compared with Torrens title by registration systems and not the different versions of the Torrens system.

When compared with the English system of registration, the Torrens system was similar to the English copyhold derived from the feudal tenure in villeinage wherein the tenant's name and interest were recorded in the manorial court rolls. Authors like Simpson and Megarry and Wade have described the copyhold as an early form of register, and its development is presented in chapter two of this research. (Simpson, 1976, & Megarry and Wade, 1975). The simplicity of the land title registration systems anchored on dispensing the requirement of investigating title as far back as its origin. In the case of English law, the ultimate owner would be the Crown. This was accomplished in a simple manner that involved the surrendering of the land to the Crown by the present landlord to be re-issued to the purchaser. In other words, there were no earlier transactions that required investigation due to the surrender of the land back to the Crown under English law (Ruoff, 1957). In this way, title could be traced back to the original owner for every transaction dealing with land, and this was described as the basis of the theory of, 'wiping the slate clean'. (*Lutz v Kawa*, 1980 *Sinclair v McLellan*, 1919).

Torrens's original plan in passing legislation and introducing the system of land titles registration succeeded in Australia and other countries as well. The system was a success and once accepted, it was fast to spread within Australia and later, overseas. "It is convincing proof of the persuasive force of Torrens's advocacy and strong evidence of the intrinsic merits of registration of title that it spread with quite extraordinary speed throughout Australia" (Simpson, 1976, p.71). The spread of the Torrens's system to other countries was not so good, and despite its advantages over other systems of registration, it has not been adopted as **THE** system of land registration in the world. The Torrens system has been described as a system of title by registration and not a system of registration of title. This technical distinction has been judicially approved by Barwick CJ

The Torrens system of registered title of which the Act is a form is not a system of registration of title but a system of title by registration. That which the certificate of title describes is not the title which the registered proprietor formerly had, or which but for registration would have had. The title it certifies is not historical or derivative. It is the title which registration itself has vested in the proprietor. Consequently, a

registration which results from a void instrument is effective according to the terms of registration (*Breskvar v Wall*, 1971).

Despite the lack of spread, the Torrens title system has prevailed in many parts of the world where it has been introduced and will continue to provide an efficient land title registration system in the countries that operate a titles registry to record land transactions. This research will compare the two systems of land registration in detail by outlining the qualities of both more comprehensively in chapter two. A further comparison of the legislative framework supporting the two main systems of land registration being title by registration or the Torrens system and recordation of deeds will form the basis of discussion in chapter three of this thesis.

1.7 The sale and purchase of real property (Land) in Zambia

In order to understand the land registration system, the practice of transferring property or conveyancing plays a significant role. The link between Conveyancing and land registration has been established under 1.2 above but it is also necessary to understand how conveyancing procedure is understood from the angle of a one single transaction involving the transfer of land rights. The aim of this research is to isolate, investigate deeply and record a single transaction of the sale and purchase of a residential property in Zambia in Chapter four. To achieve this aim, the selection of a common transaction in Zambia being the purchase of a residential property was made. In terms of procedure before the ownership in the residential property can be transferred from the seller (vendor) to the buyer (purchaser), various steps have to be followed by Advocates representing both parties, and a number of documents have to be drafted. The documents which are drawn up involve complicated agreements and assignments with clauses that require the skill of drafting, thus the need to engage an Advocate or a conveyancer to complete and register the transaction between the vendor and the purchaser. The entire process is called conveyancing. The process commences through bargaining which usually takes place between the parties themselves or the estate agents before the Advocate comes into the picture.

An illustration of the entire procedure and the tasks placed on each Advocate is given in Figure 2.1 in chapter two. The procedure has been simplified in the Figure but in practice, many other issues such as payment of Property Transfer Tax to the Zambia Revenue Authority and payments to the Lands and Deeds Registry have not been reflected since the aim of this research is to consider a single transaction only and the registration process in

particular. The Figure has been simplified and it merely outlines the basic procedure, the names of the documents, and the other stakeholders that may be involved in the transaction but avoids the legal details of drafting each of the documents. The Figure does not reveal the legislative provisions supporting the conveyancing procedure, as these are the subject of discussion in chapter three.

1.8 Statement of the problem

Land rights of an individual in any country need to be clearly defined, documented and protected for economic growth to take place. The rights attached to land are governed under the general law of real property, while the processes whereby those rights are created and transferred are covered under a land registration system. When discussing the nature of land rights, there is clear overlap between the substantive law and procedures. Hanstad identifies this overlap by stating that land is a fundamental resource that is most effectively used and exchanged when rights to land are registered (Hanstad, 1998). Designing an appropriate land registration system requires comprehensive analysis of fundamental principles governing the security, certainty and accuracy of the title to land (Hanstad, 1998). Land registration systems world over have evolved and have been in use for more than one hundred years. Several authors have conducted comprehensive comparative studies of the different Australian land titles registration systems (Whalan 1982; Francis 1972; Kerr 1927; Hogg 1905; Hogg 1920). Park in particular in his research, points out that these comparisons are not relevant for the 21st century by stating: “Because of marked changes to the systems none of these studies are current” (Park, 2003, p.7). However, there has been a lack of comparative studies between the Torrens system and the land registration systems adopted by countries in Africa. This gap or lack of information in developing countries was correctly summed up by Simpson in his book in the introductory part, stating that the purpose of writing the book was:

Yet, though our intention is to produce a book intelligible to lay men, we hope that it will still be of interest and use to professional practitioners, both legal and survey- not to mention registry staff who, particularly in developing countries, are often in need of the kind of information we aim at providing. A legal draftsman, for example, ought to find our book of help when land legislation is contemplated, though it is not intended to be an authoritative legal treatise any more than it is a handbook on cadastral survey (Simpson, 1976, p.xx)

It is therefore, accurate to conclude that due to changes in the land registration systems and the legislation that supports these systems, the studies that have been carried out do not reflect the present position as regards land registration systems. In addition, the idea of a

comparative legal research between the legislative framework, Torrens system of land registration, and the deeds registration in Zambia is a novel contribution being made by this thesis.

The aim of this research is to design an appropriate land registration system for a developing country in Africa such as Zambia. The question is, ‘What type of land registration system is suitable to secure land rights in Zambia for statutory land involving the sale and purchase of real property?’ The problem is not so much the choice between the existing registrations of deeds or what is called ‘land recordation’ or title registration under the Torrens system, but a successful and reliable land registration model. Drawing the distinction between the two existing systems is relevant for comparative purposes. The reason for selecting and using the comparative method of legal research for this study is discussed in detail under the heading, research design and methodology below.

This research will test the three theories from the Torrens system which are fundamental to the success of land title registration to the deeds registration system in Zambia in detail. Ruoff suggests that the three principles or what could be termed the three theories are the ‘curtain principle’, ‘mirror principle’, and the ‘insurance principle’ or what is sometimes called the ‘principle of compensation’ (Park & Williamson, 1952, pp.118-121). These three original principles will be considered in the light of the three modern features of the Torrens system. Firstly, registration as a source of legal titles, secondly, simplification of the registration and conveyancing transactions, and lastly the reversal of the law of forgery. This research will by testing the three principles and the modern features against the existing deeds registration in Zambia, develop an appropriate land registration MODEL for Zambia.

The lack of a reliable land registration system in Zambia has IMPACTED adversely on development of the country’s economy, especially in terms of the land market and social development. Therefore the central issue of this research will be:

- importance of land registration systems
- discussion of the Torrens system and its adaptation to the 21st century
- a comparison of a system of title by registration and title by recordation of deeds
- comparative analysis of the legislative framework supporting the two land registration systems

- registration rules and regulations including practices in Zambia
- Achieving greater tenure security by designing a suitable land registration system.

1.9 Primary Objective

The primary objective of this research is to address the following question:

What appropriate system of land registration will achieve greater security of tenure in Zambia?

1.10 Secondary Objectives

The secondary objectives will address the following:

- To explore the importance of the land registration system in securing land rights;
- To explain principles of title registration and deeds registration;
- To provide a comparison of the legislative framework supporting the two land registration systems;
- To show the practises and procedures of the current deeds registration system in Zambia;
- To assess and recommend the appropriate model of land registration system for Zambia;

This thesis is important for three main reasons. Firstly, it will demonstrate that in order for land rights to be secured, there is need to adopt a suitable land registration system. Secondly, there is a clear lacuna of an in-depth evaluation of the two major systems of land registration and legislative framework, and the comparison will reveal the need to revise the laws and systems in light of the current changes. Thirdly, the development of a novel land registration model appropriate for the 21st century is long overdue and these sentiments have been echoed by the Law Commission for England and Wales in its report, giving birth to the Land Registration Act 2002 (Great Britain. The Law Commission, Land Registration for the Twenty-First Century; a conveyancing revolution, 2001).

1.11 Summary of Research design and methodology

In general, legal research is broadly undertaken using two main approaches, firstly, the 'black letter law' which focuses on the law itself in the form of statutes, decided cases, rules and regulations with no reference to the world outside the law (McConville & Chui, 2007) . Secondly, 'law in context', which McConville and Chui describe as the approach which does not start with the law but addresses the problem in the society (McConville & Chui, 2007). This work has utilised the second method of law in context approach which, as a legal research methodology, has received approval by authors in Zambia. Munalula supports the "broader approach rather than the narrower or what is termed the legal centralist study of the black letter law, and states that legal pluralism is grounded in reality, and views laws differently.

Research is more grounded in reality and is becoming increasingly popular. As a theory, centralism or pluralism serves as the orientation for the gathering of facts since it specifies the type of facts to be systematically observed. As theory, it allows for the classification and conceptualisation of facts by summarising, relating and predicting facts to guide observation (Munalula, 2004, p.234).

More recently, with the increase in the global character of legal life describing and analysing legal systems across the world, a third type of legal research has emerged and it is described as international and comparative research (Curran, 1998). This approach expands the understanding of different legal systems in an era of global interdependence and more aptly described by Raff as: the comparison of functionality (Raff, 1999). This research has utilized a fusion of two approaches by discussing law in context and using the comparative legal methodology for the purposes of comparing the land registration systems as well as the legislative frameworks supporting these systems. In the era of globalisation and interdependence, this is inevitable.

The reason for selecting the comparative legal method is based on the need to adopt a novel approach in studying the land registration systems in the developed world, and comparing it with the land registration systems in the developing world. Academic authors using comparative analysis between 1920 and 2011 have published several works, but it was Hogg who pioneered the major comparative analysis of more than twenty-one land registration systems in the British Empire (Hogg, 1920, Downson & Sheppard, 1956, Ruoff, 1957, Simpson, 1976, Mostert, 2011). Some of the major studies have concentrated on the comparison of countries within the developed world, but what is lacking is a comparison between the land registration systems in the developed countries and the developing

countries. MacLeod in her thesis discussed the law of property in Jersey and states that where legislative gaps occur in the national laws, recourse is made to other jurisdictions and comparative legal studies provide solutions for these gaps (MacLeod, 2011). Once again, in this study, the writer had compared property law in developed countries and asked the question which countries can provide the most suitable comparator by stating:

Legislation, cases, juristic writing, and customary law do not alone provide as complete a view of a modern system of property law as is achieved in many other legal systems. The problems are two-fold: some areas of detail are missing, and the structure of the law is itself often unclear. One way of addressing these gaps is by reference to foreign law. All legal systems borrow from others at some point, smaller ones more than others. The question is: from where? There is no single answer, but classifying a system assists the finding of foreign law which is most compatible (MacLeod, 2011, p.16).

This research has borrowed the concept of classifying a legal system in order to discover the most compatible foreign law to compare and provide solutions for Zambia. Church in his work classifies the world's major legal systems into six main categories (Church, 1984, as cited by Munalula). Based on his classification, the common law system in England was selected as the most suitable foreign law for comparing the legislative framework of land titles registration with the legislative framework of the deeds registration system in Zambia. The comparative value was reinforced by applying the same comparator being the three principles of Torrens system which originated in Australia. The comparative perspective was achieved by describing the principles, features, rules and legislative frameworks of the land titles registration systems and its functions across one jurisdiction, and importing them into the deeds registration systems in Zambia. The reasons for the selection of the comparator as well as the jurisdiction are outlined under chapter three and four respectively.

Despite several works on individual land registration systems such as Hanstad who discusses land registration systems from the perspective of a developing country's government and theories in Property Law, as Cooke exposes the way land registration is influenced by the evolution of land, the comparative perspective has not been explored by legal writers (Hanstad, 1998, Cooke, 2003). It is for this reason that this research chose the comparative legal perspective to carry out the study.

In addition to the two approaches explained above, the case study research methodology of qualitative nature was used to collect primary data from the lands and deeds registry to reflect the land registration system in Zambia. The data collected from the lands and deeds registry

utilized the empirical method of observing the facts within their natural surroundings without any attempt to interpret those facts. Munalula in her book makes reference to empirical approaches to legal research as follows:

Research is conducted in order to generate knowledge. It employs a scientific method of authority which combines both the rationalistic and the empirical approaches. The rationalistic method is based on human reason, thinking logically and thus discovering laws using pure abstract intelligence. The empirical method on the other hand draws on facts observed from nature without any attempt at interpretation of the relationship between those facts (Munalula, 2004, p.233).

The research design and plan for this study identified the unit of study (where the investigations to collect the data of the existing process of land registration) as the Lands and Deeds registry based in Lusaka, Zambia. The collection of empirical data was based on a single subject being the system of land registration. The research method employed to collect the data was of qualitative nature. In-depth information about the process of land registration collected through observation was recorded and presented in Chapter four of the research. The reasons for selecting the case study method are explained below.

The definition of the case study research method states that it is an empirical inquiry that investigates a contemporary phenomenon within its real-life context. The boundaries between phenomenon and context are not clearly evident and in which multiple sources of evidence are used (Yin, 1984). For the purposes of this research, securing land tenure rights of an individual who purchases real property using the system of land registration in a particular country is a real-life situation. The modernisation of the system is a reality that is being achieved by the introduction of e-registration and this is a contemporary feature that the research addresses. The Lands and Deeds registry was the chosen government body of the study since it is the only unit empowered by legislation to register land so that individual rights are secured. The system ensures that records are not defective and that the rights are secured and any changes are carried out within a prescribed time frame to avoid land disputes and encourage investment in real property in Zambia. The case study research technique proved more suitable for the type of research undertaken due to various reasons.

Firstly, case study research is particularly well suited to investigating processes (Yin, 1994) which in this research is the land registration process currently practised at the Lands and Deeds registry. Secondly, case study research calls for selecting a few examples of the phenomenon to be studied and then intensively investigated to reveal the characteristics of those examples. The researcher selected two files (examples 1 and 2) with reference to the

sale of residential houses (real property) from one individual person to another. The procedure traced was from the point of lodgement of the documents at the Lands and Deeds registry to the issuing of the new certificate of title in the name of the new person being the purchaser. Through observation and recording the evidence collected revealed the detailed procedure that was followed in practise at the Lands and Deeds registry. It also provided an insider view of the registration system. Thirdly, case study research is a direct method of collecting data instead of data presented through the reports of the individuals involved (Shrestha, 2003).

For this research, evidence was gathered directly in the form of observations of the procedure, letters, internal memorandums, internal processing schedules, rules, regulations and practices made available to the researcher directly from the Deeds registry or through desk research. The data collected through observation and other methods was recorded and reported as part of the deeds recordation system. The result was an in-depth legal as well as procedural analysis of the land registration system operating in Zambia. The evidence collected by observation was verified with the written schedules, rules and practice regulations made available to the researcher in order to discover any discrepancies between practice and the provided procedures. The documents collected by the researcher were scanned and attached as part of the reporting process under chapter four. The data collected was also used for comparative analysis of the two main registration systems, the titles registration and the deeds registration as presented in chapter four.

The comparison of the two legislative frameworks was presented in chapter three. The reason for comparing the legislative frameworks before outlining the procedure was to provide the backbone of the two systems of land registration before reporting on the evidence of the process of deeds registration system. The aim of the research was achieved by assessing the most suitable land registration system leading to e-registration in Zambia, to secure tenure rights of an individual in the concluding chapter.

The two main strengths of using the case study method in this research were its flexibility and emphasis on content. With regards to flexibility, the research design allowed for emphasis on exploration rather than prescription or predication and this meant that the researcher was able to discover and address issues as they arose along the process being observed. The two example files were traced through the procedure at the pace, time and in the manner without any interference by the observer. By seeking to understand as much as possible about the land

registration process, the single subject case study produced 'deep data' or 'thick description' which the observer was able to record and report in this research (Yin, 2008). Summarizing the case study method, White in his book, citing Merriam and Yin states:

In a case study the researcher explores a single entity or phenomenon ("the case") bound by time and activity (a programme, event, process, institution, or social group) and collects detailed information by using a variety of data collection procedures during a sustained period of time (Merriam, 1998; Yin, 1989 as cited by Creswell, 1994, p.49).

The weakness of inherent subjectivity of using the case study method has been acknowledged by the researcher in the recording and the reporting to some extent. However, this subjectivity had been reduced to a minimum by the observer in selecting example files and simply following their journey and recording the details without searching for any explanation or clarification from individuals performing the different tasks at the Lands and Deeds registry. With regards to the other weaknesses of using the case study method that the investigations may lack precision and objectivity, they were overcome by the observer recording systematically what was discovered at each stage of the registration process, and objectivity was achieved by tracing two different files instead of one.

However, to a limited extent, the investigations done by the researcher were not completely precise and accurate because it was not possible for the observer to be present and observe the procedure at every single stage due to issues of confidentiality and security. One such task was the typing of the original certificate of title in the name of the purchaser where the observer was denied access to the office for confidentiality and security reasons. The second was the actual process of uplifting the documents or collection of the original certificate of title which could only be carried out by the individual being the purchaser of the property or her advocate who is authorised to perform the task on behalf of the client.

The other weakness associated with the case study method which the observer did not encounter was due to the in-depth study of one subject matter. Case studies involve learning more about the subjects than most of the other methods of doing research. The researcher did not know and has never met the vendors or the purchasers of the properties whose files were observed and the members of staff at the Lands and Deeds registry were not known to the researcher. Therefore, the researcher did not learn anything about the subjects. In conclusion, the researcher had overcome to a larger extent the weaknesses associated with the case study method.

1.12 Conclusion (Chapter outline)

In summary, the research examines the topic of land registration systems as follows:

Chapter one answers the question; what is the link between Property Law and land registration? In understanding the relationship, it is necessary to evaluate the models defining property in land and ownership of land. The practice of transferring land rights is described as the conveyancing procedure and for the purposes of this research, it is important to show how land registration and conveyancing are two parts of a single legal process. The systems of land registration are not the subject matter of substantive Property law issues but are used to regulate land rights that arise under property law. Therefore these systems need to be examined in their historical context to appreciate whether they are still suitable for modern day registration schemes. The Torrens system of land registration and its principles remain the cardinal structures through which land rights are registered. This chapter establishes the need to re-look the Torrens system in light of modern developments by comparing it with other systems.

Chapter two examines the conveyancing procedure by defining its components and tracing its development in England. It lays down the discovery process of how land rights were registered and continue to be registered. The overview of the entire conveyancing procedure is explained but emphasis is laid on the registration process. The distinction between titles registration and deeds registration is brought out clearly using the various approaches as suggested by several authors of a positive system against a negative system, and a system of recording title as opposed to deeds. Clarification is also given in relation to whether the particular system promotes static or dynamic security of tenure. Distinction is drawn between the two registries, and the structures responsible for performing the task of land registration conclude the chapter.

Chapter three compares the two legislative structures supporting the different land registration systems of titles registration and deeds registration, utilizing the 'black letter law' approach as opposed to the rest of the chapters that have considered 'law in context' approach. The research method used for this chapter is the legal comparative study. The justification of the selection of legislation from England is given under chapter one with further clarification under this chapter. The substantive basis of the comparison is how the three original principles, borrowed from the Torrens systems, are reflected in the new English

legislation, and how they compare with the Zambian legislation and the deeds registration system.

Chapter four describes the most important part of the land registration system, being the procedure at the Lands and Deeds registry in Zambia. By mapping the journey of the two Example files simply identified as 1 and 2, the process is evaluated. The primary data collected using the observation method provided an objective, systematic recording and reporting channel for the research. The selection of case study method as an empirical inquiry of the modern land registration system in its real-life context in Zambia was achieved through the writings in this chapter. The strengths and weaknesses of the case study method and how they have been overcome were a subject of discussion in chapter one.

Chapter five focuses on the conclusion of this research by providing an overview and a summary of the Torrens system as compared with the deeds registration systems and the legislative structures that support these systems. Presentation of the comparative value of the three principles of the Torrens system as they apply to the deeds registration in Zambia is presented in this chapter. The development of an appropriate model is presented, followed by some suggested important amendments to the current legislative framework in Zambia. Recommendations are also proposed for institutional structures to support a suitable land registration system for statutory tenure in Zambia. The focus of this research was the development of a suitable model for Zambia to be used for statutory tenure only; the possibility of the use of the model, to customary tenure can be investigated before proposing it as a suitable model to be adopted by other developing countries in Africa.

CHAPTER TWO

2 THE TECHNICAL TERMINOLOGIES OF LAND TRANSFER AS THEY RELATE TO LAND REGISTRATION SYSTEMS

2.0 Introduction

In chapter one, conveyancing has been defined in different ways by several authors but the central issue that describes it is that it refers to the process of transferring rights and interests in real property, including land from one person to another. A more elaborate discussion on the system of conveyancing and a deeper understanding of how it has been defined and developed is presented in this chapter to show the broader context it represents, and the role of electronic conveyancing a key theme for the 21st century debate on the establishment of a suitable land registration system. The definition of conveyancing has evolved according to a particular historical era of development of the law of property in England, and it is used to describe not only the process and the system but also the documents used in the transfer and registration of real property or land.

The ownership of property on the other hand is referred to as title to land. When an individual is an owner of a property, it would be considered that such a person (either natural or legal i.e. a company) is entitled to the use of that particular parcel of land. The owner of land receives a title deed issued by the government body, confirming ownership. In simple terms, the transfer of the title to land or property in land by one or more persons to another is called conveyancing. By the use of the term 'persons' in law, it is understood not only to mean natural persons like human beings but corporations or artificial legal entities such as companies as well. The instrument or the document which conveys the property is called a conveyance. As far as the procedure is concerned, in the absence of express agreement to the contrary, the expense of drafting the conveyance falls upon the purchaser who must prepare and tender the conveyance through his legal representative. The expense of the execution of the conveyance is, on the contrary, always borne by the vendor. The final stage of registering the property in the name of the purchaser is placed upon the purchaser herself or through her advocate. The focus of this research is the final stage of the conveyancing process which is registration of land and not the whole process of conveyancing, but in order

to understand the registration process, the entire conveyancing procedure has to be considered to some extent and in more detail.

A comprehensive definition of conveyancing starts from a technical perspective involving the process by which title to property is transferred from one owner to another. Over time, it has been accepted that conveyancing is the **system** while **conveyance** is the **description for the document** used to carry out the transaction. There are several overlapping substantive laws that regulate the conveyances and the conveyancing procedure. The legislative framework outlining the substantive laws governing conveyancing and land law are discussed in chapter three of this research but the aim of this chapter is concentrated on understanding the technicalities and the elements of the conveyancing procedure in general, in other words, the practical aspect of the system only. The purpose of discussing the whole process of conveyancing is to show how the land registration system fits into the bigger picture of the transfer of property or land.

Several definitions of conveyancing have been developed by different authors depending on the types of land registration system practised in the particular country. The starting point of this discussion is the definition given by a Zambian author and the reason for selecting this definition and placing it right at the beginning is because the research is primarily considering the development of a suitable land registration system for Zambia. Conveyancing is mainly concerned with how rights and interests in land may be created and transferred. It is defined by Mudenda as a science and art of validly creating, transferring, and extinguishing rights in property, particularly in or over land by written deeds of various kinds (Mudenda, 2007). This view of considering conveyancing as a science and art has also been supported by Butt, who agrees with Mudenda's definition of conveyancing but goes further by distinguishing it from a conveyance by explaining that:

Conveyancing is the art or science of preparing documents and investigating title in connection with the creation and assurance of interests in land. Despite its connection with the word 'conveyance' the term in practice is not limited to use in connection with old system title but is used without discrimination in the context of all types of title (Butt, 1988, p.7).

Other authors such as Walker have considered expanding the borders of conveyancing to include the process that is based on the knowledge of what rights can exist in or over particular kinds of property and it extends to the investigation of title and preparation of agreements and other instruments which operate as conveyances (Walker, 1980).

Conveyancing has also been described as an art or business that involves drafting and preparing legal instruments that transfer ownership in Land or real property.

To understand Conveyancing from its broader perspective, it is necessary to conceptualise the process with the substantive land law that supports it. In addition it is fit to show how the definition of conveyancing has evolved, using the three foundations of land law upon which it rests. The three foundations of legal relationships includes the law of obligations or contractual law, equity and trust laws. These three different branches of substantive law have a bearing on the conveyancing procedures. Individual rights between the vendor and the purchaser are governed under the three different laws at the same time the relationship relates to land which is subject to state regulations. As far as development of conveyancing is concerned, the title 'conveyancing' is fast moving to the direction of 'property law and practice' and therefore a combination of substantive law and procedure. This shows that substantive property law provisions are linked to the practice of conveyancing in the twenty-first century. This approach of linking law with practice has been necessitated due to firstly, the changes within the areas of land law and case law, interpreting the provisions of the substantive law. Secondly, the introduction of technology which has revolutionised the provision of better and faster administrative efficiency in dealing with land transfers. Lastly, policies and law reform initiatives have been undertaken to handle the national wealth of the country in the form of land and property rights, including the governing of the market forces determining property prices of the land transactions.

This research will not adopt a single, static definition of conveyancing but a moving definition or a contemporary one that will be broad enough to include e-conveyancing and more particularly, e-registration, the central theme of this research. E- conveyancing is beyond the scope of this research. The definition of conveyancing elaborated above needs be read together with the details outlined in chapter one, more particularly 1.3 for determination of the definition of conveyancing or law of property and practice which this research seeks to adopt.

Conveyancing is also directly linked to the concept of ownership of land rights because it is the tool used to transfer these rights from one person to another. A substantive explanation is therefore necessary in explaining how the link between the two concepts affects land registration, and this is covered under 2.1.3 below.

Understanding ownership of land requires an explanation of the two pillars that form its foundation, namely: possession and control. Physical control or possession of land and its control was and continues to be an important condition in the acquisition of ownership of land in England or any other country. Under Roman law, authors have described the law of possession in relation to physical control in three different situations. Firstly, a person could have physical control without possession and its advantages. Secondly, a person could have possession and its advantages without physical control, or thirdly, he could have both. (Dias, 1985). In the first situation, the person has physical control but no possession of the land. In the second, he would have possession but without physical control, and in the third, he would have both physical control and possession. Under Modern Land law, possession became separate from physical control and this did in some way obscure the understanding of the possession of land. The concept of possession had a cardinal thread under Roman law of property, and this was the protection of *dominium* or ownership at civil law. Therefore, in this way, possession was for that era connected to ownership. Under English law, the term possession is not confined to physical control. LJ Roskill opined that, “Having something in one’s possession does not mean of necessity that one must actually have it on one’s person” (R v Purdy 1975, p. 298).

In legal debates, a further distinction is drawn between possession in fact and possession in law. The two are difficult to distinguish but possession in law is based on possession in fact. Therefore, possession involves two concepts. The first is described as *corpus possessionis*, meaning the control over the thing itself which may be exercised by a person, and secondly, the *animus possidendi*, which is the intent to exercise exclusive possession of the thing itself and thus prevent others from using it (Padfield, 1970). Judicial interpretation of the word possession shows that its meaning is vague and dependent on the subject matter it is being applied to. Possession cannot be defined as a set of rules and the meaning will vary according to subject matter it is being applied to. CJ Erles notes, ‘possession’

is one of the most vague of all vague terms, and shifts its meaning according to the subject-matter to which it is applied-varying very much in its sense, as it is introduced either in to civil or into criminal proceedings. (R v Smith, 1855, p.556).

The distinction of the meaning of possession and control is also based on which branch of law the word possession is being used in. Like ownership, possession also acquires a meaning dependent on the circumstances in which it is used. For the purposes of this research, property law disputes regarding possession as well as ownership are considered under civil

proceedings and not criminal proceedings, and therefore the meaning of the two words are restricted in two ways. Firstly, the subject matter which is ownership of land or the property in land and the control or possession of that land. Secondly, the branch of law being civil and not criminal law. The restriction is best illustrated with an example. If Alan rents his house to Bwalya for three months, Bwalya is in temporary physical possession of the house but does not have control as an owner. On the other hand, if Alan allows the constructor (Zulu) possession while the house is under repairs, Zulu also has possession but no control as an owner, and both the relationships arise under civil law and not criminal law. Both have temporary possession of the house but are examples that fit into the two different concepts of possession explained above under English law. Land cannot be physically transferred from one person to another and it cannot be handled and moved like other goods and therefore becomes difficult to conceptualise it in terms of ownership and possession. The meaning of possession in this research will be in the light of the above explanation and therefore restricted to possession of land or property in land under civil law.

Conveyancing as a system of transferring ownership of land or property from one person to another depends on the use of documents which are called deeds. As a conveyancing document, a deed is defined as a written instrument, signed, sealed and delivered, to prove and testify the agreement of the parties whose deed it is to the things contained in the deed (Roger, 1983). The three elements of a valid written deed are that it must be signed, sealed and delivered. Where one of the elements is missing, the party may claim that the deed does not belong to them. “....if I make and seal a deed, and the party takes it without my delivery, I may plead it is not my deed” (Finch, 1759, p.108). The doctrine of *Non est factum* (it is not my deed) was developed by the courts in England to protect the person who has mistakenly signed a legal document called a deed. The doctrine was introduced in the late sixteenth century but the question that remains unanswered is how this doctrine can be applied in the twenty first century or in the electronic era. The suggested answer to that question is that it may apply to four different situations. However, as Taylor suggests, these are mere speculations and cannot be confirmed until case law becomes available in the future and e-conveyancing systems start accepting electronically signed documents. The four different situations include fraudulent misrepresentation of the terms contained in the deed, where the user (the person whose deed it is) suffers from some disability and fails to access the terms and conditions stated in the deed, where the user does not understand the implications of signing a deed online, and finally where the deed is not in the language that the user

understands, since e-conveyancing can be conducted internationally (Taylor, 2012). This research will concentrate only on e-registration and not e-conveyancing and therefore the doctrine will be of general applicability only under the topic of conveyancing.

There is a dual use of the term deed in conveyancing. In the original and technical sense, a deed is a written instrument under the seal of the party executing it. Since there is a wide use of such instruments in the conveyance of land or property, it has also come to mean any formal conveyance for the transfer of land or of an interest therein (Brown, 1955). The word 'deed' has a more technical legal meaning than stating that it is a written instrument under seal and more specially, a conveyance. While Blackstone defines it as a 'writing sealed and delivered by the parties', Anderson and his Law Dictionary adopts the same concept and adds: "This comprehensive meaning includes any writing under seal, as a bond, lease, mortgage, agreement to convey realty...." quoted in (Noblejas, 2007, p.49). For the purposes of this research, the dual meaning of a deed is adopted.

Under the registration of deeds, the system of land registration adopted by Zambia and other countries around the world regarding the transfer of property from the one owner to another, the deed represents the documents that are involved in those transactions. These written instruments are drafted in legal language and must be accurate and precise in transferring the interest or the property intended so that the record at the deeds registry reflects the correct position. "The maintenance of a public register in which documents affecting interests in land are copied or abstracted is generally known as 'registration of deeds' " (Simpson, 1976, p.14). The registration of deeds as a system of land registration compared with the registration of title to land is discussed towards the end of this chapter.

Conveyancing as an ancient deeds-based system has now evolved into e-conveyancing, the sole reason for the enactment of the new LRA, 2002 in England. A computerised land registration system facilitating lodgement of electronic format of documents of conveyance and creating electronic records of land registration is called an e-conveyancing system. It means that the entire conveyancing process, from the initial stage of taking instructions to the registration of the title in the name of the buyer should take place as a single, secure, unified and paperless system. E-conveyancing is a recent phenomenon and a concept of the future, and it fits into e-registration. It is beyond the scope of this research to address issues of e-conveyancing which still remains a system for the future, even in the developed world.

Commenting on the future of e-conveyancing in England as a dream or something achievable in real terms, the Law Commission report stated that;

The decision of the Land Registry Board, in effect to stick with doing what we do best, means that, even if we get to a stage where all the documentation for a conveyancing transaction is electronic, a complete e-conveyancing system may be a dream for a very long time (Electronic Conveyancing- Dreams and Realities, 2001, Law Com, p.271)

Commenting on e-registration and not e-conveyancing, the land registry in England released a statement in the press stating thus:

This decision is both in keeping with our policy of concentrating our resource on enhancing and expanding e-registration services and in line with the research findings. It enables us to carry on doing what we do best, while supporting the commercial market to develop entrepreneurial or innovative new services which will meet the needs of conveyancers in the future.

The Land Registry will continue to develop electronic services through the launch of e-discharges, e-charges and cross-government collaboration with the Legal Services (quoted in Law Com report).

The lesson for Zambia that arises from experiences in England shows that e-conveyancing is a complex reform and should be broken down in stages that would include e-registration, followed by e-discharge of mortgages, and finally to the bold step of e-conveyancing. The research will adopt the above strategy and begin by addressing in chapter four the details of e-registration since it is this stage that the plans by the Lands and Deeds registry, in its restructuring programme in Zambia, has emphasised. E-conveyancing, including the lodgement of e-documents, is beyond the scope of this research and a concept for consideration in the future.

When identifying the registration process in the light of the entire conveyancing process, it would appear that registration is an essential element in the creation of land interests and in the transfer of these interests. Simpson states, "Registration of title is essentially a conveyancing device, since its primary purpose is to make the creation and transfer of interests in land simpler and more certain" (Simpson, 1976, p.53). Therefore it is an accepted view that registration of title to property is part of the conveyancing process. The procedure of conveyancing differs from country to country but the documents that are drawn up are similar. This chapter will trace the origins of conveyancing in England as well as Zambia. The need to trace the origins of conveyancing from the English perspective is supported for historical reasons due to the fact that Zambia was a British colony and most of its laws and

procedures have been adopted from the ones enacted and practised in the United Kingdom. Due importance in this research will be given to the registration part of the conveyancing system, and not the entire procedure as earlier alluded to. This chapter will also define the terms and Latin maxims used in conveyancing, and land registration currently applicable in Zambia to illustrate the depth of the technicalities of the more complex terms used in conveyancing. The chapter will also go further to draw out a distinction between the two different systems of land registration, being the deeds registration used in, and title by registration based on the Torrens system used in England and other countries around the world, in order to lay down the foundation of testing the theories and concepts within the two different systems.

2.1 The origins of conveyancing in England

Conveyancing deals with the rules that govern how interests in land can be passed from one person to another. The transfer of land has its roots in the memory register since the transfer was verbal in nature before the use and development of written instruments. “There is evidence of an original record in 1038 of a suit in which a verbal conveyance was declared in the gemot” (Holdsworth, 1903, pp.76-77). The word gemot was of special significance in the historical context since it was used to describe a local judicial assembly or a public meeting where land transactions had taken place (Garner, 2007, p.1310). The word was used mostly in the twelfth century, and it described a verbal land record made at a public meeting. Verbal land records were phased out and replaced with written records but the meeting point between the verbal and written system in use today is the register of deeds which is held as a public record, even though the rights created by it are private in nature. The relevance of the gemot remains in the historical context of describing conveyancing. Therefore, verbal conveyance originated before 1066, when the Norman conquest introduced the Domesdays recording of land in England.

It is understood that the initial methods of conveyancing were symbolic and in oral format more than written documents. The transfers of land were by means of rods, turves or knives which were exchanged between the buyer and the seller as a symbolic gesture. “The transfer of a rod is an ancient symbolic method of transfer.”(Holdsworth, 1903, p.77)

Modern land law now requires that the transfer should be done in writing by means of a formal document called a ‘deed’. “The modern system of conveyancing is rooted in English legal systems dated back to 1290, now referred to as ‘Old System Title’”.

<http://miidas.co.uk>) The use of writing to record legal transaction is almost as old as the beginning of writing itself (Donahue, 1993). Writing was not common in ancient times until the introduction of the Christian missionaries in Ireland in the 5th century (Donahue, 1993). Oral knowledge was learnt off by heart and ownership of land was orally recorded along with its audit trail of previous owners and transactions signifying the memory register. The memorializing event was the transaction itself. The history of evolution of conveyance of ownership from one person to another was marked by a public ceremony that signified the transaction and the ceremony was performed before important witnesses. This meant that there was no written record of the transaction and it only existed in the memory of the witnesses, thus creating the memory register. Land registration dates back to the memory register and therefore it is not a modern concept and has a rich historical background which Cooke describes as:

Without going into detail about remote history, we observe that land registration is a feature of a state with a centralised bureaucracy; and one where a settled civilisation is content to have ownership recorded and regulated by officialdom rather than by force. In its modern forms, it is a feature of a society where individuals own and trade land as a capital asset and so need their ownership to be easily proved and efficiently transferable. Land registration is a means of achieving that end, although it is not the only way of doing so (Cooke, 2003, p. 3).

The recording of land ownership as well as transferring of land rights as a process became known as conveyancing, and land registration systems set up by the government of the day was the accepted mode through which transfers of land ownership and rights were conducted. Apart from the role of the state in setting up the structures and the legislation to support it, the church had played its role in the land registration and transfer of ownership in England.

2.1.1 The Church and its role in land transactions in England

In England, as was the case in the rest of Europe, the church played a major role in the transfer of land by introducing the custom of conveying land through the use of written documents (Holdsworth, 1903, p.24). “The ‘Boc,’ or written charter by which land or privileges are conveyed, is ecclesiastical in its origin” (Holdsworth, 1966, p.24). The word charter is derived from Latin *charta*, which means a piece of reed-paper (papyrus) (Donahue, 1988). Early charters used in transferring land were single-sheet specific legal documents frequently involving the conveyance of land between individuals (Donahue, 1988). Therefore, the written charter on reed-paper signified conveyance of land from one person to another in written format.

In order to understand the terms used in the conveyancing documents signifying the land transactions, it was important in those days to know the methods of cultivation and land measurements that existed at that time. "All land of the township was divided up into two or three open and unenclosed fields (campi) which were cultivated in a certain rotation. Each of these fields were divided into a number of strips (seliones) (Holdsworth, 1903, p.56). The size of each strip would be about an acre in terms of today's measurements. At that time, the length of strip was measured in terms of the drive of the plough before it is turned. The measurement was a practical adoption of the fact that the land was mostly used for the purposes of agriculture. The size of the holdings also showed the attachment of certain common rights. It was not easy in the historical context to conclude that the size, measurements and the mode of cultivation clarified the land holdings in the conveyancing documents. This is because during that era, writers were preoccupied with explaining legal theory rather than the mode of cultivating land in their documents of transfer of land.

The method of land measurement used to describe the piece of land in the documents and the records created from those documents was called a 'hide' and was achieved by adopting a practical approach. For measuring the smaller pieces of land, the comparisons used were the size of the hand or the foot of a person (Holdsworth, 1903, p.64). For the larger tracts of land on the other hand the comparison was drawn on the approximate amount of land that would support a man and his family (Domesday Book and Beyond). "This seems to be the meaning of the word 'hide' in the oldest document" (Holdsworth, 1903, p. 64). The 'hide' was not only used as a means of measurement of the size of land but it later became the basis of the imposition of public burdens such as tax on the landowners.

The church, in most of the land transactions played the role of being the original source of grant directly from the King to it. The Book was of ecclesiastical origin since the earliest grants by the King to the Church were by the book in written form. Bede, in a famous letter to Egbert, Bishop of York, confirms that these grants by the King were made to save the King's souls. What the King granted was not only the land but also the various royal rights by the Book (Domesday Book and Beyond, 1897, p.19-21). The land charters mentioned earlier included the transfer of privileges attached to the land as well and these included the ones given to the iron mines, saltworks, and pasturages, and in one case, it included vestment. (Holdsworth, 1966). It would seem that land grants were made by the King to the church as an initial transaction before grants to individuals, so that upon death their souls could be saved hence the reason that the book became of ecclesiastical nature.

2.1.2 Evolution of Land Law of the Anglo-Saxon era and its relation to land registration

In order to understand the terms used in the documents that contained the records of land, it is important to show how land law of the Anglo-Saxons era classified the different kinds of land ownerships, since the records relating to land depended on how the land was owned. During that era, there were three kinds of land ownership dependent on how land was held by an individual person. “It is generally said that there are three kinds of land ownership known to Anglo-Saxon law. A man may own Folkland, Bookland or Laenland” (Holdsworth, 1966, p.67).

Vinogradoff, the historian, writing for that era defined the term Folkland and proved in 1893 that it meant land held by private persons according to the folk or customary law of the community. His definition had gone against the original theory of the meaning of folkland described by Allen in his treatise on the Prerogative as *ager publicus*, meaning land of the people or public land. This classification of land ownership is still applicable today. ‘Ager’ is a Latin word meaning a piece of land enclosed by definite boundary while ‘ager publicus’ means land of the people or public land (Garner, 2007). This original definition of folkland as public land has played an important role in the classification of land ownership in the evolution of property law in general. This classification of land into public as well as private land is still common in England as well as Zambia.

Folkland was accepted during the Anglo-Saxon era to mean private land held by individuals with rights in land bonded and defined by the customs of the community. Vinogradoff overcame the difficulty of the distinguishing between private and public land for that era by describing land held under folkland as meaning:

The folkland is what our scholars have called ethel and alod and family land and yrfeland; it is land held under the old restrictive common law, the law which keeps land in families, as contrasted with land which is held under a book, under a privilegium, modelled on Roman precedents, expressed in Latin words armed with ecclesiastical sanctions, and making for free alienation and individualism (Holdsworth, 1966, p.11).

The above statement showed that the original theory of describing folkland as public land was incorrect and, it was later settled that for that era, folkland remained ownership of private land according to the customs of the community and would not be used in the classification of public land.

Bookland was the opposite of folkland since the right to land arose by virtue of the book. “The book was the law to which the land is subject” (Holdsworth, 1966, p.68). As stated above, the book was of ecclesiastical origin and the earliest grants were by the King to the church. Bookland did not lose all trace of ecclesiastical origin as witnesses by the Domesday Book (Domesday Book and Beyond, 1897). Bookland still has a connection to church but it was not brought in the later development of the tenure system. The development of the tenure system was independent of land ownership as classified under the Anglo-Saxon era of property law.

The third classification of land was the laen or loan of the land which was a temporary loan or gift of land for one or more lives. It has been suggested that the English church could have adopted the rule of Justinian Law with regards to Laen and generally prohibited the leasing of church land for a period exceeding three lives (Domesday Book and Beyond, 1897). The person receiving the land could be bonded to perform services or pay rent in return for the loan. Some of these loans were made to cultivators of the soil but records of such loans do not exist, since there was no requirement to put them in writing during the Anglo-Saxon era. However, where specimens are available, they reveal that these loans were given to great men or men of superior class (Domesday Book and Beyond, 1897). The relationship between bookland and laenland was that they were both in the wider sense belonging to the general category of bookland (Domesday Book and Beyond, 1897). “The laen is in fact the more modern instrument used by the greater landowners in imitation of the royal book; and the book itself is being used for a greater variety of purposes than in earlier law” (Holdsworth, 1966, p.71). The laen is the product of the modern day mortgage and is no longer a form of ownership of land.

Ownership of land was redeveloped later in England with the advent of the doctrines of estates, tenures and possession of land which are discussed more fully later in this chapter. For the purposes of this research, concentration is on the development of land ownership and possession as it relates to land registration only, and this is discussed in the next part.

2.1.3 The link between possession, ownership and conveyancing under English Law

Historically, ownership was described in terms of proprietary rights in land and not linked to the process of conferring those rights. The term ‘Allodial’ was used to describe land held in absolute ownership.

The term 'allodial' originally had no necessary reference to the mode in which the ownership of land had been conferred; it simply meant land held in absolute ownership, not in dependence upon any other body or person in whom the proprietary rights were supposed to reside, or to whom the possessor of land was bound to render service. It would thus properly apply to the land which in the original settlement has been allotted to individuals, while bookland was primarily applicable to land the title to which rested on a formal grant. Before long, however, the words appear to have been used synonymously to express land held in absolute ownership the subject of free disposition inter vivos or by will (Digby, 1897 p.11-12).

Ownership in terms of real property plays a pivotal role in describing not only the owner but also the interest held by an individual in a piece of land. Ownership has been discussed briefly in chapter one but a more elaborate explanation on ownership as it relates to conveyancing is given below.

Ownership in general is described as the entirety of powers of use and disposal allowed by law. The owner of a thing has an aggregate of rights, namely (i) the right of enjoyment, (ii) the right of destruction, and (iii) the right of disposition, subject to the rights of others. Ownership includes the entire bundle of rights allowing one to use, manage and enjoy property, including the right to convey it to others (Garner, 2007, p.1138). The meaning of ownership has also been clarified by the courts in decided cases, and to some extent, it outlines limitations on the powers of the owner through statutory intervention.

Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional powers of those who use it (Black, J. in *March v Alabama*, 326 U.S. p.501 at 506).

When defining ownership, it is important to understand how ownership is acquired. There are generally four means of acquiring ownership in law, either originally, or by creating something, or through occupying something or by virtue of accession. Ownership can also be acquired derivatively by way of sale, gift or compulsory acquisition by law. Property or land can be also acquired by succession on the death of a previous owner (Padfield, 1970, p.269).

Ownership of land is slightly different from ownership of goods but for the purposes of this research, the technical and legal definition of ownership in general as explained above will be adopted wherever the word has been used in connection with land or property.

Further explanation on ownership as defined under the law of property makes it possible for a number of persons to have several types of interests and rights over the same piece of land.

Thompson describes how the division of rights and interests in one piece of land can affect the prospective buyer of that land.

Ownership rights can, as has been seen, be fragmented and divided among different people. Again, a particular piece of land may be subject to a covenant restricting building upon it. From the point of view of a person buying that land, these are matters of major concern. A property developer will obviously not wish to buy a piece of land which is subject to an obligation prohibiting building upon it (Thompson, 2003, p.2).

People who buy land need to know before purchasing the land what rights they are acquiring and what rights other people will be able to exercise over the same piece of land. For such rights to be recognised by law, they should be certain in nature and easily identifiable (Thompson, 2003). The law further insists that certain formalities should be observed before such rights are created. These formalities used to transfer land or create an interest in land are the formal documents or deeds used under the conveyancing systems. Cooke refers to these formal documents under the conveyancing systems as deeds. “Conveyancing, in this context, is the ancient deed-based system, whereby title is proved by the production of a heap of deeds” (Cooke, 2003, p.23). A deed has been defined by several academic writers and includes the dual use of the term under conveyancing, but its technical meaning is stated in the legal dictionary as discussed under chapter one and expanded under this chapter. Apart from the use of deeds as formal documents of conveying title to land, there is also a system of registration based on the documents that are registered, namely, the registration of deeds. A more comprehensive discussion on registration of deeds as a system follows under 2.3 below.

Ownership of land or the idea of property in land has also been a subject of academic debate among many scholars, especially under the jurisprudence of property. Even though the aim of this chapter is not to discuss the jurisprudential theories of property in land, it is necessary to define ownership for the purposes of understanding conveyancing in general and land registration in particular. The explanation is therefore restricted to the understanding of the term ownership in relation to conveyancing.

The lack of understanding and the misuse of the term property in land have been identified by authors such as Bright and Dewar, and Bentham (Bright & Dewar, 1998, & Bentham, 1948). Gray and Gray have also expressed the lack of understanding of the concept of property as follows:

Few concepts are quite so fragile, so elusive and so often misused as the idea of property. Most everyday references to property are unreflective, naive and relatively meaningless. Frequently the lay person (and even the lawyer) falls into the trap of supposing the term 'property' to connote the *thing* which is the object of 'ownership'. But the beginning of truth about property is the realisation that property is not a *thing* but rather a *relationship* which one has with a thing. It is infinitely more accurate, therefore, to say that one has property in a thing than to declare that the thing is one's property (Gray & Gray in Bright & Dewar, 1998, p.15).

From the above explanation, it can be deduced that the concept of property has been misused by linking it with ownership of an object but in its deeper sense, resting on the relationship of control regarding the property than the ownership of the thing itself. This relationship of control is essentially possession and not ownership per se. Possession has a more precise judicial definition given by Toohy J. in the renowned Australian land law case of *Mabo v. Queensland* as; "Possession' has been described as a conclusion of law defining the nature and status of a particular relationship of control by a person over land (*Mabo v. Queensland*, 1992, 175 CLR, 1)". This definition has been accepted under common law in England, and throughout the history of English land law, the operative concept as far as ownership of property is concerned, has been possession rather than ownership.

Linked with the different forms of land ownership is the conveyance of land. Out of the forms of conveyance of land, other than bookland historically, there is very little record regarding the other forms (Holdsworth, 1966). In the early days, the symbolic methods of transfer were the evidence of the transfer and verbal conveyance was sufficient to show transfer of land from one person to another. Written documents conveying land were not the rule but the exception in those times. "In the case of bookland it is possible that the signing and delivery or the transfer of the book was all that was needed to complete the conveyance" (Holdsworth, 1966 p.76). What this meant was that bookland was the only form of holding land that required the use of written records when transferring right from one person to another. However, it was the Romans who at a later stage had made prodigious advances in recording legal transactions involving land (Donahue, 1988).

Turning to the Norman English tradition grants, by the King were the only ones in writing and copies of the grants were filed in courts. By the middle ages, villein tenure was recognised as a property interest held by the custom of the manor: "it came to be said that a man held 'by copy of the [manor] court roll –hence, he was a copyholder with tenure on record" (Hogue, 1966, p.110). On the other hand, transfer from one owner to another owner was not in writing but through a formal process of handing over possession. The process was called

feoffment (a gift and grant of land by which the recipient acquires a freehold) *with Livery of Seisin* (the vesting of an estate in freehold). Seisin came to mean,

.... the possession of land enjoyed by a person who is 'seated' on the land, who is in a position to take what the land produces. Seisin of a freehold is occupation by one other than a tenant in villeinage, a tenant-at-will, a tenant for a term of year, or a guardian (Hogue, 1966, p.245).

Under the feudal system in England, a person possessed land. That possession which a freeholder of land had or enjoyed was of a special kind known as seisin. Seisin was, therefore, the interest of a freeholder in his land. His right of seisin was protected in the courts of common law. Seisin is possession as Pollock and Maitland describe, "...the man who is seised is the man who is sitting on land; when he was put in seisin he was set there and made to sit there" (Pollock and Maitland, 1923, p.30). Originally, seisin simply meant possession but gradually seisin and possession became two distinct concepts. Seisin came to mean in relation to land, possession under claim of a freehold estate. Although the word 'seisin' appears in modern statutes frequently, it is usually treated as synonymous with ownership (Moynihan, 1988, pp.98-99). The definition of seisin is important in historical context of land law in England, and it is of little significance in Zambia today because freehold tenure has been abolished since 1975 (Land (Conversion of Titles Act, repealed). For the purposes of this research, seisin is a form of ownership of land in the historical context.

To a certain extent, it is true that the terms explained above which developed under English common law are of little or no significance in describing ownership of land in modern times. However, the term ownership has developed in a historical context and still continues to be influenced by the complex terms surrounding it. For the purposes of conveyancing, it was the giving of possession of land to the purchaser through a public act, and this act being conducted in the presence of men of standing in the society that was of great significance. There was clear similarity with what prevailed under the English common law as regards the giving of possession of land with the procedure in Ireland in the historical era. The ceremony or the public act could take many forms, but the usual one was the cutting of a sod (piece of earth) which was then handed over to the purchaser as a symbolic gesture indicating the grant of land (Holdsworth, 1966). The ceremony was followed by a suitable verbal declaration made in the presence of the witnesses. It was this that brought about the conflict between publicity and privacy under land law. Ownership required publicity but individual owners of

land had a desire to keep their property affairs private and this conflict between these two goals has remained with conveyancing and land law even today. Ownership is linked to conveyancing because it is the transfer of ownership in land which is achieved by using the process of conveyancing.

2.2 Definitions of key terms and Latin words used in land law and conveyancing

To understand the history of land ownership and conveyancing in England and in Zambia, the research will discuss and adopt definitions of certain important terms and Latin maxims that characterise property law and conveyancing. These terms and their definitions have a direct bearing on the land registration system operating in a particular country. Some of the major terms have been incorporated in the substantial part of the discussions while the others have been isolated. The reasons for isolating the few is due to their prominence in property law and land registration systems in the world. The importance of some of the definitions is historical, while others continue to be useful even today. Few isolated definitions that have a bearing on the research are based in property law and others are more prominent in the practice of conveyancing. The following terms have been identified as having a more prominent role in understanding conveyancing in general, and land registration in particular. The list is neither comprehensive nor exhaustive but it is presented as propriety of importance as regards the understanding of the registration systems and property law.

2.2.1 Estate

In order to understand the nature of legal rights that a person has in respect of the land that he holds, it is important to define not only ownership of land but estate in land. The holder of land is entitled to a number of legal rights in respect of his landholding and the total sum of his rights in the estate. In order to clearly outline the rights, it is necessary to decide the estate the person owns and to know what rights and duties the law attaches to that type of estate. Estates are part of the substantive law of real property, but they are linked to land registration due to the fact that estates are reflected on the registers.

An estate is defined as, “an interest in land. An absolute estate is one granted without condition or termination” (Roger, 1983, p.136). Therefore, an absolute estate is a full and complete estate that cannot be defeated by a third party. Cheshire, on the other hand, gives a more comprehensive definition of an estate from the historical perspective as.

The word 'estate' was probably adopted because in early days it was possible to ascertain a man's status or position in life by discovering the particular kind of tenure by which he held his lands. The quality of his tenure gave a clue to his status. The baron for example ought in theory to be the holder of a barony; he has the status of a baron because he has the estate of a baron...[O]ne of the distinguishing marks of [the] freehold estates was the uncertainty of their duration. They were invariably held either for life or for some other space of time dependent upon an event which might not happen within a lifetime, and thus a freehold estate came to be regarded as one which involved the performance of free services only but as one which endured for an uncertain time. In this way, the word 'estate' came to denote the quantity of a man's interest in land (Cheshire, 1933, p.26).

It is important to define estate as it relates to ownership in this research because land registration deals with both estate as well as ownership, as a record of the transaction relating to that piece of land on the public register. Estates in land go hand in hand with tenures and these are defined under 2.2.3 below.

2.2.2 Land and Property

Land and property are the two most important terms used in this research and therefore defined together to show the relationship between them. In this research, the definition of land will be considered from two different perspectives being common law and statute law. In addition, since land and chattels are treated differently by law, it is important to define both. Chattels may also be affixed to the land and become part of the land. To show how a chattel can become part of the land, an example can be used to illustrate the point. A house or the property that is built on a parcel of land and affixed to the land itself is a chattel but when the parcel of land is sold, the conveyance includes the land and the building attached to it but not the chattels that are placed on that parcel of land. However, the conveyance does include those things which were once chattels but have been affixed to the land and therefore part of the land itself, the house or the building is an example of such a chattel (Maudsley & Burn, 1980, p.82).

The conveyance of a residential house or any other building structure normally built on a parcel of land is subject to the land registration process, and therefore it is important for this research to define land. "Land comprehendeth any ground, soil, or earth whatsoever" (Roger, 1983, p.195). The wider meaning of land would include castles, houses, other buildings and water and minerals found on the land or under it. It further, includes the air, sky, climate, vegetation, flora and fauna.

Land is an important natural resource for a country, and in most jurisdictions, a legislative provision will expressly provide for the definition of land. In England, land is elaborately defined by section 205 (1) (ix) of the Law of Property Act as

“Land” includes land of any tenure, and mines and minerals, whether or not held apart from the surface, buildings or parts of buildings (whether the division is horizontal, vertical or made in any other way) and other corporeal hereditaments; also a manor, an advowson, and a rent and other incorporeal hereditaments, and an easement, right, privilege, or benefit in, over, or derived from land; and “mines and minerals” include any strata or seam of minerals or substances in or under any land, and powers of working and getting the same ; and “manor” includes a lordship, and reputed manor or lordship; and “hereditament” means any real property which on an intestacy occurring before the commencement of this Act might have devolved upon an heir (section 205 (1)(ix), Law of Property Act, 1925).

Therefore, 'Land' in England includes land of any tenure, and mines and minerals, whether or not held apart from the surface, buildings or parts of buildings. Land also includes land covered with water. (section 132(1), Land Registration Act, 2002). When a person in England 'owns' a piece of land, what they in fact own is an estate in the land which is defined by the length of time of their ownership and the physical boundaries.

In comparison, the definition of land under Zambian legislation excludes the mining rights for the minerals found under the ground but includes bare land or the buildings and structures found on it. “land means any interest in land whether the land is virgin, bare or has improvements, but does not include any mining right as defined in the Mines and Minerals Act in respect of any land;” (Section 2, Lands Act, 1995).

Land would therefore include the surface of the earth as well as the interest held in the land by any individual person. Land has been defined differently in another statute in Zambia to include smaller units of land under the Lands and Deeds Registry Act as “.... land within Zambia, and includes units and remainders under common leasehold schemes, tenements and hereditaments, but does not include any mining right as defined in the Mines and Minerals Act in or under or in respect of any land;” (Section 2, Lands and Deeds Registry Act, 1994).

The definition of land in Zambia is also found in the Draft Land policy (Ministry of Lands, 2006) which states that land includes the surface of the earth, the earth below the surface, the substances other than minerals or petroleum found below the earth. It also includes things naturally growing on the land, buildings and other structures fixed to the land in some

permanent manner. At the time of writing this research, the draft land policy of 2006 still remains a draft after being in existence for eight years.

Comparing the definition of land in the two jurisdictions which have been selected for comparative purposes, and presented in chapter three of this research, England and Zambia, the major difference is in reference to the ownership of the minerals and the water rights. Acknowledging the difference in the legal position of ownership which is absolute or freehold in England and Leasehold in Zambia, mineral rights and water rights in the Zambian situation are held by the President and not the leasehold owner of the land. In England, mineral as well as water rights belong to the freehold owner of land. With regards TO buildings and property on the parcel of land, both countries have similar statutory provisions.

Property on the other hand is defined as ‘that which is capable of ownership’ (Roger, 1983, p.267). This meaning of the word property is not restricted to land but extends to ownership in the property of the goods as well. It is therefore the right and interest which a person has in lands and chattels to the exclusion of others, is what is termed as property. It further includes the right to enjoy and to dispose of certain things in the most absolute manner as she pleases, provided she makes no use of them prohibited by law. For the purposes of this research, property and land have been used interchangeably, and property is described as ‘real’ where the individual who has been wrongfully dispossessed of her land, can bring a real action and claim the land in question. For the individual who is dispossessed of goods other than land the claim is a personal action for damages only. Viewed from this perspective, land is in fact real property.

In this chapter, land and property have been defined separately in this section but as explained in chapter one, the words have been used interchangeably. Property in its narrow application is restricted to ownership and interests while land is the physical surface of the earth, what is above it and what is below it to the core, or the centre of the earth. Connected with the definition of land are the terms land register, land registration and land records which form the key elements of discussion in chapter four and are defined under it. Land ownership has been shown as a relationship rather than a commodity possessed for utility.

2.2.3 Tenure (to hold)

Tenure is based on the Latin word ‘tenere’ meaning to hold and the doctrine of estate which is defined above is concerned with the length of time for which the land is held. Estate has been defined earlier under 2.2.1 of this part, but tenure is discussed separately. The mode of holding or occupying land or a building is called tenure (Roger, 1983, p.321). Land tenure is the relationship among people, as individuals or groups, with respect to land, (“Land” is used here to include other natural resources such as water and trees as defined above.).

It is the rules of tenure that define how property rights to land are to be allocated. The rules also define how access is granted regarding rights to use, control, and transfer land, as well as associated responsibilities and restraints on that use. In simple terms, land tenure systems determine who can use what resources for how long, and under what conditions. There are different forms of tenure which originated under the feudal era. This historical classification is not significant to the modern day concept of tenures, because part of the feudal classification has been fused, while the other part has been simplified to provide for the two main divisions between freehold and leasehold tenure. Garner extends the definition of tenure to include, “A right, term or mode of holding lands or tenements in subordination to a superior” (Garner; 2007, p.1509). In feudal times, the property was held as part of a tenure system which has evolved with time. The term tenure is important and will be extensively used throughout this research since the land registration system which forms the thesis of this work provides records of how the rights and interests in land are held.

2.2.4 Title, Record Title and Title-deeds

Title, record title, and title-deeds have several factors in common and therefore have been defined together. The sum total of legally recognized rights to the possession and ownership of real property is referred to as the title. It also means the owner of land has possession of his property. This general definition of title is restricted to land only. Title to land is acquired by two methods, namely, by descent and by purchase. Title therefore is the legal recognition of the ownership of property usually proven by a document. Title has been more comprehensively defined as having two inseparable elements. McNeil outlines these two elements as:

Though employed in various ways [title] is generally used to describe either the manner in which a right to real property is acquired, or the right itself. In the first sense, it refers to the conditions necessary to acquire a valid claim to land; in the

second, it refers to the legal consequences of such conditions. These two senses are not only interrelated but inseparable: given the requisite conditions the legal consequences or rights follow as of course; given the rights, conditions necessary for the creation of those rights must have been satisfied. Thus, when the word 'title' is used in one sense, the other sense is necessarily implied (McNeil, 1989, p.10).

Legally, the definition of title has received judicial acceptance as the lawful cause or ground of possessing that which is ours (Hunt v Easton, 2009, p.429 at 431).

Case law has further considered the definition of title to real property as a thing not with physical attributes but is a conglomerate of jurisdiction and substantive legal rights fused with residuals of equitable remedies, all developed historically out of feudal notions and medieval conditions. Like ownership, title has its roots in the feudal period as well. The term title is also understood from three different perspectives as follows:

The term "title" has been defined as that which is the foundation of ownership, of either real or personal property, and that which constitutes a just cause of exclusive possession. It has also been defined as ownership, equitable or legal, and title may be of several kinds, among them absolute, conditional, equitable, and legal. "Title" has also been defined as the evidence of the right which a person has to possession of property, or to the enjoyment thereof, or the means whereby a person's right to property is established (Grant, Eugene, Page & Thomas, 1995).

The three different perspectives of considering the definition of title include the fact that title is the foundation of ownership of land, secondly, that the owner may hold legal or equitable ownership, and thirdly, title can also be evidence of certain rights attached to land or property. The definition of 'Title' should be read together with record title and title deeds for a more comprehensive description of the terms.

Record title on the other hand is defined as the title that appears in the public records after the process of correctly recording the deed. It can also be called the title of record or the paper title issued by the lands and deeds registry in countries that operate a deeds registration system. A title that appears in the public records after the deed has been properly recorded is also referred to as title of record or paper title (Garner; 2007).

A deed that evidences a person's legal ownership of land or property is called a title deed. It also refers to the documents and instruments conferring or evidencing the title to land (Roger, 1983). The title deed is a certificate of title to land and its production by an individual is evidence that the person is the owner of the land parcel indicated in this document. It can also

be referred to as a 'land certificate' or 'certificate of title'. The definition of certificate of title is provided for under the Lands Act in Zambia to mean "...a Certificate of Title to land issued in accordance with the Lands and Deeds Registry Act;" (section 2 , Lands Act, 1995,)

The sum total of the definitions of ownership, possession and custody constitutes title. Title relates to land or real property and should be distinguished from a title deed which is the document showing title to land. The terms, 'title', record of title to land and title deeds are important for land registration, the basis of this research. A sample of this paper title called title deeds in Zambia has been discussed and produced under Figure 4.10 in chapter four of this research.

2.3 The place of Land registration in conveyancing system

The definitions outlined above show that registration of title to land identifies ownership of the parcel of land, as well as other forms of tenure and interests in it. It is land registration that simplifies, cheapens and expedites land transactions and conveyancing and improves credit flow to encourage land development, as well as facilitate more effective planning as regards land (Department of Spatial Science and Engineering, 1991).

Conveyancing on the other hand describes not only the procedure by which the property is transferred from the seller to the buyer but it also includes the documents that need to be drafted for the purpose of completing the transfer of property, utilizing the registration process. A detailed discussion on historical aspects as well as the modern conveyancing procedure and the documents required to register interest in land has been covered under 2.1 earlier in this chapter, and the emphasis for this part is on the land registration process and how it fits into the conveyancing procedure.

Writing on registration of land, the renowned author, Simpson relates registration to conveyancing by stating that:

Registration of title is essentially a conveyancing device, since its primary purpose is to make the creation and transfer of interests in land simpler and more certain. Therefore if we are to appreciate its advantages we must know something of the conveyancing procedure it is designed to supplement or replace. (Simpson, 1976, p.53).

In order to understand conveyancing from a practical point of view, a common transaction of transfer of ownership of land has been selected in this research. The selection has been based

on what is common in the two countries whose registration systems are being compared. The two jurisdictions are England and Zambia. Chapter three of this research presents the comparative value and the reasons for selecting the two jurisdictions. Coming back to the common transaction in both jurisdictions, Simpson writing about England, states that the most common transaction regarding transfer of land includes the purchase of a house and the same can be said for Zambia, hence the explanation of the procedure for the sale and purchase of a residential house in Zambia. The same selection criteria has been used to select the two sample files presented in chapter four.

In order to explain the place of registration in the conveyancing process, the following diagram illustrates the entire conveyancing process step by step for the purchase and sale of a residential house in Zambia.

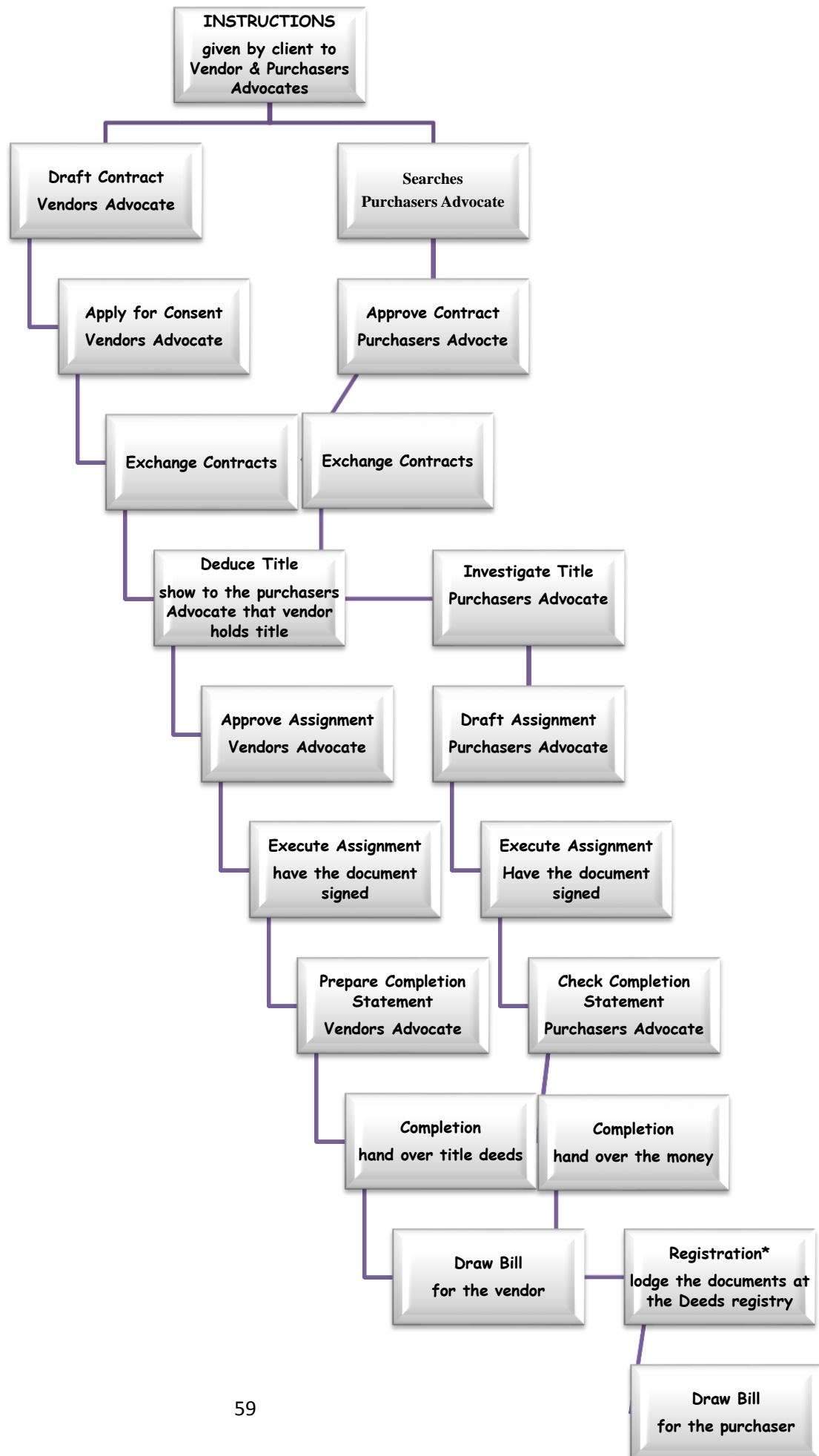


Figure 2.1

The diagram illustrating the procedure is limited to a single transaction, and the documents involved and named in the diagram have been produced as part of the sample files in chapter four of this research. The only portion that is the focus for this research from the diagram illustrating the entire conveyancing process is the box entitled ‘registration’ involving the lodgement of the documents at the lands and deeds registry the subject matter for chapter four. Registration systems are divided into two main categories, registration of title and registration of deeds, the debate between the distinctions of the two system is what follows next.

2.4 Registration of land titles and Deeds: two distinct concepts

As shown earlier, the conveyancing process ends with the registration of the property in the name of the buyer for the transaction involving the sale of a house. Land registration has been defined judicially in an American case by separating the two words ‘land’ and ‘registration’, to register means, ‘to enter in a registry; to record formally or distinctly; to enrol; to enter in a list (Reck v Phoenix Ins. Co., 1880). While registration is the act of recording (Garner; 2007,). The separation of the two words gives a more general meaning to the land registration process. Having defined the two words separately as land and registration, the words combined together show that ‘land registration’ is in fact a single concept. Borrowing from the International Federation of Surveyors who define land registration with a single definition as, the official recording of legally recognised interests in land gives a more precise legal meaning to the words. This single definition include the systems as well as the process of recording rights in land. Noblejas writing about the registration systems, clarifies the definition and states that:

“Land registration on the other hand, pertains to the proceeding either administrative or judicial, for registering the title to, or interest in, a land in a public registry so that such title or interest, becomes a matter for public record, and all persons who have any interest in the land may be informed thereof, actually or constructively and be bound thereby if they make no objections thereto within a specific time” (Noblejas, 2007, p.49).

The above definitions can be compared with the one provided by the United Nations Economic Commission for Europe guidelines that define land registration as: “the process of recording rights in land either in the form of registration of deeds or else through the registration of title to land” (Land Administration Guidelines, 1996, UN, New York & Geneva, glossary, p. 91). As conceptually illustrated in chapter one, land registration includes

the system of registration, the process by which interests in land are registered and the land record itself. The definition of Land registration as adopted in this research will include the system of registration as well as the process of registration.

To ensure that existing land rights are secured and to facilitate the creation of new rights in land, there are two international solutions provided to this problem. The first is the registration of titles called the Torrens system or the LTR operating in the United Kingdom, and the second is the registration of deeds or what is called 'deeds recordation' also referred to as 'instrument recording' or 'the registry system in the United States of America (O'Connor, 2003). Collectively, the two systems represent 'land registration' as defined above.

There has always been a lack of a clear distinction between the two systems, and the 'title' and 'deeds' registers are in fact referred to without any inference that they may be radically different. This lack of clear distinction between the two systems dates back to the 1846 report in England where the select Committee on the Burdens on Land opined that a registry of title was essential but then went ahead to recommend a register of deeds for England (Select Committee on the Burdens on Land, 1846n (4ll) vi, p.xiii). Academic writers on the two systems such as Pottage and Howell have noted the confusion in differentiating the two concepts. Pottage maintained that the elements of the two systems were being confused in England by asserting the following;

The existence of an interest was to be noted and indexed on the register, leaving the extent of the interest to be verified by examining the instrument itself, which was retained at the Registry for that purpose. It might seem that this scheme confused the elements of registration of title and registration of deeds, but the scheme of indexation was tabular rather than 'dynastic'. The resemblance does, however, say something about how dealings should be incorporated into the register" (Pottage, 1995, pp. 390 & 391).

Pottage's explanation shows that the interests in land are noted and indexed on the title register but the extent of the interest has to be verified by examining the interest itself created under the documents that are registered, suggesting a confusion of what he calls the elements of deeds and title registration. According to him, the distinction between the two is found in the schemes of indexation which for title registration is 'tabular' and for deeds registration which is 'dynastic'. Howell, citing Pottage, agrees that there is a distinction between the two systems but states further that the differences should not be unduly emphasised.

This failure to keep separate the two ideas is understandable. The way in which title to land was shown was by the documents, “deeds”, which traced each transaction and transfer-one could not prove title without deeds. Similarly, the idea of *relativity* of title, that there is no absolute title but only better title, is central to land law. No one “owns” land: each merely has an entitlement to an interest in land, each of which has a place in a hierarchy of interests. It requires a fundamental change in point of view to accept that a single person may be shown in a public register as the “owner” of property. On the other hand, it is important not to make too much of the differences” (Howell, 1999, p369).

Noblejas adds a further distinction to clarify the difference by stating that it is not the land that is registered but the deeds and the title to land that is registered (Noblejas, 2007, p.1).

Titles registration has been and continues to be described as the positive system in which the state guarantees that the rights shown on the register are conclusive (O’Connor, 2009, Hogg, 1920 and CJ. Whalan in *Douglas v Westfall*, 1902). In England, where titles registration was introduced without success, part of the complex problem supported under the 1925 Land Registration Act (LRA) was that, for a long time, land registration has been voluntary until 2002 when it was made compulsory (Mostert, 2011). It was only under the 2002 Act that statutory support is given to a system where only the register will confer title to land upon registration (Cooke, 2003). Therefore, in England, the compulsory titles registration system is in place to date with no indications of the introduction of a totally new system or a new version that would combine titles and deeds registration or what Dillon suggested one hundred and twenty years ago, as a hybrid system of land registration.

There are several international works on the lands title registration systems but the most comprehensive study was by James Edward Hogg who in 1920 carried out a major comparative analysis of twenty-one land registration systems in the British Empire (Hogg, 1920). This was followed by the pioneer work of Dowson and Sheppard which shifted the emphasis from comparative studies within the developed jurisdictions to multi-jurisdictional investigations of land title registration systems (Dowson and Sheppard, 1956). Renewed interest in the subject of land law and registration in the colonial era resulted in the book by Simpson in 1976. The preface outlining the purpose and scope of the book states that the book was published,“.....in the hope that it would be of use to Colonial Administrative and Survey Officers whose duties embraced the establishment and/or maintenance of land records”(Simpson, 1976, pxx). What Simpson’s book provided was the much needed guidance to the colonized countries on how to establish the registration system. The book

also provided a comparative view of the land registration systems in the developing countries such as Kenya, Malawi and Sudan and the developed countries such as England.

More interest in the subject matter of land titles registration was generated as land transactions increased, and this led to the surveys conducted by several international organisations. The two major ones of importance to this research being the International Federation of Surveyors (FIG) (Kaufman and Steudler, 1998) and the United Nations Economic Commission for Europe respectively (UN/ECE) (HM Land Registry, UN/ECE, 2001). The surveys outlined comparative data on land titles registration systems prevailing in different countries where titles registration had been introduced. Following the introduction of the European Union and the concept of unification and standardization of laws and systems, new interests have emerged towards the development of what has been termed the Electronic Registration (e-registration) systems and the 'Euro tile' in the European countries. Very recently, changes in the laws regarding land registration have encouraged English legal scholars to produce works on the new law of land registration (Cooke, 2003). The gap that still remains evident is the lack of substantive works on the comparison between not only the two systems of deeds registration and titles registration, but a comparison between the land registration systems in the European countries as the developed world, and African countries, as the developing world. This research will bridge this gap to a certain extent by not only comparing the two systems of land registration but also comparing the titles registration systems in England as a developed country, with the deeds registration system in Zambia as a developing country.

To draw a clear distinction between the two systems of land registration, it is vital to understand legal 'ownership' of land and the recording of the interests in the land register, as outlined by most authors attempting to explain the differences. Ownership has been discussed in detail under the introductory part of this chapter, and it simply means an entitlement to an interest in land. While a land register can refer to a record of single property or a complete record of all the registered properties, the records are kept either individually or collectively. In England, the records are kept individually as well as collectively, and each individual register is further divided into three parts as explained below. For example, in the land register for England and Wales, there are three divisions, the property register, the proprietorship register, and the charges register. The property register gives a clear identification and a plan of the parcel of land and of the right owned. The proprietorship

register outlines the names and addresses of the owners of the property and any restrictions on the owner's rights. The charges register records any interests affecting the property such as leases, mortgages, restrictive covenants and easements over the property (Simpson, 1976). A land register is statutorily defined under the Lands and Deeds Registry Act (LDRA) in Zambia as: "a register of documents relating to land not subject to customary title, other than documents referred to in paragraph (b), called the Lands Register" (Section 9(a), LRDA, 1994).

Where the land register, as is the case in Zambia, records the documents affecting the interests in land, the system is called the registration of deeds and not registration of title. Chapter four of this research discusses the Lands and Deeds Registry and the content of the land register in Zambia in detail. In this chapter, only the definition of a Land register has been provided in order to draw a more definite distinction between deeds registration and titles registration.

Several authors have attempted to distinguish between deeds and titles registration but the dividing line still remains blurred despite the fact that both systems are to some extent distinct from one another. The views echoed by the then Solicitor-General, Sir Hugh Cairns in 1859 when introducing the proposal for a register of title, that the registration of land titles had nothing in common with deeds registration, remains a reality (cited by Howell, 1999).

This research will attempt to draw the distinction by considering the views from at least five different authors, followed by a general discussion in order to show the differences between the two concepts. In order to avoid repetition and overlap of the ideas presented by these authors selection, of the authors has been based on different elements of the two systems.

Maguire in his writings on registration of deeds and title, provides a simple division of the two systems of land registration in terms of what is recorded;

Systems of registration in relation to land titles and transfer are divisible into two classes. In one, the ownership of the land is entered on the register; in the other various transactions which affect ownership are recorded separately, and from these and other facts the ownership may be deduced. A registry of the former class is called a Registry of Title, and one of the latter a Registry of Deeds sometimes called a Registry of Assurances ((Maguire, 1922, p. 58).

The simple distinction between the two systems is based on the fact that under a title registration system, it is ownership of land that is recorded while under the deeds registration system, it is the transaction or the deed which is recorded.

Simpson on the other hand in his book, writing extensively on the process of land transfer and land registration, compared registration of title and registration of deeds and concludes that the two are not distinct. He rightfully asserted that: “It is usual to think of registration of deeds and registration of title as two quite separate and distinct systems which are mutually exclusive. This is misleading (Simpson, 1976, p. 19). His assertion that the two systems are not distinct is supported by the Ontario Law Reform Commission’s report stating that:

Each is not a single system, but rather is composed of different alternatives, and the combined alternatives form a continuum. The major variable in this continuum is the extent of the affirmation made by the [State] of the existence and ownership of interests. Other differences among different forms of the systems, such as the arrangements for indexing the records and control of descriptions, plans and surveys are not inherent, and are often the result of chance (Ontario Law Reform Commission, 1971, p.19).

Simpson’s views support the explanation that registration of title and registration of deeds are not two distinct systems but a combination of different alternatives within a single system of land registration. Addressing the different forms of land registration in the twentieth century, Cooke agreeing with the views of Smith states otherwise,

.....land registration is found today in a number of forms. Broadly, there are deeds registration, interest recording, and titles registration. Each form has been adopted in several jurisdictions, with many local variants and varying degrees of success. It is not unusual for a jurisdiction to adopt a number of forms of registration in turn, implying a search for a form that is in some way better; and we sometimes find more than one form combined within a system (Cooke, 2003, p.4).

She provides an explanation that there is more than one system of land registration and further classifies land registration systems by considering their effect which in her analysis could either be protective or dispositive.

A protective system records ownership and/or other interests in land as a way of settling their relationship to each other; it affects priority, but not the actual existence of the interests. A dispositive system exercises a much tighter grip upon its users by regulating the very existence of property rights, as well as their priority (Cooke, 2003, p.4).

In her opinion, deeds registration system is both protective as far as a deed has priority over subsequent truncations only if it is registered and it is dispositive in that it has no effect unless it is registered. Titles registration is described as the most complete form of land registration, as long as there is an ideal title register to support the system which means it is both protective as well as dispositive but in reality, according to her, this is more of a myth (Cooke, 2003).

O'Connor in her research, accepting Norman's views, describes land titles registration as a 'positive' system of land registration and the deeds registration system as a 'negative' or merely evidentiary system.

In a system of LTR, the registrar, on behalf of the state, undertakes the function of examining the proofs of title and establishing the parcel boundaries. This is what Paul Norman calls a 'positive' system of land registration. The registration of an instrument acts as a warranty by the state that person shown on the register is the lawful owner of the relevant interest.

In theory, deeds registration systems are 'negative or merely evidentiary systems. The registrar's role is passive, and instruments are not examined for validity (O'Connor, 2003).

The distinction of the two systems as positive and negative implies a sense of superiority of the titles registration system over the deeds registration.

The fifth author, Mostert, in her article on the South African Land registration system and electronic registration, throws insight into the above classification of titles registration as being a positive system while deeds registration as a negative system, and provides the judicial acceptance of this distinction.

It is only the occasional, unusual case that forces land registration practitioners and lawyers to return to the source of the law that gave rise to the practice of registration. *Ousekraal Estates (Pty) Ltd v City of Cape Town*, for instance, cast new light on the nature of our registration system. It draws attention to the fact that, because of our country's peculiar colonial past, South Africa has a registration system with characteristics so close to the positive systems of "titles" registration that some tend to doubt its classification as a negative system of "deeds" registration. The system is nevertheless held to be negative because of the fact that the register may well contain erroneous information or may not be up to date and because no formal protection is made for bona fide third parties who rely on the correctness of the register in their dealings with land (Mostert, 2011).

The five authors drawing the distinction between the two systems of land registration systems for different countries, have shown the developmental trends in making the distinction less blurred and more easily understood is the main theme of approach when discussing titles registration as compared with deeds registration.

Generally understood from the explanation given with regard to the differences of the two systems the most important aspect of the land registration system for this research is the theory outlining the distinction between a registry of titles and a registry of deeds. The arguments presented by various writers on this subject state that the system of registration of land titles is divided into two classes. When the transfer of real property rights is in question, two systems of land registration are available, the Australian Torrens System or Title registration and registration of deeds or the deeds registry (Brochu, 2003). To draw out the distinction between the two systems more clearly, the qualities of a Registration of Title system or the positive system are expressed below as compared to deeds registration systems:

1. The title document must give an unambiguous record of ...the parcel of land...the nature of the rights of the proprietor and others...the persons involved with the title, estates and interests.
2. The title depends on registration of an instrument....
3.record systems must be kept up-to-date, secure and purged of dead material...
4. The system should be controlled by central government....
5. It is an advantage....that the state guarantees the content of the title document.
6. The administrative processes of bringing land under the system should be kept separate from the running of the system (Holstein & Williamson; 1984, 3).

Even though the six elements presented above emanate from the Torrens's title system, it is clear that these elements may well describe any other titles registration system. The method of Torrens system of land registration establishes a system of registration by which title recorded becomes absolute, indefeasible and imprescriptible. Furthermore, the rights acquired under this system are guaranteed by the government which provides an assurance fund to answer for damages to be suffered by persons through the operations of this system.

Registration using the deeds system on the other hand involves the maintenance of a public register in which the documents affecting interests in land are copied (Simpson, 1976). It should be noted that the idea of recording deeds in a public register was in existence long

before the introduction of title by registration or the Torrens system. The discussion of deeds registration should be chronologically placed before the explanation on the Torrens system or title registration, but there are two important setbacks of following this format. Firstly, there is a fundamental defect in a system of land registration by deeds which arises from the very nature of the deed itself. “A deed does not in itself prove title; it is merely a record of an isolated transaction” (Simpson, 1976, p.15). Secondly, registration of deeds has been accepted as a negative system and was almost a total failure in England. It is for these reasons that title by registration has been discussed first in this chapter instead of registration of deeds, but there is a clear distinction that can be drawn between the two systems. The importance of the deeds system when compared with the titles system is a continuing debate among most writers, but it is accepted that the two systems are distinct. The distinction is not very clear but it is there, since the systems overlap in many areas and procedures. Furthermore, the distinction is blurred by an overlap of a combination of different alternatives available within each of the systems.

For the purposes of this research, the basic difference between the two systems can be understood by stating that the deeds system registers instruments from which title to land can be derived, while in the Torrens or titles system, the register reflects the title to land. Support for this distinction has been endorsed judicially in the case of *Re Land Titles Act – Ferguson v Registrar of land Titles [1953]* outlining four main points of comparison. The first point is in relation to the Torrens system, and it states that estates and interest pass on registration and not upon execution of an instrument. The written documents (deeds) are privately negotiated and drawn up between two parties in the case of sale of a residential house between the seller and the buyer. What the document shows is that the current seller had acquired the house from a previous owner, who in turn by the production of his document, had acquired it from another person and so on as far back as the law requires, until the ultimate owner can be established. This is referred to as the major defect of the deeds registration system, thus classifying it as a negative system.

The second point states that priority dates from registration and not from the date of execution of these documents. Execution means the date the documents are signed by both parties. This principle is that registered deeds take priority over unregistered, or deeds registered subsequently (Simpson, 1976). The legality or otherwise of a particular deed is not affected in any way. What priority determines is that from the date of registration and not the

date of execution of the deed, in the absence of any other competing documents, the deed has been registered. Registration has no advantage as far as vesting of the property is concerned (Simpson, 1976).

The obvious disadvantage arising from the second point is that, in the case of deeds registration, no inquiry can be made as to the authenticity of the deed regarding its form or its content (McLintock, 1966). This disadvantage has been statutorily accepted and is provided for under The LDRA in Zambia; that registration of a deed will not cure any defect within the instrument or affect its validity in any way. This shows that a deed will remain valid or will be considered invalid as a document on its own, and registration plays no part in its effect (section 21, LDRA, 1994). This fundamental defect of the deeds registration system that has been stated by most authors, is connected to the principle that the deed or the instrument does not prove title, what it shows is a record of an isolated transaction only. If the deed is properly drafted without defects, it shows that the transaction took place. It will not even prove that the parties to the transaction are legally entitled to carry out the transaction. In other words it proves whether the transaction was in effect valid or not. This means that systems of deeds registration are ‘monojural,’ operating within the ordinary rules of property law that requires a valid document to transfer or pass an interest in land (O’Connor, 2009). Theoretically speaking, no document should be registered unless it is valid under the ordinary law but in practice, many invalidating defects such as forged document, a document executed by a person lacking legal capacity, among others can pass undetected at the deeds registry (O’Connor, 2009). The legality of the document is covered under the general law of contract and the common law, and therefore beyond the scope of this research. It is sufficient to note that registration does not affect the validity of the deed which is registered under a deeds registration system.

The third point states that the registered owner, except in the case of his own fraud, holds free from all estates or interests not stated against the title. This means that any estate or interest not shown on the record of title to land cannot stand as a claim against the registered owner, unless fraud can be proved. The register in this case must indicate the estates and interest registered against the title through the use of documents of transfer, and this principle was clearly expressed in The Real Property Commissioners report which inquired into English Land Law and confirmed that:

In all civilised countries the title to land depends in a great measure on written documents, and the purchaser looks, and is empowered by the law to look for proof of the seller's right beyond the fact of his possession. It is obvious that a documentary title cannot be complete, unless the party to whom it is produced can be assured, that no document which may defeat or alter the effect of those, which are shown to him, is kept out of sight. It follows, that means should be afforded by the law for the manifestation of all the documents necessary to complete title, or for the protection of purchasers against the effect of any documents, which, for want of the use of such means, have not been brought to their knowledge; in other words, that there should be a General Register (Great Britain. Real Property Commissioners – Second Report, 1830.p.3).

The fourth point relates to a person taking a transfer from a registered owner who is not, except in the case of his own fraud, affected by any notice of another's equity or unregistered interest. The third and the fourth points both make reference to the phrase 'in the case of fraud'. This phrase has received judicial interpretation to mean fraud committed by not only the registered owner but also by his or her agents who have been empowered to act on the owners behalf (*Assets Co Ltd v Mere Roihi*, 1905). The fourth point presents two circumstances; the first one is an equitable interest and the second one in an unregistered interest. The second circumstance of unregistered interest has been discussed above under the second point but there is need to outline equitable and common law interests in Land. This narrative description fits into substantive real property law but it is important in understanding the effect of the fourth point, and the distinction between a legal and equitable owner of property. The difference between a legal and an equitable owner of property has its basis under English Land Law. In terms of definitions, common law and equity originated in England and by virtue of colonisation, the systems as well as the substantive laws, were brought into Zambia. English Common Law is defined as that

.....part of the law of England formulated, developed and administered by the old common law courts, based originally on the common customs of the country and unwritten. It is opposed to equity.... and to statute (Burke, 1976, p.82).

While equity, which came later in time is defined as follows:

Equity is primarily fairness or natural justice. A fresh body of rules by the side of original law, founded on distinct principles, claiming to supersede the law in virtue of a superior sanctity inherent in those principles (Maine). Equity is the body of rules formulated and administered by the Court of Chancery to supplement the rules and procedure of the common law (Burke, 1976, p.134).

In Zambia, the continued application of common law and equity has been sanctioned by statute law. The *English Law [Extent of Application] Act, 1963*, declares the extent to which Law of England applies to Zambia, with regard to common law and equity, it states that:

2. Subject to the provisions of the Constitution of Zambia and to any other written law-
 - (a) the common law; and
 - (b) the doctrines of equity; and
 - (c) the statutes which were in force in England on the 17th August, 1911 (being the commencement of the Northern Rhodesia Order in Council, 1911); and
 - (d) any statutes of later date than that mentioned in paragraph (c) in force in England, now applied to the Republic, or which hereafter shall be applied thereto by any Act or otherwise; and
 - (e) the Supreme Court Practice Rules of England in force until 1999: Provided that the Civil Court Practice 1999 (The Green Book) of England or any other civil court practice rules issued after 1999 in England shall not apply to Zambia except in matrimonial causes shall be in force in the Republic (section 2, The English Law: Extent of Application Act, 1963).

This statutory enactment shows that common law of England and doctrines of equity continue to apply in Zambia. With regards to property law in particular Megarry and Wade expound that the situation in England has changed over time, and the law of real property is regulated more under statute law but it is still very important and essential to have a clear understanding of common law and equitable principles upon which the statutory law is based. Furthermore, there are gaps in the statute laws in England as well as Zambia that continue to be filled and guided by principles of common law and equity (Megarry and Wade, 2000). Therefore Zambia still relies heavily on principles of common law and equity in understanding property law and issues of conveyancing and land registration.

The distinction between common law and equity centres on the fact that equity is based on rules of fairness and natural justice which came in to escape the rigidity of one form of action, strict adherence to procedure and lack of remedies under common law. In the realms of property law, equity made its greatest contributions (Howarth, 1994). Although common law and equity have been fused in England, it is important to understand what the learned author Cheshire calls, 'duality of ownership,' that is legal ownership and equitable ownership of one parcel of land or real property (Cheshire, 1972). This concept of dual ownership arose

out of the 'use' or 'trust' and was adopted by the Court of Chancery and therefore an equitable concept. During the fourteenth century, the owner of land would convey his land to a group of his friends for 'his own use' (Simpson, 1976). The group of friends became the legal owners of the land and original owner could keep the profits and enjoyment of the land. Simpson commented that:

Thus it will be seen that, in effect, a dual ownership was created and indeed the success of the stratagem rested on the fact that the 'legal' ownership was vested in trustees whilst the beneficiaries enjoyed the 'equitable' ownership, though it is not really clear why the latter should be called *ownership*, the whole point being that, though the beneficiaries had a right fully enforceable against the owner, it was not itself ownership (Simpson, 1976; p. 35).

This concept of duality of ownership arising under the Law of Trust has remained part of substantive land law and is still applicable in England as well as Zambia by virtue of The *English Law [Extent of Application] Act, 1963*. Registration of land relates to legal as well as equitable interests in real property.

To use title as evidence of land ownership, registration should be done under a correct system and using the correct method, otherwise the land will be considered as unregistered. In the case of *Estate of Don Mariano San Pedro v CA, G.R. No 103727* and *Engracio San Pedro, et al. V CA, G.R. No 106496*, December 18, 1996, the Supreme Court ruled that, 'Titulo de Propriedad' No. 4136 which covered 173,000 hectares of land in five provinces was null and void and therefore no rights could be derived from the land. There could be no ownership, possession or disposal of the portion or the entire piece of land. That anyone in possession of the land should vacate it immediately. The Supreme Court of the Philippines said;

The most fantastic land claim in the history of the Philippines is subject of controversy in these two consolidated cases. The heirs of the late Mariano San Pedro Y. Esteban laid claim and have been laying claim to the ownership of, against third persons and the government itself, a total land area of approximately 173,000 hectares of 314,047 quiniones on the basis of a Spanish title..."(Combined cases cited above).

Considering the vastness of the land claim, innumerable disputes cropped up and the land swindles and rackets proliferated resulting in tedious litigation in various trial courts, in the appellate court and in the Supreme Court in connection herewith. (cited from the combined cases explained above).

It is clear that only when registration is under the correct existing system, using the correct mode of acquiring title will the courts consider title as being vested in the owner. The accurate record of transaction will guarantee ownership of land. Whether ownership is legal

or equitable, it will depend on the estates and interests registered against the particular parcel of land or real property.

It is important when designing a suitable model of land recordation and registration by title or deeds in Zambia to consider the advantages of one system over the other. Even though the distinction between registration by title or deeds is not clear and precise, the two systems continue to operate as two ways in which land interests are registered around the world, and therefore there are two separate systems of land registration.

2.5 The distinction of deeds registry and the titles registry as part of the registration system

Apart from understanding the difference between the system of registration by titles and registration by deeds, it is important to consider the distinction between the deeds registry and the titles registry. The registry is described as the physical working machinery of the system of registration (Simpson, 1976). The word land register has been described above but the word register on its own has an ambiguous meaning. Simpson commented that: “The word ‘register’ is itself ambiguous, for in ordinary speech it is used to refer either to the record of the title to a single property or to the complete record of all registered properties (i.e. all the individual records collectively)” (Simpson, 1976, p.305). The word register in Zambia has been elaborated under statute (LDRA) to mean:

The following registers shall be kept:

- 9.(a) a register of documents relating to land not subject to customary title, other than documents referred to in paragraph (b), called the Lands Register;
- (b) a register of documents relating to common leasehold schemes, called the Common Leaseholds Register;
- (c) A register of other documents required or permitted to be registered under this Act, called the Miscellaneous Register (Zambia, 1994; S9).

The registries are the heart of the registration systems and provide for different ways in which data regarding a land transaction is captured, recorded, and stored before being transmitted to the public. Both registries, whether under titles registration or deeds registration, are created under a legislative structure and adopt the system provided by the statute. The systems have much in common regards their main features but in detail they differ widely (Maguire, 1922, p.158). Registration is either of the ownership of land or of the deeds and documents

affecting the ownership. When compared with deeds registration system, title registration system is rigorous, lengthy and expensive (Griffith, 2007). The first registration of a parcel of land tends to be time consuming and costly since the title to the land becomes guaranteed by the state upon registration (Griffith, 2007). Title registration systems are neither efficient nor effective when compared with deed registration system. A lot depends on the structure of the system itself and the institutions, including the legislation and policies that support the functions and the administration of the process within them. The main point to note is that the title registration system seems to be more conclusive to transactions of sale of land than deeds registration. No doubt with the increase in the number of land transaction involving the sale and resale of residential houses countrywide in Zambia, there should be clear positive benefits to the economy of the country if an efficient and effective land registration system can be devised to address the needs of the particular country. This research aims to design a new land recording and registration system based on a suitable model for a developing country.

2.6 Conclusion

In order to understand the core issues relating to the transfer and registration of land, it is valuable to consider the entire conveyancing procedure and the system of land registration. Systems of registration have been developed and supported by a legislative framework. In most countries, the registration process is either titles registration like the Torrens system in Australia, or deeds registration like the ones in South Africa and Zambia. It has been the thesis of this research to show that deeds and title registrations are two separate systems even though there is some overlap in the principles and theories supporting each system. Although some authors have laboured to show that titles registration per se is superior and is more favoured as far as security of land rights are concerned, it cannot be ruled out that deeds registration system has certain advantages and has been successfully operated in countries such as South Africa. Before proposing a model for land recording and registration in Zambia, a detailed record of process and procedure currently operating at the land registry in Lusaka, Zambia, its operation and the nature of the documents presented for registration will be presented as part of the primary data collected, using the case study method through observation in chapter four. The current system adopted in Zambia, is the deeds registration and not titles registration or the Torrens system. In concluding this chapter when considering which land registration system will be more suitable and appropriate for registration of land in Zambia it is also necessary to analyse the legislative framework that supports the two

different systems of land registration; titles registration or deeds registration. The choice between the two systems still remains an option until the model is finally developed in chapter five and practically implemented as the accepted land recording and registration system for Zambia. The next chapter considers the legislative framework for titles registration and deeds registration.

CHAPTER THREE

LEGISLATIVE FRAMEWORK FOR TITLES REGISTRATION IN ENGLAND AND DEEDS REGISTRATION IN ZAMBIA-COMPARATIVE FINDINGS AND ANALYSIS

3.0 Introduction

One of the earliest common law countries to develop titles registration system was England and yet the system failed to attract voluntary registration of land title. “Systems of registration of title have been in existence for many years. At first, what was in place was a regime which allowed for the voluntary registration of titles” (Thompson, 2003, p.93). There is little emphasis on the other option of deeds registration which was also introduced in England. The deeds registration system in England was evidenced by the establishment of two deeds registries, one in Yorkshire and the other in Middlesex supported by various legislations (however, the first registry of deeds was established in the West Riding of Yorkshire by an Act of Parliament of 1703, followed by other legislative enactments in 1707 and 1708) (Anderson, 1992). The other country that introduced titles registration was Australia under what was called the Torrens title and the Torrens system, which continue to be a success even in the twenty-first century (Whalan, 1967). Robert Torrens from whom the system has derived its name had served as the Registrar- General of deeds in South Australia and that is what had convinced him that titles registration was necessary to bring about a successful land registration model (Mapp, 1978). Dowson and Sheppard commenting on the success of the Torrens system in Australia and its failure in England rightly asserted:

We think that the outstanding success of the first South Australian measure associated with the name of Sir Robert Torrens in such contrast to the equally outstanding failure of the contemporary English Act, coupled with the growth of the term ‘Torrens system’, suggested a distinction in kind between the two and generated the conception of further alternatives systems (Cited in Simpson, 1976, p.76).

Both authors applaud the comments of Torrens himself when he acknowledges the clear similarities between the titles registration in England and the Torrens system in Australia, stating:

whereas we have repeatedly observed elsewhere, Torrens himself pointed out that there was ‘a similarity amounting to identity’ between the South Australian and the English measure, and that they followed principles whose practicability and advantage had been previously proved both on the Continent of Europe and in England itself” (Dowson and Sheppard, 1956, p.73).

The English system and the Torrens system are similar in many aspects but differ in one fundamental way. In England the register may be rectified more readily when compared with the Torrens register (Stein, 1983). The author supports this argument with the following example: “If under general law rules it is wrong to accept the statement of interests recorded on the register, it may be rectified to reflect the true legal title, leaving the deprived proprietor to the remedies provided by the assurance fund” (Stein, 1983, p.267). Despite the main difference between the two titles registrations systems stated above, there are a lot of similarities within the two systems.

Whether referring to titles registration in England or Torrens registration in Australia, both systems require the backing of legislative framework to operate. When comparing the English titles registration with the Torrens title, O’ Connor emulates that it is the ignorance of the English Lawyers that has brought about the wrong conclusion that the two are fundamentally different (O’ Connor, 2003). She in fact argues that the two are similar rather than unique. The similarities or distinctions between the two systems are not the emphasis of discussion in this research. The need in this research is to select one system of titles registration and its supportive legislative framework over the other in order to compare it with the deeds registration system and its supportive legislative structure in Zambia. The reason for selecting the English system of titles registration is also based on the fact that the English system has its roots in the Torrens system. Fairchild and Springer support the fact by stating: “But the present systems in the British Empire and the United States can be traced directly to the original land Registration Act in South Australia, promulgated by Sir Robert Torrens in 1858 when he was the Register General of that province” (Fairchild and Springer, 1939, p.565).

The choice of the English titles registration system over the Torrens system for this research is based on historical reasons and the distinction which this research will draw is between two different systems of land registration: titles and deeds registration. The selection of the English system over the Torrens system is elaborated in the next paragraph under 3.1.

3.1 Value of comparing legislative frameworks

The selection of the English model as a comparator and not the Torrens by the researcher is founded on two main reasons. The reasons are based on historical as well as the similarity of the type of legal system operating in both countries. Firstly, Zambia being a common law jurisdiction will benefit more from enactments and jurisprudence existing in England which

is a common law jurisdiction, operating a titles registration system, while Zambia operates a deeds registration system. Arguments presented by writers on research methods for law, support the view that such comparisons happen not only in research works but also in courts of law.

It is something which happens even among common law countries, where one finds cases being cited in courts from other common law jurisdiction and where legal scholars show a natural interest in developments in their areas of expertise in other common law jurisdictions (McConville, & Chui,(eds), 2007,p.88).

Secondly, Zambia being a former colony of the British Empire and therefore drawing most of its legislation from English statutes or having adopted English Acts as far as content is concerned, makes English statutes a better comparator. Substantive Land law or Property Law in Zambia that governs the land registration system is based entirely on English law in its fundamental aspects. The difference only lies with regard to the system of registration which is titles in England and deeds in Zambia.

The Torrens system on the other hand has been adequately elaborated under chapters one and two of this research but for the purposes of this chapter it concentrates on the use of a particular research methodology as well as its relevance has. The appropriate methodology for this chapter is comparative legal study and it is justified in terms of the benefits that it will bring to the Zambian national legal system and more especially to the land registration system. The lessons learnt in England during the development of the new Land Registration Act 2002 (LRA) and its practical implementations on the system of titles registration will provide the ground work needed for the change in the Zambian system of deeds registration and the possible shift from deeds registration to titles registration or the adopting of a hybrid system.

The case study method selected for this research will be used in detailing the process of land registration in Zambia and specifically applies to Chapter four. However, comparative legal analysis has been used in chapters one, and two to some extent when comparing the two systems of registration: title and deeds but features more prominently in chapter three by comparing the two legislative structures supporting the land registration systems. In the first two chapters, the single comparator has been the distinction between the 'Titles' and the 'Deeds' registration. For the purposes of this research, no distinction has been drawn between the Torrens system and the English system. The rationale for this is that the English system is based on the Torrens principles and borrows heavily from its principles. Even though there is

in fact a fine distinction between the two which is supported by some authors, it has been blurred in the light of new statutory reforms in England.

But even the distinction between Torrens and English origins becomes blurred as problems are re-examined and dealt with on their own in the light of modern developments, or new statutes replace old and draw their provisions from different sources (Simpson, 1976, p.77).

The generalisation is that both are systems of titles registration and strikingly similar in many respects. Different authors on this subject matter, discussing the two systems, have shown that both systems provide for titles registration but differ to some extent in the legislative framework only (Simpson, 1976, Whalan, 1967 and O'Connor, 2003). The differences between the previous English title registration statute (and similar statutes) and that of the Australian Torrens statutes do not justify the conclusion that the two systems are distinct from each other. Additionally, other authors have expressed the view that the English and Torrens systems of title registration are basically one and the same (Ruoff, 1957).

The aim of this chapter is to compare the legislative framework supporting the two land registration systems being the Land Registration Act 2002 (LRA) in England and the Lands and Deeds Registry Act in Zambia (LDRA). The discussion will not show the differences and similarities between the Torrens system and the English system of titles registration. It will try to bring out the different legislative frameworks supporting the English titles registration based on Torrens principles, with the statutory provisions governing the Deeds Registration system in Zambia.

3.2 The aim, purpose and object of land registration systems and its legislative support

Land registration refers to two main issues, firstly, the land registration system that a country adopts and secondly, the legislative support given to that particular system to function well. The aims, purpose and objects outlined below refer to the systems of land registration as well as the legislation enacted to support the operations of the system. The systems of land registration are the titles registration or what is called the Torrens system and the Deeds registration system, and the distinction between them is not drawn since the aims, purpose and object relate to all the systems of land registration generally, whether deeds or titles.

Land registration is an ancient phenomenon which can be traced back to the Egyptian empire where land records showing ownership were kept in documentary form (Dowson and

Sheppard, 1956). Cooke describes what can be termed the historical concept of land registration and the more recent form of modern land registration.

Without going into detail about remote history, we may observe that land registration is a feature of a state with a centralised bureaucracy; and one where a settled civilisation is content to have ownership recorded and regulated by officialdom rather than by force. In its modern forms, it is a feature of a society where individuals own and trade land as a capital asset and so need their ownership to be easily proved and efficiently transferable (Cooke, 2003, pp 2 &3).

3.2.1 Aim of land registration

One of the aims of land registration is to facilitate the security of land ownership and transfer (Thompson, 2003). When transferring or registering title to a particular piece of land, ownership can easily be proved through a simple process of inspection of the register. This is the mirror principle under the Torrens system, but there are several exceptions to this principle. In the case of unregistered land or the deeds recordation system, there is need to deduce title, a process under private conveyancing (refer to Figure 2.1 in chapter 2) where individual deeds must be traced in the records to complete the chain of title. This process is used to establish proof of ownership. The tracing of these documents goes back to a legally accepted starting point, usually sixty years provided for under common law system as root of title (Cooke, 2003).

To replace this laborious process, the fundamental idea behind the system of registration of title was that, as opposed to the land charges system, whereby third party rights affecting land are registered, it is the title to the land itself which is registered. The registered title replaces the evidence of entitlement to the land which was previously provided by the title deeds (Thompson, 2003, p.94).

Under title registration by the simple process of inspecting the register, one would determine the owner of the land and the rights arising to it. Registration should enable a person to identify the owner just in the same way as showing a person who owns a car or shares in a private limited company. This simple aim of registration is discussed by Pottage (Pottage, 1995).

The other aim of registration of title is to show a complete picture of the title to land and eliminate as far as possible the interests that cannot be discovered by inspecting the register (Cooke, 2003). Security of land ownership and transfer is the main aim of land registration under either system; title or deed.

3.2.2 Purpose of land registration systems and land Registration legislation

The purpose of land registration on the other hand under titles registration system or deeds registration is twofold, and it affects the documents transferring the interest in a particular parcel of land. Noblejas explains this twofold purpose as: “Under the system of law, registration of titles to, and deeds affecting land is made in order: (a) to make the instruments evidencing the transactions valid as against third persons; (b) to make them binding on the land itself” (Noblejas, 2007, p.60). Unlike the aim of the registration of title as a system, the purpose of land registration law has received judicial interpretation in the case of *Zuñiga vs. Court of Appeals*, where the Supreme Court said:

The purposes of the Land Registration Law in general, are: to ascertain once and for all the absolute title over a given landed property; to make, so far as it is possible, a certificate of title issued by the court to the owner of the land absolute proof of such title; to quiet title to the land and put a stop forever to any question of legality to a title, and to decree that land title to be final, irrevocable, and undisputable (*Zuñiga vs. Court of Appeals*, 1980).

The above purpose of land registration laws or the legislative framework supporting the systems of land registration is applicable to both the LRA 2002 of England supporting the titles registration system, and the LDRA of Zambia supporting the deeds registration system.

Addressing the question why land registration system is necessary, Hanstad provides the answer by stating: “Land registration provides a degree of certainty and security to the owner as well as to others having rights in land” (Hanstad, 1998, p.658). When considering the aim, purpose or object of land registration, the key pointer is security whether it is tenure security or title security relating to a particular parcel of land. The object of land registration has been the subject of much debate when compared with its aims and purpose.

3.2.3 Object of registration of Title

The object of registration of title, unlike the aim and purpose of land registration, has been adequately commented upon by many authors. It has also been the subject of judicial analysis by the courts of law and is further provided for within the preambles of the legislative frameworks supporting titles registration. Hoggs, when making reference to the ideal system of registration of title and its possible realization, states the object of registration of title as:

The object of registration of title being to enable transactions with land to be carried out easily and cheaply, the ideal system will be that by which these objects are best attained, at the same time retaining all advantages belonging to other systems of conveyancing and conforming to the general policy of jurisprudence as regards ownership of land. There are two things to be considered: how to bring land on to the register, and what rights to confer on owners of interests in it when it is once on the register. The first of these questions is much more difficult of the two (Hoggs, 1918, p57).

O'Connor, on the other hand, in her thesis argues that the objects of the Land Titles Registration is improving security of title and facilitate transactions relating to land (O'Connor, 2003). She identifies two objects and states that they are essential elements supporting land title registration system.

The two objects of LTR are, first, to make existing property rights secure, and secondly, to make the rights more securely tradeable. The second object is often expressed as facilitating the transfer of rights, or making conveyancing quicker, cheaper and simpler but these are merely the consequences of enhancing the security of transfer and acquisition (O'Connor, 2003, p3).

The concept of security underpins the object of land registration in that the existing owners are protected as far as their rights and interests in land are concerned, and should not be deprived of the property they hold. For the two objects of land registration to be achieved, they require what Rene Demogue termed 'dynamic security' and 'static security', while accepting the two forms of security stated by Demogue, O'Connor expresses them as the dilemma of legal security. Before expanding the debate between static and dynamic by legal scholars, Cooke presents the persuasive argument when considering registration as a consumer product, that it represents an instrument of practical security, making land more marketable. She describes the commercial tension between safety and marketability of land which in the legal sphere of land, law relates to either dynamic security or static security (Cooke, 2003).

The debate on dynamic and static security will be analysed by presenting the two views of Demogue, cited by O'Connor (O'Connor, 2003), and by Cooke, (Cooke, 2003) as well as cited by Mostert, (Mostert, 2011). The three authors agree that there is tension between the two securities and this tension is more aptly described by O'Connor as: "The thesis of this work is that the system of LTR incorporates two objects which are to some degree antithetical, and that this conflict is the root cause of a number of legal problems experienced in the title registration law of many countries" (O'Connor, 2003, p.3). Mostert on the other hand, accepting the views expressed by Cooke, states that:

For her, dynamic security represents those movements towards a simplification of the types of interests that may be held in land: a simplification of “title” to land. Static security, conversely, represents an emphasis in land law on the protection of all existing rights and interests in Land (Mostert, 2011, p.91).

Static security, it seems, fits into the first object of land registration which is to make existing property rights secure, meaning that once land rights are acquired, the owner should not be deprived of her rights to that parcel of land. Owners and purchasers of land need to be sure that the interests or rights that they are acquiring are free from hidden claims and this is dynamic security which fits into the second object of land registration being security of transfer and acquisition of land (O’Connor, 2003). Accordingly, the legislative framework supporting the land registration system may not be able to provide for both static as well as dynamic security.

Discussing security of title generally, Mapp observes that security of title is in fact, ‘elusive ideal’ and he rightfully sums the conflicts of the two securities as: “Security of ownership and facility of transfer are inherently inconsistent. Society can opt for either of two legal regimes concerning land ownership: hard to come by, hard to lose; or easy come, easy go. More likely, some rough balance will be sought” (Mapp, 1978, p.49). The proposed solution to the question of security by most authors is to strike a balanced approach between both static and dynamic security because owners of land need both. Demogue in particular proposed two methods by which the law can achieve the balance, and these are publicity and insurance which are both principles of the Torrens systems, and elaborated below in more detail.

3.3 Evolution of legislative structure of titles registration in England

3.3.1 The title registration and its origin

Before tracing the legislative developments of the English titles registration system, it is important to stress that there were several attempts to create a register of dealings in land in England. Howell traces three early forms of registers namely, the enrolment of a bargain and sale of freehold land, conveyances of copyhold, and the register of judgements affecting land (Howell, 1999). The Statute of Enrolments of 1535 and the Fines and Recoveries Act 1833, gave these registers the necessary legislative backing. The Statute of Enrolment provided that from 31st July 1536:

No manors, lands, tenements or other hereditaments shall pass, alter or change from one to another, whereby any estate of inheritance or freehold shall be made or take effect...by reason only of any bargain and sale thereof, except the same bargain and

sale be made by writing indented, sealed and enrolled in one of the King's court at Westminster, or else within the same country or countries where the same manor, lands or tenements so bargained and sold, lie or be, before the *Custos Rotulorum* and two justices of the peace (Cited in Cooke, 2003)

Unfortunately, the Statute of Enrolments in England had failed in its purpose (Simpson, 1976).

The point lacking clarity for England was whether these first comprehensive registers of the seventeenth century could be classified as register of deeds or of title (Howell, 1999). The seventeenth century witnessed the breakage of the monarchy and the repeated demands for the introduction of a register of dealings with land in whatever form (Howell, 1999). This was followed by a number of bills presented in Parliament which had tried but not succeeded in establishing a register. It was only later in Queen Anne's reign that England managed to set up its deeds registries which continued functioning until the last ones that closed in 1976, when registration became compulsory for that area (Howell, 1999).

What followed in England were several proposals for the establishment of an effective system of registration of deeds to make title simpler. The turning point happened when a Select Committee was appointed to consider a Bill for registration of deeds introduced by Lord Cranworth in 1852. The committee's report in 1853 recommended the introduction of a proposed scheme for registration of title (Howell, 1999). Detailing the origin of registration of title, Simpson citing the Real Property Commissioners' second report, states that it was a London solicitor named Thomas George Fonnereau who when giving written submission to the commission, brought forward the idea of a registry of title and not deeds as:

Although.....my opinion is against a registry of instruments relating to landed property I entertain little doubt that a registry of the property – a registry which should in itself be evidence, not of a deed but of a title – would be highly beneficial by accomplishing facility and cheapness of transfer as well as security of title (Real Property Commissioners – Second Report, 1838).

Since the Statute of Enrolments and its repeated failures followed the reintroduction once again of the idea of a general register, the Commissioners from whom the idea developed were of the opinion that the introduction of registration of title was dependent on extensive alteration of the law (Simpson, 1976). The importance of legislative support to introduce a functional land registration system was evident, even at that time in England. The purpose of this research is not to trace and detail all the legislative enactments and their failures but to

consider the major ones and how they influenced the current legislative framework for the registration system.

This discussion would be incomplete without mentioning the Land Transfer Act 1875 which is the basis of the system operating today in England. The major contribution of this Act on the registration system was by way of providing remedies for three defects that were identified in the previous statutes. The wide discretionary powers of the registrar to hear and determine objections were curtailed by referring matters to court. Secondly, precision regarding boundaries was made flexible, and finally registration was confined to full legal ownership only, thus excluding all partial and equitable interests from the requirement of registration (Simpson, 1976).

The next major legislative leap was the enormous scope of the 1925 legislation which was designed to tackle Property Law, registration systems, and practice. Eminent authors on Property Law considering the positive contribution of this legislation, pointed out:

These Acts have simplified both practice and study in a multitude of ways. Obsolete and incongruous rules have been cleared away; new and beneficent principles have been invented, in a great many matters it is now unnecessary to go behind these Acts. But they are not a code: as was said in 1925, they represent evolution rather than revolution. They proceed by patchwork, often adapting old ideas to new problems in much the same manner as led the old law into some of its tangles. But on the whole, they have done much to infuse simplicity and reason (Megarry and Wade, 1966).

The Land Registration Act 1925 proved to be more of a success story than its predecessors, and this success was partly attributable to what Thompson calls the principle of compulsory registration of title (Thompson, 2003). Up until the enactment of the Act, the regime had permitted voluntary registration of title which did not make the land registration system popular.

3.3.2 Title Registration and its development in the nineteenth century

Before considering the substantive effect of the Land Registration Act 1925 on the title registration system, it should be noted that two distinct schools of thought were developing at the same time. Simpson refers these two schools as the battle between theory and practice: private conveyancing reform versus registration of title. Registration of title was successful in theory but in practice, it proved to be difficult to establish, while private conveyancing was accepted in practice and it was difficult to replace it completely (Simpson, 1976). Chapter one of this research has outlined the conveyancing process and reiterated that the registration

process is in fact the end product of the conveyancing process, and this may not be a suitable interpretation for this historical development in England, since registration was voluntary. It would be more appropriate for the Zambian situation where private conveyancing has not been possible without registration of deeds.

The Land Registration Act 1925 and the Law of Property Act, simplified and codified existing land law in England, and further built on the system of title registration which was in existence before the nineteenth century (Cooke, 2003). The concentration for this research is not the Law of Property Act which is the substantive land law but the Land Registration Act of 1925 which provides for the system of registration of title to land. Further, this research will not attempt a complete analysis of the entire Act but will identify the provisions within the Act that will serve as valuable comparator with the LDRA in Zambia. It should be noted that the English Act of 1925 has now been repealed and replaced by the Land Registration Act 2002, but it is necessary to outline the essential framework provided in the 1925 Act which has remained in the new Act. Thompson articulates the old Act with reference to the new Act by stating:

Despite this new legislative reform, the system put in place by the 1925 legislation still remains the bedrock upon which modern land law is based. Although the 2002 Act will, for the future, be the principal piece of legislation relating to land ownership in this country, a good deal of the theoretical underpinning of the subject will remain that provided by the 1925 legislation (Thompson, 2003, p.61).

3.3.3 The seventy-five year journey of the Land Registration Act 1925.

The Land Registration Act 1925 was introduced at a time when title registration and its legislative framework existed in England. There were two main points to be considered under the Act firstly, the absence in the previous legislation for an indemnity fund to pay out compensation for errors in the register (Cooke, 2003). Secondly, that registration was on a voluntary basis and there would be no requirement to register if there was no transaction regarding that particular property or parcel of land. Even where there was a transfer of property, it could be carried out under what was called private conveyancing. At that time, registration was also considered to be expensive due to the standard of title to be proved and the rigid procedure involved (Cooke, 2003).

There is need at this stage to point out the difference between the two systems of conveyancing in relation to the registration process in England. One was registered conveyancing and the other was unregistered or private conveyancing. The difference

between them can be explained with regard to a property transaction and the manner in which the vendor of a property proved his ownership to the intending purchaser. Under the unregistered system, the vendor will prove ownership by establishing that he had undisturbed possession of the property for a long period of time. This is done by the production of the documents known as conveyances. Collectively, these documents are called, 'title deeds' (Butt & Duckworth, 2008/2009). To show proof of ownership, there must be no missing link in the chain of documents. The major setbacks of this system were its cumbersomeness, expense and repetition every time a property transaction occurred, including time consuming work to establish title.

In order to address all these setbacks, a registered conveyancing system was introduced. Under this system, the government establishes and maintains a register of title to land and every time a transaction affecting that piece of land takes place, there is need to notify the registry. The amending details are then entered and recorded against the title to that particular piece of land. This meant that the intending purchaser only had to search the register to confirm the information regarding that particular piece of land. "A register of title is an authoritative record, kept in a public office, of the rights to clearly defined units of land as vested for the time being in some particular person or body and of the limitations, if any, to which these rights are subject" (Simpson, 1976, p.16).

The choice between registered and unregistered conveyancing did not provide the solution for land registration in England. There was need (as Lord Birkenhead who become the Lord Chancellor decided to set up a committee) to overhaul land law and the systems of land transfer. The Committee which was set up,

.....agreed unanimously that the existing Law of Real Property is archaic and unnecessarily complicated and that no great improvement in the existing systems of transfer of land whether registered or unregistered can be effected until the Law of Real Property has been radically simplified (Fourth Report of the Committee, (1919).

Thus the Land Registration Act 1925 was enacted for a framework to support titles registration for registered conveyancing in England.

The question that required addressing was, Whether the Land Registration Act was a success story in addressing the problems of unregistered conveyancing identified above? The answer is that some authors are not convinced and have concluded that registered systems make conveyancing more expensive without any useful improvement in the quality of titles.

(Smith, 2000). The same author has, in the new edition of his book, shown that registration is good but it is more expensive when compared with unregistered conveyancing because of Land registry fees. On the issue of speed and efficiency, the author is not convinced that there was much improvement (Smith, 2003).

The Land Registration Act 1925 was repealed and replaced by the Land Registration Act 2002 and it was brought into force in October 2003. The principal Act is divided into twelve parts and has thirteen schedules attached to it. Writing about the Act and the changes that it proposes, Cooke making reference to the consultative papers preceding its enactments, states:

But the 2002 statute is designed to change more than the procedure for sale and purchase. The consultation paper that preceded it announced that one of the objects of reform would be to bring about acceptance, of ‘not a system of registration of title but a system of title by registration. The new law will continue a process which can be seen to have taken place throughout the twentieth century, whereby land registration has gradually changed the nature of ownership of land (Cooke, 2003, p.1).

Commenting further on the better drafted provisions in the 2002 Act as compared with the 1925 Act, Thompson making reference to the reports of the law commissions, agrees that the changes will modernise land registration and reshape land law by stating:

For over seventy-five years, the law governing land registration was underpinned by the Land Registration Act 1925, as amended. Pursuant to a joint report by the Law Commission and the Land Registry, a radical overhaul to the system was proposed. Following consultation, a further joint report was published, entitled: *Land Registration for the Twenty First Century: A Conveyancing Revolution*. As the title to this report suggests, the changes introduced are intended to be substantial and these changes have now been implemented by the Land Registration Act 2002. While it may be an overstatement to say that the changes made by the Act....., it is undoubtedly the case that the Act and, in particular, the introduction of compulsory electronic conveyancing, which will be implemented in several years’ time will reshape the terrain of modern land law (Thompson, 2003, p.94).

It is clear from the above discussion that the LRA 2002 is a well drafted legislation to support land registration systems in the modern era. The next part looks at the detailed provisions of the Act as they relate to the three principles of the Torrens system.

3.4 Land Registration Act 2002 as it relates to the mirror, curtain and insurance principles of Torrens system

In England, the period from 1980 to 1995 marked the beginning of turmoil between the Law Commission and the land registry. Mainly due to lack of political support, the reforms to the legislative framework existing under the LRA 1925 resulted in a fifteen year struggle before

the enactment of the LRA 2002. The first two reports of the Law Commission advocated for reforms in the existing title registration systems, while the third report suggested substantive changes to the legislative framework under the LRA 1925. The fourth and final report included changes to the Land Registration Bill which would repeal the LRA 1925 (Great Britain, Law Commission Report, 1986-7). It was only in 1988 that the Law Commission and the Land Registry joined hands and their efforts was the production of a report introducing substantial changes resulting in the enactment of the LRA 2002 (The report was entitled: *Land registration for the Twenty First Century: A Conveyancing Revolution*, 2001).“What ensured the passage of the Land Registration Act 2002 through Parliament were its provisions for electronic conveyancing” (Cooke, 2003, p.31). Electronic conveyancing is beyond the scope of this research but it is worth mentioning that at the time of writing this research in 2014, there are no positive signs of hope that the electronic conveyancing system is up and running in England. Kelway, commenting on electronic conveyancing stated that it is more of a dream than reality in England (Kelway, 2009).

The LRA 2002 makes several major reforms to the law regulating registered land and modernizing the badly drafted, unclear and complicated LRA 1925. In addition, the 1925 Act had been on the statute books for nearly three-quarters of a century, which meant that there was need to repeal and replace it in its entirety with a modern version. The Law Commission’s consultative document stated:

Furthermore, after nearly three-quarters of a century on the statute book, a number of practical difficulties have arisen with the present legislation that need to be remedied. Some of these require significant changes to the legislation (Great Britain, Law Commission Consultative Document, 1995, para1.4).

The background information to the enactment of LRA 2002 shows clearly that the purpose of the legislation was to create an electronic conveyancing system for titles registration. The Act under Part 8 bears the heading, ‘Electronic Conveyancing,’ proclaims the purpose of this statutory enactment (LRA 2002, sections 91 and 93). In addition to this, the fundamental objective of the Act is the creation of a register which is ‘a complete and accurate reflection of the state of the title of land at any given time’ (Dixon, 2010). The LRA 2002 also presents major reforms to substantive land law and principles such as adverse possession which are separate but connected to registration. The purpose of this research is not to analyse the entire Act but to consider the same principles which informed the LRA 1925 regulating the three principles of the Torrens system that have now been embodied more ambitiously in LRA

2002. The three principles being the ‘mirror’, ‘curtain’ and ‘insurance’ that were initially derived from the Torrens system and imported into the English system (Ruoff, 1957). The aim of the next part is to analyse the legislative provisions of the LRA 2002 as they reflect the three principles stated above.

3.4.1 LRA 2002 and its pursuit of the mirror, curtain and insurance principles

The mirror, curtain and insurance principles are the product of the common ancestor to LRA 1925 of England and the Real Property Act 1858 enacted to support the Torrens system of titles registration. As explained above, this research is not a comparative analysis of English and Torrens system of title registration but a reflection of how the three principles of the Torrens systems are provided for under the LRA 2002. Simply explained, the mirror principle is that the register should reflect or mirror all rights and interests regarding title to registered land. This principle was reaffirmed in a joint report leading to the enactment of the LRA 2002 in the following terms:

The fundamental objective of the [Act] is that, under the system of electronic dealing with land that it seeks to create, the register should be a complete and accurate reflection of the state of the title to land at any given time, so that it is possible to investigate title to land, with the absolute minimum of additional enquiries and inspections (Great Britain, Law Commission Report, 2001, para.1.5).

3.4.2 Mirror Principle

The three principles of the Torrens are inter-dependent and linked in many aspects, and the curtain principle espoused below overlaps to some extent with the mirror principle. Under the mirror principle, the register book reflects all facts material to an owner’s title to land. In the case of *Registrar of Titles (Vic) v. Paterson (1876)*, the court explained the mirror principle: “[T]he register book reflects all facts material to an owner’s title to land. Nothing that is not actually registered appears in the picture but the information that is shown is deemed to be both complete and accurate...” (*Registrar of Titles (Vic) v. Paterson 1876*, p.117).

The mirror principle outlines that the register should reflect or mirror all rights and interests regarding a title of registered land as long as they are required to be registered. There are two things that do not appear on the register, interest that are incapable of registration such as land held on trust, and secondly interests that may not be registered such as an equitable mortgage. What is deemed under the mirror principle is that the information which is shown

is both complete as well as accurate” (Ruoff, 1952). “But although the register is deemed to be both correct and complete in fact it is never perfect in either respect”(Ruoff, 1952, p.119).

The mirror principle has two angles to it depending on whether it is viewed by the purchaser or the proprietor (owner of the land). The purchaser has been given due attention above but what does registration mean to the proprietor? When she looks at the register, the entire story about the rights and interests are not available by simply inspecting the register. There are matters that may be exempted from being registered such as an equitable mortgage which remains unregistered and unprotected but bind the proprietor through a contractual agreement (Cooke, 2003). To the proprietor, a further distinction of value is whether the land is subject to first registration or registration of disposition. “But different considerations apply to first registration from those operative on the registration of a disposition of already-registered land” (Cooke, 2003, p.86).

First registration is provided for under LRA 2002, Section 11 which replaces Section 5 of LRA 1925 and bears the title ‘effects of first registration’:

- (1) This section is concerned with the registration of a person under this Chapter as the proprietor of a freehold estate.
- (2) Registration with absolute title has the effect described in subsection (3) to (5).
- (3) The estate is vested in the proprietor together with all interests subsisting for the benefit of the estate.
- (4) The estate is vested in the proprietor subject only to the following interests affecting the state at the time of registration-
 - (a) interests which are the subject of an entry in the register in relation to the estate,
 - (b) unregistered interests which fall within any of the paragraphs of Schedule 1, and
 - (c) interests acquired under the Limitation Act 1980 (c.58) of which the proprietor has notice.
- (5) If the proprietor is not entitled to the state for his own benefit, or not entitled solely for his own benefit, then, as between himself and the persons beneficially entitled to the estate, the estate is vested in him subject to such of their interests as he has notice of.
- (6) Registration with qualified title has the same effect as registration with absolute title, except that it does not affect the enforcement of any estate, right or interest which appears from the register to be excepted from the effect of registration.

(7) Registration with possessory title has the same effect as registration with absolute title, except that it does not affect the enforcement of any estate, right or interest adverse to, or in derogation of, the proprietor's title subsisting at the time of registration or then capable of arising (Section 11 LRA 2002).

Cooke, espouses the interpretation of Section 11 as not only what the effect of first registration is but also the mirror principle and the reflection of the title on the register on first registration. ".....the effect of registration as proprietor of a freehold estate is that the estate is vested in the proprietor 'together with all interests subsisting for the benefit of the estate'" (Cooke, 2003, p. 86). Thompson emulate the exceptions to Section 11 as read together with Schedule 1 of LRA 2002 which outlines unregistered interests which override first registration which amongst others include interests of persons in actual possession. The summation of the two provisions, Section 11, Subsections (3), (4) and (5) as read together with Schedule 1 of LRA 2002 brings forth the position of the registered proprietor on first registration.

This provision is fundamental to the working of the system. It operated at two levels. First, it has a credit side, stipulating what it is that the statute gives to the registered proprietor, and, secondly, making clear the rights to which he takes subject (Thompson, 2003, p.109).

Property law is based on a general rule under contractual principle that one cannot give what one does not own expressed in a Latin maxims *nemo dat quod non habet*. This means that if the owner or proprietor of a parcel of land does not have title to that land or if he purports to convey more than what she owns, the transfer is void or has no legal effect. This is where an exhaustive search of the chain of title in the case of deeds registration system and the search of the register in the case of titles registry, will not give the purchaser complete security due to the *nemo dat* rule. There are several examples of defects of title that will not be revealed by a search. These may include deliberate removal of documents from the chain of title, purported fraudulent conveyance of title, cases where the conveyance was void due to forgery and incorrect or incomplete documents where interest purporting to be conveyed has failed to pass from the vendor to the purchaser of the property (Edgeworth, Rossiter, Stone,. & O'connor, 2012).

The legislative structure under the LRA 2002 also creates a major exception to the *nemo dat* rule. Judicial interpretation of what Thompson correctly asserts as "the statutory magic" was stated in the case of *Re 139 High Street, Deptford*, (1951). The facts of this case involved a conveyance of a shop together with an annexe. The purchaser was registered as the proprietor

with an absolute title of both the shop and the annexe. It was later discovered that the annexe did not belong to the Vendor but to a third party. The third party applied to court to secure the rectification of the register so that the land (comprising the annexe) could be returned to him. The action by the third party succeeded and the proprietor in this case, the purchaser, was deprived of the annexe. The effect of section 5 of the LRA 1925 was undone and it was ordered that the register be rectified. The proprietor was entitled to compensation for the loss he had suffered as a result of the rectification. This point will be elaborated further under the insurance principle of the Torrens system discussed below.

“The point for present purposes, is that what was once termed “the statutory magic” had operated to vest the registered proprietor the legal estate to the land, even though the person who had purported to transfer the land to him did not own the land which he had purported to convey” (Thompson, 2003, p.109). The effect of “the statutory magic” has been given statutory approval under the LRA 2002; Section 58(1) which is on conclusiveness of the register and provides that: “If, on the entry of a person in the register as the proprietor of a legal estate, the legal estate would not otherwise be vested in him, it shall be deemed to be vested in him as a result of the registration.”

One major issue not addressed by both the statutes being the LRA 1925 and the current law LRA 2002 is equitable interest. Thompson alluded to this problem stating that: “.....the fact of registration is conclusive as to the location of the legal title; it is vested in the registered proprietor. Unfortunately, neither the old nor the new Acts dealt explicitly with the ownership of the equitable title” (Thompson, 2003, p.110). Cooke commenting on the two principles of the Torrens system states that title registration functions as a mirror and a curtain in which the mirror reveals while the curtain hides (Cooke, 2003). She further alludes that; “The strange thing about this mirror is that it is an active one; what it reveals has been made true, at least to some extent, by the register itself” (Cooke, 2003, p.53). Therefore whoever is indicated by the register to be the registered proprietor does have vested in him that legal estate even where the wrong person is registered due to an error, forgery or fraud? Section 58 of LRA 2002 makes no reference to equitable interests and rightfully so simply because registrable estates are legal estates only.

The mirror principle in summary uses the central registry where each parcel of land is recorded to operate as a mirror which accurately and completely reflects all legal interests in the land material to the owner’s title. The curtain principle states that the purchaser should

not in fact concern himself with trusts and other equitable interests lying behind the curtain of the register. Statutory provisions under the LRA 2002 anchored around the mirror principle, have been outlined above while legislative enactments supporting the curtain principle will be discussed under the next subheading.

3.4.3 Curtain Principle

The curtain is the second principle of title by registration and states that one should not go behind the register to discover interests in the land. The curtain principle means that the register is the sole source of information for anyone who wants to buy the property and they need not be concerned with trusts and equities which lie behind the curtain (Ruoff, 1957). The manner in which the “curtain” operates in practice has been aptly described by Stein as follows:

I remember Mr Justice Chitty, in his judgment in some case – I think *Corrutt v. Real Person Advance Co.* (42 Ch. D. 263) describing the curtain as follows: ‘You shut your eyes very tight and pretend you don’t see. ’I do not think this remark got into the printed report, but it very vividly described this game of pretence, or of deeming one thing to be another. Still this game of pretending that you can’t see behind the curtain, or of deeming one thing to be another is quite effective and useful provided you don’t play tricks with high explosives (Stein, 1983).

The true title may not be revealed by the register but it is understood that equitable interests are not to be recorded on the register unless the status specifies. This means that ownership is simplified by the doctrine of the ‘curtain.’

The curtain principle hinges on simplicity and to ensure simplicity in the operation of the Torrens system, none can be more effective than a proper application of what the writer has called the curtain principle (Ruoff, (1952). The curtain principle is one of the main devices to ensure simplicity in the operation of the Torrens system and this fact has even received judicial recognition by an Australian court: “The register was not to present picture of legal ownership trammelled by all sorts of equitable rights in others, which those who dealt with the registered proprietor must take into account” (per Rich and Evatt, JJ., in *Wolfon v. R.G. of New South Wales*, 1934, p. 308).

The question is, How does the LRA 2002 provide for and support the curtain principle? It does this by setting out its aims and extending the scope of rights which are registrable. Section 2 of the LRA which is entitled scope of title registration, lists those estates that can be registered:

This Act makes provision about the registration of title to-

- (a) Unregistered legal estates which are interests of any of the following kinds-
 - (i) An estate in land
 - (ii) A rentcharge
 - (iii) A franchise
 - (iv) A profit a prendre in gross, and
 - (v) Any other interest or charge which subsists for the benefit of, or is a charge on, an interest the title to which is registered; and
- (b) interests capable of subsisting at law which are created by a disposition of an interest the title to which is registered (Section 2, LRA 2002)

The above section provides for first registration of certain unregistered legal estates and what has been termed by Cooke, next-generation registration where registration arises from registered estates (Cooke, 2003). The meaning of 'legal estate' under the general interpretation section 132 has been maintained from the Law of Property Act 1925 despite the promise by the Law Commission to include a statute specific definition of 'estates and interest' (Great Britain, 2001 Law Commission consultative doc. Para.3.4) Two obvious problems remain; firstly, it makes the drafting of section 2 unpleasant by cross referring between statutes drafted at the interval of seventy-seven years. Secondly, interpretation of section 2 may pose problems with the inevitable amendment or repeal of the LPA 1925 in the near future to reconcile it with LRA 2002.

It should be emphasised that what is registered is not the land itself, but the title to the land (refer to chapter two for definitions and explanation of the terms used in Land Law as they relate to land registration). There is need to separate registration with an independent title and registration of matters that affect that title (Thompson, 2003). What this entails is that title to the land can be registered, legal estates in land can be registered as well as other interests in land can be substantively registered with a separate title (LRA, 1925, S2). The scope of what can be registered under the LRA2002 has been expanded to include rentcharge, a franchise, and a *profit a prendre* in gross. The three terms require brief explanations so that they can be clear how expanding the scope of what can be registered has a bearing to the curtain principle. "The rentcharge is a sum of money payable on a freehold" (Cooke, 2003, p.37). Freehold tenure has been described in this research under chapter two in detail. The general interpretation Section 132 of LRA 2002 does not provide definitions of the three terms stated above but guidance can be sought from the judicial definition of a franchise. A franchise is "a royal privilege or branch of the royal prerogative subsisting in the hands of a subject, by grant from the King" (*Spook Erection Ltd v. Secretary of State for the Environment*, 1989, at p.305

per Nourse L.J.). Once again, the historical development of land and the complex position of the grants from the King feature into the statutory provisions of the law. For a profit a prendre, the Law Commission's report did provide a definition and an example to clarify its meaning. A profit on the other hand is a right to take something from someone else's land such as fish or game and this right can exist as a right per se separately from ownership of land (Megarry, and Wade, 1966). These rights can now be registered in England with their own titles but they are subject to voluntary and not compulsory registration. This concept fits well into the curtain principle in that more rights are brought on the register resulting in a complete record, and an intending purchaser of land need not go behind the register to discover those rights and interests in land.

On first registration of title, the LRA 2002 makes a distinction between what is termed voluntary registration under Section 3 and compulsory registration under Section 4. Of relevance to this research is a specific subsection under compulsory registration, section 4(1)(c)(i) which states: "The requirement of registration applies on the occurrence of any of the following events-

(a).....

(b).....

(c) the grant out of a qualifying estate of an estate in land-

(i) for a term of years absolute of more than seven years from the date of the grant....."

This section provides that a lease granted for more than seven years must be registered. Under the previous statute, the LRA 1925, only leaseholds of 21 years or more had to be registered. The clear effect of change in the statutory provisions is that more proprietary interests can be brought onto the register, thereby making the record even more complete and thus reducing the need to go behind the curtain.

Section 3 provides the basis for voluntary registration of the estates that re-listed under subsections 1 to 7. Details of the nature of the estates is beyond the scope of this research. The issue of concentration for this research relates to the change that comes through the legislative provision governing Crown Land under Part 7 of LRA 2002, more specifically, Section 79. It was a theory of the feudal era that all land is ultimately held by the Crown.

Since land registration provisions are based on registration of estates, the Crown could not be registered as the proprietor of a particular parcel of land in England. Due to this, ancient lands of the Crown were not registered as freeholds and there are in fact large tracts of land in England held by the Crown and no one has an estate in that land, and the Crown holds the land in demesne. Demesne Crown land is land belonging to the sovereign personally, or to the government as distinguished from private ownership of land (Garner, 1999). The change to the legislative provisions comes in the form of voluntary registration of demesne Crown land. Under LRA 2002, this is provided for under special cases and Section 79 which is headed 'voluntary registration of demesne land'. Section 79 solves the problem of demesne Crown land by enabling Her Majesty to grant an estate in fee simple absolute in possession out of the demesne land to herself (Thompson, 2003). In addition, section 79 lays down the procedure and the manner of the application as read together with Section 3 which addresses the question when title may be registered. Section 79 states:

- (1) Her Majesty may grant an estate in fee simple absolute in possession out of demesne land to Herself.
- (2) The grant of an estate under subsection (1) is to be regarded as not having been made unless an application under section 3 is made in respect of the estate before the end of the period for registration
- (3) The period for registration is two months beginning with the date of the grant, or such longer period as the registrar may provide under subsection (4) (Section 79, LRA, 2002).

The position of the law before the LRA 2002 was demonstrated in the case of *SCMLLA Properties Ltd v. Gesso Properties (BVI) Ltd*, 1995, which involved land that had reverted back to the Crown by escheat. The process was applied when land ownership reverted back to the lord when the immediate tenant died without heirs. In this case, there was an attempt to purchase land which had vested in the Crown as an automatic escheat following the disclaimer of freehold land. Under the LRA 1925, the legislative provision permitting the Crown to hold land was not provided for. Disallowing the registration of the land, Stanley Burnton QC stated that a major lacuna in the system of land registration in England rested on the fact that the Crown cannot hold land of itself and that the land registry is only empowered to register title to estates in land. It is for this reason that the ancient lands of the Crown are not registered as freeholds. (Gray & Gray, 1998).

It is significant, for instance, that the ancient Crown lands could not be registered as freehold titles under the statutory regime provided by the LRA 1925 -- "a major, but unremarked,

lacuna in the system of land registration in England and Wales" (*Scmla Properties Ltd v Gesso Properties (BVI) Ltd*, 1995 793 at p.798). The Crown cannot hold land of itself; and the Land registry is empowered to register title only to "estates" in "land", the latter term statutorily requiring the existence of "tenure" (Land Registration Act 1925, ss 2(1), 3(viii)). The LRA 2002 has now addressed this lacuna in the system of land registration by the provision of Section 79 quoted above. Once again, this legislative provision has brought the curtain principle into focus by allowing more rights to be brought on the register so that the intending purchaser need not go behind the register to discover interests in land.

As explained under the mirror principle, the register becomes the only source of information and the intending purchaser need not be concerned with any trusts or equitable interests that may lie behind this curtain. The curtain principle can draw its analogy from the veil of incorporation in Company Law. This is where a curtain is drawn between an artificial legal entity and its members or directors to protect the company from liability in cases of fraud and abuse of powers by its owners and managers. In the same vein, the curtain principle under the Torrens's system would serve to protect the intending purchaser from hidden interest that cannot be discovered by a simple search of the register. The register serves as a screen and keeps information that the purchaser does not need hidden. Cooke describes this implication as those trusts and equitable interests that cannot in anyway affect the intending purchaser of land (Cooke, 2003). Trusts and equitable interests fall within the realm of substantive property law and therefore beyond the scope of this research.

The third and final principle of the Torrens system of titles registration is the insurance principle. The insurance principle holds that if the mirror of title gives an incorrect or incomplete reflection by which loss is incurred the state will compensate that person. The next subheading will detail the insurance principle and its reinforcement through the statutory provisions of LRA 2002.

3.4.4 Insurance Principle

The third pillar of the Torrens system has been called the Insurance principle by most of the academic writers on the Torrens title registration but in the Australian jurisdiction it is referred to as the assurance fund which is basically used to settle successful claims under the insurance principle (Stien, 1983). Ruoff has described the Insurance principle as: ".....that the register is deemed to give an absolutely correct reflection of title but if, through human

frailty, a flaw appears, anyone who thereby suffers loss must be put in the same position, so far as money can do it, as if the reflection were a true one” (Ruoff, 1957, p. 13).

The insurance pillar ties in well with the first principle being the reflection of the register under the mirror principle. This link is accurately stated by Ruoff as well as Thompson in the following assertions: “Primarily it warrants that if the mirror of title gives a specious or an incomplete reflection by reason of which someone incurs a loss that cannot otherwise be made good, the State will recompense him” (Ruoff, 1952, p. 194). Compared with: “This is that the state provides a guarantee of the accuracy of the register and will compensate any person who suffers loss as a result of any errors contained in it” (Thompson, 2003, p. 95). Cooke’s summation of the two views presented above states that it is a myth to have what she calls an ‘ideal title register’, that most title registers are incomplete and vulnerable to human error and fraud and therefore it is impossible to have a complete mirror of title.

In fact it should be noted that the three principles of the Torrens title registration are closely interlinked and the distinction between them is a fine line. The purpose of presenting the three principles separately in this chapter is not to identify the differences between them but to show how the legislative provisions under LRA 2002 relate to the three principles. The insurance principle as described above is that once title is registered, it is guaranteed by the state and supported by a statutory scheme of indemnity. It is for this reason that this principle under the Torrens Act and not the system has been termed as ‘assurance’ rather than ‘insurance’.

Under the insurance principle, if for some reason the mirror of title gives an incomplete reflection and loss occurs due to this, the state will provide monetary compensation. When the state compensates, there is a conversion of a legal right into cash for the person deprived to be put in the same situation as before, so far as money can do it, as if the wrongful act had not taken place. This principle was laid down in the case of *Registrar of Titles v. Spencer (1909)*. The unfortunate part is that an action based on this principle would fail in the case of a forged transaction due to a lacuna in the law. In the case of *Gibbs v. Messer and Others (1891)*, the case involved the name of a registered owner having been removed in favour of a fictitious and non-existing transferee as a result of a forged transfer; a mortgage purporting to have been executed by such transferee was subsequently put upon the register by bonafide mortgagees. In an action by the true owners against the registrar, the mortgagees and the perpetrator of the fraud, it was decided that the plaintiff’s name must be restored to the

register. Furthermore that the mortgage was invalid and did not, in favour of the mortgagee, constitute an encumbrance of the plaintiff's title.

The only case where the insurance principle cannot be successfully applied is where forgery is proved. This research will answer two questions firstly, how the insurance principle is reflected in the LRA 2002 and secondly, whether cases of forgery remain as an unfilled lacuna in the new legislative provisions. Ruoff provides a neutral answer by suggesting that the lacuna in the law does not in any way undermine the excellence of the insurance principle under the Torrens system (Ruoff, 1952).

The answer to the question on the insurance principle reflected in the LRA 2002 is found under Section 103 entitled 'Indemnities'. The section does not provide any statutory guidelines but brings into effect Schedule 8 whose subheading is 'entitlement' and states as follows:

1(1) A person is entitled to be indemnified by the registrar if he suffers loss by reason of-

- (a) rectification of the register,
- (b) a mistake whose correction would involve rectification of the register,
- (c) a mistake in an official search
- (d) a mistake in an official copy
- (e) a mistake in a document kept by the registrar which is not an original and is referred to in the register,
- (f) the loss or destruction of a document lodged at the registry for inspection or safe custody
- (g) a mistake in the cautions register, or
- (h) failure by the registrar to perform his duty under section 50.

(1) For the purposes of sub-paragraph (1)(a)-

- (a) Any person who suffers loss by reason of the change of title under section 62 is to be regarded as having suffered loss by reason of rectification of the register, and
- (b) The proprietor of a registered estate or charge claiming in good faith under a forged disposition is where the register is rectified, to be regarded as having suffered loss by reason of such rectification as if the disposition had not been forged.

- (2) No indemnity under sub-paragraph (1)(b) is payable until a decision has been made about whether to alter the register for the purpose of correcting the mistake; and the loss suffered by reason of the mistake is to be determined in the light of that decision (Schedule 8, LRA, 2002).

Considering the overall effect of the LRA 2002 it is to provide certainty as to the ownership of land and indemnity arises in cases where rectification was done due to mistake. (Thompson, 2003). Alteration to the register is covered by discretionary indemnity for both loss suffered as a result of rectification, and also loss as a result of refusal to rectify (LRA 2002, Sched.8, and para.1). Illustrating this point is the case of *Re 139 High Street, Deptford (1951)*, involving indemnification of loss due to rectification of the register. The case arose because a wrong person had been registered as the proprietor of an annexe of the parcel of land. The property was then restored to the person who had title. An example of the insurance principle can be amplified by distinguishing title that is registered and title that is not registered. Thompson commented thus when making reference to the case of *Re 139 High Street, Deptford (1951)* as follows:

The position contrasts with that which pertains when title is unregistered. In that case, if a person had purported to convey land which he did not own, the conveyance would have had no effect and the purchaser would have paid money but got no title to the land. Where title is registered, he first gets title to the land and, if he is deprived of that land, by rectification, he is compensated from public funds; an example of the insurance principle (Thompson, 2003, p.154).

Of relevance to the concept of entitlement to be indemnified is the distinction between rectification and alteration of the register. The LRA 2002 attempts but does not succeed to make the distinction under Schedule 4.1 by stating: “In this Schedule, references to rectification, in relation to alteration of the register, are to alteration which-

- (a) Involves the correction of a mistake, and
- (b) Prejudicially affects the title of a registered proprietor.”

“Schedule 4 makes provision for the register to be altered’ and certain instances of alteration are defined as ‘rectification” (Cooke, 2003, p.122).

Rectification means the correction of a mistake that affects the title which the registered proprietor is holding, causing loss. Indemnity is paid if loss is caused by that rectification under Schedule 8. Cooke’s analysis of the special provisions relating to the rectification of the register is to deal with mistakes. She states that mistake has not been defined by the Act

but the intention that comes out clearly from this statutory provision is that mistake does not only include innocent errors but a forged transfer is also a mistake under Paragraph 2(b) of Schedule 8 Cooke, 2003).

To answer the second question, the only reference that schedule 8 makes regarding a forged disposition is under paragraph 1 2(b). Thompson articulates a possible interpretation of this provision as read together with Schedule 4 in the following words:

Schedule 8, paragraph 1(2)(b) provides that the proprietor of a registered estate or charge claiming in good faith under a forged disposition is, where the register is rectified, to be regarded as having suffered loss by reason of such rectification as if the disposition had not been forged. To give this section any effect, it would seem necessary to hold that the “disponee” of the fraudulent transfer comes within it, despite the fact that rectification of the register, in the technical sense set out in Schedule 4, has not occurred (Thompson, 2003, p. 155).

Transfers of land involving forgery or fraud are an exception to the insurance principle and further explanation regarding the exceptions is beyond the scope of this research.

In summary the insurance principle states that if the mirror of title gives an incorrect reflection and as a result a person incurs loss, that loss should be met by the state (Giggs, 2001). Transactions relating to land secured by fraud or forgery are an exception to the insurance principle and continue to remain so under the LRA 2002.

3.5 Deeds Registration: a critical appraisal of statutory provisions in Zambia

Though Zambia was colonized by the British, it did not inherit the system of registration of title which was introduced on a voluntary basis in England in 1862 and to-date, Zambia still continues to operate a Deeds registration system. The purpose of this part is not to compare the titles registration and the Deeds registration systems which have been covered under chapter two. It suffices to recap the two main problems faced by the deeds registration system before answering the question why Zambia operates a deeds registration system and not a titles registration system. In addition, this part shows how the current legislative provisions under the Lands and Deeds Registry Act (LDRA) reflect the mirror, curtain and insurance principle of titles registration.

In post-independence Africa, the general trend was that the new rulers did not change the law received from their departing imperial overlords. To this date in the 20th century, countries such as Zambia have maintained the inherited laws with little or no substantial changes. Seidam has aptly commented on this stagnation in Africa generally by stating that what has

been repealed is in fact only the ‘blatantly discriminatory statutes (Seidam, (1984). Accordingly, vast areas of the law remain the same as the ones that were inherited and the courts continue to refer to English precedent for guidance. This statement is of general application but it is more prominent in private law areas such as property law ((Seidam, (1984).

“Grants of land and dealings in land are effected by means of documents which are drawn in compliance with the formalities required by English law as applied in Zambia”(Mudenda, 2007, p.613). The statement above confirms that even though England operates a titles registration system and Zambia operates s deeds registration system, they both share the conveyancing documents and formalities to transfer interest in land. The remnants of the application of English common law, doctrines of equity and English statutes enacted before 17th August 1911 have been a subject of academic debate. Notable is the critique by Harchard and Ndulo.

For a statute of such fundamental significance Chapter 4 is uncomfortably vague. There is doubt about the significance of the 1911 date, about precisely which pre-1911 English statutes are applicable, about what the doctrine of equity means and most of all there is doubt about whether it embraces the law as developed in the common law jurisdictions other than England. It is possible to argue that the law referred to can include only English Common Law. The history of the enactment supports this view although past history is increasingly of questionable significance in the circumstances of Zambia (Harchard and Ndulo, 1985).

Common law and equity still continue to be applied in matters of property law in England as well as Zambia. Megarry and Wade commented in relation to England that even in the realm of wide statutory provisions, understanding the content of property law requires the principles of common law and equity upon which the statutory framework has been overlaid (Megarry and Wade, 2000). This is equally true for Zambia (Mudenda, 2007).

3.5.1 Deeds registration under the Lands and Deeds Registry Act (LDRA)

The legislative framework supporting the deeds registration system in Zambia is based on the Lands and Deeds Registry Ordinance, which came into operation on 1st November 1914. This Ordinance went through a major amendment on 1st May 1944 and forms the basis for the current Lands and Deeds Registry Act.

There are four objects of the legislation as determined from its preamble. Firstly, it was to provide for the registration of documents and secondly, to provide for the issuance of

certificate of title and provisional certificates of title. The third objective is to provide for the transfer and transmission of registered land and lastly, to provide for matters related to the three objectives stated above (Long title of the LDRA). This can be compared with the objects of reforming the law of land registration in England under the LRA 2002. The objectives have been adopted from a statement made by Barwick CJ in an Australian case. Firstly, it was to revolutionize conveyancing and secondly, to bring about acceptance of ‘not a system of registration of title but a system of title by registration’ (Breakvar v. Wall, 1971). The major differences between the two legislative objectives are firstly, the distinction between the two registries: deeds and titles and secondly, the development of the proposed e-conveyancing in England. The Zambian legislation provides for the registration of documents and therefore establishes a registry of deeds. The deeds registry and its operations have been explained under chapter 4 of this research.

3.5.2 The Deeds Registration system in Zambia as it relates to the mirror, curtain and insurance principles of Torrens system

Unlike the previous discussion of the English titles registration and the three principles of the Torrens, the Zambian situation is different since the registration system is a deeds registration system. The focus of this discussion will not be the titles registration and the deeds registration but it will be the three principles of the Torrens system and their reflection in the LDRA in Zambia. Each of the three principles will not be considered separately as was the case when looking at the English system but all three principles will be discussed in totality as they are identified within the legislative provisions. The reason for not considering the principles individually is firstly because the system in Zambia is not a titles registration like the one in England but a deeds registration and secondly, the insurance principle is non-existent in the Zambian system. As argued by Hogg, it is a fact the state does not warrant title under a deeds registration system wherever the system operates. “Both in Scotland and South Africa registration is essential to the passing of property in the land conveyed, though there is no state warranty of title” (Hogg, 1918, p.53)

The elements of the three principles of the Torrens system are once again repeated to emphasise their importance and show how they link into the legislative provisions of the LDRA in Zambia. Griggs describes the three principles in simple terms as:

1. The ‘mirror principle.’ This principle arises from the use of a central registry where each parcel of land is recorded in a separate folio in the register. The

- register operates as a mirror to accurately and completely reflect all interests in the land material to the owner's title.
2. The 'curtain' principle. This states that the purchasers of land should not concern themselves with trusts and other interests lying behind the curtain of the register; and
 3. The 'insurance' principle, which hold (sic) that if the mirror of title gives an incorrect reflection and as a result a person incurs loss, that loss should be met by the state (Griggs, 2001,p.).

The link between the three principles is that the register must be accurate and complete, thus reflecting all interests in the land to the owner's title and the purchaser of that parcel of land need not be concerned with what lies behind the curtain of the register, and lastly if the mirror gives an incorrect reflection, loss arising from that is compensated. This part of the chapter will address the question on how the above statement regarding the three principles is provided for under the LDRA in Zambia.

The LDRA is more ambitious in its pursuit of the mirror and curtain principle but creates a large lacuna as far as the insurance principle is concerned. The LDRA under section 3(1) establishes the registry of deeds in the following terms:

For the registration of documents required or permitted by this part or any other Act or by any law to be registered, there shall be an office styled the Registry of Deeds (hereinafter termed "the Registry") in Lusaka, and the Minister may from time to time direct, by Gazette notice, that there shall be a District Registry of Deeds (hereinafter termed a "District Registry") in such place as shall be in such notice mentioned for any district to be thereby defined (Section 3(1) of LDRA).

Section 3 does not only establish the Registry of Deeds situated in Lusaka but also provides for the establishment of district registries. Exercising the powers vested in him, the Minister responsible for land matters has established a district registry in Ndola. There have been no other district registries established in the country at the time of conducting this research. Since there are only two registries operating for the entire country, it is difficult for land proprietors to travel all the way to the registries in order to register their rights and interests in land. It is for this reason that a large part of the country has parcels of land that are unregistered. Commenting on compulsory registration such as the one in England and its relation to low income countries, Dale and Mclaughlin observe that the result is that it promotes informality since compliance with the laws is a cost that most will not be able to afford (Dale & Mclaughlin, 1999). This statement is well suited to the situation in Zambia where it is difficult and costly to register land rights. The case study in this research under chapter four is limited to the Lands and Deeds Registry in Lusaka only. The reason for

choosing Lusaka is that the system of registration and the process would be better understood by observing a registry that has been established for a long period of time and the procedures have been practically tested as is the case at the registry in Lusaka. The District registry in Ndola has been set up recently and is not yet fully operational to provide a suitable sample for such a study.

The dual tenure system in Zambia has been alluded to under chapter one of this research and it should be emphasised that Land that is subject to registration is state land and not land held under customary tenure (Mandhu, 2000). Developing a registration system for land held under customary tenure is beyond the scope of this research. This is mainly because the nature of rights and interests held under customary tenure have not been accorded their legal status and secondly, at present there is no system of registration of deeds or title for interest under customary tenure in Zambia. The initial step for Zambia would be to develop a sound system for registration of state land which can absorb customary interests in Land as well, once legal rights are clearly legislated upon. Even the Torrens system of title registration is easily adoptable to customary tenure or what in Australia is termed 'indigenous title'. Wallace rightly suggests that: "Torrens principles are compatible with recognition of indigenous titles. The barriers to recognition of indigenous relationships with the land are political and legal, not administrative. The success of the recognition of the indigenous relationship to land is dependent on the political will of the country in question. If the indigenous relationship is accorded legal status, the local administration and recording system can contain the information" (Wallace, 1999). The focus therefore of this research is on statutory land only and the existing deeds registration system which is governed by the legislative provisions under the LDRA.

Understanding the nature of the documents that are required to be registered for rights and interests created under state land are provided for under section 4 of LDRA. Section 4 in part states:

Every document purporting to grant, convey or transfer land or any interest in land, or to be a lease or agreement for lease or permit of occupation of land for a longer term than one year, or to create any charge upon land, whether by way of mortgage or otherwise, or which evidences the satisfaction of any mortgage or charge, and all bills of sale of personal property whereof the grantor remains in apparent possession unless already registered pursuant to the provisions of, 'The North-Eastern Rhodesia Lands and Deeds Registration Regulations, 1905' or "The North-Western Rhodesia Lands and Deeds Registry Proclamation 1910", must be registered within the times

hereinafter specified in the Registry or in a District Registry if eligible for registration in such District Registry (Section 4, LDRA).

Two main points arising from this statutory provision is the use of the word ‘purporting’ in relation to the documents that must be registered and the time limit within which registration should take place. The two issues have received judicial interpretation in the case of *William Jacks and Company (Z) Limited v. O’Connor (in his capacity as Registrar of Lands and Deeds) Construction and Investment Holdings Limited (1967)*. The meaning of the word ‘purport’ from two other English cases, *In re Broad, Smith v Draegar (1901)* where the document before the court was a will which on its face appeared to be validly executed but subsequent evidence could not allow the will to be admitted to probate. However, for other purposes it was held to be a document purporting to be a will. While in *R V. Keith (1855)* which involved the offence of engraving a note purporting to be a bank note, Coleridge, J, said: “.....An instrument purports to be that which on the face of the instrument it more or less accurately resembles.” According to the Judge, the intention of Parliament in using the word ‘purporting’ in section 4 is to relieve the Registrar of the great burden of establishing what in fact is the true nature of any document presented to him. As long as the document appears to the registrar as resembling a valid document which requires registration, he must accept it for registration.

Section 4 of LDRA can be compared with section 3(2) of the LRA 2002 in England. The English statute provides that a person may for registration as proprietor of the land if the estate is vested in him or he is entitled to it. “Section 3 lists the interests in respect of which one may (not must) apply to be registered as proprietor” (Cooke, 2003, p. 39). The comparison shows that under section 4 of the *Zambian Act*, what are registered are the documents and not the estate in land as is the case in England.

Considering the mirror and the curtain principles the link provided in LDRA is under Section 54 which states that a certificate of title issued by the Registrar of Lands and Deeds shall be evidence of proprietorship of land. The section provides that:

Every Provisional Certificate and every Certificate of Title, duly authenticated under the hand and seal of the Registrar, shall be received in all courts of law and equity as evidence of the particulars therein set forth or endorsed thereon, and of their being entered in the Register, and shall, unless the contrary is proved by the production of the Register or a copy thereof certified under the hand and seal of the Registrar, or unless the rectification of a Provisional Certificate is ordered by the Court, be conclusive evidence that the person named in such Provisional Certificate or Certificate of Title, or in any entry thereon, as seized of or as taking estate or interest

in the land therein described is seized or possessed of such land for the estate or interest therein specified as from the date of such certificate or as from the date from which the same is expressed to take effect, and that such certificate has been duly issued (Section 54 LDRA).

The above legislative provision outlines that it is the production of a Certificate of Title issued by the Registrar that will prove proprietorship of land. Judicial interpretation of the above section was given in the case of *Chilufya v. Kangunda (1999)*. The facts of this case involved a property under the description of Lot No. 4 Munkulungwe situated in Ndola. There was no dispute that the property was originally allotted to Mr Chilufya for a period of fourteen years from the 1st of January 1978. Under the Lease attached to the Certificate of Title, Mr Chilufya was required to put up developments on the land for at least K20.000. The state on its part had covenanted that if he did not breach his obligations and paid the survey fees, he would be given a lease for 99 years. There was conclusive evidence to show that there was development on the land amounting to K143 million. At the end of the 14 year lease, the Provincial Lands Officer wrote a request to the Commissioner of Lands as per the required procedure so that a 99 year lease could be issued in favour of Mr. Chilufya. The problem that emerged at that stage was that the 99 year lease attached to a Certificate of Title had already been issued to the Respondent, Mr Kangunda for the same piece of land. Mr. Chilufya was not aware of that and he sued Mr. Kangunda for vacant possession of the land. Mr Kangunda had been assisted by two senior government officers who had given false declarations that no developments had taken place on that piece of land in their letters to the Commissioner of Lands. The judgement on trial was given in favour of Mr. Kangunda and hence the appeal. The reasoning of the trial judge was based on the fact that Mr Chilufya's lease had expired and the title was correctly vested in Mr. Kangunda in accordance with Section 54 of LDRA. Mr. Chilufya was only entitled to compensation in respect of the unexhausted improvements made on the land.

Reversing the decision on appeal, the appellate court reasoned that Section 54 of the Act did not in any way authorise fraud and what in fact had transpired was a clear fraudulent action by Mr Kandunda and the government officers. Considering the effect of the Certificate of Title the court construed Section 33 of the Act. Section 33 aptly states that:

A Certificate of Title shall be conclusive as from the date of its issue and upon and after thereof, notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the President or otherwise, which but for Parts 111 to V11 might be held to be paramount or to have priority; the Registered Proprietor of the land comprised in such Certificate shall except in case of fraud, hold

the same subject only to such encumbrances, liens, estates or interests as may be shown by certificate of title and any encumbrances, liens, estates or interests created after the issue of such certificate as may be notified on the folium of the Register relating to such land but absolutely free from all other encumbrances, liens, estates or interests whatsoever:

- (a) Except the estate or interest of a proprietor claiming the same land under a current prior Certificate of Title issued under the provisions of Parts 111 to V11; and
- (b) Except so far as regards the omission or misdescription of any right of way or other easement created in or existing upon any land; and
- (c) Except so far as regards any portion of land that may be erroneously included in the certificate of title evidencing the title of such Registered Proprietor by wrong description of parcels or of boundaries (Section 33 LDRA).

The court concluded that fraud will vitiate the certificate of title. In arriving at that decision the court held that: “Section 54 of the Lands and Deeds Registry Act does not authorise fraud and this was a clear case of fraud. The law contemplates that fraud will vitiate a certificate of title” (*Chilufya v. Kangunda, (1999), p.166*). This would mean that the Certificate of Title will have no force or effect and the registered proprietor will not be protected.

The legislative provisions under Section 54 and 33 of the LDRA and the interpretation given to it in the case of *Chilufya v. Kangunda (1999)* shows that in the case of fraud on the part of the registered proprietor, the certificate of title will not be conclusive evidence of proof of ownership of land. Under the Torrens system, the concept of fraud and forgery is very wide and the normal conclusion is that a forgery or fraud relating to a transaction in land cannot pass a title to that piece of land. The land registration system in England does not confer indefeasibility (protection) on a person who registers a forgery and the same is true under the Torrens system (Wallace, 1999). The difference between the mirror and curtain principle under the Torrens system which is the basis of the English system of registration and the Zambian deeds registration system is that under the former, registration is the source of legal title and the register is not only the final and highest proof of title but title cannot exist without it. In Zambia, it is the paper Certificate of Title that is conclusive proof of title to land but the extent of fraud as a vitiating factor on titles registration have not been given due consideration by the Courts in Zambia..

Lawful considerations such as the requirement for procedural accuracy, the ethical element of land registration, the extent of fraud as a vitiating factor in titles registration and the equitable concept of duality of land ownership have not been considered by the Supreme Court of Zambia as can be noted from the recent case of *Bhura v. Ismail (2015)*. The basic deeds registration system suffers from the four deficiencies stated above. A short discussion regards

the recent case will argue that the Supreme Court arrived at the correct decision but without addressing or considering the four deficiencies of the deeds registration system outlined above.

The case was an appeal by Hanif Mohammed Bhura acting through a Power of Attorney granted in his favour by his sister Mehrunisha Bhura against a judgement of the Lusaka High Court which had ruled that there was fraud in the issuance of Certificate of Title No. L4491 for Stand 6867, Lusaka and therefore should be cancelled. The brief facts of this case are that the appellant had commenced an action in the High Court on behalf of his sister, the wife of the respondent. The claim was to obtain a declaration that the appellant's sister was the lawful and registered owner of Stand 6867 Lusaka. It was common cause that the respondent was initially the legal owner of the property in issue. However, by a Deed of Gift produced in the Court below the said property was transferred to the respondent's wife in 1996. The contentious issue was the signature on the Deed of Gift. It was established that the respondent was not in Zambia at the time of execution of the said document since he had been deported. The respondent alleged that the signature on the Deed of Gift and the National Registration Card were not his as prior to his deportation from Zambia he did not hold a National Registration Card. In the opinion of the forensic handwriting expert the signature on the Deed of Gift as well as the National Registration Card was not that of the respondent. However the expert did allude to the fact that the respondents signature could sometimes change.

The disputed property was occupied by Mary Mumba who had two children with the respondent. She had place a caveat on the property in issue in 1987 which she did not remove. There had been no court order to remove the caveat, the Deed of Gift purportedly executed by the respondent was in fact registered and the property was placed in the name of Mehrunisha Bhura, the appellant's sister. On these facts the Learned Judge arrived at the conclusion that there were irregularities in the issuance of Title No. L4491 in favour to the appellant's sister. The Judge also found that the caveat placed by Mary Mumba had been fraudulently and corruptly removed. This fraudulent removal of the caveat was subject of a complaint by the respondent to the Law Association of Zambia. The Learned Judge ordered that the caveat be restored and her conclusion was that the Certificate of Title No. L4491 for Stand No. 6867 Lusaka was fraudulently obtained and therefore decline to declare the appellant as the legal owner of the said property. In addition as per Section 54 of the LDRA, she ordered that the property reverts back to the respondent.

The manner in which the four deficiencies of the deeds registration system being lawful considerations such as the requirement for procedural accuracy, the ethical element of land registration, the extent of fraud as a vitiating factor in titles registration and the equitable concept of duality of land ownership which were not reflected in the Supreme Court's reasoning and will be discussed below by critiquing the grounds of Appeal that the Supreme Court considered in arriving at its decision.

One of the grounds of appeal alleged that the learned trial Judge misdirected herself in law and in fact when she ordered the cancellation of the Certificate of Title issued to one Mehrunisha Bhura and the deletion of entries in the Lands Register in the absence of a counterclaim. The holding that the High Court was on all fours with the law and is justified is not entirely correct since the reasoning is not adequate to arrive at that conclusion. Firstly, Section 11 of the LDRA which is discussed at length in the next paragraph makes provision for correction of errors in the Register and pursuant to Section 11(2) the deletion of entries in the Land Register are not only necessitated through a claim by an aggrieved party but the courts may, if satisfied of the justice of the matter before the court, may make an order for rectification of the register in such a manner as it shall direct. It is irrelevant that the defendant makes a counterclaim or not. Secondly, the ethical element in land registration which is lacking in the Zambian land registration system as provided by Battersby's was not considered by the Supreme Court (Battersby, 1995). The 'ethical element in land registration' is a challenge to the courts to assess that land legislation providing for a registration system is both principled and ethical without undermining the good effect of and achievements of the statutory scheme. The order of deletion of entries in the register and cancellation of title was in the said case based on a finding of fraud and a counterclaim cannot be said to a prerequisite for such an order to be made. The court had failed to take up the Battersby's challenge of the ethical dimension of land registration. Thirdly, the question of the necessity of the counterclaim as a prerequisite to such an order would have been preempted by Article 118 (2) (e) of the New Amendment to the Constitution, (Act No.2 of 2016) which states in part that justice shall be administered without undue regard to procedural technicalities.

The other ground of appeal, on whether, the learned trial judge misdirected herself in law and in fact when she held that the allegations of fraud had been proved by the defendant despite fraud not having been clearly and distinctively pleaded by the defendant in his defence. The Supreme Court's upholding of this ground was justified but reasoning could include the

concept of ‘Duality of Ownership’ and that fact that in order to use title as evidence of land ownership, the requirement that registration should not only have been done under a correct system but using the correct method as well, otherwise the land remains as unregistered land. The concept of ‘Duality of Ownership’ arising under the Law of Trust in England remains a part of the substantive land laws in Zambia by virtue of Section 2 of The English Law (Extent of Application) Act, (Chapter 11 of the Laws of Zambia). ‘Duality of Ownership’ refers to both the legal as well as the equitable ownership of one parcel of land or real property. Consideration of dual ownership is reflected in the land registration system that provided for the registration of both types of interests legal as well as equitable to provide a complete record of the parcel of land. This reasoning was not advanced by the Court is upholding the said ground.

Further, the defendant’s denial of having executed a Deed of Gift, the claim that the property belonged to him and the fact that title had in fact changed into the appellant’s name without the knowledge of the *caveator* (Mary Mumba) and without a specific court order to remove the caveat, should have put the learned trial judge on inquiry as to whether the title issued to the appellant was in fact genuine. To use title as evidence of land ownership, registration should be done under a correct system and using a correct method otherwise it is null and void. This change of ownership without the knowledge of the caveator is evidence of irregularities in the procedure of acquiring the title. It can be concluded that the appellant’s action were contrary to the statutory framework established within the system of land registration in Zambia. Section 79 of the LDRA prohibits the Registrar from making an entry on the Register of charging or transferring the estate or interest protected by the caveat. For guidance the court could have considered the case of *Intestate Estate of Don Mariano San Pedro Y. Esteban (1996)*, the Supreme Court’s decision where it was stated that only when registration is under the correct existing system using the correct mode of acquiring title the courts will consider title as being vested in the owner. The Court declared the *Titulo de Propiedad* No. 4136 is null and void. As a result of this decision, thousands of citizens became victims of unscrupulous persons peddling such spurious title. The case involved a corporation engaged in squatting business by selling lands or land rights over such lands not belonging to it. This clearly means that an accurate record of transaction will guarantee ownership of land. In the Zambian case there is evidence of fraud and the proof of fraud distinctly as required by law, even where it fails on account of proof of signatures and the expert witness does not take the appellants dealing outside the realm of fraud.

From the critique of the above case it is clear that a deed does not in itself prove title, it is merely a record of an isolated transaction. If properly drawn, it shows that a particular transaction took place, but does not prove that the parties were legally entitled to carry out the transaction and consequently it does not prove that the transaction was valid. Reviewing and assessing all the documents relating to one parcel of land is extremely tedious and expensive to undertake for the Courts in order to determine the nature of the registered interests in land. This is the basic defect of the deeds registration system which this research has addressed.

The insurance principle is not supported by the legislative framework in Zambia. This third pillar of the Torrens system serves as a warranty that if the mirror of title gives specious or incorrect reflection and a person suffers loss as a result, the state should compensate her (Rouff, 1952). The insurance principle provides a curative process since it is the state rather than the parties that provides for the registration of rights and interest in land. To understand the principle properly and its effect if correctly applied, it is not only a guarantee by the State but as Rouff asserts;

In the widest sense it means not only that registration will be carried on literally as an insurance undertaking but also that it is the privilege of the Registrar, or the Commissioner, or other responsible officer, on bringing land under the Act, to cure the title of known defects so far as he possibly can (Rouff, 1952, p.195).

This ideal is not always possible even in jurisdiction where the Torrens system originated and continues to be applied like Australia.

In Zambia, the ideal insurance principle is not provided for under the legislative framework but the LDRA does under Section 11 provide for the correction of errors or omissions in the register.

(1) Where any person alleges that any error or omission has been made in a Register or that any entry or omission therein has been made or procured by fraud or mistake, the Registrar shall, if he shall consider such allegation satisfactorily proved, correct such error, omission or entry as aforesaid.

(2) Any person aggrieved by any entry or omission made in a Register after application to the Registrar under subsection (1) may apply to the Court for an order that the Register may be rectified, and the Court may either refuse such application with or without costs to be paid by the applicant or it may, if satisfied of the justice of the case, make an order for the rectification of the Register in such manner as it shall direct (Section11, LDRA).

The lacuna in the law in Zambia is clear since Section 11 deals with alteration but not indemnity. LDRA when compared with Schedule 4 and 8 of the LRA 2002 in England which

provides for alteration, rectification as well as indemnity to uphold the insurance principle, it shows that the indemnity provision is missing in the *Zambian Act*. In addition, the *LRA 2002* of England uses the term alteration as a more general term under Section 65 which states that schedule 4 has effect as regards alteration of the register. The schedule makes a distinction between alteration and rectification of the register.

The term rectification is limited to situations which involve the correction of a mistake and which prejudicially affects the title of a registered proprietor. Alteration is wider than this and includes any changes to the register. Alterations which do not amount to rectification are those which do not prejudicially affect the title of a registered proprietor (Thompson, 2003, p.149).

The distinction drawn between rectification and alteration under schedule 4 is linked to the payment of indemnities under schedule 8 of *LRA 2002* as explained under the heading 'Insurance Principle'. What the statutory provisions make very clear is that indemnity is payable for cases of rectification and not for cases involving alteration. Such distinction is lacking under the *Zambian Act*. Even though the concept of indemnity is not available under the deeds registration system in Zambia, a distinction between rectification and alternation would provide guidance for the courts to determine the indemnity payable.

Under the English system if a person is registered as proprietor of piece of land when she is not entitled to that land because the person from whom she purchased the land was himself not the owner the mistake is corrected and the person who suffers a loss is compensated. This was the situation in case of *Re 139 High Street, Deptford (1951)* explained earlier. In addition protection is also given to a proprietor in possession as provided for under provisions relating to rectification of the register but not alteration of the register because that does not prejudicially affect the proprietor. Indemnity is the remedy complementary to alternation of the register and therefore where legislation provides for alteration it should in turn also make provisions for indemnity. In addition under the English system indemnity is, what can be termed a two sided remedy where claim can be made when loss is suffered as a result of rectification and also when loss occurs when rectification is refused (Thompson, 3002).

In Zambia there is a lacuna in the legislative provisions for rectification and alteration of the register and the distinction between them. Further there is no statutory guidance on indemnity under which loss can be claimed as a result of rectification, alteration and denial of such corrections of the register. It is recommended that such a provision should be provided for under the *LDRA* in Zambia.

3.6 Deficiencies in the Lands and Deeds Registry Act

The LDRA in Zambia is the legislative provision providing for a registration system which was initially devised from registration scheme adopted for the then territory of Northern Rhodesia. The primary intention of the registration scheme was to assure the European Settlers' interest in land (Mvunga, 1977). The registration scheme was supported by a cadastral survey system of South African origin, and was confined to only 6 per cent of the total land area in Zambia (Dale, 1976). The historical anomaly of the applicability of the scheme to only 6 per cent of the land has been practically adopted to date despite the fact that the LDRA does not confine its application to state-land or 6 percent of the total land area in Zambia. The legislative provisions are deficient in making it clear that all interests and rights in land should be registered. If the Act is amended by inserting a provision that all land in Zambia can be registered, the possibility of registration of customary tenure will be opened under the same system being used for statutory tenure.

The LDRA supports a deeds registration system but Mvunga divides the existing system into two schemes and argues that registration of deeds is provided for under Section 4 of the Act, while the issuing of the certificate of title under Part 111 of the Act in fact amounts to registration of title to land and is proof of proprietorship. His argument still remains that Zambia operates a deeds registration system but he rightly points out the flaw in the system by stating:

The essence of this recording system is to provide a facility for determining the state of any land and indeed in ascertaining or deducing in whom proprietorship of title vests. It is essentially a register of transactions. In this the registry of transaction is not a guarantee as to the validity of the documents registered. This therefore is the flaw in this system in that accuracy in the contents of the documents so registered is not capable of ascertainment (Mvunga, 1977, p.546).

This flaw in the deeds registration system which makes it unreliable is not evident under the titles registration system firstly, because it is interests and rights in land that are registered and not the documents creating those rights. Secondly, under the Torrens system, the title document or record reflects the complete up-to-date situation for that title. Thirdly, there is no need to look beyond the register (Holstein & Williamson, 1984). The legislative provisions governing the deeds registration system in Zambia require amendment. To overcome some of the flaws the legislation should provide safeguards as to the accuracy of the documents being presented for registration such as the ones provided in the South African Act:

Proof of certain facts in connection with deeds and documents by means of certain certificates

- (1) A conveyancer who prepares a deed or other document for the purposes of registration or filing in a deeds registry, and who signs a prescribed certificate on such deed or document, accepts by virtue of such signing the responsibility, to the extent prescribed by regulation for the purposes of this section, for the accuracy of those facts mentioned in such deed or document or which are relevant in connection with the registration or filing thereof, which are prescribed by regulation (Section 15A, Deeds Registries Act SA).

Insertion of such provisions within the Act will provide the buyer and the seller of the property the assurance that the documents being presented for registration are in fact accurate and relate to that property which is the subject matter of the contract for sale. Following the legislative requirements in South Africa, it would be clear that the Advocate preparing the documents for registration would be loaded with the duty to ensure the accuracy of the document drafted in accordance with the prescribed regulations. It is proposed that the regulations to the current LDRA in Zambia can be amended to provide for the guidelines which the Advocate needs to follow.

With reference to Section 4 of the LDRA, there are four main issues provided for as regards documents that are presented for registration. The four points outlined by Mvunga are:

the document conveying an interest need only ‘purport to grant...

it is every kind of document

the interest conveyed should be for a term not less than a year but

in the case of an encumbrance such as a charge or mortgage affecting land there is no limitation as to duration (Mvunga, 1977, p.548).

There is, according to the above analysis, some reliability provided by the legislative provision to the extent that a document which on the face of it appears to be invalid will not be accepted for registration. Even where the registrar accepts rightly or wrongly a document for registration, the fact that it is registered will not cure any defects in the document (Mvunga, 1977). “Section 21 of the Act provides that the registration of a document shall not cure any defect in any instrument registered or confer upon it effect or validity. In other words, an instrument registered stands or falls on its own merits” (Mudenda, 2007, p.617). This means that a document which is defective will remain so even if it is accepted for registration.

Judicial interpretation of section 4 was given in the case of *William Jacks and Company (Z) Limited v. O’Connor (in his capacity as Registrar of Lands and Deeds) Construction and*

Investment Holdings Limited intervening (1967). The facts of the case involved an agreement entered into between the appellant and Pan African Construction which was dated 29th December 1966 but lacked a commencement date. This agreement was not registered, and on 26th June, a notice of motion was filed in the High Court for an order to extend the time within which the document be registered. Furthermore, that the registrar should register the document even though it was not registered within the specified time provided by the legislation. This application was adjourned to consider the main issue of the case, whether there was in fact an agreement for a lease on the documents put before the court. It is against the order of adjournment that the appeal was lodged but it was not clear from the order whether the learned Judge considered the effect of the document standing by itself. The Judge in this case referred to a Court of Appeal decision by Lord Denning in the case of *Harvey v. Pratt (1965)* on the issue of the requirements of a valid agreement for a lease. This case had similar facts as the one in Zambia where the agreement for lease did not contain a commencement date. Of importance are the three extracts from Lord Denning's judgment:

It has been settled law for all my time that, in order to have a valid agreement for a lease, it is essential that it should appear, either in express terms or by reference to some writing which would make it certain, or by reasonable inference from the language used, on what day the term is to commence.

It is settled beyond question that, in order for there to be a valid agreement for a lease, the essentials are that there shall be determined not only the parties, the property, the length of the term and the rent, but also the date of its commencement. And

This is an agreement for a lease to start at some future time. The time has never been specified or agreed.

There was, therefore, no concluded contract (*Harvey v. Pratt, 1965, p. 786*)

Applying the above judgement to the case in Zambia, it is clear that the agreement dated 29th December 1966 is not a valid agreement for a lease but what remains to be decided is whether or not it purports to be an agreement for lease. Once the registrar had perused the agreement, he would be satisfied that on the face of it, it does not purport to be an agreement for lease, then Section 4 of LDRA would have no application to this case.

On the issue of an order that the Registrar of Lands and Deeds do register the agreement, the court decided that it is doubtful that registration could be ordered in this case. Concluding on this case, Mvunga commented thus: "In so far as a document apparently invalid does not qualify for registration it can be said that this registration system is not entirely unreliable" (*Mvunga, 1977, p.549*). There are some safeguards within the legislative provisions to ensure

that documents that are registered convey or at least purport to convey an interest in land. Furthermore, safeguards provided under the system of deeds registration under the LDRA is apparent under Section 21. Where the Registrar rightly or wrongly registers a document, registration itself does not cure any defects in the document so registered.

In addition, the legislative provision of the LDRA under Section 12, subsection 2 assures the accuracy of registration as it relates to a particular parcel of land (Mvunga, 1977). “Subject to this section, any document relating to land which is lodged for registration shall describe the land by reference to a diagram, plan or description of the land, quoting the year and Surveyor-General’s number of the plan, diagram or description” (Mvunga, 1977, p. 549). The section defines a diagram, plan and description as having the same meaning as the one given under the Land Survey Act. On registration of a document, the land should be described by means of a diagram, plan or a sketch plan of reasonable accuracy. Simplifying the description to make it as clear as possible is one suggestion to bring about accuracy and this is offered by Beale.

The interpretation of the description of land in a conveyance is a matter that cannot be made certain by any method of transfer. The most that can be done is to simply the descriptions and make them as clear as possible. This is accomplished by the provision that each entry of title shall be accompanied by a plan; and in addition to this, the fact that the entries are indexed according to the location of the land also tends to secure accuracy (Beale, 1893, p. 372)

The practical deficiency of this provision relates to the fact that land in most parts of Zambia is not surveyed and cannot be described accurately, which in turn could mean that the transaction relating to that parcel of land cannot be registered.

The definition of a parcel of land varies according to jurisdiction. For practical purposes, a parcel of land has been defined as a closed polygon on the surface of the Earth (United Nations, 1996). The manner in which a parcel of land is defined has a bearing on any land administration system, registration being a key element of the system (Enemark, 2010). However, land parcels as it was defined generally lack sufficient flexibility to incorporate the increasing number and diversity of interests and rights that are now becoming evident in land. Property too, as explained under chapter two of this research, has different meanings in various countries and is often used in conjunction with the definition of land parcels to understand the precise nature of the interests held in that particular parcel of land. It is recommended that the legislative framework providing for the registration of interests in land

should provide a definition of a parcel of land before defining a plan, diagram or description relating to that parcel of land.

Even though the object of this research is to improve the current deeds registration system in Zambia, there is need to discuss the link between land record and the registration system arising from Section 12 of the LDRA. “Cadastral Surveying is concerned with the charting of land to accurately define its boundaries for purposes of obtaining a certificate of title to that land. In Zambia, cadastral surveying is governed by the Land Survey Act under which a Survey Control Board, which regulated the practice of Cadastral Surveying, is constituted” (Mwanza, 2004, p. 3). It is important to define with reasonable accuracy the parcel of land that is subject to the registration process to avoid future boundary disputes as well as to prove ownership of that parcel of land by attaching the diagram to the certificate of title. Tracing the brief history of the cadastral system in Zambia, Chilufya considered the possible integration of the cadastral and land registration information systems to avoid what he noted as delays in survey records examinations caused by the lack of trust in the system (Chilufya, 1997). The entire system of cadastral surveying in Zambia is in need of urgent change to meet the needs of producing accurate boundaries to parcels of land in Zambia, and it has been noted that a review of the entire system is inevitable so that the future demands on land registration can be met (Minango, 1998). The cadastral system and its problems are beyond the scope of this research, but it should be noted that there is need to improve the accuracy of identifying a parcel of land by the use of a diagram, plan or a sketch plan as provided for under the Land Survey Act and Section 12 of the LDRA.

When using the term ‘completeness’ to describe the land register, there are two meanings attached to the word (Simpson, 1976). Firstly, it is the completeness of the cadastre and secondly, the completeness of the register entry. With regards to cadastral, it is only complete if all land in the jurisdiction is included within the registered title system. In Zambia, cadastre is incomplete because of the deeds registration system and land held under customary tenure for which no system of registration exists. On the register entry, this will be complete if all the relevant information relating to a particular land parcel is recorded. The register remains incomplete where undisclosed proprietary interests such as equitable interest and interest based on long term occupation remain off the register but binding on the proprietor of the parcel of land. These interests are referred to as overriding as defined by Megarry and Wade since the registered proprietor is bound by these interests that are not entered on the register

(Megarry and Wade, 2000). The registry entry remains incomplete under the deeds registration system in Zambia, since equitable as well as overriding interests in land remain enforceable against the registered proprietor. Therefore in conclusion, both the cadastres as well as the register entry remain incomplete in Zambia, showing a need to reform the statutory framework supporting the deeds registration system.

In conclusion, there is need to reform the current law of Deeds Registration under the LDRA, firstly, because the current statute is founded on the old 1914, legislation and secondly most of its provisions will not be relevant in the light of the need to change or alter the current system of deeds registration and the current proposal to introduce the first step to e-conveyancing being e-registration. The next part of this chapter will consider e- registration as the future road for the proposed land registration system in Zambia.

3.7 E-Registration: a concept for the future

The reports and consultative documents which preceded the enactment of the LRA 2002 in England, consistently referred to a land registration system for the twenty-first century as a system to support the move to electronic conveyancing (Law Com. 254, 1998). It should be noted from the outset that this conveyancing revolution introduced by the LRA 2002 in England has not yet been implemented at the time of writing this research in 2014, a good twelve years after the enactment of the legislation. Commenting on the implementation progress of electronic conveyancing Raymond writing for the newsletter, asserts that:

The plan was to introduce a working e-conveyancing system based in England and Wales by 2006 although recently this has changed to "2006 to 2008". However the Government has a poor record when it comes to large-scale IT deployments. It should not be automatically assumed that the e-conveyancing project will be taken through to a successful conclusion on time or at all (Raymond, 2003).

Putting the conversion from the paper-based system to the electronic system on hold after consultations with the stakeholders, the Chief Land Registrar in England reported that:

This consultation has told us that many of our customers and stakeholders are unconvinced that the time is right to offer e-transfers. They would want to see e-charges and e-signatures sorted out first and they have not yet been persuaded that e-transfers are desirable or achievable in a time of low property sales and increased risk of fraud. As a result we're planning to put the development of e-transfers on hold and concentrate instead on fully automating our delivery systems, so customers can send us electronically (sic) documents that have been prepared in the traditional way (Land Registry Report, 2010).

The task of converting from a paper-based system to an e-system began with the enactment of the LRA 2002, and as Cooke alluded that the sole reason for enactment of this Act was e-conveyancing: What finally convinced the English Parliament to pass the Land Registration Act 2002 was its provisions for electronic conveyancing and there were many votes in favour of the proposed conveyancing reform (Cooke, 2003). However, it has been observed that implementation of the e-system has proved to be immensely complex and difficult to achieve in England. This research is not about e-conveyancing and the technical aspects of e-conveyancing will not be considered in a substantive way, but it is proposed that the first step for Zambia must be to complete the electronic register so that e-searches and e-registration can be commenced while e-conveyancing can be marked as the road ahead for the next decade.

In conclusion, this chapter has laid the legislative framework under which the deeds registration system is operating in Zambia. By conducting a comparative study of the legislative framework of the English titles registration and the Zambian deeds registration system, the contrast between the two has been brought out. The aim of this comparative analysis has been achieved by lifting the three principles of the Torrens system (mirror, curtain and insurance) which is basically titles registration and observing their application in the English as well as the Zambian context. The selection of a single comparator has been justified by the operation of the two distinct systems of registration in the two countries, and the new legislative framework enacted in England.

Lastly, the mapping of the road ahead and the possibility of e-conveyancing in England and e-registration in Zambia have been mentioned but are not explored in detail because they are beyond the scope of this research. Furthermore, e-conveyancing has not yet been implemented in England and there is great uncertainty surrounding its introduction in the near future, which means it does not provide a useful comparator. E-registration on the other hand is useful as an initial step for Zambia, but its relevance will be dependent on the future system that Zambia will adopt between maintaining the current deeds registration system or converting to titles registration or adopting a hybrid, a discussion theme for the final chapter of this research. The need to amend the legislative framework in Zambia cannot be overemphasised in the light of the future system of land registration in Zambia. Some of the proposed amendments have been mentioned in this chapter while others are presented in chapter five. Before recommending the suitable system for land registration in Zambia, the

next chapter will describe the current paper-based system of land registration operating at the Lands and Deeds Registry in Zambia.

CHAPTER FOUR

THE GOVERNMENT MACHINERY OF LAND REGISTRATION PROCESS IN ZAMBIA

4.0 Introduction-A Case Study Approach

Land is registered in any part of the world using a particular system. The mechanics of registration is usually supported by the law that establishes the system and outlines how it will function. Description of each process within the system shows how it will function and fit into what can be termed land registration (Simpson, 1976).

The general conditions required for any land registration system to succeed have been identified by Hanstad in his research on designing land registration systems for developing countries (Hanstad, 1998). There are five conditions that have been outlined: firstly, the need for the landowners to understand and support the system. The author stresses an assessment of user needs before designing the system rather than the imposition of a system that is not acceptable. Secondly, governments committal in terms of expenses on a long term investment basis and the duration of such a project (Furmstrom & Logan, 1987). Thirdly, property rights must be clearly identified and boundaries should be definable. "Land registration should not be employed to create interests, but to record and confirm existing interests and definable future interests (Hanstad, 1998, p. 656). Fourthly, the requirement of competent and skilled registry staff for compilation and maintenance of an effective and efficient land registration

system. Discussing this condition Furmstrom notes that there is in most land registries a shortage of trained technical personnel in most developing countries (Furmstrom & Logan, 1987). Lastly, there must be a developed system of property rights for the land registration system to function well. “Land registration systems register legal rights in land. If such rights are ambiguous, non-existent, or poorly defined by law, registration of those rights is likely to be an expensive and wasteful exercise” (Hanstad, 1998, p.657). The five conditions outlined above should be present in whatever type of land registration system is being developed especially in the developing countries, Zambia being one of them.,

The standard against which the success of the registration system is measured is not based on whether it is legally and technically sophisticated but whether it ensures adequate security and protection of the land rights being registered (Pienaar, 2009). The second standard is measured against the fulfilment of its publicity function as efficient, uncomplicated, expedient and affordable. These general standards are applicable to both the positive title registration systems and the negative deeds registration systems.

According to Hogg, “By deed registration – or registration of deeds – is meant primarily a system under which instruments are recorded merely as such, and not with special reference to the land they purport to affect” (Hogg, 1920, p.1). Zambia operates a deeds registration system within the above definition. The first registration scheme devised for Northern Rhodesia, now Zambia, was supported by a cadastral survey system. By definition, a cadastral survey system covers an interactive multitude of land administration sub-systems including adjudication, boundary definition and demarcation, surveying, registration, dispute resolution, and information management (Barry, 1999). This research touches upon the sub-system of registration only as a component of the Land registration system. Discussion on the multitude of the other sub-systems is beyond the scope of this research.

The land registration system in Northern Rhodesia was primarily intended to assure European settlers’ interest in land during the colonial era. It is for this reason that the registration scheme was confined to and still continues to be applicable to approximately 6 per cent of the total land area of Zambia (Dale, 1976). The restriction has been carried forward in practice even after fifty years of independence. The reason for this practise is not supported by Law, and the Lands and Deeds Registry Act (LDRA) does not in any way restrict what is registerable as long as it is a document that grants, conveys or transfers land

or any interest in land. It would seem that the inherited practice from the colonial era continues to apply without questioning its validity.

The LDRA is the principal statute that provides for the registration system and the regulations under which the system operates in Zambia (Zambia, 1994). The Act is not restrictive in application but due to historical reasons it has remained within the 6 per cent land area when in fact it is applicable to the entire country (Mvunga, 1977). However, land that is subject to registration is land that is referred to as state land or land under leasehold tenure (leasehold tenure has been discussed under Chapter 2 of this thesis). Land held under customary tenure is not subject to registration. In this research, the focus is on registration system for state land and leasehold tenure, or more particularly, the registration process for the purchase and sale of a residential property which rightfully falls within the 6 per cent and not under customary tenure. There is no system of land registration covering land held under customary tenure but it is hoped that this research will recommend a model of registration that will be applicable to land situated throughout Zambia without any legal or practice restriction as is the current position. Before presenting the primary data collected by the researcher, it is important to lay down the rules, regulations and policies that govern the operations of Lands and Deeds Registry.

4.1 The Deeds Registry in Zambia: Policies and Practices

4.1.1 Administrative structure of the Deeds Registry

The system of registration of deeds and other instruments affecting title to land has been in operation in Zambia since Independence, as explained above. The Ministry of Lands, Energy and Water Development under which the Lands and Deeds Registry is established, provides for the machinery of registration of interest in Land. The Ministry of Lands, Energy and Water Development is one of the government ministries mandated; “to efficiently, effectively and equitably deliver land and land information to all Zambians for its optimum utilisation for the benefit of the Zambian people and the Country”(Zambia, Ministry of Lands, 2004). The functions of the Ministry of Lands, Energy and Water Development are gazetted for public awareness and include:

- (i) Formulation of Land Policy;
- (ii) Land administration;
- (iii) Land surveys and mapping;

- (iv) Cadastral survey and exploration;
- (v) Control of unauthorised settlements; and
- (vi) Registration of land (Zambia, Ministry of Lands, 2004).

The mandate of the Ministry of Lands, Energy and Water Development involves allocation, survey, and registration of leasehold titles in the State, Trust, and Reserve Lands, and in both urban and rural land in Zambia.

Under the legal-break down of responsibilities, allocation is handled by the Lands Department (headed by the Commissioner of Lands), survey by the Survey Department (headed by the Surveyor General), and registration by the Lands and Deeds Registry (headed by the Chief Registrar) under the Commissioner of Lands” (Roth, (ed), 1995, p. 47).

For the purpose of this research, concentration is on the function of registration of land performed by the Lands and Deeds Registry only. In addition, the above functions are described in general terms but on a day to day, basis with the Ministry of Lands as the supervising ministry which provides guidance and administrative support to all the departments established under it, including the Lands and Deeds Registry. The Annual Report of the Ministry of Lands states in its objectives the day to day functions as;

...to formulate policies and provide guidelines for all; to effectively collect revenue on land in order to contribute to government revenue; to provide an accurate, national base and specialised mapping services; to ensure the provision of effective and efficient cadastral services; to provide up-to-date and timely information in order to facilitate expeditious land transactions and enhance public awareness of their rights regarding land; to maintain an efficient and effective administrative support service and continuously develop human resource so that the Ministry provides its services effectively and efficiently (Zambia, Ministry of Lands, 2002).

To carry out these functions, the Ministry of Lands is made up of three main departments. These include the Lands department, the Survey department, and the Lands and Deeds Registry. Even though all the three departments are interlinked for the purposes of carrying out the ministries’ functions, for the purposes of this research, the detailed study will be concentrated on the Lands and Deeds Registry which is responsible for registration of land.

4.1.2 Statutory Provisions regulating the Deeds Registry

The Lands and Deeds Registry is created under statute, the LDRA. The birth of this statute was the Lands and Deeds Registry Ordinance that was applicable in Northern Rhodesia, which had first come into operation on 1 November 1914 (Mudenda, 2007). The object of the

Act is stated in its preamble and includes the registration of documents relating to land transaction.

An Act to provide for the registration of documents; to provide for the issue of Provisional Certificates of Title and Certificates of Title; to provide for the transfer and transmission of registered land; and to provide for matters incidental to or connected with the foregoing (Zambia, Lands and Deeds Registry Act, 1994,p.6).

The LDRA is divided into seven parts and has ninety –two sections as part of its substantive provisions. A detailed discussion of the relevant provisions relating to the Lands and Deeds Registry and the Land and Deeds Registry Regulations (LDRR) will be the focus of this research.

The LDRA provides for the office of the Registry of Deeds. This office is responsible for the registration procedure.

For the registration of documents required or permitted by this Part or any other Act or by any law to be registered, there shall be an office styled the Registry of Deeds (hereinafter termed "the Registry") in Lusaka, and the Minister may from time to time direct, by Gazette notice, that there shall be a District Registry of Deeds (hereinafter termed a "District Registry") in such place as shall be in such notice mentioned for any district to be thereby defined (S3(1) , LDRA).

In Lusaka, the Lands and Deeds Registry is situated in the capital city of Zambia and there is another office called a District Registry in Ndola, the Copper-belt Province, which has been set up recently in order to decentralise the operations of registering documents. The collection of primary data has been restricted to the Lands and Deeds registry in Lusaka, since the District Registry in Ndola is created under the same statute (LDRA) It follows the same procedure and is governed by the same policies as the main office in Lusaka. The Ministry of Lands, Energy and Water Development under which the registry is situated maintains a website that provides a link to ‘Lands and Deeds,’ displaying the following information for the public:

Lands and Deeds Department is headed by the Chief Registrar and assisted by two (2) Assistant Chief Registrars one based at the Headquarters and the other at Ndola Regional Office. The department is responsible for issuance of certificates of title and registration of various interests. The Department operates within the ambit of the Lands and Deeds Registry Act CAP 184 of the laws of Zambia.

Functions of the Department

The Department’s functions are:

- To efficiently register rights and interests in land;
- To efficiently issue certificates of title to provide security of land holding;
- To undertake timely and accurate updating of various registers in order to facilitate efficient storage and retrieval of information;
- To contribute to government revenue by ensuring that all registration and search fees are paid;
- To act in a quasi-judicial capacity and make rulings on the applications arising under the Lands and Deeds Registry Act subject to appeal to the High Court;
- To appear in court where matters dealing with registered interests and rights are being adjudicated upon. (www.ministryoflands.gov.zm)

The office of the Chief Registrar, District Registrar, and the Provincial Registrar are created by the statute (LDRA) and the information on the website is given to raise public awareness. This provision in the Zambian Act is comparable to Section 9(9) of the Land Registration Act 2002 in England (LRA 2002) which equally states that the Chief Land Registrar who is appointed by the Lord Chancellor will head the Registry and appoint staff to assist him conduct the business of registration. Until 1990, the position in England was that the Chief Land Registrar should be a solicitor or barrister of at least ten years' standing (Thompson, 2001). This requirement was necessary because the Chief Land Registrar had powers to perform the function of resolving land disputes and interpreting land legislation. After 1990, the position changed when the Land Registry became an executive agency and the legal qualification requirement for the Chief Land Registrar no longer exist (Thompson, 2001). The reason for this change is due to the removal of powers of the Chief Land Registrar to adjudicate on land disputes and interpret the laws which are now vested in an independent office led by an Adjudicator. (Section 107, LRA 2002). This means that the essential role played by the Chief Land Registrar under the new system is managerial only. The difference between the two jurisdictions is that in Zambia, the Chief Registrar continues to have quasi-judicial powers. The powers of the Registrar given under the legislation, supports the judicial function stated as quasi-judicial under Section 4(3)(c) and (d) of LDRA which states:

(c) Any person aggrieved by any order of the Registrar under this subsection any appeal to the Court which may annul or confirm the order of the Registrar with or without modification

(d) If any person disobeys the order of the Registrar made in pursuance of paragraph (b), the Registrar may certify such disobedience to the Court and thereupon such person, subject to such right of appeal as aforesaid, may be punished by the Court in the same manner in all respects as if the order made by the Registrar were the order of the Court (Section 4(3), (c) & (d), LDRA, p.9).

Equating the decisions of the Registrar to that of a court order would mean that the decision of the Registrar is binding on the parties in Zambia as long as they do not appeal to the Courts of Law.

One of the main functions of the Lands and Deeds Registry is to register rights and interests in land and provide accurate data on land rights in Zambia. Recording of the data is the basic requirement of land registration.

The registration of deeds and instruments under these Acts does not of itself affect the passing of title to any estate or interest in land, nor does it add any efficacy to the registered instrument, so far as it operates as an instrument of conveyance. The primary purpose of the establishment of registers is, of course, to constitute a public record of deeds and instruments affecting land (Francis, 1972, p.7).

Section 92 of LDRA permits the Minister to make rules and regulations to conduct registration and provide for prescribed fees and forms in which documents can be presented at the Lands and Deeds Registry. The Act also contains the Lands and Deeds Registry Regulations (LDRR). These regulations set out the format of the documents presented for registration and the requirements for an official search on any piece of land in Zambia. These regulations will be discussed in detail under lodgement of documents at the Lands and Deeds Registry.

4.1.3 Internal Procedures adopted by the Deeds Registry

The procedure at the Lands and Deeds Registry is not only governed by statutory provisions but internal rules and policies created to enhance the efficiency of the department in performing its functions. One such internal policy document provided by the Registry staff during the observation of the process of collecting data on registration is called the time function map. This document serves two major purposes. Firstly, it states the time frame within which the process of registration should be completed and secondly, the responsible officer who should perform the task and the time within which the task should be performed should be identified. Practically, this time function map provides for checks and balances within the land registration system, by making registry staff accountable for the tasks they perform. A simple survey on the data entered on the time function map will show where the documents which were lodged are at a particular time on a certain date, as far as the process of registration is concerned, and which officer is responsible for non-performance or delay in the performance of the tasks involved. The issue of time is of great significance to the process

of registration. Simpson in referring to the registry procedure in England at the beginning of 1974, discussed what he called the time lapse of some twenty-eight weeks between lodgement and the issue of a certificate of title (Simpson, 1976). If the same principle of time lapse is applied to the Zambian process of registering land according to the time function maps (Figure 4.1 and Figure 4.2 below) to be precise, it should take seven days and six hours to complete the process for registration of an assignment. For a mortgage or direct lease, it would be three days and four hours.

LANDS AND DEEDS DEPARTMENT

TIME FUNCTION MAP FOR ASSIGNMENTS/TRANSFERS/GIFTS/MOITIES

Customer Service Centre	Various documents Lodged by Law Firms & members of the public											
Lands and Deeds Officer (duty officer)		Duty officer Shares, records & distributed Docs to all officers										
Lands and Deeds Officer			Officers put Processing Schedule, Computer lodgment									
Lands and Deeds Officer (duty officer)				Duty officer Distributes Docs to Registrars for Vetting (authority)								
Registrar					Registrar Scrutinize							

					& vets docs						
Lands and Deeds						Officer Registers docs on computer & manually					
Typist							Typing of New title deeds in New name/s				
Registrar								Registrar signs & approves docs			
Stenographer									Stenographer Records ready docs		
Deeds clerk										Docs sorted, Recorded & put in Pigeon hole	
Customer service center											Collection of docs by client
Total Time taken	9-12:30 Hrs (3hrs 30 mins)	14:00-16:00hrs (2hrs)	16:00-17:00 Hrs (1 hr)	09:00-10:00 (1 hr)	2 days	2 Days	2 Days	1 Day	1 Hour	1 Hour	

Figure 4.1: Lands and Deeds internal regulations
LANDS AND DEEDS DEPARTMENT

TIME FUNCTION MAP FOR MORTGAGES/DISCHARGES/SUBLEASES/DIRECT LEASE

Customer Service Centre	Documents lodged by law Firms & members of the public									
Lands & Deeds Officer (duty officer)		Duty officer records, shares & distributes docs to officers								
Lands & Deeds Officer			Officers put processing schedule, do computer lodgment & registration							

Typist				Typing pool memorizes transaction on C.O.T				
Registrar					Registrar signs & approves docs			
Stenographer						Stenographer records ready docs		
Deeds clerk							Docs sorted, recorded & put in pigeon hole	
Customer Service Centre								Docs Collected by clients
Total Time Taken	9-12:30 Hrs	14:00 – 16:00 Hrs (2 Hrs)	1 Day	1 Day	1 Day	1 Hour	1 Hour	

Figure 4.2: Lands and Deeds internal regulations

The time function maps were made available to the researcher by the Lands Officer during the observation of the two sample files, example 1 and 2 used to collect the primary data regarding the procedure of land registration adopted by the Lands and Deeds Registry. They have been scanned and presented in their original form as Figures 4.1 and 4.2.

The time function maps of the Lands and Deeds Department do not only refer to the timeframe within which registration should be completed but it also outlines the nine steps that have be undertaken and which officer at the Deeds Registry is responsible for the performance of that particular task. Each task has been identified and in summary form, they are indicated as steps and the process of registration comprises nine such steps which are:

- (a) Step one; Lodgement
- (b) Step two: Recording and distributing
- (c) Step three: Processing
- (d) Step four: Vetting
- (e) Step five: Scrutinizing
- (f) Step six: Manual entry

- (g) Step seven: Issuing of Certificate of Title
- (h) Step eight: Sorting & recording
- (i) Step nine: Uplifting

The steps from the time function maps will be tested against the primary data collected by the researcher through observing the process of registration, using the two sample files (Example 1 and Example 2) to establish the practical reality of achieving the objective of the time-frame within which registration of land should take place at the Lands and Deeds Registry in Lusaka.

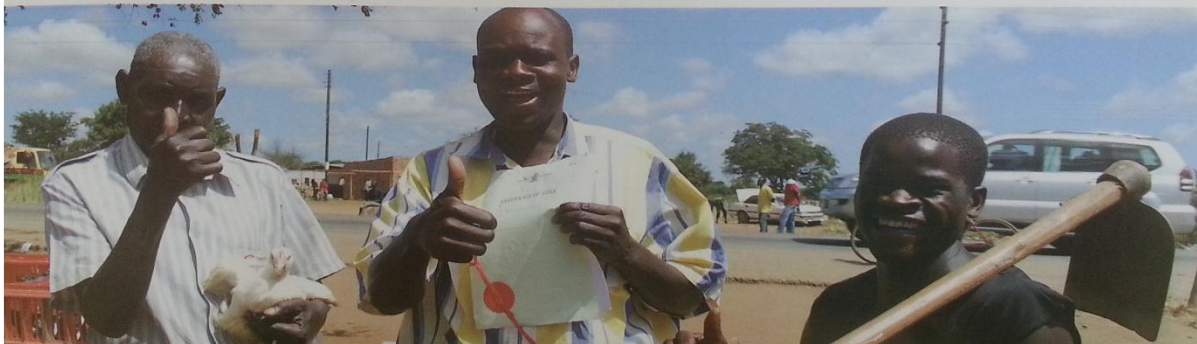
In order to understand the procedure involved in recording the deeds presented for registration at the deeds registry, it is important to understand how documents and files move from one office to another after they have been lodged by the client or the Law Firm representing the client. Lodgement which is the first step of the registration process but the last stage in the conveyancing process as shown in diagram 2.1 in chapter 2.

In addition to the internal time function maps which are used by the lands officers performing the functions of land registration, there is more information available from the Ministry of Lands to the public outlining the functions of the Lands and Deeds Registry and the benefits of land registration. This information is available in two formats to the public, in the printed version in the form of a booklet which has been scanned and produced below. The booklet was obtained by the researcher from the Lands and Deeds Registry during the observation process. The second format is the information available from the website of the Ministry of Lands. This document makes reference to the statutory requirements for registration of land in Zambia in accordance with the LDRA, LDRR and fee schedules. It also provides guidance to the clients who wish to register land and explains to them the benefits of land registration. The content of the document is in simple language so that it is made user-friendly.

Guidelines on Lands and Deeds



REPUBLIC OF ZAMBIA
MINISTRY OF LANDS



Guidelines on Lands and Deeds

www.ministryoflands.gov.zm

Introduction

The Ministry wishes to inform the public that in its quest to provide security of title to land and support all land related transactions, the following guidelines on Land and Deeds Registration in Zambia are hereby published.

Lands and Deeds Registry

The public's attention is drawn to section 3 (i) of the Lands and Deeds Registry Act CAP 185 of the Laws of Zambia, which provides for establishment of the Registry of Deeds by the Minister responsible for land. Currently, there are two registries in Lusaka and Ndola.

Registration of Documents

The Public's attention is also drawn to section 4 of the Lands and Deeds Registry Act, which requires that every document purporting to grant, convey, or transfer land or any interest in land be registered. The documents must be registered within time stipulated in Section 5 of the Land and Deeds Registry Act.

In the case of a document executed at the place where it is registered, the date of execution should be within 30 days.

In the case of a document executed elsewhere in Zambia, the date of execution should be within 90 days.

In the case of a document executed out of Zambia, the date of execution should be within 1 year.

Probate of a will affecting land or any interest in land shall be registered within 12 months of the grant thereof.

Any document required to be registered as previously mentioned and not registered within the time specified shall be null and void.

All documents required to be registered have priority according to the date lodgment, and the date of registration is to be the date upon which the document shall first be lodged for registration in the Registry.

The public is hereby informed that for the service to be provided, the client is required to pay appropriate fees, which are subject to review from time to time.

The Client in Registration

The Lands and Deeds Registry provides a service to clients with in and outside of the Ministry of Lands.

Internal Clients

Internal Clients the Office of the Commissioner of Lands and the Surveyor General generally conduct searches and lodge the following documents, among others:

- Presidential Leases
- Expiration of Leases
- Notices of Intention to Re-Enter
- Certificate of Re-Entries
- Expiry of Leases
- Surrender Deeds
- Revocation of Leases



External Clients

External Clients are members of the public, who generally conduct searches and lodge the following documents:

- Certificate of Title
- Direct Leases
- Lease Agreement
- Deeds of Transfers
- Deeds of Gift
- Deeds of Moleity
- Deeds of Assignments
- Deeds of Assets
- Deeds of Severance
- Trust Deeds
- Mortgage Deeds
- Discharge of Mortgage
- Debentures
- Agriculture Charges
- Caveats
- Withdrawal of Caveats
- Duplicate Certificates
- Probates of the Will
- Order of Appointment of Administrator
- Water Rights
- Deeds of Rectification
- Court Orders
- Application for Common Leaseholds
- Deed Polls
- Power of Attorney

Benefits of Land Registration

The benefits of having property registered include:
The title is conclusive evidence of ownership.

The system of registration can be a tool in the resolution of disputes. Interests in land can be verified with the system of land registration.

The title given to land can be used as security for credit. This security has a positive impact on Land productivity, because it enables the release of major financial resources for investment in the land. The system provides a frame work to facilitate more secure and efficient land transactions.

The system of registration provides comprehensive information on all registered properties

The Ministry of Lands will continue to promote transparency, efficiency, and effectiveness in the registration of property rights.



Beneficiaries of land registration being interviewed in Luangwa District, Lusaka Province

Information pertaining to the Registration of Properties in the Lands and Deeds Registry can be accessed from the Office of the Chief Registrar, Ministry of Lands, Ministry of Lands, Mulungushi House, P.O. Box 50694, Ridgeway, Lusaka, Zambia, Tel: +260 21 1252323/ 1252288

Figure 4.3: Guidelines on Lands and Deeds: available at [www.ministryof lands.gov.zm](http://www.ministryoflands.gov.zm)

4.2 The use of Case Study research method and collecting data by observation

The aim of this chapter is to record and interpret the data collected by observing the procedure at the Lands and Deeds Registry by the researcher and to test it against the practical guidelines developed by the Lands and Deeds and the conditions essential for the success of the land registration system, including its suitability to electronic registration. The primary data regarding the procedure at Lands and Deeds Registry was collected directly from the real world without the researcher participating in the event being observed. The choice by the researcher not to participate was made so as to gain an independent view of comparing what goes on in practice with what is provided for in law and policy, and guidelines that regulate the Land registration system in Zambia.

Recognition has been taken by the researcher of the risks involved in the selection and use of this method of collecting primary data. The risk that the mere presence of the observer may alter the events has been minimised firstly, by tracing two independent files in which the researcher has not known the clients and has not looked at the documents being presented for registration until after observing the entire process of registration. Secondly, to separate the observation of the procedure from the personal feelings and reactions of the observer, the researcher has used the double-entry notebook to separate what has been directly observed from what can be interpreted by observing, with regard to the procedure of registration. Thirdly, the risk that the quality of the results of the observations may have been affected by the fact that it is difficult to capture everything taking place even by taking detailed notes, remains a limitation of this research. The researcher has addressed this limitation by providing an ‘internal audit’ of the procedure. This internal audit involved comparing what the researcher has observed with what the law, policies and internal documents of the Deeds Registry provide which have been scanned and reproduced in their original format. The reliability of using the case study method has been increased by using this review procedure (Yin, 1994). The limitation is further addressed by focusing the research on the procedure and not what Simpson describes as the ‘physical components’ of the system (Simpson, 1976, p.304). The research will not consider issues such as the contents of the land register, the form of the register, the register maps, the records of surveying and the day to day administrative issues governing the workings of the registration system.

The approach taken by the researcher is that this case study is done from a positivist epistemological perspective based on the positivist belief that the world conforms to laws of causation, which could be objectively tested (Fitzerald & Howcroft, 1998). The registration process at the deeds registry is a phenomenon of interest to this research that is difficult to study outside its natural setting, and the researcher had no control over the subjects or events that take place during the process of land registration. It is for this reason that the case study research method has been selected as the most appropriate research method for this chapter by the researcher, by using the technique of observation to collect the data to be tested.

The purpose of the primary research data collected from the Lands and Deeds Registry is simply to explain the current process of the system of land registration and test its suitability for the success of the land registration system, even when introduction of electronic registration in Zambia becomes a reality. In the collection of data, the researcher had selected, tagged and followed two different files (Example 1 and 2) through the procedure adapted by the Lands and Deeds Registry in Lusaka from the time of lodgement of the documents to the time the new title deeds are issued or uplifted. The reason for selecting two files and not one was to ensure that the entire process is captured since there was a possibility that on one of the files a query can be raised in which case the procedure would be halted and remain incomplete until the query is resolved. This would stagnate the research and valuable time would be lost in resolving the query before the process is completed. The method of collecting data was by observing the two files as they commenced their journey from the entrance or lodgement to exit within the lands registry offices, up to the stage when the documents were uplifted by the clients or their representatives.

For the purposes of identification, the two files have been stated as Example 1 and Example 2. The documents that have been presented for registration have been reproduced in their original form but the identity of the parties involved has been blanked out for ethical reasons. The content of the files below show the necessary documents. However, no comments will be made about the content of the documents and its legality. The purpose of showing the original documents is to establish the nature and purpose of the transaction only. Where the original document is not available such as the Certificate of Title because it is in the client's possession, only the title of the document is stated and a note is inserted explaining the position regarding the unavailability of that document..

4.3 Sample File and its details (Example 1)

4.3.1 Lodgement Schedule

The lodgement schedule shows the type of document, the title of the document, the fees payable and the law firm lodging the documents. Once accepted for lodging the official stamp of the Deeds Registry indicates the date when the documents were lodged. As stated earlier the names of the parties and the property details have been blanked out for ethical reasons.

According to the legal requirements, a memorandum of registration is endorsed on the original documents registered under Section 18 of the LDRA, which provides;

A memorandum signed by the Registrar shall be endorsed in every document registered, containing a sufficient reference to the number and position of the document in the Register, which memorandum shall be proof of the due registration of the document in the absence of sufficient evidence to the contrary (Section18,LDRA).

LODGEMENT SCHEDULE

relating to Stand No. _____ and
 Farm No. _____
LIVINGSTONE

REPUBLIC OF ZIMBABWE
 REGISTRY OF LANDS AND DEEDS
 08 FEB 2013
 CUSTOMER SERVICE
 CENTRE
 P.O. BOX 10160, LOGAKA

1. Certificate of Title No. _____ in respect of Stand _____
2. Certificate of Title No. _____ in respect of _____

1. Assent and two copies 1)

3. Consent to Assign
4. DR 53
5. Tax Certificate and Tax Clearance Certificate

DISBURSEMENTS

Registration x 2	ZMW 100.00
Certificate of Title x 2	ZMW 200.00
	ZMW 300.00

Lodged by:  **EMILY PATEL HAMIR & LAWRENCE**
 STAND NO. 4658/A, CHIKWA ROAD
 OPPOSITE OLD MAGISTRATES COURT
 P.O. BOX 30605
LOGAKA
ADVOCATES & NOTARIES

Figure 4.4: Scanned copy of lodgement schedule as lodged at the Lands and Deeds Registry

4.3.2 Certificate of Title

The original certificate of Title to the particular parcel of land is in the possession of the client. In this case, the vendor, and therefore a copy has not been produced here due to the fact that one could not be obtained from the file maintained at the Lands and Deeds Registry. However, a sample of a Certificate of Title has been presented in Example 2, since the example involved a purchase of a property as opposed to the registration of an assent under Example 1, and it was possible to obtain a photocopy of the Certificate of Title available from the file maintained by the Law firm.

4.3.3 Assent and Copy

The assent has been scanned and produced below to show the actual document presented for registration for ethical reasons. The names of the parties, the signatures and other sensitive information have been blocked out. No comments have been made about the content of the document. The name of the Law Firm appears on the cover page as per legal requirements of lodging documents at the Lands and Deeds Registry. The documents indicated on the lodgement schedule, except for the original Certificate of Title, are available to the public by conducting a search on the File at the Lands and Deeds Registry. Under Section 22 of the LDRA, the registry is open for search;

(1) Subject to such regulations as the Minister may make from time to time, the Register may during the usual office hours be searched and examined by any anyone and certified copies of any entry may be obtained if required upon payment of such fees as may be prescribed.

(2) Where a register or part of a register is kept other than in the form of a book, it shall be made available for search in a convenient written form, as a printed document or by means of an electronic devise (Section 22, LDRA).

The Act provides for electronic searches but not electronic registration of documents. However, the search can only be conducted by a person who travels to the Deeds Registry for that purpose. The obvious setback of such a system is that if the person who needs to conduct a search is based in Livingstone, she will need to travel to Lusaka in order to conduct the search on the property. There is an urgent need to provide for electronic searches from different points in each town within the country. The proposed land recordation and registration system will provide for that, as stated in chapter five of this research.

ASSENT: BASSON

REF: BA.250

DATED the 10 day of NOV 2013

[REDACTED]

to

[REDACTED]

ASSENT

relating to Stand No. [REDACTED], Livingstone and
Farm No. 3234,
LIVINGSTONE

SOLLY PATEL HAMIR & LAWRENCE
STAND NO. 4658/A, CHIKWA ROAD
OPPOSITE OLD MAGISTRATES COURT
RHODES PARK
LUSAKA
ADVOCATES & NOTARIES

I [REDACTED] of Livingstone in the Southern Province of the Republic of Zambia as the Personal Representative of [REDACTED] late of Livingstone aforesaid who died on the 4th day of May Two Thousand and Eight do this 10 day of NOT 1976 Two thousand and Thirteen HEREBY as Personal Representative Assent to the vesting in myself the said [REDACTED] of Livingstone aforesaid of FIRSTLY ALL THAT piece of land in extent 97.1906 hectares more or less being Stand No. 2112 situate at Livingstone in the Southern Province of Zambia which piece of land is more particularly delineated and described on Diagram No. 1795 of 1996 annexed to the Certificate of Title relating to this piece of land EXCEPT and RESERVED all minerals oils and precious stones whatsoever upon or under the said land and SECONDLY ALL THAT piece of land in extent 1092.701 acres more or less being Farm No. 3234 situate at Livingstone in the Southern Province of Zambia which piece of land is more particularly delineated and described on Diagram No. 263 of 1962 annexed to the Certificate of Title relating to this piece of land EXCEPT and RESERVED all minerals oils and precious stones whatsoever upon or under the said land for all the estate or interest of the said [REDACTED] at the time of her death AND

DECLARE that I have not previously hereto given or made any assent or assignment in respect of any legal estate in the premises or any part thereof

IN WITNESS whereof [redacted] the Personal Representative of [redacted] has set her hand and seal the day and year first before written

SIGNED SEALED and DELIVERED by) [redacted]
([redacted])
in the presence of:)

WITNESS [redacted]
Name: [redacted]
Address: [redacted]
Occupation: [redacted]

Figure 4.5: scanned copy of the assent as lodged at the Lands and Deeds Registry

4.3.4 Consent to Assign

In order to lodge documents for registration, the legal requirement is to obtain consent to assign using the prescribed form. Obtaining consent from the President is a prerequisite to any transaction in land including the buying and selling of property. Under Section 5 of the Lands Act (LA) it provides; “(1) A person shall not sell, transfer or assign any land without the consent of the President and shall accordingly apply for that consent before doing so” (Section 5, LA). A blank application for consent form under regulation 3a of LDRA has been scanned and produced below. Once the application is approved, a formal consent to assign is given in the name of the applicant.

The requirement of obtaining consent before transacting in land arises from the statutory provision that all land in Zambia is vested in the President or what Hansungule calls the vestment clause (Hansungule, 2001). “Section 3 of the Act decrees: 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 “(Hansungule, 2001, P. 10). Accordingly, this means that each and every parcel of Zambian land is vested in the Republican President. This would mean that any transaction in land would require consent from the President who has delegated this power to the Commissioner of Lands. Furthermore, section 13 of the repealed law, the Land Conversion of Titles Act, had the same content as section 3 of the LA and was the subject of interpretation in the case of *Siulapwa v Namusika, 1985*. The facts of the case involved the sale of a village house held under customary tenure without obtaining presidential consent. The question before the court was whether section 13 applied to land held under the English system of tenure or it did in fact apply to both customary tenure as well as English tenure. The court held that: “In so far as s.13 provided no exception, all types of dealings in land, including the sale of village houses had to comply with it. This clearly shows that parties holding land under customary tenure have to obtain presidential consent because the land registry will not register the transaction without Presidential consent. The transaction would be null and void (of no legal effect) as per the case of *Siulapwa v Namusika, 1985*

**REPUBLIC OF ZAMBIA
MINISTRY OF LANDS**

THE COMMISSIONER OF LANDS
P.O. Box 30069
LUSAKA

PART I

(To be completed by the Lessee in triplicate)

Application for Consent to Assign/Transfer

1. Property: Stand/Plot/Farm/Subdivision No.....
Town/District.....
2. Area (hectares)..... Zoning: Residential/Commercial/Industrial/Agricultural/Other Use
3. Name of Lessee.....
P.O. Box
4. Residential Address.....

PROPOSED ASSIGNEE/TRANSFeree

5. Name in full
6. Address.....
7. Details of Unexhausted Improvements: Gross External Areas/Hectares of cleared land, etc.

	Value	
	K	N
(a) Dwelling House – G.E.A. (metres squared).....		
(b) Servant's Quarters –G.E.A..... (metres squared).....		
(c) Other buildings		
i)		
ii)		
iii)		

TOTAL

=====

8. Proposed Price/Consideration/Payment.....

Signature of Applicant

Date.....

PART II
(For official use only)

9. Lease Rent paid up to Last Receipt No.....
Dated

10. Details in Part I have been checked and the following are relevant
comments.....
.....
.....
.....
.....

Checked by:.....

Position:.....
for/Commissioner of Lands

Figure 4.6: Blank: Consent Application Form

4.3.5 DR53

In accordance with the LDRR, the fourth schedule regulation 3A provides for the immovable property transaction form. This form has been scanned and produced below. Once again, the names of the parties and other sensitive information have been blanked out for ethical reasons. DR53 is one of the forms that has to be presented when registering documents at the Lands and deeds registry involving a land transaction.

The Lands and Deeds Registry Act

IMMOVABLE PROPERTY TRANSACTION FORM

1. Type of Transaction: /Transfer* 2. Date of Document:

3. Transferor:

Full Names: [Redacted]

Postal Address: [Redacted]

Residential Address: LIVINGSTONE

4. Transferee:

Full Names: [Redacted]

Postal Address: [Redacted]

Residential Address: LIVINGSTONE

5. Property:

Province: SOUTHERN Town (or nearest Town): LIVINGSTONE

Farm No.* Stand: [Redacted] Area: 97.1906 hectares*

Address: (Number, Street and Area of Town): Livingstone

Brief Description (i.e. nature of improvements): Dwelling House.

Total Rateable Value: K Land: K Improvements: K (if any)

6. Interest Transferred or Created:

* (i) Leasehold Assigned of: 99 Years from 1/08/1995 @ K p a

* (ii) Lease Granted of: Years from

7. Consideration for this Transaction:

* (i) Capital Payment now: NIL (Assent) (in words) NIL

* (ii) Mortgage Debt to Transferor Created: p.m. (in words)

* (iii) Rent Reserved: p.m. (in words)

* (iv) Any other (debt released, terms surrendered, land exchanged, royalty, etc.)

8. Minor Interests:

9. Advocates Registering Transaction:

Messrs. Solly Patel Hamir & Lawrence, Stand No. 4658/A, Chikwa Road, Opposite Old Magistrates Court, P.O. Box 30605, LUSAKA Advocates for:

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Figure 4.7: scanned copy of Form DR53 as lodged at the Lands and Deeds Registry

4.3.6 Tax Certificate and Tax Clearance Certificate

The final document on the lodgement schedule is obtained from the Zambia Revenue Authority (ZRA) which completes the property transfer tax form scanned and produced below. For purposes of confidentiality, the tax certificate and tax clearance form issued upon submission of this form, and the payment of the requisite tax have not been scanned and produced below. The requirement of paying property transfer tax is provided for under section 9(1) of the Property Transfer Tax Act. This is a statutory requirement for any transaction in land. If the tax clearance certificate is not presented with the documents lodged for registration, the deeds registry will not accept the document for registration.



ZAMBIA REVENUE AUTHORITY

Domestic Taxes Division

PROPERTY TRANSFER TAX ACT CAP 340 (Section 9(1))
Provisional Return

Sr. No	Description	Details
1	Seller's TPIN *	
2	Buyer's TPIN, if registered	
3	Relationship between Buyer and Seller * (Applicable only in case of related parties)	Immediate family members <input type="checkbox"/> Group Companies <input type="checkbox"/> Nature of Relationship : _____
Seller Details (Please notify the Tax Office if there has been any change in details under 5 to 8)		
4	Name of Taxpayer	
5	Postal Address	PO Box
		Town
		Province
		Country
6	Physical Address	Plot / House No
		Street
		Area
		Town
		Province
7	E-mail Address	
8	Telephone / Cell Number	Country Code
		Area Code
		Number
Buyer Details		
9	Name of Taxpayer	Title
		Fore Name
		Middle Name
		Last Name
10	Postal Address	PO Box
		Town
		Province
		Country
11	Physical Address	Plot / House No
		Street
		Area
		Town
		Province
12	E-mail Address	
13	Telephone / Cell Number	Country Code
		Area Code
		Number

Part 1: IMMOVABLE PROPERTY DETAILS

.....

1.1	Stand / Farm / Plot No/House No.	
1.2	Street Name & No.	
1.3	Suburb/Area	
1.4	Town	
1.5	Province	
1.6	Sale Price/Transfer value (K)	
1.7	Date of Sale / Transfer	
1.8	Property Description	
1.9	Improvements (e.g. borehole etc.)	

1.10 (Please tick or indicate size / No. where appropriate)

Residential Building

<i>Residential Plot (Square Meter)</i>	<i>Residential Building (Square Meter)</i>	<i>No. of bedrooms</i>	<i>Block wall fence</i>	<i>Pool</i>	<i>Service Qtr. Guest House</i>	<i>Car Port</i>	<i>Floor tiles</i>	<i>Ceiling</i>
			Yes/no	Yes/no	Yes/no	Yes/no	Yes/no	Yes/no

Industrial Building

<i>Industrial Plot Approx. area (Square Meter)</i>	<i>Industrial Approx. area of Building (Square Meter)</i>	<i>block wall fence</i>
		Yes/no

Commercial Building

<i>Plot Approx. area (Square Meter)</i>	<i>Shop/ office No. of floors</i>	<i>Approx. area of Ground floor (Square Meter)</i>

Farming Property

<i>Land (hectares)</i>	<i>Main House (Square Meter)</i>	<i>No. of Bedrooms</i>	<i>Other features (e.g. bam, piggery etc.)</i>	<i>Area Cleared (hectares)</i>

*Use separate sheets for transfer of more than one property between the same buyer and same seller.

Part 2: STOCKS AND SHARES IN ZAMBIAN INCORPORATED COMPANIES

		Ordinary Shares	Preference Shares
2.1	Type of stock or shares		
2.2	Number of shares held		
2.3	Date of Sale / Transfer		
2.4	Sale Price/ Transfer value (K)		
2.5	Nominal Value(K)		
2.6	Number of shares transferred		
2.7	Company in which Shares/Stock held		

*Use separate sheets for transfer of shares of more than one company between the same buyer and same seller.

3.1	Type of Mining Right	
3.2	Mining Right Number	
3.3	Application Reference Number	
3.4	Date of Sale/ Transfer	
3.5	Sale Price/Transfer Value (K)	
3.6	Minerals Covered by Mining Right	
3.7	Area covered by Mining Right(Square Kilometres)	
3.8	Name of Town/District	

*Use separate sheets for transfer of more than one mining right between the same buyer and same seller.

PART 4: ASSESSMENT

Sr. No.	Property	Assessed Value (K)	Tax Rate (%)	Tax Assessed (K)
4.1	Immovable Property Transfer			
4.2	Stock/shares in Zambian Incorporated Companies			
4.3	Mining Rights or Interest in Mining Rights			
Total				

PART 5: PERSONS OR SOLICITORS HANDLING THIS TRANSACTION

5.1	Name of Firm	
5.2	Name of Person / Solicitor	Title
		Fore Name
		Middle Name
		Last Name
5.3	Physical Address	Plot / House No
		Street
		Area
		PO Box
		Town
		Province
		Country
5.4	Telephone / Cell Number	Country Code
		Area Code
		Number
5.5	Capacity	

DECLARATION	
I Certify that the above details are true and correct.	
Full Name	Capacity
Signature	Date

FOR OFFICIAL USE ONLY7

Officer's Name		Receiving Office Date Stamp
Officer's Signature		
Date Received		

Attachments

1. For land and buildings- Consent to assign, , contract of sale/ letter of sale.
2. For shares and stocks- Latest Financial Statements, Share valuation report, contract of sale/ letter of sale.
3. For mining right & interest on a mining right- Letter of offer from Ministry of Mines, contract of sale/ letter of sale, application form (with all attachments) submitted to Ministry of Mines.
4. Other supporting documents as may be required.

Figure 4.8: Blank: Property Transfer Tax Form

Example 1 shows the lodgement schedule for the transaction relating to the property and the documents that are indicated in the schedule. The documents have been scanned and produced in the order that they appear on the lodgement schedule for easy reference. Each document has been given a number and has been presented in their original format and content. Certain forms have been presented as 'blank' due to the issues of confidentiality. The only information that has been blanked out in cases where the original document is produced are the names of the parties or confidential information relating to the transaction. The researcher has strove to ensure that the transaction remains as real as possible in order for the reader to follow the procedure as it happens. Just as for Example1, the same format has been adopted for Example 2

4.4.2 Certificate of Title and Copy

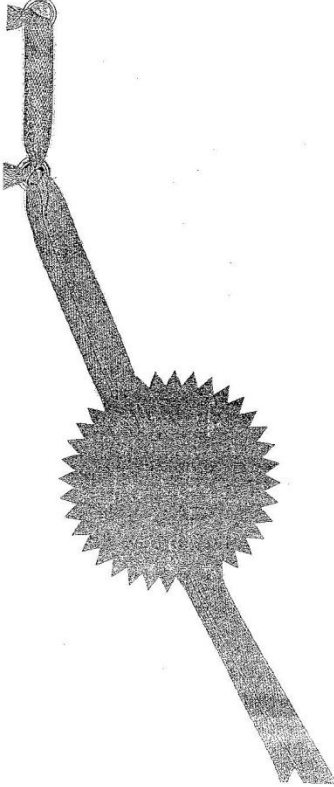


CERTIFICATE OF TITLE

Subdivision of
Subdivision of

No.:

FARM No.:



88

DR 1A

No.: 162361



REPUBLIC OF ZAMBIA

Registered No.: [REDACTED]

THE LANDS AND DEEDS REGISTRY ACT
(Section 45)

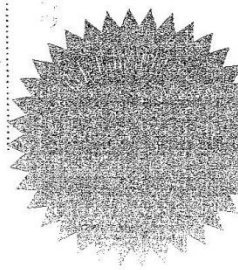
CERTIFICATE OF TITLE


THIS Certificate, dated the TWENTY-EIGHT day of MAY
thousand and TWELVE under the hand and seal of the Registrar of the
Lands and Deeds Registry of Zambia WITNESSETH that [REDACTED]
[REDACTED] First

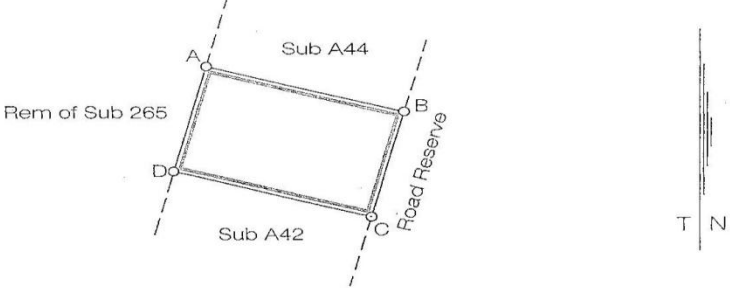
is a tenant or lessee for the unexpired residue of a term of 99 years from the
day of January 20 12 (subject to such reservations, restrictions, incumbrances, liens,

estates and interests as are notified by memorial underwritten or endorsed hereon) of and in ALL that
piece of land in extent 936 square metres more or less being Subdivision [REDACTED] of Subdivision [REDACTED]
of Farm No. [REDACTED] situate in the Lusaka Province of Zambia which piece of land is more particularly
delineated and described on Diagram No. 3688 of 2012 except and reserved all minerals oils and
precious stones whatsoever upon or under the said land

[Signature]
Registrar



SIDES	METRES	ANGLES OF DIRECTION	CO-ORDINATES		DIAGRAM NUMBER 3688/2012
			SYSTEM Y	METRES X	
AB	39.00	104.43.10			APPROVED:  GOVERNMENT SURVEYOR DATE: 14/05/2012
BC	24.00	194.54.10			
CD	39.00	284.43.10			
DA	24.00	14.45.00			



SCALE 1: 1,000.....

BEACON DESCRIPTION..... All are iron pegs in concrete.....


THE FIGURE..... A - B - C - D - A.....

REPRESENTS..... 936 Square metres.....

OF LAND BEING..... Sub. [redacted] of Sub. [redacted] of Farm [redacted].....

SITUATED IN THE..... LUSAKA..... PROVINCE..... REPUBLIC OF ZAMBIA.....

SURVEYED IN..... April 2012.....

BY ME.....

 LAND SURVEYOR

PARENT DIAGRAM No.:	897/2012
SURVEY RECORDS No.:	411/2012
S G FILE No.:	S/34/609
PLAN No.:	411/2012
MAP REFERENCE:	SHT. 1528 A4

Figure 4.10: Scanned copy of the Original Certificate of Title as obtained from the Lands and Deeds Registry

4.4.3 Assignment and copy

THIS INDENTURE made the _____ day of _____ Two thousand and Twelve **BETWEEN** _____ Company incorporated in Zambia and having its registered office at Lusaka (hereinafter called "the Vendor") of the one part and _____ of Lusaka in the Republic of Zambia (hereinafter called "the Purchaser") of the other part

WHEREAS

1. By a Lease (hereinafter called "the Lease") dated the 2nd day of March Two thousand and Twelve and made between The President of the Republic of Zambia of the one part and the Vendor of the other part **ALL THAT** the hereditaments and premises more particularly described in the Schedule hereto (hereinafter called the "Premises") were demised to the said Vendor for a term of 99 years from the 1st day of January Two thousand and Twelve at the rent reserved and covenants conditions and stipulations contained in the said Lease
2. The Vendor has agreed with the Purchaser for the sale to the Purchaser of the said premises subject as aforesaid but otherwise free from encumbrances at the price of One Hundred and Forty-seven Million Eight Hundred and Eighty-eight Thousand Kwacha (K147,888,000.00)

NOW THIS DEED WITNESSETH as follows:-

1. In pursuance of the said agreement and in consideration of the sum of One Hundred and Forty-seven Million Eight Hundred and Eighty-eight Thousand Kwacha (K147,888,000.00) paid by the Purchaser to the Vendor (the receipt whereof the Vendor hereby acknowledges) the Vendor as Beneficial Owner **HEREBY ASSIGNS** unto the Purchaser **ALL AND SINGULAR** the piece of land comprised in and demised by the Lease **TO HOLD** unto the Purchaser for the residue of the term of years created by the Lease **SUBJECT** to the exceptions reservations restrictions restrictive covenants and conditions mentioned contained in the said Lease

2. The Purchaser with the object and intention of affording to the Vendor its successors in title a full sufficient indemnity in respect of the rent covenants and conditions reserved and contained in the Lease but not further or otherwise covenant with the Vendor as follows:-
 - (a) To pay the reserved rent henceforth to become payable in respect of the premises

 - (b) To perform and observe all the covenants and conditions henceforth on the part of the Lessee to be performed and observed

3. The necessary consent in writing to the Assignment hereby made has been duly obtained and Property Transfer Tax paid to Zambia Revenue Authority

4. It is hereby certified that for purposes of any fees and Property Transfer Tax payable the aggregate amount or value of the consideration for this transaction does not exceed One Hundred and Forty-seven Million Eight Hundred and Eighty-eight Thousand Kwacha (K147,888,000.00)

IN WITNESS whereof the Vendor has caused its Common Seal to be hereunto affixed and the Vendor has set his hand and seal the day and year first before written

THIS SCHEDULE hereinbefore referred to:-

ALL THAT piece of land in extent 936 square metres more or less being Subdivision [REDACTED] of Subdivision No. [REDACTED] of Farm No. [REDACTED] situate in the Lusaka Province of Zambia which piece of land is more particularly delineated and described on Diagram No. 3688 of 2012 annexed to the Certificate of Title issued in respect of this piece of land **EXCEPT** and **RESERVED** all minerals oils and precious stones whatsoever upon or under the said land

THE COMMON SEAL of [REDACTED])
[REDACTED] was hereunto affixed)
in the presence of :)

DIRECTOR:

SECRETARY:

SIGNED SEALED and **DELIVERED** by)
[REDACTED])
in the presence of :)

WITNESS:

Name:

Address:

Occupation:

Figure 4.11: Scanned copy of the Assignment as lodged at the Lands and Deeds Registry

ASSIGNMENT: [REDACTED]

REF: [REDACTED]

DATED the _____ day of _____

2013

[REDACTED]

to

[REDACTED]

A S S I G N M E N T

relating to Subdivision [REDACTED] of Subdivision [REDACTED]
of Farm No. [REDACTED]

LUSAKA

SOLLY PATEL HAMIR & LAWRENCE
STAND NO. 4658/A, CHIKWA ROAD
OPPOSITE OLD MAGISTRATES COURT
RIDGEWAY
LUSAKA
ADVOCATES & NOTARIES

Figure 4.12: Scanned copy of the cover page of the Assignment

4.4.4 [Blank] Consent to Assign

(Refer to Example 1 for the format of this document)

4.4.5 DR53

This form is provided for under the fourth schedule, regulation 3A of the LDRR and is submitted by the Law firm or the individual registering the transaction. The form for this particular transaction has been scanned and produced below.

The Lands and Deeds Registry Act

IMMOVABLE PROPERTY TRANSACTION FORM

1. Type of Transaction : 2. Date of Document:

3. Transferor :
Full Names:
Postal Address:
Residential Address: **LUSAKA**

4. Transferee:
Full Names:
Postal Address: C/O
Residential Address: **LUSAKA**

5. Property:
Province: **LUSAKA** Town (or nearest Town): **LUSAKA**

Farm (No. *..) Area: **936** square metres*
Address: (Number, Street and Area of Town):
Brief Description (i.e. nature of improvements):
Total Rateable Value: K Land: K Improvements: K
(if any)

6. Interest Transferred or Created :
*(i) Leasehold Assigned of **99** Years from **1/01/2012** @ K p.a.
*(ii) Lease Granted of Years from

7. Consideration for this Transaction:
*(i) Capital Payment now..... **ZMW 147,888.00**..... (in words) ... **One Hundred and Forty-seven Thousand Eight Hundred and Eighty-eight Kwacha Rebased**.....
*(ii) Mortgage Debt to Transferor Created...p.m..... (in words)
*(iii) Rent Reserved p.m. (in words) ..
*(iv) Any other (debt released, terms surrendered, land exchanged, royalty, etc.).....

8. Minor Interests:


9. Advocates Registering Transaction:
Messrs. Solly Patel Hamir & Lawrence,
Stand No. 4658/A, Chikwa Road.,
Opposite Old Magistrates Court,
P.O. Box 30605. LUSAKA
Advocates for:

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Figure 4.13: Scanned copy of Form DR 53 as lodged at the Lands and Deeds Registry

4.4.6 Tax Certificate and Tax Clearance Certificate

For example 2, the actual tax clearance certificate was made available to the researcher and has been scanned and produced below but the names of the parties and other information have been blanked out.


**ZAMBIA
REVENUE
AUTHORITY**

New Revenue House
P.O. Box 35710 Lusaka
Tel: 229214/8 Fax: 221933
mailto:mwendab@zra.org.zm
Website: www.zra.org.zm

COM/6442/2013
6th November, 2012

**The Commissioner of Lands
P O Box 30069
Lusaka.**

**PROPERTY TRANSFER TAX ACT, CAP. 340:
TAX CLEARANCE CERTIFICATE.**


Transfer of Stand/Farm # [REDACTED], LUSAKA
[REDACTED]

This is to confirm that Property Transfer Tax of [REDACTED] has been paid on property value of [REDACTED] at 5% tax rate.

Therefore, I have no objection to the property transfer being registered by the Registrar of Lands & Deeds.

This tax clearance certificate is valid up to **31ST MAY, Year 2 Thousand And THIRTEEN.**

Yours faithfully



**BRIDGET M. MUNDIA MWENDA
CLIENT SERVICE OFFICER
For /COMMISSIONER DOMESTIC TAXES**

Senior Inspector – Other Taxes' Office

Figure 4.14: Scanned copy of the Tax Clearance Certificate

The researcher commenced the process of collection of data at the lands and deeds registry by obtained permission from the Chief Registrar's office, and the Law firm responsible for lodging the documents to follow the files (example 1 and 2) through the system. The description below is a record of the findings of this primary research.

4.5 Mapping the Journey of sample files (Examples 1 and 2) from lodgement to uplifting

4.5.1 The Customer Service Centre at the Deeds Registry

Lodgement of documents at the Deeds Registry is done either by the purchaser of the property personally or through a law firm which has been appointed by the purchaser to act on his behalf. Section 3A of the Lands and Deeds Registry Regulations (LDRR) provides that:

No document purporting to grant, convey, assign or dispose of land or any interest therein (other than a State Circuit or State Lease) shall be accepted for registration by the Registrar unless it is accompanied by a form (in duplicate) set out in the Fourth Schedule hereto duly completed by the person interested under the document or by a legal practitioner practising in Zambia and having an office or place of business there (Section 3A, LDRR).

The fourth schedule referred to under the regulation is the immoveable Property Transaction Form which has been scanned and produced for both the Examples file 1 and 2.

The two example files (example 1 and 2) selected for this research were lodged through a Law Firm (Solly Patel Hamir and Lawrence) and not the purchaser himself. The documents lodged bear the official stamp and address of the Law firm and the documents can be searched at the public registry within the Lands and Deeds Registry in Lusaka, hence the disclosure of the name of the Law firm in this research is ethically accepted since they are public documents.

To lodge the documents, the representative from the Law Firm entered the Customer Service Centre (CSC) at the Lands and Deeds Registry with the documents that are to be lodged. The CSC at the Deeds Registry serves as the entry point as well as the exit point of the documents brought in for the purpose of registration. The CSC is open to receive applications from 09:00 to 12:30 from Monday to Friday. This requirement is provided for under Section 9 of the LDRR. Following this legislative requirement, documents are accepted for lodgement only in the mornings during working days. The reason for this is to allow the processing of

documents in the afternoon when the registry staff are not interrupted by attending to clients and accepting documents for registration as is the case in the mornings. The public are notified of the times within which to lodge the documents by way of a written notice displayed at the entrance of the Hall (refer to Figure 4.15). These images have been adopted from a presentation by Mwanalushi, the Assistant Surveyor-General available at www.africageospatialforum.org.

The CSC as shown below in the Figures 4.15 and 4.16 provide a visual view of the internal part of the building, its arrangement and the various notices displayed within it. The purpose of providing a visual display of the CSC in this research is to understand and appreciate practically the procedure involved in the lodgement of documents from commencement and following the journey of the documents through the registry, and back again to the same CSC for uplifting and collection by the client.



Figure 4.15: Image of the entrance to the CSC

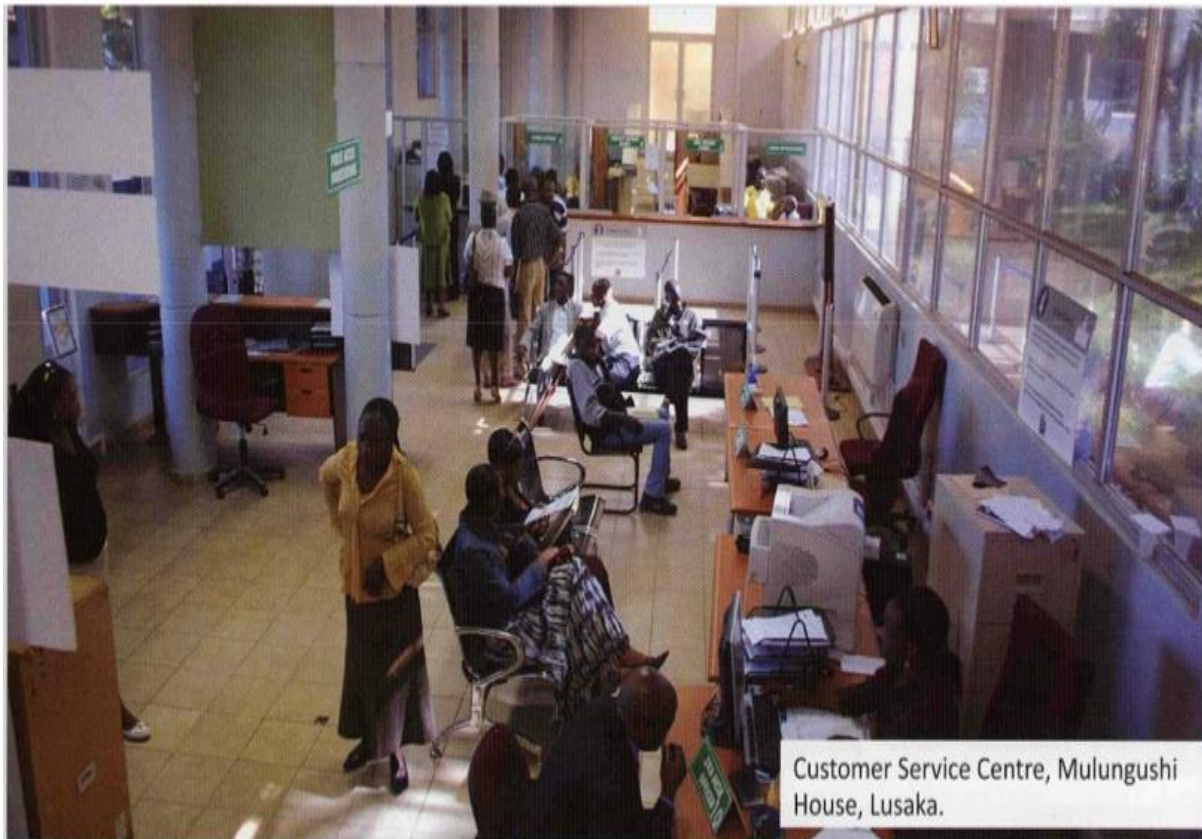


Figure 4.16: Image of the inside view of the CSC

The Customer Service Centre (CSC) is guided by its charter which was issued by the Minister of Lands to ensure speedy and efficient delivery of services for the process of land registration. The Charter which outlines the following serves as a guideline to the lands and deeds registry:



REPUBLIC OF ZAMBIA
MINISTRY OF LANDS



Customer Service Charter

A guarantee to Deliver quality
services to our Valued Customers

www.ministryoflands.gov.zm

Statement by the Minister of Lands

Zambia is the land.

We, the management and staff of the Ministry of Lands have been entrusted with the great responsibility of developing and implementing policies and programs to assure that our most important, shared resource the land - is utilized for the maximum benefit of all Zambians.

To help the Ministry discharge its duties efficiently so as to serve our customers we have developed a Customer Service Charter.



This Customer Service Charter identifies key services that the Ministry of Lands will provide in carrying out its duties, initially in Lusaka and Ndola but eventually throughout the country. For each of our services a performance standard has been defined. This will enable all our customers to know exactly what service they have a right to receive, when they follow the defined procedures.

This Customer Service Charter also reflects the core values recently adopted by the Ministry. Our capacity to provide services in an open, professional, and efficient manner also has been enhanced by the opening of a Customer Service Centre with improved, automated systems at the Ministry of Lands headquarters in Lusaka. These initiatives are intended to demonstrate the new, customer-focused approach by the management and staff of the Ministry of Lands.

On behalf of all employees at the Ministry of Lands, I offer my personal guarantee that we will strive to provide you with this level of service every time we conduct a land-related transaction. And should we fail to meet our own published standard, I encourage you to contact us through any of the avenues specified in this charter.

Peter Daka
Minister of Lands

Customer Service Standards

Consistent with law, policy, experience, and our core values - and if our customers have provided complete and accurate information as required - the Ministry of Lands commits to deliver services according to the following standards:

Services /Products	Standard
LAND ALLOCATION	
Assign Property Number	Assigned in 9 working days
Acknowledge Receipt of Application	Acknowledged within 1 hour of submission
Response to Application	Respond in 5 working days
Issue Offer Letter	Issue 30 working days after approval of application.
Prepare Lease	Prepared in 10 days, after acceptance of offer, submission of survey diagrams or sketch plans.
Issue Primary Title Deed	Issued 7 days after joint signature of lease by the customer and the Commissioner.
Issue Secondary Title Deed	Issued in 14 days
Issue State Consent	Issued in 3 days
Resolve Disputes (If Required)	Disputed cases will be resolved in 84 working days of receipt of complete and accurate documents.
LANDS AND DEEDS DOCUMENTS	
Issue Title Deed	Issued in 7 days following acceptance by MOL of documentation of payment of the Property Transfer Tax to the Zambia Revenue Authority.
Register Mortgages	Registered in 7 days
Register/Withdraw Caveats	Completed in 3 days
Register Miscellaneous Documents and Other Interests	Register within 5 days
Provide Property Searches	Completed in 3 days
SURVEY SERVICES	
Conduct Cadastral Survey	Quotations for survey will be provided in 2 working days. The quotation will state a guaranteed time frame and cost for conducting the survey.
Issue Survey Diagrams for Surveyed Land	Issued in 7 working days
Lodge and Approve Survey Records	Completed in 5 - 21 working days based on the number of properties
Prepare Sketch Plans	Prepare and approve sketch plans in 3 working days
Prepare CTCs and Supercede Diagrams	Prepare and approve diagrams in 7 working days.
Provide Mapping and Cartographic Services	Refer to appropriate officer in 60 minutes
Provide Geodetic Data	Refer to appropriate officer in 60 minutes
OTHER SERVICES	
Attend to Customers at CSA	Attend to customers within 10 minutes after registration in the Customer Service Centre
Acknowledge Comments/Complaints	Within 5 working days of receipt by appropriate MOL manager
Respond to Comments/Complaints	Within 20 working days of receipt by appropriate MOL manager
Distribute Bills for Ground Rent	Completed by August 31st annually
Deliver Services	In accordance with our core values, services will be respectful, impartial, efficient, and excellent.
Publish information	All applicable laws and regulations will be published and prominently displayed for customer convenience. This will include specifically the right of customers to appeal any adverse decision.
Report Performance on Standards	Publish performance report on these standards 4 times

What is Expected from Our Customers

To enable the Ministry of Lands to meet its standards, we encourage all customers to take notice of and comply with the following:

Answer truly and completely any questions asked of you either on any application form or verbally by any authorized employee;

- Do not offer any money, gratuity, food/drink, lodging, favor, gift or other advantage to any Ministry of Lands employee in return for a public service or to obtain speedier attention;
- Provide any document, data or supporting evidence necessary to process any transaction or request;
- Acquaint yourself with applicable laws, regulations and general requirements through the different publications and information sources of the Ministry of Lands;
- Adhere to procedures set and duly published by the Ministry of Lands with respect to requested services and products;
- Do not attempt to by-pass procedures by using external, political or other privileged influences;
- Initiate all transactions and requests for service at the designated Customer Service Centre since only referred customers will be served at the back office;
- Recognize that the Ministry of Lands is attempting to work toward standards of timeliness and efficiency. Therefore, please be precise with your request for service and complete your transaction as quickly as possible so as not to unnecessarily delay other customers.
- Treat with courtesy and respect all Ministry of Lands staff serving you;
- Quote your property number, transaction number, or other assigned case reference number, when applicable, when you contact us or provide documents for review and processing;
- Understand that our staff are bound by privacy and confidentiality standards and, therefore, require your written authorization in order to release information to anyone claiming to be acting on your behalf.
- Feel free to share with us your feedback about the Ministry of Land's services and standards.

Complaints, Comments, and Compliments

We have created many opportunities for you to provide feedback about the quality of our services and the way we deliver them. Please take advantage of any of the following avenues for contacting the Ministry.

By Phone: 0211 252288 MOL Switchboard/Request Department

By Fax: 0211 253640

In person: Customer Service Centre
Ministry of Lands/Ground Floor
Mulungushi House, Independence Avenue, Lusaka

In writing: At the CSC by filling in a customer comment card and depositing it in the box provided or

By post to: Permanent Secretary
Ministry of Lands
Mulungushi House, Independence Avenue, Lusaka

On our website: <http://www.ministryoflands.gov.zm>

Figure 4.17: Scanned copy of The Customer Service Charter

The layout of the customer service centre consists of counters, desks and chairs for customers waiting to be served in the central area of the room. On a raised platform to the side of the room is the desk of the Customer Service Manager, clearly visible from the entrance and in sight of any visitor to the CSC. The CSC is lined with a number of notices as well as an information desk. The notice pasted above the information desk states the customer services & fees not clearly visible in Figure 4.18. The amount of fees payable for lodging a particular document changes from time to time and it is displayed in the notice but for the purposes of this research, it is not important to indicate the actual amounts. Suffices to state that lodgement of a document attracts statutory fees.



Figure 4.18: Image of the information desk at the CSC

While observing the two example files, the researcher had spent approximately two hours observing and recording the contents of these notices placed around the CSC. The researcher's observation regarding the first impression of a client walking into the CSC is that it would be difficult for a client coming into the CSC to firstly, get her bearing around the place with so much information to look at immediately upon entering the CSC. Secondly, the client would be overwhelmed by the amount of information that has to be read in order to understand the actual procedure to follow since the information is placed amongst the

explanations about the current position of the CSC, rather than just the explanation of the procedure which the observer felt was totally irrelevant for the client. Thirdly, the observer did not understand why the CSC outlined the guidance to the clients about the future plans for the virtual service which the CSC intends to implement. At the time of conducting the field research, the virtual service which the CSC intends to implement is still in its planning stage and very far from being implemented. The researcher questioned the need for displaying so much information that is not directly relevant for the client to read, assimilate and follow the procedure, especially if they are entering the CSC for the first time to lodge their document. Communications between CSC and the client should not only be direct and relevant but should convey the message so that the practical procedure is easily followed without overuse of the information desk and queries from the client. An example of the irrelevant Information such as “in the future, this desk will host incoming calls as part of a planned call centre” is not useful to the client and crowds the notices which the client will either read without understanding its significance or read only the portion that she thinks is required or important to understand the procedure of lodging the documents. The client may even choose to ignore the entire notice by not reading its contents at all (refer to the notice at the information desk displayed in Figure 4.18). The observer sees the need to trim the information or separate the information about the procedure and general information to the public, to decrease the time spent reading and understanding that information in order for the client or Law firm representative to lodge documents at the CSC.

4.6 The process of Registration

Upon entering the CSC, the first point of contact for the researcher observing the two sample files was the CSC Manager who would introduce the researcher to the personnel at the intake counter (indicated at intake counters in Figure 4.19) responsible for receiving the documents from sample Files (indicated as Example 1 and 2 and showing the documents of each file). The lands officer at each counter would in turn introduce the researcher to the next person so that the researcher could observe the two files as they map their journey through one office to another in accordance with the laid down procedure for registration. The researcher did not conduct interviews with any member of staff at the registry or any clients. The purpose was to collect the data simply by observing the procedure. The record below is prepared from the data collected and recorded, and includes the time it had taken to map the entire journey of sample files 1 and 2. For the purposes of logical presentation and testing the data with the time function map discussed under Figures 4.1 and 4.2, each part of the journey of the

documents is set out as steps. Each step is a sub-heading provided for in accordance with Figures 4.1 and 4.2. Where the researcher has identified a gap and one of the steps had not been practically performed during the course of observing the Files, the notes under that step would indicate that. The actual time taken and the time it should take according to the internal regulations of the registry are presented as part of the testing process.

4.6.1 Step No. 1: Lodgement

The process for the two Examples file 1 and 2 commences when the documents are lodged by the representative from the Firm of Advocates at the last unmarked intake counter. The intake counters are divided in accordance with the departments that exist within the Lands and Deeds Registry. The counters total five in number and are marked as lands intake, survey intake, and Zambia Revenue Authority intake to facilitate onsite Property Transfer Tax payment and lands applications. The last counter remains unmarked. The proposed suggestion is that the counter should be marked as ‘lodgement’ or ‘document intake’.



Figure 4.19: Image of the five intake counters at the CSC.

The Land Officer at the unmarked counter receives the document for lodgement. The observer does not understand the reason or the logic in leaving the counter unmarked. The

question is, 'How a client would know that for lodging documents, the starting point is the unmarked counter?'

Once accepted, the documents are verified and an entry in the book produces a written record. An initial entry of the documents is made on the computer as well. The observer noted that the time taken to lodge the document depended on the length of the queue as well as the speed of the person recording the documents. The two files being traced (Examples 1 and 2) took about an hour and half to lodge. The time factor has been noted and it should be emphasised that the representative from the Law firm lodges documents at the Lands Registry on a regular basis, and is familiar with the procedure and therefore the time spent in lodging the documents for the two Example files does not reflect the correct time it would take a client who is performing the task for the first time. Time would be spent in discovering where to start the process of lodging the documents, and secondly which queue to join and finally performing the actual task. It would be safe to state that two more hours can be added to the time from entering to lodgement of documents. The researcher further observed that the two sample files being used as examples for observing the procedure were ready for lodgement and the pre-registration stage of preparing the necessary documents, such as payment of property transfer tax had been completed earlier. Therefore, the total time may also increase by another hour. The time of one hour and thirty minutes stated above represents the physical time spent at the Lands and Deeds Registry just in order to lodge documents that are correctly presented in terms of the statutory requirements. In real terms, the time taken may well be about four to five hours. The LDRR under Section 6 (1) stipulates the form in which the documents should be presented for lodgement. This includes:

(1) The original and one copy or, in the case of documents to be registered in the Township Lands Register or Lands Register, the original and two copies, shall be handed to the Registrar when a document is presented for registration. The original shall be returned to the person presenting it but the copy or copies shall be retained by the Registrar for filing (Section 6(1) LDRR).

The Registrar may refuse to accept documents for registration if it is discovered that they are not presented in the correct format. There are four conditions that have to be complied with and these are outlined under Section 6(2) and include:

(2) The Registrar shall refuse to register any document of which the proper number of copies is not handed to him and may refuse to register any document which does not comply with the following requirements:

- (a) The document shall be plainly written, printed or typed on foolscap paper and shall not be a carbon copy;
- (b) The copies for filing shall be plainly written, printed or typed;
- (c) All alterations on the document or copies for filing shall be initialled by the persons executing the document and by the witnesses to such execution;
- (d) The upper half of the first page of any document shall be left blank for the purpose of registry endorsements (Section 6(2) LDRR).

Where the four conditions outlined in the statutory provision above are not met the documents cannot be accepted at the lodgement counters at the CSC. The four statutory conditions concentrate on the format in which the document is to be presented. They include written format, typed or handwritten, all alterations to be initialled by the person signing the document and the witness and finally the top half of the first page left blank so that the registry may stamp the date and other official endorsements on the document. The regulations provide for a manual system of lodgement and there is no provision for electronic submission of documents at the time the research was conducted. This ends the first step of the process or lodgement of documents.

It was observed by the researcher that the client and the representative from the Law firms do not have access to the documents once they are lodged, but they are able to inquire at what stage the file has reached as far as the registration process is concerned from the CSC. The photograph below shows the intake counter which receives documents for lodgement. The next stage observed by the researcher is recording and distribution of the documents and the files which are not open to the public but an internal process of the land registry. For the purposes of comparing the time schedule within which the process is to be completed as given in the time function map of the lands and deeds department with the actual time taken, stage one was recorded to have been completed on Friday 8th February 2014 at 12:30 pm.



Figure 4.20: Image of the unmarked counter where documents are lodged for registration at the CSC

The two computer print-outs scanned and produced below for sample files Example 1 and 2 show the entries dated 8th February 2013, marking the end of step of the registration process. When compared with the time indicated on the time function map and the time within which lodgement had taken place for Example files 1 and 2 it can be concluded that it is within the scheduled time indicated in the time function map.

Property Number LIV/2112

PRELIMINARY REGISTRATION

ENTRY NO. 11 DATE OF DOC 23-SEP-11 DATE OF REG. 19-OCT-12
1st Party THE HIGH COURT FOR ZAMBIA
2nd Party BASSON CATHARINA MARIA ELIZABETH
NATURE OF DOC PROBATE
AREA 250 A

PRELIMINARY REGISTRATION

ENTRY NO. 12 DATE OF DOC 08-FEB-13 DATE OF REG. 08-FEB-13
1st Party BASSON CATHARINA MARIA ELIZABETH
2nd Party BASSON CATHARINA MARIA ELIZABETH
NATURE OF DOC DEED OF ASSENT201391
AREA 250 A

PRELIMINARY REGISTRATION

ENTRY NO. 13 DATE OF DOC 08-FEB-13 DATE OF REG. 08-FEB-13
Title Holder BASSON CATHARINA MARIA ELIZABETH
NATURE OF DOC CERTIFICATE OF TITLE NO.201391
AREA 250 A

Rec'd 12/12/2013

Figure 4.21: Scanned copy of preliminary registration printout for Example file 1

Property Number F/609/265/A43

ENTRY NO. 1 DATE OF DOC 28-MAY-12 DATE OF REG. 28-MAY-12
1st Party CPD PROPERTIES LIMITED
2nd Party CPD PROPERTIES LIMITED
NATURE OF DOC APPLICATION FOR SEPARATE CERTIFICATE OF TITLE162361
AREA .0936 H

ENTRY NO. 2 DATE OF DOC 28-MAY-12 DATE OF REG. 28-MAY-12
Title Holder CPD PROPERTIES LIMITED
NATURE OF DOC CERTIFICATE OF TITLE NO.162361
AREA .0936 H

PRELIMINARY REGISTRATION

ENTRY NO. 3 DATE OF DOC 08-FEB-13 DATE OF REG. 08-FEB-13
Assignor CPD PROPERTIES LIMITED
Assignee ABDUNABIEVA DILBAR
NATURE OF DOC ASSIGNMENT OF PROPERTY AT K147,888,000 ONLY201389
AREA .0936 H

PRELIMINARY REGISTRATION

ENTRY NO. 4 DATE OF DOC 08-FEB-13 DATE OF REG. 08-FEB-13
Title Holder ABDUNABIEVA DILBAR
NATURE OF DOC CERTIFICATE OF TITLE NO.201389
AREA .0936 H

Figure 4.22: Scanned copy of preliminary registration printout for Example file 2

4.6.2 Step No. 2: Recording and Distribution and

4.6.3 Step No. 3: Processing

Steps 2 and 3 are interrelated and the process shows that they are performed as a continuous task by the responsible officer at the Deeds Registry and hence the need to discuss them under one heading. The observation continued on the 8th February 2014 in the afternoon.

At the CSC, once recorded the two sample files are kept aside with the heaps of all the files where lodgement had taken place on that date. The researcher was given permission by the Chief Registrar at the Lands and Deeds Registry to remain within the CSC after it had closed to the public, in order to observe what happened to the documents after lodgement. It was observed that at 12:30pm when the CSC is closed to the public, the files on which the copies of the lodged documents have been inserted are physically carried from the CSC upstairs to the Senior Lands and Deeds Offices situated at the Lands and Deeds Registry Department. The observer noted that the physical carrying of documents posed several risks. The most common ones are the possibility of misplacement, loss of documents or files, altering of the documents lodged, misfiling of documents, and other errors for which no controls are put in place in the current system. Once again, it is observed that several notices are placed at the entrance of the corridors of the building. Just like the notices in the CSC these notices also contain detailed information which a person must find time to read and understand in order to follow the procedure.

Once the files have made their journey safely to the offices upstairs, they are received by the officer on duty for that particular day for distribution to the other officers who are responsible for working on them. The files are recorded in what is called the ‘daily lodgement book’ and are distributed within two hours on the same day in the afternoon as per the time function map. The contents of the page of the lodgement book as observed and recorded by the researcher shows the following information:

Date stamp	8 th February 2013	
F/609/265/A43	Solly Patel Hamir & Lawrence	Assignment
LIV/2112 & F/3234	Solly Patel Hamir & Lawrence	Assent

From the notes made by the observer, the entry shows the date the file is received for lodgement, the property details, the name of the person or Law Firm lodging the documents, and the nature of the documents lodged. The entry book also contains the name of the officer who is assigned to perform the required task on the file.

The researcher observed that the officers were not in their offices on the 8th February 2013 due to an ongoing training programme which they were required to attend. The office upstairs where the Example files 1 and 2 were received had stations for five officers including the officer on duty. The files are shared out by the officer present as equitably as possible between all the officers to be worked on when they returned to their offices. Since the officers were not present on the day in question, the two sample files and the records were left on the desk of the assigned officer to be attended to when the officer reported back to work. These files were left unattended to and therefore they were subject to several risks including but not limited to the loss of the entire file and other related risks. It suffices to note that the files were exposed to serious risks within the three stages of their journey within Lands and Deeds Registry. This concluded the observation for the 8th of February 2013.

At this stage the reconciliation of the details in the time function map and what takes place in practice shows as far as the two sample files are concerned that the time taken is seven hours and thirty minutes, inclusive of the three steps and therefore within the time schedule. This would show that the time function map depletes the true position as far as timing is concerned. However, its accuracy cannot be tested using two Example files only, and therefore the conclusion is generalised.

The researcher was informed to return to the Lands and Deeds Registry on Monday 11th February 2013 to follow up the sample files 1 and 2 for their continued journey. It was at that stage that the researcher was given the two copies of the documents showing the time function map for the Lands and Deed Registry by the lands officer present which have been scanned and produced as Figures 4.1 ad 4.2. The document depletes the time schedule within which the documents should be processed. A comparison with the actual or real time observed by the researcher and the time provided in the schedule up to step 3 is exact. However, this is a general conclusion.

4.6.4 Step No. 4: Vetting and;

4.6.5 Step No. 5: Scrutinizing

Step 4 and 5 are interrelated and the process shows that they are performed as a continuous task by the Registrar at the Deeds Registry and hence the need to discuss them under one heading. The researcher continued the observation of the two sample files on Monday 11th February 2014 in the afternoon. It was observed that the two sample files were sent to the registrar's office for verification after the performance of the first three steps. The Registrar had to check the physical copies of the documents which the client had submitted against the initial record that was created by the Land Officer on the computer. If all the documents are in order, he grants the Lands Officer authority to proceed with the registration. If there is a query on the documents or it is found that some information is missing, the file is sent back to the CSC with the details of the query. The client would receive the details about the query and would be requested to submit an explanation. The process of registration would resume once the query is answered.

Regarding the sample files Example 1 and 2 the subjects of this research, the documents were in order and therefore the Registrar was able to give his approval for registration. The processing schedules were stamped and signed and the file was once again sent back to the Lands Officer who had been allotted the file to start the process of actual registration. The registrar had completed the process of scrutinizing, vetting and finally approval by 14:50 on Tuesday 12th February 2013.

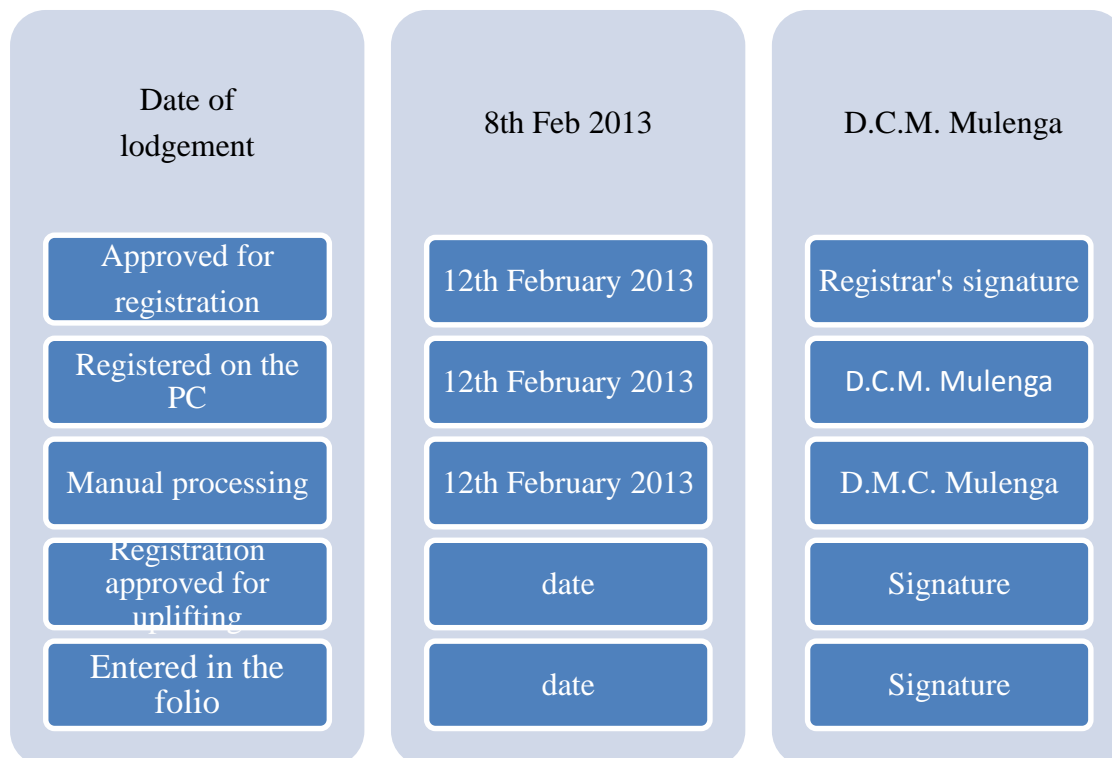
On Monday 11th February 2013 the two sample files were received by the Registrar for vetting and obtaining authority and were sent back to the land officer by Tuesday 12th of February 2013 at 14:50. The researcher observing the two sample files had found the files with the senior lands officer who was assigned to work on it. At that stage, the observer discovered that a file cover had been pasted with a processing schedule and an initial entry had been made on the computer. Upon obtaining a copy of the printout, the observer noted that its contents were the same as the one reflecting on the Figures 4.1 and 4.2 showing the preliminary registration printout for Example files 1 and 2. The observer also noted and recorded the contents of the processing schedule which had been recreated with the details that were recorded from the original. The land officer responsible for working on the file had no objection to her name being reflected on the processing schedule. Accordingly, the processing schedules for both files showed the following details

THE INTERNAL PROCESSING SCHEDULE

CLIENT: Solly Patel Hamir & Lawrence

PROPERTY: LIV/2112 and F/3234

NATURE OF THE DOCUMENT: Assent



1. QUERY:
2. ANSWER:
3. QUERY:
4. ANSWER:

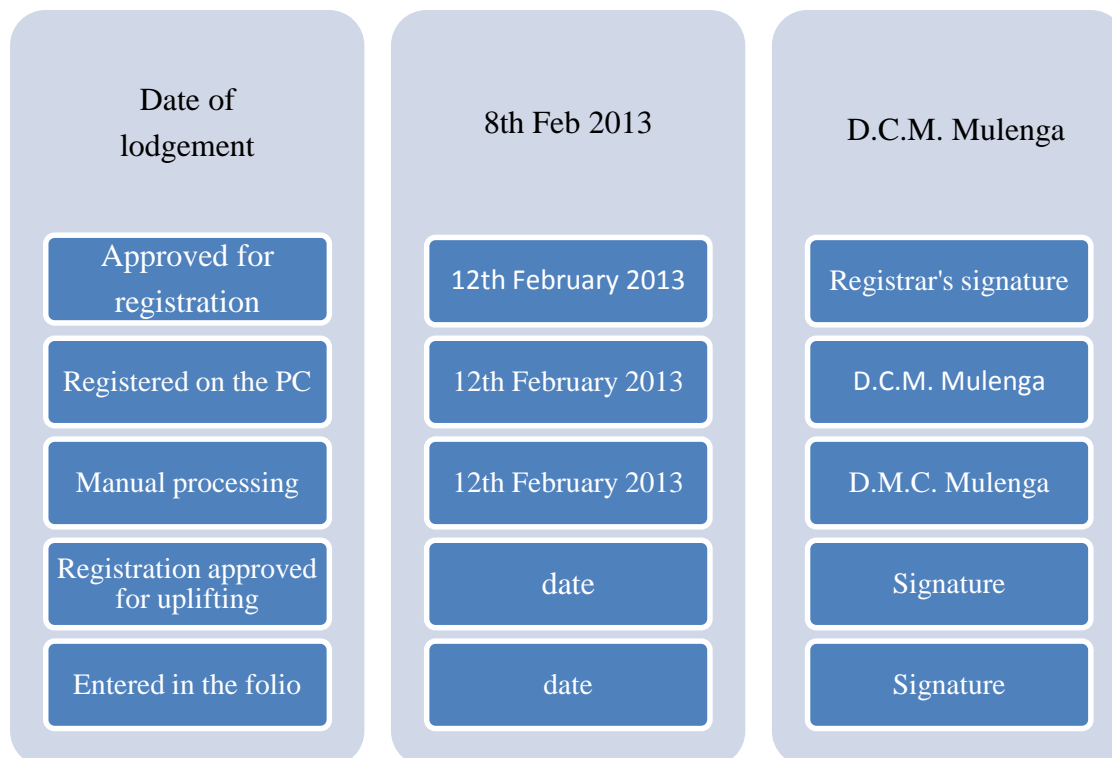
Figure 4.23: Recreation of the Internal Processing Schedule reflecting details for Example file 1

THE INTERNAL PROCESSING SCHEDULE (Example 2)

CLIENT: Solly Patel Hamir & Lawrence

PROPERTY: F/609/265/A43

NATURE OF THE DOCUMENT: Assignment



1. QUERY:
2. ANSWER:
3. QUERY:
4. ANSWER:

Figure 4.24: Recreation of the Internal Processing Schedule reflecting the details for Example file 2

The name of the Law firm and the name of the lands officer have remained in their original form since there was no objection from either party. The details on the internal processing schedule are in original form for both the sample files, Example 1 and 2 and it was noted that the same officer had been assigned to work on both files at the same time.

It was observed on Monday 11th February 2014 at 12:50 that the files were sent to the Registrar, who had approved the documents and accepted them for registration on Tuesday 12th February 2014. That requirement was reflected on the internal processing schedule.

Analysing the time-frame given in the time function map which shows the internal regulation of the Lands and Deeds Department and the time taken in practice shown through the observation process, it proved difficult to reconcile the two. The time function map showed that the total time for the four steps outlined above should be two days. The observation showed that from the 8th February to the 12th February 2014, it had taken four days. When reconciling the dates, it was possible to state that the two dates 9th and 10th of February were non-working days, hence the delay and therefore the two day period provided in the time function map is a realistic time-frame. The question that this research cannot answer is whether the steps outlined above are completed on time in the case of every file, where documents are brought for registration, or only in the particular case of sample files 1 and 2 because of the fact that the two files were being observed.

4.6.6 Step No. 6: Manual entry

It was observed that the processing schedules on the two sample files were stamped and signed and the file was once again sent back to the lands officer who had been originally allotted the file to start the process of registration. It was observed that the process of manual entry was completed by 14:50 on Tuesday 11th February 2013.

The researcher observed that during the process of manual entry, the registrar's office had remained closed for a substantial part of the day, and it was difficult to obtain details as to the whereabouts of the officer, in this case the registrar from the other land officer who was on duty. The observer had to wait the whole morning and most part of the afternoon before being attended to. While sitting in the waiting area outside the registrar's office, the researcher had observed that small groups of people, including clients, land officers and other people (who could not be identified) were discussing issues, a feature commonly found at the Lands and Deeds Registry. It would appear that these discussions groups are a common way of discussing official issues in the corridors of the buildings where the offices are situated, and the question that remains unanswered is, 'What is the nature of these discussions and why are they conducted outside the offices when dealing with official matters?'

On Tuesday 12th February 2014 the observation continued and the two sample files, Example 1 and 2 were sent back to the responsible officer from the office of the registrar for the purpose of converting the manual into the final version of the computer entry.

4.6.7 Step No. 7: Issuing of the Certificate of Title

It was observed that the sample files for example 1 and 2 were sent back to the land officer, and once again a manual entry was made in the book showing the date when they were received. The land officer had then entered the outgoing record reflecting that the files had been sent to the typing pool on Wednesday 13th February 2013. The original Certificate of Title issued by the Lands and Deeds Registry to the registered proprietor is a printed document as shown as part of the documents on sample file 2 under Figure 4.10. Parts of this printed document are filled in by typing the details using a typewriter. Errors are common and the only security feature apart from the signature of the registrar on the certificate of title is the ordinary red seal on which the stamp of the Lands and Deeds Registry is imprinted. The security features of the certificate of title in its current form need to be strengthened and these are suggested as part of the recommendation in the next chapter in detail.

The procedure continues once the details have been typed on the certificate of title. The document is sent to the Chief Registrar for signature.

Reconciling the time factor from the time function map and the time taken practically for the two sample files, it can be once again concluded that the process was completed within the time limit of five days from the 8th of February to the 13th February 2013.

4.6.8 Step No. 8: Sorting and Recording

This process was not observed by the researcher since it takes place within the typing pool where access to the public is denied due to the nature of the documents being worked on and the issue of confidentiality. The researcher was informed that each certificate of title is recorded manually in a book, once the Chief Registrar checks and approves the preliminary registration entry on the computer, and signs the certificate of title. The Chief Registrar had been out of office attending a training programme, therefore the signature from him was only secured on the 18th February 2013, ten days after step no. 7 had been completed.

Reconciling the time factor from the time function map and the time taken practically by the two sample files, the conclusion is that it was not within the time limit since a total of ten

days had passed from the 8th February 2014 when the documents were been lodged. According to the time function map, the total time should have been seven days and six hours within which to complete the transaction

4.6.9 Step No. 7: uplifting

The final step involves the uplifting of the registered documents. During this stage, the individual or the representative from the Law firm collects the documents from the CSC. Once the new certificate of title is signed and received by the secretaries in the typing pool, a manual record is created and the documents are sent to the dispatch centre within the CSC, ready for collection by the clients. Once again, at the dispatch section, a manual record is created in the outgoing documents book. A record is made stating the date, property number, client's name, the number on the document collected and the status whether it is ready for collection or a query has been raised. For sample file 1, the process ended at 12:30 pm on the 18th February 2014 when the documents were uplifted by the representative from the Law firm. For sample file 2, the documents were uplifted on 25th February 2014, a good seven days later. An evaluation of the process will follow in the next part of this chapter

4.7 Evaluation of the Deeds registration system in Zambia through the observation conducted for sample files 1 and 2.

Outlining the broad overview of the process of deeds registration in Zambia through the observation of the two sample files Example 1 and 2, it is noted that there are certain defects and gaps that can be corrected in the existing manual system before discussing e-registration. Certain minor suggestions are outlined below while more robust solution and recommendation are proposed in the next chapter. In conclusion, the most obvious issue relating to the registration process is the overlapping of one step of the process into another and the files going back and forth from one office to another. In addition, the documents and the register books are physically carried from one place or office to another, increasing the risk of loss, destruction, misplacement, misfiling or even damage. It is further concluded that the deeds registration system presupposes an interest in past history and therefore the safety of the documents is a priority. This does not seem to be the case at the deeds registry in Lusaka. The manner in which the documents are kept and the form of the register which in Zambia are ledger books in bound form, affect operational efficiency of the system. Davis, commenting on the loose-filing system and the bound system stated:

Ideally a folio of the register should be either 'in file' or the subject of registration action or search. Under the existing system, however, on each occasion that a folio leaves file its 49 captive neighbours travel with it. Ninety-eight per cent of movement is redundant, therefore, and this, coupled with frequent simultaneous demand by members of the public and staff to refer to different folios in the one book, seriously disrupts searching and work-flow. It is aggravated by the long registration 'production line' imposed by the rubber-stamp method of entering memorials along which the book must pass before being returned to file. A loose-filing system, well administered, permits attainment of the ideal; a bound system however well administered does not (Davis, 1961, p.259).

The other defect of the system includes errors in the registers. This is provided for under Section 11 of the LDRA which has received judicial interpretation and has been discussed under chapter three. One further defect identified under the deeds registration system in Zambia is the lack of security features on the certificate of title and the fact that the identity of the registered proprietor on the certificate of title is not reflected. Furthermore, suggestions on how to include security features on the certificate of title and the reflection of the identity of the proprietor on the certificate of title will be addressed in chapter five.

4.8 Conclusion

The data presented in this chapter was collected using the case study methodology and the method of observation. The researcher has identified some weaknesses and some strengths in choosing the research method and using it. The reasons for selecting the case study method and its strengths and weaknesses have been presented under section 4.2 in this chapter. The data collected has been recorded, analysed and presented in a logical manner to map out the journey of the two sample files simply called Example 1 and 2 for ease of reference. The conclusions drawn have not been generalised but have been used to suggest some improvements to the current paper-based deeds registration system before recommending a new land recordation and registration system suitable for Zambia.

The evaluation of the deeds registration system in Zambia, with the three principles of the Torrens system of title by registration, is the thesis of this research and it has been presented in the previous chapter. The comparison, recommendations, and solutions, followed by an ideal model for land recordation and registration in Zambia, will complete the research in the next chapter.

CHAPTER FIVE




THE DEVELOPMENT OF AN APPROPRIATE LAND RECORDING AND REGISTRATION MODEL FOR ZAMBIA

5.0 Summarized recommendations

The recommendations of this research are presented in three components namely:

- Amendments to the legislative framework supporting the land recording and registration system
- The institutional structure of the proposed model
- Testing of the proposed model against the three principles of the Torrens system

These can be illustrated as follows:

	Legislative Framework <ul style="list-style-type: none">• Repeal and replacement of LDRA• LDRA amendments to Sections 3, 4, 11, 12, 21, 33 and 54
	The Proposed Model <ul style="list-style-type: none">• The establishment of the registry of records, deeds, rights and title under the main Lands registry• E-registration and E- lodgement
	Testing the Proposed Model against the Three Principles of the Torrens System <ul style="list-style-type: none">• The Mirror Principle• The Curtain Principle• The Insurance Principle

These recommendations are now presented in more detail.

5.1 Introduction

This thesis has shown that land is a fundamental resource and that legal rights to land must be adequately defined and documented through a formal system to ensure that landowners enjoy security of tenure. To enhance security of tenure, alterations in the substantive land law must take place before curing the defects in the land registration systems (Vozarikova, 2010). Therefore this chapter will begin by addressing the key issues in amending the legislative

framework supporting the deeds registration system in Zambia before constructing the appropriate land recordation and registration model, and finally testing the model against the three principles of the Torrens system.

The aim of this thesis, stated in chapter one and in the first paragraph of this chapter, has been achieved through the following objectives:

1. Exploring the importance of the land registration system in securing land rights.
2. Explaining principles of titles registration and deeds registration.
3. Comparing the legislative framework supporting the two different land registration systems, title registration and deeds registration.
4. Showing the practices and procedures of the current deeds registration system in Zambia.
5. Assessing and recommending the appropriate model of land recordation and registration system for Zambia.

The first four objectives have been achieved in chapters one to four, and the final objective is achieved in this chapter.

5.2 Key features of the new legislative framework for the proposed land recording and registration model for Zambia

The task of legislative reform in land involves not only amending one individual provision in a statute but several pieces of legislation regulating land rights and land registration. Looking at the whole legislative structure supporting the current system of land registration in Zambia, the starting point would be to consider the amendments to the Lands and Deeds Registry Act (LDRA) and its counterpart, the Lands Act (LA). For the purposes of this research, the recommendations and suggested amendments will be minor and consequential and will concentrate on the LDRA only and more particularly, the sections dealing with registration. The concentration is on the sections that have been discussed in chapters three and four of this research. However, a more holistic approach would be the suggestion to repeal the entire Act and replace it with a new legislation in the future for the proposed model to operate effectively, using e-registration, and eventually the e-lodgement schemes. In particular this research recommends amendment of legislation with regards to sections 3, 4, 11, 12, 21, 33 and 54 of the LDRA which have been reviewed under section 3.6 in chapter three.

Firstly, under the proposed land recording and registration model for Zambia, the name of the Act, LDRA should be amended to reflect the hybrid system being proposed, using a combination of the deeds as well as the titles registration systems. The proposed name would be the Land Records and Registration Act (LRRRA). Accordingly, the long title should reflect the four different registers, namely the land records register, deeds register, record of rights register, as well as a titles register.

5.2.1 Proposed amendment to Section 3, LDRA

The current Section 3 of the LDRA which established and provides the constitution of the deeds register, will require substantial changes under the proposed model. The section should establish the four registries under the main land registry within the existing institutional structures, thus avoiding the high cost of a totally new establishment. The appointments of full time officers and registrars to operate the new system can be worked out within the existing positions under the current Section 3 as well. The four different registries that need to be developed, include the lands record registry, the deeds registry, record of rights, registry and finally, the titles registry. By proposing four different registries, the model separates each part of the titles and the deeds registration as explained in chapters three and four to simplify the recording and registration process, by allowing registration to take place one step at a time.



Figure 5.1: The proposed institutional structure for the new model

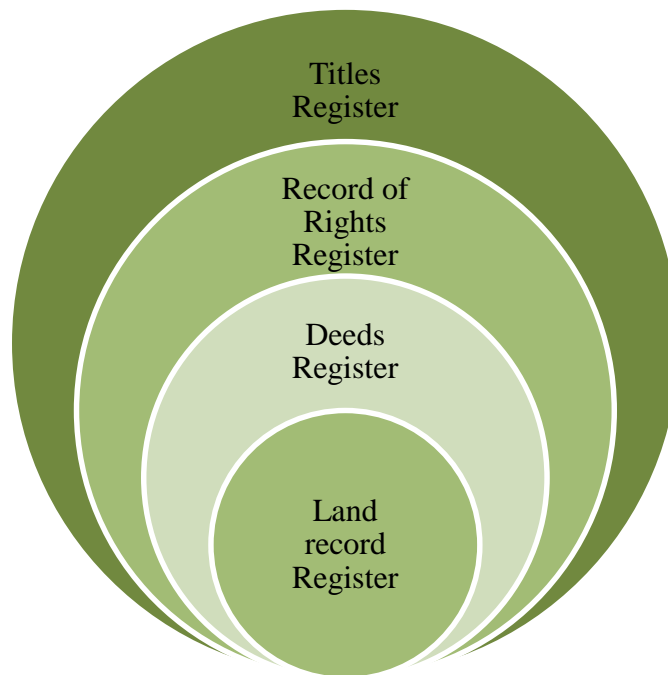


Figure 5.2: Illustration of the procedure for recording and registration from commencement until the issuance of the Certificate of Title

The justification to maintain the current legislative institutional structure is based on the fact of reducing or minimising the initial costs involved in creating and maintaining an entirely new land recording and registration system. Hanstad agreeing with West in his writings suggests that it is the high cost of implementing a new land registration system that is causing hesitation on the part of governments in developing countries to reform the existing systems (Hanstad, 1998). Thus, re-organising the existing institution and members of staff to operate the additional registries will no doubt receive support from the government in Zambia, since it will reduce the initial costs of setting up the new system. In addition, operational costs are minimised since the same positions provided for under the current law, for example; principal registrars, senior registrars, senior assistant registrars as assistant registrars (S3 (4), LDRA), will be reorganised and there will be no need to create new positions or amend the law to provide for additional positions to operate the proposed system.

However, the creation of the four different registries within the lands registry as proposed under the new model will require inserting several additional legislative provisions dealing with reorganisation within the current legislative structure in the future. This research

concentrates on few of the proposed legislative changes. The following are the proposed amendments to the particular sections of the current Act:

5.2.2 Main points from the comments and critique of the new model as given by the stakeholders

The proposed model of land registration and the legislative amendments have been subjected to comments from different stakeholder groups as indicated under 5.5 below. The presentation of the views is in summary form. With regards the proposed amendments to Section 3 of LDRA the main issue is that proposed establishment of the four registries would require a huge financial outlay since the current registry and staffing levels will be inadequate. It was further stated that the cost factor alone will be responsible for the failure to implement the new model in Zambia. In addition it was emphasised that the creation of the four different registries will make the process of registration more inefficient as far as one land transaction was concerned. In support of this comment the stakeholders explained that poor records management systems that characterises public offices the multiplicity of documents in the new model may be mislaid resulting in further inconvenience and challenges for

5.2.3 Proposed amendment to Section 4 LDRA

Following the analysis under 3.5.2 in chapter three of this research regarding Section 4 of the Act (LDRA) which deals with documents required to be registered, it is proposed that the word ‘purporting’ in Section 4 of the Act should be deleted. As elaborated on in chapter three, the two main points arising from this statutory provision is the use of the word ‘purporting’ in relation to the documents that must be registered and the time limit within which registration should take place. With regards to the documents being lodged under the proposed system, the deeds registrar will have the responsibility of ensuring that documents lodged are in fact correct as far as the description of the property is concerned, by cross-checking with the land record register. This process of verification will avoid alternation of

the register at a later stage for mistakes and in addition, avoid the transfer of a different property than the one intended to be transferred by the vendor.

It is further proposed that an additional provision to Section 4 be inserted to provide for linking the Lands and Deeds Registry Regulations (LDRR), and the internal time function schedule under which the current deeds registry operates as shown under Figure 4.1 and 4.2 in chapter four. **The new provision should state that registration of documents lodged shall be deemed to have taken place within sixty days of lodgement. It should also state that the titles registry will be mandated to issue the certificate of title within the sixty days' time limit as well.** The reason for selecting the period of sixty days is to give sufficient time for any queries on the file to be addressed. The reason for inserting the provisions deeming registration is firstly, to reduce any pending documents that have not been registered for some reason or the other and secondly, to mitigate the delay in processing the documents received by the deeds registry, by ensuring that the documents are registered within a statutory time frame instead of the current internal time frame. This statutory provision will cater for the reduction in the number of pending files currently before the deeds registry.

Finally, under the proposed system, the aggrieved persons who have lodged documents for registration and these documents have not been registered, will be accorded the right to appeal against the decision of the deeds registrar to the land registrar. The land registrar will be given powers to hear these appeals by way of arbitration. It would therefore be important to legislate the qualifications of the person holding the office of the lands registry as an Advocate and a trained arbitrator. In addition to hearing appeals, the functions of the land registrar should include heading the land registry and providing the overall checks and balances within the land recording system, and registration system being proposed. In this way, documents at the deeds registry will move away from the deeds registry to a supervising registry for queries and disputes to be resolved, using a simpler method of arbitration as compared to the current method of referring the matter to the lands tribunal.

5.2.3 Proposed amendment to Section 11 LDRA

The current legislation under Section eleven of the LDRA is a general provision dealing with alteration to the register. **Under the proposed system there is need to amend section eleven firstly, to include the alteration to the four different registers. Secondly, the regulations governing the operations of these four registries should be stated in the schedule to the Act and not as part of the substantive provisions of the LDRA.** The

reason for the second recommendation is to separate the details of the procedure of alteration from the substantive provisions relating alteration of the registers. The proposed suggestion is to adopt schedule four of the Land Registration Act (LRA 2002) of England that deals with alteration of register. The adoption should take into account the fact that the proposed system has four registers as opposed to the single titles register in England. In addition, the schedule should classify alterations to the registers made in accordance with court orders and alterations made without a court order. This classification of the two different types of alteration will make it clear which register out of the four should be altered in the event of an error or mistake.

The requirement of proof of the allegation of an omission or error can remain with the powers of the registrars as provided under the current law, with the only difference that it will not be the registrar of deeds that will exercise the power. The power to alter will vest in only one registrar being the lands registrar. Such restriction on the power to alter the register will allow the system to once again create checks and balances.

Just as stated under amendment to Section 4 the appeal procedure for aggrieved parties against the decision of the deeds registrar should lie with the registrar of lands. Where the parties are dissatisfied with the decision of the registrar of lands, they can appeal to the court of law which in the case of land disputes, would be the Lands Tribunal. The reason for this recommendation is to resolve issues of alteration to the register through arbitration between the parties instead of formal court decisions. Arbitration is a much simpler as well as cheaper and quicker method to resolve land disputes as compared with formal court cases.

5.2.4 Proposed amendment to Section 12 LDRA

Section 12 under the current Act provides for diagrams, plans and descriptions of the property in the documents being lodged is maintained for the purposes of the new model, except with two minor amendments. Firstly, that the provisions within the section will be applicable to the lands record register only since the initial record will be created and recorded by the land record registry. Secondly, the diagrams, plans and descriptions in the documents lodged for registration should be the same as the ones showing on the land records register.

In addition, under the proposed model, the land record registrar will be given the substantive legislative powers to develop an initial data bank for land records in Zambia, using the

diagram, plan or description as applicable, depending under which tenure the land is being held. It is proposed that the data could be easily collected by individual persons who are owners of parcels of land or have possession of these parcels of land by submitting details to the respective councils within their districts, using a diagram, sketch plan or description of the property. Utilizing the modern ways of communicating, a submission to the council's offices can be made by SMS. The data once received by the council offices can then be transmitted to the Lands record office in Lusaka for the purposes of creating an initial record. In this way parcels of land wherever situated in Zambia, and held under different tenure, can be recorded at a central place. Developing this land data base will be the mandate of the land records registry only.

The data recorded by the land record registry will be uploaded to the deeds registry for purposes of verification with the description of the property in the documents lodged for registration. In this way, a checks and balances mechanism as far as the fact that the documents show the correct description of the property is provided within the proposed system of land recording, and registration will be created.

5.2.5 Proposed amendment to Section 21 LDRA

Section 21 of the Act (LDRA) provides that registration does not in itself cure any defects in the documents, audit does not require any amendment, and it fits well into the proposed system. The essence of the statutory provision is that where the Registrar rightly or wrongly registers a document, registration itself does not cure any defects in the document. The only minor amendment proposed for this section will state that this provision will only be applicable to the deeds registry since documents for registration will be lodged with the deeds registrar.

5.2.6 Proposed amendment to Section 33 LDRA

Section 33 of LDRA deals with the question of ownership and states that the certificate of title is conclusive proof of ownership of land. The registered proprietor is the owner of the land except in the case of fraud. The title to land is held subject to the encumbrances, liens, estates or interests endorsed on the certificate of title. However, if they are created after the certificate of title is issued, they will be placed in the folium of the register of titles. It is proposed that Section 33 should be retained in the new legislation with minor amendment stating that the provision will only apply to the titles registry as it will be the issuing authority

for the certificate of title under the proposed system. Section 33 of LDRA is normally read together with Section 54, and the link is discussed below.

5.2.7 Proposed amendment to Section 54 LDRA

Whereas Section 33 of LDRA refers to proof of ownership, Section 54 of the same Act refers to the certificate of title issued by the registrar under his hand and seal as evidence of proprietorship. Under the proposed system, it is recommended that this section remains in the new legislation with the minor amendment clarifying that the ‘registrar’ referred to in this section should mean the registrar of the titles registry and not the registrars of the other three registries.

As earlier alluded to in this research, the legislative provisions under Section 54 and 33 of the LDRA have received judicial interpretation in the case of *Chilufya v. Kangunda*. It was stated by the court that in the case of fraud on the part of the registered proprietor, the certificate of title will not be conclusive evidence of proof of ownership of land. By retaining Section 54 in the new legislation, this interpretation by the courts will remain as the correct position under the proposed system as well.

5.3 The proposed model

5.3.1 Background

Ruoff, writing in 1957, stated that the Torrens system rested on three main principles which are closely inter-dependent and summarized the principles as indicated below:

The first of these is the *mirror* principle under which the register book reflects all facts material to an owner’s title to land. Nothing that is incapable of registration and nothing that is not actually registered appears in the picture but the information that is shown is deemed to be both complete and accurate. Secondly, there is the *curtain* principle which emphasises that so far as a proposing purchaser is concerned, the register book is the sole source of information about the legal title so that he neither need nor may look behind it. To clutter the picture with trusts and “obscure equities, for example, is an evil and is forbidden. The third principle is the *insurance* principle which, whilst upholding the correctness of the register book declares that if through human frailty a flaw appears in the mirror of title, anyone hereby suffering loss will be put in the same position, so far as money can do it, as if the reflection were a true one (Ruoff, 1957, p.17).

The three principles explained above have been discussed within the titles registration system in England under section 3.4 in chapter three of this research, while the application of the

same three principles under the deeds registration system in Zambia follows under 3.5.2 under chapter three respectively.

The research has further shown by citing five different authors that there is a difference between the titles registration system and the deeds registration system. However, there are to a certain extent, quite a number of similarities between the two systems. Thomas, writing in 1882, suggested a union of the two systems and commented that:

Apparently it has never occurred to anyone that neither system is perfect by itself-that there is no reason why they should be separated-that one is a natural associate and complement of the other-that the idea of a perfect registration is involved in such a union of systems. The purpose of the present writing is to demonstrate the advisability of such a union and its entire feasibility (Thomas, 1882, <http://www.jstor.org/stable/60217533>).

It is this unification of the two systems that was proposed by Thomas which this research has used to develop the appropriate model of land recording and registration in Zambia. Support for the theory that the two systems are more similar than different is presented by the same author in the following illustration:

Of course, as already stated, it never for a moment occurred to either Deed or Title Registry supporters that the two systems, whether in principle or practice, were simply part of the same design, had the same objective in view, and were as necessary to each other as the body and limbs of a man are to his head-that the Title Registration upholders would be always driven into a Deed registry, and the friends of Deed Registration would forever more aim at the results of Title Registry! (Thomas, 1882, <http://www.jstor.org/stable/60217533>).

This research agrees with the theory proposed above and concludes that the two systems of land registration have the same object and are based on the same design and therefore can be joined together. The proposed model is structured on this unification. However, the distinction between the two systems made by several authors such as Cooke and Howell cannot be simply ignored. Howell outlines the contrast between the two systems as:

Under a system of deeds registration documents relating to transactions with a piece of the land are registered in a public register. A person wishing to deal with a piece of land would search the register under the name of the owner and would find memorials of prior registrable dealings with that land. He must then work out for himself the effect of the various dealings and thus the actual state of the title to the land. Within the class of registrable interests, no distinction was made between the various dealing with the land:.....

By contrast, under a system of registration of title, documents relating to the land are also submitted to a public registry but the substantive effect of the documents is deduced by the person controlling the register. He records on the register the net

effect of his findings and the purchaser is presented with that summary (Howell, 1999, pp. 369-370).

It should be noted that the most important distinction between the two systems is that the register of deeds gives no guarantee of title to land and is therefore more of a simple record of information gathering. Whereas title registration provides a state guarantee that title is as shown on the register (Howell, 1999).

5.3.2 The institutional structure of the proposed model

Taking into account the distinction between the two registration systems as stated by Howell and the suggestion to unify the systems as presented by Thomas, the proposed model for land recordation and registration in Zambia should unify the tasks of the process of registration in order for the whole system to emerge. This unification should commence with the main purpose of land registration which is to provide for a simple record of legal rights to land, that is secured as far as the owner is concerned and that these rights can be transferred safely, easily and without errors. The proposed model fits into four distinct institutional parts as presented in the figure below:

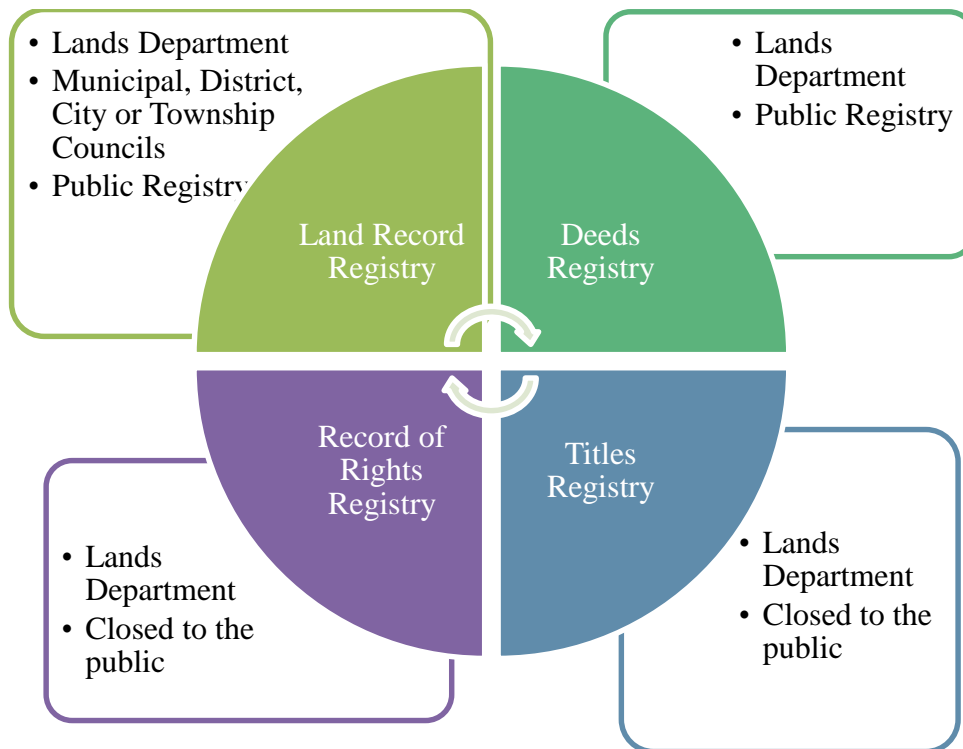


Figure 5.3: The institutions responsible for operating each registry stating whether the registry is open to the public and can be searched or not

The original idea in the development of the proposed land recording and registration model for Zambia is the division of the procedure of land registration into four different stages, and that each stage is to be performed by a different institution within the land registry structure.

In the restructured model, steps one to six explained under 4.2 in chapter four of this research remain with the deeds registry, while steps seven to nine, beginning with the issuing of the certificate of title to uplifting are moved to a different registry called the ‘titles registry’.

Presenting the proposed model in terms of the steps involved, the main division lies between the initial recording process and the combined deeds and titles registration illustrated as follows:

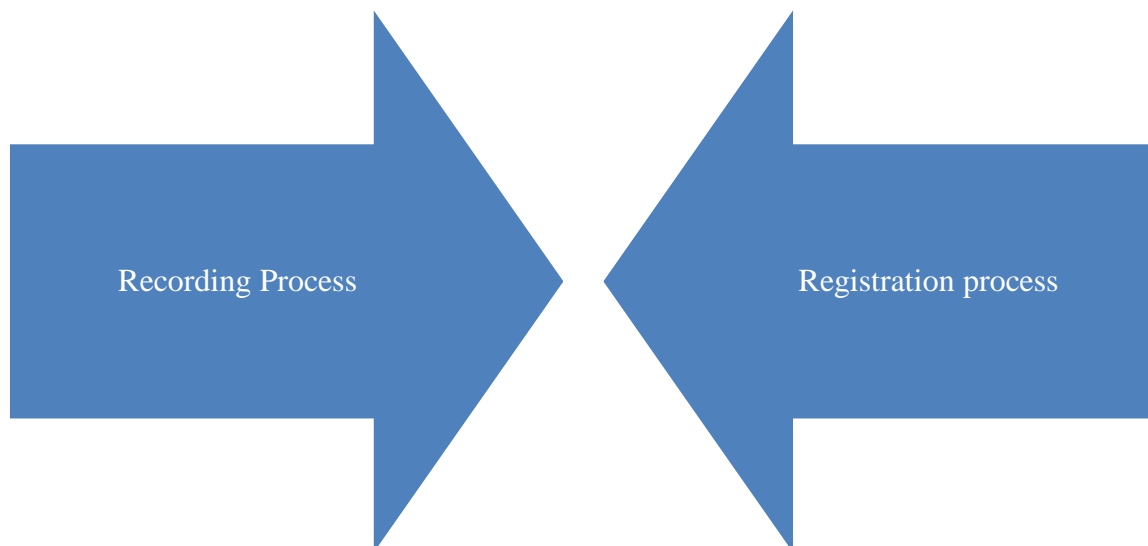


Figure 5.4: The two processes of the proposed land registration system illustrating how they will progress from the central source shown as the land registry in Figure 5.1

5.3.3 The procedure adopted by the proposed model

5.3.3.1 Step No. 1: Initial record

In the proposed system, step one will require the owner of land where land is held as statutory tenure or an occupier in the case of land held under other tenures, to submit to the respective authority (councils) the description of the property. This will create the initial record for that parcel of land. For land held under statutory tenure a diagram has to be attached while in the case of an occupier, a sketch plan as per Section 12 of LDRA will suffice. It is proposed as

stated above that the information can be collected from the public by requiring an individual to simply send an SMS message to the relevant authority using a phone. The information received from the owners/ occupiers will be recorded by the authorities, be it the Municipal, District or Rural councils, dependent upon where the parcel of land is situated as the case may be. The use of the established institutions under the Local Government Act (LGA) will reduce the cost of initial land recording exercise and provide for the decentralisation of the current registration system. The LDRA can be linked in particular to Section 3 of the LGA which provides for the establishment of the councils as follows;

3.For the purposes of local government, the Minister may, by statutory order, establish for any District, a city council, municipal council, district council, township council or management board as the case may be, and the name of the council or management board shall include the name of the District: (Local Government Act, 2004, p.10).

The linking of the two institutional structures being the lands department and the councils will not only make the land recording and registration system more accessible to the public but also it will provide for the much needed decentralisation of the current system. It is proposed that the information collected by a simple method by the councils can then be forwarded to the land record registry. The public will not be required to travel all the way to Lusaka or Ndola to submit their information and documents as it is the case under the current system of deeds registration in Zambia.

5.3.3.2 Step No.2: Verification

The information collected by the Municipal, District, City and Township councils will be submitted to the Land record registry for purposes of consolidation and creating an e-record of land in Zambia. The record will be verified with the current information available regarding each parcel of land at the lands department. In this way a comprehensive and accurate record register of land will begin to emerge. Eventually the data collected from the councils will feed into the proposed land audit project for Zambia. The establishment of the Land Audit Commission and the methods to carry out the Land Audit has been the recommendation of the Lands, Environment and Tourism Parliamentary Committees recommendations (Zambia, Lands, Environment and Tourism Committee, 2013). It is proposed that the Commission can work with the land record registry to develop the data bank before carrying out the mandated land audit.

5.3.3.4 Step No.3: Deeds Registration

Registration of documents relating to land transfers and other transactions involving land will remain with the current deeds registry. It is proposed that improvements can be made to existing paper-based procedure outlined in Chapter four under 4.2, more particularly as follows:

- a) Instead of receiving documents for all the different types of transactions at one desk, the Customer Service Centre (CSC) should permit Law firms and individual clients to submit documents at different points depending on the nature of the documents, so that step No. 2 of the current process can be combined with step No. 1 and performed jointly. This proposal will improve the system by reducing the workload of step No. 2. However, with the introduction of e-registration, access can be given to law firms for online submission of documents, or where this is not possible, to accept documents in hard copies, assist individual clients submitting documents to scan and submit the e-copies from a work station provided within the CSC at the lands department as illustrated in Chapter four, figure 4.16.
- b) It is proposed that a pilot project be established to look into the feasibility of providing work stations at each of the council offices to allow for e-submission of documents as a way of decentralising the operations of the proposed land recording and registration system.
- c) It is further proposed that steps 3, 4, 5, and 6 in the current system can now be condensed and the verification process will be against the land records available from the land record registry. Manual entries should continue while the pilot project is in place but once the system is tested and up and running, the manual system can be phased out.
- d) In order to reduce the tasks performed by the current deeds registry it is recommended under the proposed system to take steps 7, 8 and 9 and move them to the titles registry.
- e) It is then proposed that once the deeds registry updates its records, the preliminary registration which is currently being issued by the deeds registry is then sent to the title registry for issuing of the certificate of title.
- f) On the other hand, it is proposed that if the transaction on the documents lodged does not involve the issuing of a certificate of title, the preliminary registration should be sent to the record of rights registry for the creation of the rights held by the individual.

- g) It is recommended that the current certificate of title being issued as illustrated in diagram 4.4.2 in Chapter four should contain certain security features within the document. In addition, it should be printed on special paper with certain security markings and sealed in such a manner as to prevent it being forged or duplicated. To implement this recommendation it will require the re-issuing of all the current certificates of titles.
- h) In addition, it is proposed that a passport size photograph of the current owner should be pasted on the certificate of title to identify the current proprietor of land with the parcel of land.
- i) The final proposal is with regards to appeals or queries on the entries in the registers of record, deeds, rights or title which would lie as explained above with the lands registrar who should be a qualified Advocate and the matter should be resolved through arbitration.

5.3.3.5 Step No. 4: Record of Rights Registration

Under the proposed land record and registration system, the initial record from the records registry will be submitted to the record of rights registry and the preliminary registration of the documents from the deeds registry will be verified by the registrar of the record of rights. The record of rights register will show the nature and type of rights held by an individual. The record of rights will include charges such as mortgages, right of way and right to surface and underground water which will be recorded against the particular parcel of land and submitted for endorsement to the titles registry. This would be a completely new form of registration as compared with the current deeds registration system. For the purposes of security and protection of individual rights between the parties, the record of rights registry will not be subject to a search by the public. However, copies of the certificate of registration of rights will be available to the individuals whose rights are being registered. This proposal for the creation of the record of right may prove useful for recording rights held under customary tenure, even though the model has been developed with statutory tenure in mind.

5.3.3.6 Step No.5; Issuing of title deeds

Under the proposed land record and registration system, the task of issuing certificates of title should vest with the registrar of titles who should verify the initial records, the deeds and the record of rights before compiling the certificate of title. To ensure that information about the individual ownership is not made public, and to safeguard the document (certificate of title),

the registry of titles will not be a public registry, and therefore it cannot be searched by the public.

In this way, the proposed land record and registration system will provide an easy step by step procedure to register land and improve security of tenure. Even though the primary research was centred on the purchase and sale of a residential property held under statutory tenure, the proposed system has taken a more holistic approach to land registration in Zambia. The system may prove suitable for land held under statutory tenure but the model can be adopted and developed further to include other types of tenure in Zambia as well. The reflection of the three principles from the Torrens system of titles registration in the proposed model will follow in the next part.

5.4 The reflection of the three principles of the Torrens system in the proposed model

To answer the question on whether or not the three principles of the Torrens system are reflected in the proposed system, the three principles will be discussed separately. Firstly, the mirror principle answers the question of whether the register is reliable. The titles register under the proposed land record and registration system will be reliable and accurate for two main reasons. The main reason for its reliability is based on the fact it is a combined systems of deeds and titles registration and therefore not a product of one system only. In addition, the information will be created at different sources and verified before cumulating into the certificate of tile. The secondary reason for reliability of the register is the separation of tasks of the deeds and titles registration within the land registration system which will allow for checks and balances to improve accuracy and produce timely and updated information about land parcels to the individual owners as well as the public. For the purposes of this research, this ticks the box of the mirror principle.

Secondly, the simple register or the curtain principle in the proposed model of land record and registration system is met by showing or reflecting all the rights in the record of rights register, and endorsing them on the certificate of title so that the purchaser of land needs not go beyond the register to discover the entire picture relating to that particular parcel of land that one is purchasing. The register is also made simple by creating an initial land record which can be verified with the documents presented for lodgement at the deeds registry. The entire process is in fact simplified by providing the five different and easy steps to follow when registering documents presented for land recording and registration.

The third principle of the Torrens system is the Insurance principle and would appear that the proposed land record and land registration system may fail in providing a guaranteed register. The aim of the insurance principle is for the state to provide compensation where the mirror gives a specious or an incomplete picture of title to land. The state, in the case of Zambia, will not be ready or willing to carry this financial burden and any recommendation on filling in the lacuna in the statute providing for it will be met with resistance. The recommendation in this research is to allow private insurers to cover for loss arising from a non-guaranteed register. This recommendation can be endorsed once the system itself proves workable.

5.5 Stakeholders observations and reflection on the proposed model.

This part of the concluding chapter brings together the threads of the preceding chapters on tracing the land registration systems, the statutory frameworks that support these system as well as the procedures and rules that guide the process of land registration. The critical observations and reflections from the various stakeholders with regards the proposed model will show the preparatory groundwork in determining the suitability of the adoption of the model for land registration in Zambia.

The two other threads being the theoretical foundation of the titles registration system and the deeds registration system from chapters one and two are drawn together as a reflection of the three features in the current deeds registration system, the other registration system being titles registration as well as the proposed hybrid system. The task of the registration system and the process will come out vividly by enabling comparisons to drawn from the different systems.

The clear limitations of these views presented by the stakeholders are based on the fact that model has not been subjected to any practical implementation in any country in the world from which lessons can be drawn. Secondly the lack of response from the implementer of the model, the Lands and Deeds Registry and the Lands Department leaves a noticeable gap which can be filled by any future research on the possibility of adopting and testing the new model to cure the deficiencies in current deeds registration system used in Zambia to register land.

The table below presents a summary of the reflections and observations from the following categories of stakeholders:

- a) Academicians
- b) Economists
- c) Environmentalists
- d) Member of staff from the Deeds Registry
- e) Non-Governmental Organisation representatives
- f) Practising Advocates
- g) Research Students

Features or parameters	Deeds Registration System	Titles Registration System: Torrens System	The proposed Hybrid System
A. Theories			
1. A reliable register: Mirror Principle		Argument against titles registration is that even an exhaustive title search of the chain of title would not give the purchaser complete security because of the principle of <i>nemo dat quod non habet</i> (no one gives what he does not have and the ever-present possibility of undetected outstanding interests.	
2. A simple register: Curtain Principle			
3. A guaranteed register: Insurance Principle			

B. Institutional Structures			
1. Titles Registry			
2. Deeds Registry			
3. Records Registry			
4. Rights Registry			
C. Statutory Framework			
1. Titles Registry			<p>Argument against proposed amendments to Section 3 LDRA with the establishment of the four registries would be the huge financial outlay in implementation and systematic changes to the current deeds registry</p> <p>Removal of the word ‘purporting’ in Section 4 LDRA would mean that the documents presented to the registry are defect free and that would be inconsistent with the provisions of Sections 11, 21, 33 and 54, the <i>stakeholder did not explain what the inconsistencies are.</i> The recommendation that appeals against</p>

			<p>the decision of the Registrar should be through Arbitration and not to the land tribunal was not supported and the reasons outlines was that vast majority of Zambians are illiterate and indigent hence they would not be able to understand the procedures. The reasons for supporting the Lands Tribunal is that it operates with simplified procedures and therefore best suited to handle these appeals</p> <p>The proposed amendment to Section 11 was misunderstood it is not addressing the issue of an error free registry but it is addressing the argument that powers to alter the registry should not be vested in the discretion of one person ‘ the registrar’ but based on rules that are annexed as a schedule to the main Act.</p> <p>The proposed amendment to Section 12 has been misconstrued since the legislative powers of the Land Records Registrar should be included in the substantive Act to create the land data base and that that the</p>
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			Registrar should enact legislation as being Unconstitutional powers
2. Deeds Registry			

5.6 Conclusion

In conclusion, the final test for the proposed land recording and registration system will lie in its success upon implementation by the Ministry of Lands, Environment and Tourism. This research has shown that legal rights to land must be adequately defined for the owner to enjoy security of tenure. What better way for this to be achieved than providing a new land recording and registration system that addresses the challenges of the twenty-first century?

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