

CHILONGA COURT CASE SUMMARY AND UPDATE



1.0 Introduction

The High Court of Zimbabwe sitting at Harare on 5/01/22 dismissed an application to have the provisions of sections 4 and 6(1)(b) Communal Land Act, Chapter 20:04 declared unconstitutional. The case had been taken to court by three members of the Hlengwe Xangani community, an ethnic group in Zimbabwe commonly known as the Chilonga Community. The case was reported as *Livison Chikutu and 2 Ors v Minister of Lands and Ors* HH 02/22.

Background

Between February and March 2021, the Government issued a series of Statutory Instruments, the main object of which was to set aside a tract of Communal land measuring 12940 for the purpose of establishing an irrigation scheme in Chiredzi District. The land in question has been inhabited by the Hlengwe Xangani (Chilonga) Community since way before 1890. The impact of the Statutory Instruments is that some sections of the Chilonga Community might be affected to the extent that they face eviction to pave way for the proposed irrigation project.

The said Statutory Instruments were made in terms of the Communal Land Act. Section 4 of the later vests all Communal land in the President. Section 6 of the same Act empowers the President to make additions or subtractions from any communal land.

Applicants' case

On behalf of the Chilonga Community, the applicants alleged that the land in question is not part of Communal Land envisaged in the Communal land Act. They base the argument on the fact their ancestors were not settled through colonialism and that their land was not artificially created and carved out by the Tribal Trust Land Act. The crux of the argument is that the land cannot be set aside in terms of the Communal land Act.

The applicants further argued that's of the Communal section 4 and 6(1)(b) Land Act has a violent and obnoxious origin. They pointed out that sections 4 and 6(1)(b) of the Act violates their right to life right to human dignity, their right to equal protection of the law and their right to culture and the language. They also argued that the proposed action to move them from their ancestral land violates their right to property.

The Court's Findings

The court accepted that the Communal land Act and particularly the vesting of title of land in any person other than the occupiers themselves has its origins on the pathological hatred of the aboriginal races by the colonial powers. The Court however held that there is nothing unconstitutional by vesting communal land in the President as envisaged in section 4 of the Act. The court ruled that the fact that the Xangani people inhabited the land in question way before colonization does not exclude it from the definition of communal land in terms of the Communal land Act. In simpler terms, the court concluded that the land in question is part of Communal Land.

The judge observed that whilst the act has racist origins, at independence



and up to the present day, the government retained the concept of vesting communal lands in the State President. Mafusire J who presided over the case accepted the respondents' argument that the land is not vested in the President in his personal capacity. For the respondents, the Attorney General argued that the land is vested by virtue of the powers vested in him as the State President to ensure orderly development of communal land.

In so far as the setting aside of land is concerned, the respondents had argued that no significant portion of the land occurs without proper planning and consultation with communal leaders and the local authorities and that had been done in the Chilonga case. The applicants were arguing otherwise. They alleged that no proper consultations had been done. The court concluded that whether or not consultation was done was a question of fact and not a constitutional determination. The case before the court was a constitutional case

The High Court invoked the political question doctrine. The judge pointed out that the land question was a political question which should be left for the other arms of the government to determine. In simpler terms the court said the Chilonga case could not be determined by the law and the courts but rather politics should determine. At paragraph 14 of the cyclostyled judgment, the court said; "Sometimes politics has to speak first, and only then may the law take over".

Whether or not the judgment allows the Hlengwe Xangani people to be evicted/ displaced

The issue before the court was not whether or not the Chilonga Community should be displaced or evicted. The outcome however has a bearing on the ultimate decision to be taken by the government. Had the court allowed the application, the proposed irrigation project was arguably going to be suspended in the long run. Now that the sections which permitted the President to set aside the land in question has been found not to be ultra vires to the Constitution, at law there is nothing that bars the government from implementing the project.

In its response to the application, the government said no one is to be displaced as the identified land is largely inhabited. That a section of the community will be moved is an undeniable fact. The government, through the attorney general says those that might be affected will be relocated and "adequately compensated".





Recommendations

There are little or no prospects of success in appealing against the High Court decision. Hope is now pinned on the compensation undertakings. It was argued that the Chilonga irrigation scheme will be an extension of the Tugwi-Mukosi project. It is a fact that people who were relocated from Tugwi-Mukosi to Chingwizi were not adequately compensated. It is therefore recommended and proposed that the governments adequately compensate the affected people first before relocation to avoid a repeat of the Chingwizi disaster.

About MACRAD

Masvingo Centre for Research Advocacy and Development (MACRAD) Trust is an independent Zimbabwean Community Based Civil Society institution committed to the development of socio-economic rights and agrarian systems that enhance equitable land rights and sustainable land uses throughout Zimbabwe. MACRAD interacts with various organizations and communities to assist them in developing capacity for policy formulation and research. It also facilitates policy dialogue among communities, governments, academics, civil society and others on land and agrarian development, especially the land rights of marginalized social groups. Masvingo Center for Research Advocacy and Community Development (MACRAD) is driven by a desire to contribute towards improved rural livelihoods that should lead to greater capacities for the rural poor to determine their own destinies and contribute towards national development. MACRAD has worked with citizens in resettlements areas around Masvingo Province on civic and voter education to ensure their voices are heard. We support victims and survivors of diverse forms of conflict, violence, displacement and disenfranchisement. MACRAD's approach entails encouraging continuous policy debates and refinement of policy. This is achieved through generation and provision of research based information, platforms for dialogue, creating and nurturing a policy community in Zimbabwe. The ambition of Masvingo Center for Research Advocacy and Community Development (MACRAD) is to provide leadership in socio-economic justice and land-agrarian policy processes, to become a Centre of Excellence and remain an independent and credible center for knowledge on social and economic justice. We support victims and survivors of diverse forms of conflict, violence, displacement and disenfranchisement.



Tseu Campaign

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