

HIGH COURT OF ZAMBIA
PRINCIPAL REGISTRY
GOLDEN AT LUSAKA
 (Civil Jurisdiction)

2019/HP/1482

BETWEEN:

CYPRIAN MULENGA

AND

WOODLOCK LIMITED
MPIKA DISTRICT COUNCIL

PLAINTIFF

1st DEFENDANT
2nd DEFENDANT

BEFORE HON MRS JUSTICE S. KAUNDA NEWA THE 31st DAY OF MARCH, 2025

For the Plaintiff : Mr M. Khunga & Mr B.J Mulenga, Messrs Barnaby
 Chitundu & Khunga Advocates
For the 1st Defendant : Mr M.J. Katolo, Messrs Milner Paul Legal Practitioners
For the 2nd Defendant : Mr C.P. Chilambwe, Messrs Chipoma Chilambwe Legal
 Practitioners

J U D G M E N T

CASES REFERRED TO:

1. *Subramaniam v Public Prosecutor* 1956 1 W.L.R. 965
2. *Kelsen v Imperial Tobacco Co* 1957 2 QB 334
3. *Shell & BP Zambia Limited v Conidaris and others* 1975 ZR 174
4. *Pye v Graham* 2002 3 WLR 221
5. *Elias Tembo v Maureen Chirwa and others* CAZ Appeal No 005/2018

OTHER WORKS REFERRED TO:

1. *Clerk and Lindsell on Torts* 20th Edition 2010, Thomson Reuters, Sweet & Maxwell
2. *Halsbury's Law of England* Volume 45, 4th Edition
3. *John Cooke on the Law of Torts* 9th Edition
4. *Mvunga and Ngambi on Torts*, Unza Press for School of Law 2011 Edition

1. INTRODUCTION

- 1.1 Seeking to enforce his right to the quiet possession of his land, Cyprian Mulenga, the Plaintiff herein, initially commenced these proceedings on 17th September, 2019, by Writ of Summons which was accompanied by a statement of claim against Woodlock Limited.
- 1.2 Then by an amended Writ of Summons which was filed on 12th May, 2020, Mpika District Council, a local authority, was joined to these proceedings as the 2nd Defendant, after Woodlock Limited applied to join it.
- 1.3 The reliefs that Cyprian Mulenga seeks are:
 - i. *An Order for damages for trespass to land against Woodlock Limited;*
 - ii. *An Order for the payment for the gravel sand that was excavated from Cyprian Mulenga's property against Woodlock Limited;*
 - iii. *An Order for damages for the ditches/damage left or occasioned on Cyprian Mulenga's land by Woodlock Limited's excavation of gravel sand from the subject property;*
 - iv. *An Order for damages for trespass to land in respect of hazardous waste materials which were dumped on Cyprian Mulenga's land by Mpika District Council;*
 - v. *An Order for the payment for the cost of removing the said hazardous waste materials from Cyprian Mulenga's land;*

- vi. An Order of injunction restraining Mpika District Council from dumping hazardous waste materials on Cyprian Mulenga's property;*
- vii. Interest on the sums found due and payable to Cyprian Mulenga;*
- viii. Costs of and incidental to the proceedings;*
- ix. Any other relief that the Court may deem fit.*

2. STATEMENT OF CLAIM

- 2.1 Cyprian Mulenga, by his statement of claim, contended that he is the owner of the property known as Plot No 7027/M which is situated near the TAZARA junction along the Great North Road in Mpika District, in the Muchinga Province of the Republic of Zambia.
- 2.2 The assertion was that Mpika District Council as a local authority, collects and disposes of waste materials in designated areas, as part of its' responsibilities.
- 2.3 Cyprian Mulenga alleged that Woodlock Limited, sometime between 1st July and 20th July, 2018, entered upon his land without his knowledge, authority or consent with earth moving equipment, and started excavating tonnes of gravel sand from the said property.
- 2.4 It was further Cyprian Mulenga's assertion, that Woodlock Limited using a Twenty (20) tonne heavy duty truck took away in excess of Fifteen (15) truckloads of gravel sand of an estimated monetary value of Two Thousand Kwacha (K2, 000.00) per truck load, translating into a total sum of in excess of Thirty Thousand Kwacha (K30, 000.00).

- 2.5 Cyprian Mulenga also contended that the said truckloads of gravel sand which were excavated from his property were being taken and used on the NAPSA building which was under construction along the Great North Road, which Woodlock Limited was undertaking.
- 2.6 It was stated that on the said day Cyprian Mulenga spoke with the Site Manager for Woodlock Limited, Mr Siuluta at the NAPSA building construction site along the Great North Road over the trespass to his land. His assertion was that Mr Siuluta agreed that the actions by Woodlock Limited amounted to trespass on his property, and he promised to have the ditches that were left by the said excavation of the gravel sand buried.
- 2.7 Cyprian Mulenga further in the statement of claim, stated that Woodlock Limited claimed that it had been granted permission by Mpika District Council to excavate laterite from his property.
- 2.8 He also went on to aver, that despite his willingness to settle the issue ex-curia, and upon giving Woodlock Limited several reminders on its' promise to bury the affected portions of his land, Woodlock Limited had failed to do so.
- 2.9 His assertion was that it would cost in excess of Eighty Thousand Kwacha (K80, 000.00) to hire earth moving equipment to bury the ditches with the appropriate soil.
- 2.10 Still in making allegations, Cyprian Mulenga stated that on or about 15th March, 2018, he found Mpika District Council dumping hazardous waste on his property using a light

truck without his consent, authority or permission. His contention was that included in those hazardous waste materials, were broken bottles of glass, empty chemical tins and assorted refuse materials from the market, such as plastic bags, plastic bottles and various paper materials, among others.

- 2.11 Thus, on 15th August, 2018, Cyprian Mulenga wrote a letter of complaint to Mpika District Council, in which he registered his disapproval and displeasure with Mpika District Council's conduct, and advised the said Mpika District Council to stop, and to remove the hazardous waste materials, but it had not done so to date.
- 2.12 The continued averment was that on or about 2nd April, 2019, Cyprian Mulenga again found Mpika District Council on his property, Plot No 7027/M, Mpika, this time with a tractor and trailer, with registration number GRZ 13488 dumping hazardous waste materials. Cyprian Mulenga stated that he took photographs of the said tractor and the attendant persons whilst they were in the act which was complained about.
- 2.13 It was Cyprian Mulenga's assertion that arising from the foregoing, on or about 21st May, 2019, he wrote another complaint letter to Mpika District Council, advising it to stop and to remove all the hazardous waste materials from his land, which had not been done. He alleged that Mpika District Council had continued to dump hazardous waste materials on his property.

2.14 It was contended that the said hazardous waste materials posed a serious health risk and endangered the safety of Cyprian Mulenga's property. Therefore, he had suffered loss, inconvenience and irreparable damage at the hands of Woodlock Limited and Mpika District Council.

3. DEFENCE BY WOODLOCK LIMITED

- 3.1 Woodlock Limited, in the defence which was filed on 7th October, 2020, denied having trespassed on Cyprian Mulenga's land, contending that it was granted permission to excavate laterite from a public borrow pit by Mpika District Council. It was further stated that Mpika District Council duly informed Woodlock Limited that the land was for use by the public to excavate laterite.
- 3.2 Thus, it was denied that Cyprian Mulenga owns the land where Woodlock Limited excavated laterite or that it excavated laterite from Cyprian Mulenga's land, which it took to use at the NAPSA building which was under construction along the Great North Road.
- 3.3 Woodlock Limited further denied that Cyprian Mulenga spoke with its' Site Manager, Mr Siuluta, over the alleged trespass to his land, its' defence being that Cyprian Mulenga was referred to Mpika District Council over the alleged trespass, which it denied.
- 3.4 Therefore, the assertion that Mr Siuluta admitted to having trespassed on Cyprian Mulenga's land was denied, and the defence was that Cyprian Mulenga did not have the right to enter or possess the land as claimed.

- 3.5 The allegations that had been made by Cyprian Mulenga that he had been willing to settle the issue excuria, and that he had issued several reminders to Woodlock Limited on its' promise to bury the portions of his land which were affected by the excavation, were said to be within Cyprian Mulenga's peculiar knowledge.
- 3.6 The contention that it would cost about Eighty Thousand Kwacha (K80, 000.00) to hire earth moving equipment to have the ditches that Woodlock Limited had left on Cyprian Mulenga's land buried with the appropriate soil was denied.
- 3.7 The defence was that Cyprian Mulenga had not given proof of how the Eighty Thousand Kwacha (K80, 000.00) was arrived at, or indeed that he had spent the same. It was stated that should liability be found against Woodlock Limited, it would seek indemnity from Mpika District Council.

4. DEFENCE BY MPIKA DISTRICT COUNCIL

- 4.1 Mpika District Council in its' defence, did not deny that Cyprian Mulenga is the owner of the property known as Plot No 7027/M Mpika. Further admission was made, that Mpika District Council as a local authority, collects and disposes of waste materials in designated areas, as part of its' responsibilities.
- 4.2 The defence was that Cyprian Mulenga's allegations with regard to Woodlock Limited having entered upon his land without his consent and authority with earth moving equipment, and excavated tonnes of gravel, equivalent to

Fifteen (15) truckloads with an estimated value of being in excess of Thirty Thousand Kwacha (K30, 000.00) which it took to the NAPSA building which was under construction along the Great North Road, was said to be within Cyprian Mulenga's peculiar knowledge.

- 4.3 The same was said as regards Cyprian Mulenga's contention that he spoke with the Site Manager for Woodlock Limited, Mr Siuluta, who acknowledged the trespass and promised to bury the ditches that were left on his land, as a result of the excavation works.
- 4.4 Mpika District Council denied that it authorised Woodlock Limited to excavate laterite from Cyprian Mulenga's property, putting both Cyprian Mulenga and Woodlock Limited to strict proof of the said allegation.
- 4.5 The averment was that, it was within Cyprian Mulenga and Woodlock Limited's peculiar knowledge that Cyprian Mulenga had been willing to settle the matter excuria and that he had reminded Woodlock Limited to bury the ditches as promised, but Woodlock Limited had not done so.
- 4.6 The averment by Cyprian Mulenga that it would cost in excess of Eighty Thousand Kwacha (K80, 000.00) to bury the ditches that had been left on his land using earth moving equipment with the appropriate soil was disputed.
- 4.7 Mpika District Council did not deny the allegation that Cyprian Mulenga had made, that he found it on his land on 15th March, 2018, dumping hazardous waste materials or the nature of such hazardous waste. It was also not denied

that as a consequence, Cyprian Mulenga wrote a complaint letter on 15th August, 2018, to it, demanding that it stops dumping the said hazardous waste materials on his land, and that it should remove them. However, that was not done.

- 4.8 Admission was made, that on 2nd April, 2019, Cyprian Mulenga found Mpika District Council dumping hazardous waste materials on his land, using a tractor and trailer with registration number GRZ 13488, and that Cyprian Mulenga took photographs of the same.
- 4.9 It was agreed that Cyprian Mulenga on 21st May, 2019, wrote to Mpika District Council again asking it to stop dumping hazardous waste materials on his land 7027/M, and to remove the said hazardous waste materials, but that it did not do so, and it had continued dumping the said materials on his land.
- 4.10 Mpika District Council also admitted that the hazardous materials that were dumped on Cyprian Mulenga's land posed a serious health risk and endangered Cyprian Mulenga's property.
- 4.11 Admission was made, that Mpika District Council had trespassed on Cyprian Mulenga's land, Plot No 7027/M, and had dumped waste on the said property. However, Mpika District Council denied all the other claims that Cyprian Mulenga had made against it, and stated that it did not grant Woodlock Limited authority to extract laterite, gravel sand or soil from Plot No 7027/M.

4.12 Therefore, if Woodlock Limited did trespass on the said land, it did so at its' own volition, exceeding the authority that was granted.

5. EVIDENCE LED AT TRIAL

5.1 At trial, Cyprian Mulenga testified and he called Two (2) witnesses. Woodlock Limited called Two (2) witnesses, while Mpika District Council called One (1) witness.

PW1-ADEN YENGA

5.2 This witness, a Land Surveyor at the Ministry of Lands testified that he was head of the Chinsali Region office. He stated that he started working at the Ministry of Lands in 2016 as an intern, and at the time of his testimony, he had been employed by the Ministry of Lands for Two (2) years.

5.3 In terms of his duties, Aden Yenga's testimony was that he supervised cadastral surveys, mapping, which involved establishment of cadastral index and providing cadastral survey services to the communities that needed them.

5.4 He explained that cadastral surveys were conducted for the establishment, demarcation and re-affirming of property boundaries. Still in his testimony, Aden Yenga stated that cadastral surveys involved the production of survey maps and reports relating to property boundaries.

5.5 In relation to this matter, Aden Yenga's evidence was that in 2016, he was working at the Ministry of Lands in Chinsali when in February, 2020, the office received a letter requesting a boundary verification for the property Lot No 7027. His testimony was that his supervisor Andrew

Mwalimu Silwembe issued a quotation to Barnaby Chitundu and Khunga Advocates of behalf of their client for the exercise.

- 5.6 Still in his testifying, Aden Yenga stated that Barnaby Chitundu and Khunga advocates paid the amount that was quoted and provided logistics so that the boundary verification could be conducted.
 - 5.7 On his part, he stated that the office prepared for the exercise by conducting a desk top study, by searching for the title for Lot No 7027, and it was found that the said property was on title in Cyprian Alex Mulenga's name. It was also his evidence that the property was surveyed in 2005.
 - 5.8 Aden Yenga told the Court that the team proceeded to the site in April, to ascertain the position of Lot No 7027 on the ground, and to depict the position of the excavations which were in the area in relation to the said property.
 - 5.9 Pages 1-4 of Cyprian Mulenga's supplementary bundle of documents dated 1st April, 2021, was identified as the letter that Barnaby Chitundu and Khunga Advocates wrote to the Chinsali office of the Ministry of Lands. Aden Yenga further identified pages 13-15 of the said bundle of documents, as the quotation that the Regional Surveyor issued as the cost for the boundary verification exercise.
 - 5.10 It was also stated that pages 17-18 of the said bundle of documents was the deposit slip for the payment.
 - 5.11 Aden Yenga, still in testifying, stated that pages 6-15 of Cyprian Mulenga's bundle of documents, was a copy of the
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certificate of title for Lot No 7027 which was in the names of Cyprian Alex Mulenga.

- 5.12 He added that at page 11, was the survey diagram for the property, and that it was used to conduct the boundary verification survey.
- 5.13 Continuing with his testimony, Aden Yenga testified that the team proceeded from Chinsali to Mpika to conduct the boundary verification, and that a Global Navigation System (GPS) or GSS was used to verify the property boundaries, which positioned the features on the ground. He explained that on being set up, the equipment was referenced to a control point which was nearest to the property, to verify the coordinates of the boundaries of the points of the property, which were keyed in the GPS system.
- 5.14 Aden Yenga's evidence was that thereafter, the machine was operated to lead the team to the boundary corners of the property, as per the initial survey of the property in 2005.
- 5.15 He stated that Two (2) beacons were found on the ground and not the other two. It was further his testimony, that the machine took them to a corner, which evidenced the existence of a beacon before.
- 5.16 The evidence that was also given, was that as Two (2) beacons were found, they were confident that the craft of check was in place, and the boundaries of Lot No 7027/M were affirmed as per the 2005 survey.
- 5.17 Aden Yenga went on to testify that the team proceeded to conduct a second investigation, whose primary objective was

to ascertain the position of the excavation in relation to Lot 7027. His evidence was that in order to achieve this, the team entered a line based on two points being, A and D of the property as labelled on the diagram from which the data was being sourced.

- 5.18 Then from there, the team walked on the line and reached the excavations and started picking the coordinates along the excavation in the direction towards where Lot 7027 is. Aden Yenga explained that the team went along the excavation until they got back to the line A D so that the excavation which fell within the property could be depicted on a map.
- 5.19 His testimony was that satisfied with the field work, the team went on to prepare a boundary verification report. It was his evidence, that after the calculations were done, it was found that the excavations partly fell within Lot 7027 and covered an area of about 989 square metres.
- 5.20 Aden Yenga testified that a map was drawn to depict how the excavations related with Lot 7027, and it was compiled and sent to the client. He explained that the report gave a brief of why the boundary verification was being conducted, as well the objective of the report, the findings and the recommendations as given by Aden Yenga's predecessor.
- 5.21 He identified pages 19-25 of Cyprian Mulenga's supplementary bundle of documents as the said report, adding that at page 24, was the map which depicted the

excavation in relation to the property Lot No 7027, while page 25 was the cover letter for the report.

- 5.22 In concluding his testimony, Aden Yenga stated that he was one of the surveyors that went on the ground to conduct the boundary verification exercise on the instructions of the Provincial Land Surveyor at the time.

CROSS EXAMINATION OF ADEN YENGA BY COUNSEL FOR WOODLOCK LIMITED

- 5.23 Aden Yenga, in cross examination, testified that he is a Land Surveyor who was trained at the University, and that he held a Bachelors' Degree in Geomatic Engineering, a science that deals in measurements under, above and on the earth's surface. He explained that the property Lot No 7027 was the same as Lot No 7027/M.
- 5.24 Further in cross examination, Aden Yenga testified that he could not say that a property number always had an M, stating that Lots under settlements are numbered differently, and do not have an M at the end. Still in his testimony, he stated that Lot 7027 was held on title.
- 5.25 When referred to a part of the certificate of title, at page 7 of Cyprian Mulenga's bundle of documents, Aden Yenga agreed that the property number on that document read as 7027/M/2. His evidence was that he did not understand why it had a slash and a 2 on the said property number, stating that someone from the Lands and Deeds could explain that, as they prepared title deeds.

- 5.26 In continued cross examination, Aden Yenga stated that numbering before a survey was done, was done by the Survey Department. He further testified that the piece of land on the certificate of title was defined as being in extent of 5.0030 hectares, being Lot No 4831. His position was that there appeared to be a problem with that page, as it stated the property as Lot No 4831.
- 5.27 Therefore, he could not tie himself to the document. Aden Yenga agreed that at page 6, the property number was indicated as Lot No 7027/M. He attributed the difference in the property numbers in the certificate of title as being due to human error.
- 5.28 The testimony that was also given, was that Cyprian Mulenga's lawyers requested for the boundary verification and at the time, Woodlock Limited was not in the picture. Aden Yenga testified that part of the excavation was done outside Cyprian Mulenga's property, and he explained that measuring the excavations outside Lot No 7027 was beyond the scope of their objectives.
- 5.29 It was further his evidence, when he was referred to the diagram which depicted the boundary verification for Lot No 7027/M Mpika, that it was not drawn to scale, and that as there was no scale, he was unable to know if it was drawn to scale. Aden Yenga told the Court that the area of the gully was in square metres, and that in relation to the hectarage of 5.0030, it represented 0.01978 percent.
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5.30 It was his testimony, that he could not agree that the percentage was negligible, and that as it was a relative term, he could not give his opinion on the same. Aden Yenga stated that when they visited the site, he did not pay attention to whether part of the land was being used as a dump site.

CROSS EXAMINATION OF ADEN YENGA BY COUNSEL FOR MPIKA DISTRICT COUNCIL

5.31 It was stated, when Aden Yenga was referred to parts of the certificate of title for Lot No 7027/M which were at pages 6-8 of Cyprian Mulenga's bundle of documents, that at page 7, the property number was indicated as 7027/M/2, while at page 8, it was indicated as 7027/M/1. He agreed that he was part of the team that verified the boundaries of the property.

RE-EXAMINATION OF ADEN YENGA

5.32 Aden Yenga clarified that he was not very conversant with preparations of certificates of title, but that the indication of Lot 4831 was a human error, as there was also a diagram number 4831, and at page 11, the diagram number was indicated as 4831/2013. Therefore, the Secretary made the error when typing.

PW2-CYPRIAN MULENGA

5.33 Cyprian Mulenga began his testimony by stating that he retired in 2012, and that as a family, they had challenges in Mpika. Thus, they resolved that find land for farming to ensure food security. It was his evidence, that he approached Mpika District Council for a small holding and he was

allocated Lot No 7027/M, and he started farming on the said land.

- 5.34 Cyprian Mulenga further told the Court that he approached Mpika District Council to help him obtain title to the land, and he was guided to purchase Form Annexure C, being the application form for a certificate of title.
- 5.35 His further testimony, was that upon completing the form, he was advised to get a site plan of the area, and he paid for the same, and he obtained one. Cyprian Mulenga still in testifying stated that he was also asked to pay for extracts of the minutes of the full Council meeting which authorised that he be allocated the land, Lot No 7027.
- 5.36 His evidence was that after he did so, he was asked to take the documents to Ndola Council if he wanted things to move quickly. The testimony that was given, was that Four (4) files were made, and that one remained at Mpika, while Three (3) were taken to Ndola in 2011. Cyprian Mulenga added that they were submitted to the Lands Officer there, and he left his phone number, and he went back to Mpika.
- 5.37 Then after a month or two, the Lands Officer from Ndola called, and she had informed him that the offer letter was ready, and he had to pay for it. Thus, Cyprian Mulenga collected the letter, and he paid the fees that were stated on the same. It was also testified that Cyprian Mulenga was informed that there was no survey diagram for the property, despite the land having been surveyed in 2005.

- 5.38 Pages 1 and 2 of Cyprian Mulenga's bundle of documents was identified as the Annexure C Form, page 3 as an extract of the minutes of the full Council meeting, page 4, as the recommendation letter to the Commissioner of Lands by Mpika District Council, and page 5 as the site plan for Lot No 7027/M, as approved by the Provincial Office in Kasama after Mpika District Council issued it.
- 5.39 Other documents that were identified, were page 6 of the said bundle of documents, being the certificate of title for Lot No 7027/M.
- 5.40 Cyprian Mulenga further testified that on 20th July, 2018, he found Two (2) machines on his property, Lot No 7027/M, stating that one was digging gravel on the said land, while the other was a tipper truck, which was loading the gravel.
- 5.41 His evidence was that on asking the workers who had authorised them to get the said gravel, they had responded that the Site Manager from Woodlock Limited, the company that had been contracted to construct the NAPSA building in Mpika along the Great North Road, as one came from Kapiri Mposhi on the left-hand side, had taken them there.
- 5.42 Cyprian Mulenga stated that he was informed that he would find the Site Manager there, and he took photographs before left. He explained that he had also asked the employee the tonnage of the truck that was being used to transport the gravel, and he was told that it was a Twenty (20) tonne truck. Cyprian Mulenga referred to pages 16-21 of his bundle of documents as being the photographs that he took.

- 5.43 In that regard, Cyprian Mulenga testified that page 16 was a photograph which showed his white pickup truck on top, and the excavation that was taking place near the beacon D, as shown at page 11.
- 5.44 Further in his evidence, Cyprian Mulenga stated that when he went to the NAPSA building, Mr Siuluta who introduced himself as the Site Manager, asked what his interest was, and he had told him that at the point where the gravel was being picked, he owned the land, and therefore, they had trespassed on his land.
- 5.45 Cyprian Mulenga's continued testimony was that he had asked Mr Siuluta to bury the land that had been excavated and to stop doing so. He also explained that he counted Fifteen (15) loads of heaped gravel. Then a week later, he went to see Mr Siuluta, who informed him that they had not buried the land, as they had challenges with the machine, and he had asked for a week to do so. Cyprian Mulenga stated that he agreed to the request.
- 5.46 However, when he went back to the land, for the third time, he found that nothing had been done, and Mr Siuluta told him that he thought that the land had been buried. Cyprian Mulenga testified that when they went to the site together, Mr Siuluta had apologised, and had assured Cyprian Mulenga that the land would be buried, and this time he asked for Two (2) weeks to do so.
- 5.47 The testimony that Cyprian Mulenga further gave, was that after Two (2) weeks the land had still not been buried, and

Mr Siuluta told him that the machine had broken down, and it had been sent to Lusaka for repairs. His evidence was that Mr Siuluta informed him that the land would be buried when the truck returned from Lusaka.

- 5.48 Then after time expired, he went back to see Mr Siuluta, who now told him that the truck had returned from Lusaka, but no fuel had been allocated for burying the land, and that fuel would be sent after a week. However, nothing was done, and Cyprian Mulenga's patience was exhausted.
- 5.49 He testified that he went to GM Trading, the only construction company that was in Mpika at the time, which had a grader, and he obtained a quotation for the sale of gravel. Cyprian Mulenga's evidence was that he was given a quotation for a Fifteen (15) tonne truck on 15th August, 2018. Then on 12th August, 2019, he was given a proforma invoice as Woodlock Limited did not bury his land.
- 5.50 He explained that the proforma invoice indicated Four Thousand Kwacha (K4, 000.00), after he took the officer to the site, and he was informed that it would take Twenty (20) days, at Four Thousand Kwacha (K4, 000.00) per day, bringing the total to Eighty Thousand Kwacha (K80, 000.00). It was added that at the time, fuel cost Fifteen Kwacha Fifty-Nine Ngwee (K15.59).
- 5.51 Still in testifying, Cyprian Mulenga stated that Woodlock Limited had not buried his land, as at the date of his testimony.

- 5.52 Page 2 of his supplementary bundle of documents was identified as the proforma invoice that was obtained on 15th August 2018, with a cost for Fifteen (15) tonnes of gravel within a Five (5) kilometre radius. Further testimony was given, that page 5 of said bundle of documents, was the proforma invoice for hire of a grader at a cost of Four Thousand Kwacha (K4, 000.00) per day for Twenty (20) days.
- 5.53 In respect of his claim against Mpika District Council, it was stated that on 15th March, 2018, Cyprian Mulenga found Two (2) trucks offloading hazardous waste materials on the same point before Woodlock Limited did the excavation works. He explained that the materials were hazardous, as they included tins, bottles and broken glass.
- 5.54 Page 1 of Cyprian Mulenga's supplementary bundle of documents was identified as the letter that was written to Mpika District Council on 15th March, 2018, over dumping of the hazardous waste on Cyprian Mulenga's land.
- 5.55 Cyprian Mulenga testified that effects of some chemicals are only seen after sometime. He also stated that on 2nd April, 2019, he found a tractor with a trailer also offloading at the same point where Woodlock Limited did the excavation, and he took some photographs.
- 5.56 In that regard, reference was made to the photographs which were at pages 26-28 of Cyprian Mulenga's supplementary bundle of documents. Particular note was made that page 27 showed the registration number of the tractor. Still on the said hazardous waste, Cyprian Mulenga's evidence was that

at page 18 of his bundle of documents, the hazardous waste materials could be seen.

5.57 His prayer was that the reliefs as pleaded should be granted.

**CROSS EXAMINATION OF CYPRIAN MULENGA BY
COUNSEL FOR WOODLOCK LIMITED**

5.58 It was Cyprian Mulenga's testimony in cross examination, that he properly acquired the land. He agreed that there was no letter of offer from the Ministry of Lands in his bundle and supplementary bundle of documents. Cyprian Mulenga did not agree that in the absence of the letter of offer, the Court would not know that he was offered the land by the Commissioner of Lands.

5.59 Whilst stating that Cyprian Mulenga was asked to pay the fees at the Ministry of Lands in Ndola, Cyprian Mulenga's evidence was that he had not produced the receipt for payment of the said fees. He agreed that even the receipt for the payments that he made at Mpika District Council were not before Court.

5.60 He took the position that at that stage, the documents that Counsel had referred him to, were not important to show that he had acquired the land legally. In that respect, he explained that he also paid for the site plan, which overtook the payment.

5.61 On being referred to the certificate of title, which was at page 6 of his bundle of documents, Cyprian Mulenga testified that the said certificate of title was for Lot No 7027/M. He agreed that at page 7, the property number was indicated as Lot No

7027/M/2, and that at the bottom of that page, the property number was indicated as Lot No 4831.

- 5.62 It was his testimony that Lot No 4831 was not his property. As to when he acquired the certificate of title for the land, Cyprian Mulenga stated that it was in 2013. He explained that he saw that Lot No 4831 was indicated on the certificate of title. Cyprian Mulenga's evidence was that when he had inquired at the Ministry of Lands, he was informed that the said number was for the survey diagram.
- 5.63 Still in cross examination, Cyprian Mulenga stated that he did not ask the Ministry of Lands to change the property number, as they were the experts. He agreed that at page 8 of the said bundle of documents, the property number was indicated as Lot No 7027/M/1. Nevertheless, Cyprian Mulenga's evidence was that the certificate of title was genuine. He added that it was for the experts to say on the discrepancies that were on the said certificate of title.
- 5.64 As for the dumping of hazardous waste materials, on his land, it was Cyprian Mulenga's testimony, that he found officers from Mpika District Council dumping the same on his land in March, 2018. His evidence was that he wrote a letter to Mpika District Council asking it to stop doing so, and to remove the said hazardous waste materials from his property. However, they did not remove them.
- 5.65 Cyprian Mulenga maintained that in April, 2019, he found a tractor on his land, but denied that it was true, that as far as Mpika District Council was concerned, it was a dumping

site, and Cyprian Mulenga was aware that it was, and that was why he did not sue them. He stated that Mpika District Council had been sued in this matter.

5.66 Cyprian Mulenga testified, when he was referred to the Writ of Summons which was at page 1 of his bundle of pleadings, that the parties on the said Writ were himself and Woodlock Limited, and that Mpika District Council did not appear there. He denied that he did not sue Mpika District Council as he had no issue with it.

5.67 His position was that he gave time to Mpika District Council to clear the hazardous waste material from his property.

5.68 In respect of Woodlock Limited, Cyprian Mulenga testified that it finished the project, and it did not bury his land. He disagreed that the Site Manager for Woodlock Limited gave him the letter from Mpika District Council, which authorised Woodlock Limited to dig gravel.

5.69 When referred to the letter dated 6th July, 2018, which was at page 1 of Woodlock Limited's bundle of documents, Cyprian Mulenga testified that Woodlock Limited in that letter, wrote to Mpika District Council requesting to collect gravel for the NAPSA building which was under construction. He agreed that page 2 of the said bundle of documents, was the approval from Mpika District Council.

5.70 Cyprian Mulenga also agreed that in the said letter, it was indicated that Woodlock Limited should contact Mr Ngoma. He denied that Woodlock Limited suggested that they should go to Mpika District Council and he had refused. Whilst

stating that he did not know how many days Woodlock Limited took to extract the gravel, Cyprian Mulenga denied that Woodlock Limited started doing so on the day that he found them. His position was that he did know when they started doing so.

- 5.71 Cyprian Mulenga on being referred to the photographs which were at page 18 of his bundle of documents, agreed that at the top of that page, he could see rubbish which was dumped. He stated that the rubbish and the trees were on the same level.
- 5.72 Still in cross examination, Cyprian Mulenga stated that he could not see the base of the trees on the picture, as there was grass all over, and he could not tell whether the trees were at a higher level than the garbage.
- 5.73 His evidence when he was referred to the diagram which was compiled on the boundary verification being done, which was at page 24 of his supplementary bundle of documents, was that he was aware of the boundary verification that was done on his property. He stated that if the diagram depicted what was correct, then it was done by a professional.
- 5.74 Cyprian Mulenga recalled that during the boundary verification, it was found that beacon D, which was supposed to be on the corner before where the gully was, was missing. He testified that the gully had not reached where beacon D was supposed to be, but clarified that what was depicted was what was on the ground.
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- 5.75 He stated that interference with beacon D had no effect on the excavation. In continued cross examination, Cyprian Mulenga stated that the gully occupied a small portion of his land. It was also his testimony, that he found about Fifteen (15) loads of gravel where Woodlock Limited was constructing. However, he could not estimate the area that was occupied by those Fifteen (15) loads, as some heaps of the gravel had been spread on an area.
- 5.76 Cyprian Mulenga further stated that it was difficult to tell how many loads of gravel Woodlock Limited got from the gully, as he only counted what he found.
- 5.77 As to what he claimed, the testimony that Cyprian Mulenga gave, was that it was damages for trespass and for payment for the gravel that was excavated from the land, as it was done without his authority. Clarification was made that Cyprian Mulenga wanted payment for the wrong that was done.
- 5.78 He could not tell on how days the excavation was done, but stated that he found the machine on his land on 20th July, 2018. Cyprian Mulenga also testified that he went to Woodlock Limited's site, and he confirmed that they had been collecting gravel from his land. He disputed that it was only on that date, that Woodlock Limited collected gravel from his land. He did not know how deep the pit was or on how many days gravel was collected from there.
- 5.79 It was Cyprian Mulenga's testimony when he was referred to the photographs which were at pages 26 and 27 of his
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supplementary bundle of documents, that he took the photograph which was at page 26, and that the Two (2) photographs had been produced to show that Mpika District Council had been dumping hazardous waste materials on his land using a tractor and a trailer.

5.80 Admission was made, that Mpika District Council offered Cyprian Mulenga the land as an agent. Thus, his position was that they were aware that it was his land. Cyprian Mulenga denied that Mpika District Council had turned his land into a dumping site for garbage, although he acknowledged that Mpika District Council had been dumping garbage on his land.

5.81 In support of that position, he testified that the pictures depicted garbage in the trailer and outside on the left-hand side. Cyprian Mulenga told the Court that the photographs were taken in 2019, and he explained that prior to that, in 2018, he had visited the plot, and he had witnessed the said dumping. However, he could not tell that the Two (2), were the only incidences of dumping.

5.82 Cyprian Mulenga, also in cross examination, testified that at page 24, the area where the gully was, was covered as wind scampered the papers and plastics, and also human beings who went there, would also scatter them. It was his evidence that as at the time of his testimony, Mpika District Council had not taken remedial measures to remove the garbage and he had sued them.

- 5.83 When referred to the statement of claim which was at pages 1-3 of his further bundle of pleadings, dated 5th March, 2021 under claim (iv), Cyprian Mulenga testified that it was a claim for the removal of the hazardous waste. He explained that it was a claim for the cost of removal of the said hazardous waste. Cyprian Mulenga agreed that the cost for removal of the hazardous waste had not been produced.
- 5.84 It was also his testimony, when he was referred to the proforma invoice, which was at page 5 of his supplementary bundle of documents, that he had not spent the Eighty Thousand Kwacha (K80, 000.00) that was indicated on the said proforma invoice. His position was that the quotation was for the hire of a grader, explaining that a grader is a multi-purpose machine, which can be used to grade a road or bury a pit.
- 5.85 When cross examined further, Cyprian Mulenga stated that he could not tell whether a grader was not the best equipment to bury a borrow pit, as its' Two (2) tyres would be in the pit before the hole was reached.
- 5.86 He did not agree that Twenty (20) days to bury a pit was an exaggeration, and Cyprian Mulenga further disagreed with the assertion that he wanted to extort money from Woodlock Limited. His evidence was that page 2 of his supplementary bundle of documents, was a quotation from GM Trading for the digging up of laterite, and delivering it, within a radius of Five (5) kilometers, using GM Trading's own transport at Two Thousand Kwacha (K2, 000.00).

- 5.87 Cyprian Mulenga testified that he did not incur costs to dig or load the gravel, but maintained that he claimed the cost at Two Thousand Kwacha (K2, 000.00), as the quotation was for a Fifteen (15) tonne truck. He added that Woodlock Limited used a Twenty (20) truck tonne truck, as informed by the Manager at Woodlock Limited, as well as the people who were on site.
- 5.88 Further testimony was given, that a picture of the said truck was also at page 19 of Cyprian Mulenga's bundle of documents, even if Woodlock Limited denied. Cyprian Mulenga denied that asking for payment as well as to bury the pit was asking for one and same thing. Cyprian Mulenga's evidence was further that, if he had allowed Woodlock Limited to collect the gravel, he would not have asked it to bury the pit.
- 5.89 He contended that Mpika District Council had no authority to issue a letter in respect of his land, which is private. Cyprian Mulenga also testified that the letter which was at page 2 of Woodlock Limited's bundle of documents, did not state that Mpika District Council issued the letter on his behalf. He did not know whether Mpika District Council had authority to write the letter in the manner that it did.
- 5.90 Whilst agreeing that Woodlock Limited was not invited to the verification of the boundaries for Cyprian Mulenga's land, Cyprian Mulenga was unsure whether Mpika District Council was invited. He nevertheless testified that he was
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part of the verification team, and that he did not see any officials from Mpika District Council there.

CROSS EXAMINATION OF CYPRIAN MULENGA BY COUNSEL FOR MPIKA DISTRICT COUNCIL

- 5.91 The testimony that Cyprian Mulenga gave, when he was referred to the letter that Mpika District Council wrote to Woodlock Limited, was that it was approval for the collection of laterite/gravel from the borrow pit near TAZARA. Cyprian Mulenga testified that he had lived in Mpika since 1981 and he knew where TAZARA is located.
- 5.92 His evidence was that there are many borrow pits near TAZARA, and that he would not be able to count them. However, he stated that from TAZARA as one went to the Boma, there was only one borrow pit. Cyprian Mulenga agreed that his land is near TAZARA, although he had not measured how far away.
- 5.93 In his estimation, he stated that it could be over Four (4) kilometers, although he was not sure. It was agreed that Cyprian Mulenga's land was not indicated on the permit, and that from the way the permit was worded, it was not for the extraction of gravel from his land.
- 5.94 Agreement was made, that Cyprian Mulenga did not find Mpika District Council extracting gravel from his land.

PW3- FELIX HALYONDA

- 5.95 The last witness who testified for Cyprian Mulenga was Felix Halyonda, the Acting Principal Registrar of Lands and Deeds at the Ministry of Lands and Natural Resources, and who

was a subpoenaed witness. He explained that his duties as including issuance of certificates of title for land, registration of documents and maintenance of the Lands Register.

- 5.96 In respect of the property Lot No 7027/M, he testified that the said property was on a State lease, and that he had a printout for the said land from the Lands Register.
- 5.97 Felix Halyonda further testified that the title holder for the property was Cyprian Mulenga, and that the certificate of title was issued on 21st December, 2013, with the lease for the property being for Ninety-Nine (99) years from 1st January, 2011.
- 5.98 He identified the Lands Register for Lot No 7027/M, and it was marked as 'ID1'. On production, it was marked as 'P1'. Still in testifying, Felix Halyonda stated that the certificate of title was issued after his office received a lease from the Commissioner of Lands, which the Commissioner of Lands signed on behalf of the President of Zambia. His evidence was further that the said lease was also signed by Cyprian Mulenga.
- 5.99 It was stated that Felix Halyonda's office further received a survey diagram from the office of the Surveyor General. Then thereafter, his office issued a certificate of title, which was signed by the Registrar.
- 5.100 He explained that the survey diagram contained details relating to the property number for the property, the area size with its' coordinates, a diagram number and the year in which it was issued.

- 5.101 The continued testimony that was given, was that the lease contained the property number, the tenure of the property, being Ninety-Nine (99) years and the commencement date. Felix Halyonda added that the lease was signed by the Commissioner of Lands and the title holder, as well as their witnesses.
- 5.102 Still in his evidence, Felix Halyonda stated that the certificate of title also had the property number, entries in relation to the lease, the survey diagram, and it was signed by the Registrar of Lands and Deeds.
- 5.103 He explained that the office of the Surveyor General issued the survey diagram, and that the lease was prepared by the office of Commissioner of Lands, while the certificate of title was prepared by the Registrar of Lands and Deeds.
- 5.104 Pages 6-15 of Cyprian Mulenga's bundle of documents were identified as being the certificate of title for the property Lot No 7027/M, with the certificate number for the property at page 7 indicated as 25310. Felix Halyonda noted that the property number at that page was indicated as 7027/M/2. He explained that the 2 at the end of the property number was indicated as per the Lands Register.
- 5.105 Testimony was further given, that the certificate of title was issued on 21st October, 2013, for a period of Ninety-Nine (99) years from 1st January, 2011. Felix Halyonda added that the property was described as indicated on the survey diagram, and that it also had a signature of the Lands and Deeds and the seal.

- 5.106 Still in testifying, Felix Halyonda stated that at page 8 was the memorials, which indicated that the lease was signed by the President and Cyprian Mulenga. His testimony was that the property number was indicated as 7027/M/1, with 1 being entry number 1 as per the Lands Register.
- 5.107 The continued testimony that Felix Halyonda gave, was that the survey diagram indicated the diagram number, and the area size. His evidence was further that page 12 was the lease agreement which was signed by the Commissioner of Lands on behalf of the President, and Cyprian Mulenga, as well as the witnesses.
- 5.108 It was stated that the property number as could be seen from lease and the survey diagram was 7027/M. Felix Halyonda testified that at page 7, the land was described as 5.030 hectares, being Lot No 4831 Mpika. His evidence was that the correct property number was Lot No 7027/M. Therefore, his office made a typographical error in stating the property number as 4831, and that the certificate of title was valid despite the typographical error.
- 5.109 The testimony that was also given, was that **Section 11 of the Lands and Deeds Registry Act** allows for the correction of errors or omissions that are done by his office on the Lands Register. Felix Halyonda clarified that the error was on the certificate of title when it was being typed, and not on the Lands Register, as the information on that document in relation to the property was correct.

**CROSS EXAMINATION OF FELIX HALYONDA BY
COUNSEL FOR WOODLOCK LIMITED**

- 5.110 In cross examination by Counsel for Woodlock Limited, Felix Halyonda on being referred to the certificate of title which was at page 7 of Cyprian Mulenga's bundle of documents, testified that it indicated the property number as Lot No 4831. He stated that his office checked before a certificate of title was issued to an owner.
- 5.111 It was also his evidence, that the Lands and Deeds Registry received the survey diagram from the Surveyor General's office, and a lease from the Commissioner of Lands, which the Lands Officer then registered on the system.
- 5.112 He stated that a new system had been adopted, as previously documents would be sent to the typing pool by the Lands and Deeds Officer, so that a certificate of title could be typed based on the Two (2) documents. Then on typing, the Secretary would take the certificate of title to the office of the Registrar, who would vet to confirm whether the details were correct.
- 5.113 Felix Halyonda went on to testify that once satisfied, the Registrar would sign the certificate of title. It was also his testimony, that the certificate of title for Cyprian Mulenga passed through that process, but that he did not sign it. Thus, he could not say whether there was a mistake on it, as he did not sign it. When cross examined further, Felix Halyonda's evidence was that when he testified that there

was a typographical error on the certificate of title, he was not misleading the Court.

5.114 His testimony was that **Section 11 of the Lands and Deeds Registry Act** empowers the Registrar to correct errors or omissions on a certificate of title or the Lands Register. Whilst agreeing that the certificate of title was issued on 21st October, 2013, Felix Halyonda told the Court that the error on it, had not been corrected. He denied that this was so, as there was no error.

5.115 He agreed that the provisions of **Section 11 of the Lands and Deeds Registry Act** *did* not prevent them from correcting the error, when a matter was in Court.

5.116 Felix Halyonda testified that he had not brought evidence to show that there was no property that was registered as Lot No 4831 at the Ministry of Lands. He agreed that a person reading the document would conclude that Lot 4831 at Mpika belonged to Cyprian Mulenga. In conclusion, he testified that apart from the Lands Register, there were documents that showed that Lot No 7027/M was given to Cyprian Mulenga.

**CROSS EXAMINATION OF FELIX HALYONDA BY
COUNSEL FOR MPIKA DISTRICT COUNCIL**

5.117 There was no cross examination.

5.118 That marked the close of the case for Cyprian Mulenga.

**CASE FOR WOODLOCK LIMITED
DW1-YOLOMINO MBEWE**

- 5.119 The director of Woodlock Limited, Yolomino Mbewe was DW1. He told the Court that he is a Civil Engineer and that as a Director, his duties included directing activities such as bidding for works, and execution of works once they were awarded to Woodlock Limited.
- 5.120 It was his testimony, that he denied that Woodlock Limited trespassed on Cyprian Mulenga's property. Yolomino Mbewe stated that Woodlock Limited was awarded a contract to construct a Three (3) storey office block for the National Pension Scheme Authority (NAPSA) in Mpika, in 2018. Thus, Woodlock Limited went to Mpika for that purpose.
- 5.121 He explained that Woodlock Limited was a visitor there, and he constituted a team of officers to go and establish the project and start execution. The evidence that Yolomino Mbewe further gave, was that amongst the important things that were to be done at the onset, was to source the materials which were required to execute the project, which materials included gravel.
- 5.122 He added that it was not the first time that they had undertaken works of that magnitude, and therefore, they were aware of the procedures for sourcing such materials.
- 5.123 Yolomino Mbewe stated that in sourcing for gravel, the first point of call was Mpika District Council, being the local authority. Thus, he sent his officers, Nedson Mupeta and Sebastian Tembo to go to Mpika District Council to inquire on where they could source gravel. He added that Nedson Mupeta and Sebastian Tembo were advised that there was a
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borrow pit which was near TAZARA, where they could get the gravel.

5.124 Further in testifying, Yolomino Mbewe stated that Nedson Mupeta and Sebastian Tembo were advised to put the request in writing, indicating the quantity of gravel that was sought, and they did so. In that regard, page 1 of Woodlock Limited's bundle of documents was identified as the letter that Woodlock Limited wrote to Mpika District Council.

5.125 He told the Court that they waited for Two (2) weeks and a response was given by Mpika District Council, who informed them that the request had been approved. His testimony was that page 2 of Woodlock Limited's bundle of documents was the said response.

5.126 In further giving evidence, Yolomino Mbewe stated that Woodlock Limited was required to pay Two Thousand Five Hundred Kwacha (K2, 500.00) for One Thousand (1000) tonnes of gravel. He also stated that in the letter, Woodlock Limited was advised to liase with the Engineer Lawrence Ngoma who would provide guidance as they collected the gravel.

5.127 Yolomino Mbewe testified that thereafter, Mpika District Council assigned Two (2) of its' officers to go with officers from Woodlock Limited to the borrow pit. He explained that the officers from Mpika District Council gave Woodlock Limited the exact place and location where to uplift the gravel.

- 5.128 Then when Yolomino Mbewe travelled to the Mpika site for a routine inspection, he decided to go and see the borrow pit to ascertain the quality of the gravel that was in the said pit, with the help of officers from Woodlock Limited.
- 5.129 He testified that he discovered that there was an existing borrow pit there, which had been dug up quite extensively, and that it was also being used as a dump site. In that regard, he testified that there were bottles, plastics and all sorts of waste disposal materials in the pits, which had been dug up.
- 5.130 Yolomino Mbewe stated that he was not put on notice that it was someone's property. Then on inspecting the gravel, he gave his officers the go ahead to collect it.
- 5.131 With reference to the photographs which were at pages 16-21 of Cyprian Mulenga's bundle of documents, Yolomino Mbewe's evidence was that page 16 showed a vehicle that was on top, which was a 1.6 meters standard of the place as dug up. He further stated that in relation to the heights shown and the excavations, on the picture, it was clear that the place was extensively dug up.
- 5.132 He continued testifying, stating that he left for Lusaka after he gave his officers the go ahead. Then hardly a day after his arrival, his officers who were at the site, called him and informed him that Mr Alex Mulenga had gone to the site, and he had demanded that they stop collecting gravel from the borrow pit, as it was his plot.

- 5.133 He added that his officers had informed him that Mr Alex Mulenga had insisted that they stop doing so, despite having shown him the application, and the authorization from Mpika District Council. Yolomino Mbewe's evidence was that he had advised his officers to stop the excavation barely Two (2) days after they started the exercise, and go back to Mpika District Council and present the problem that had arisen. He explained this, as being because Mpika District Council had taken his officers there, so that they could collect the gravel.
- 5.134 It was also his testimony, that at Mpika District Council, his officers were asked who had stopped them from collecting the gravel, and his officers had said that it was Alex Mulenga. That in response, the officers at Mpika District Council had stated that they had been looking for Mr Mulenga as he had done a similar thing.
- 5.135 Further in his testimony, Yolomino Mbewe stated that his officers had informed him that they went back to the site with officers from Mpika District Council, and his officers were guided to dig in the opposite direction in the same borrow pit.
- 5.136 Then from there, his officers had informed him that Mr Mulenga had visited the site, and had demanded that Woodlock Limited buries the place where it had excavated previously. Thus, he instructed the officers to make good that area that Woodlock Limited had worked on the previous Two (2) days, and in his belief, the matter had been concluded.

- 5.137 Yolomino Mbewe in his continued testimony, told the Court that however, he was informed that Mr Mulenga had continued going back to the site insisting that the borrow pit be buried. He also stated that his officers went with Mr Mulenga to the site to establish how much of the borrow pit he wanted to have buried.
- 5.138 Yolomino Mbewe's evidence was that his officers had informed him that Mr Mulenga wanted the entire borrow pit which had previously been dug, buried. He testified that he had advised his officers not to proceed with such an undertaking, as Woodlock Limited only excavated a small area, which it had made good at the time.
- 5.139 Yolomino Mbewe, with reference to the boundary verification diagram for Lot No 7027/M Mpika, which was at page 24 of Cyprian Mulenga's supplementary bundle of documents, testified that a small gully was indicated on the document. He also stated that the straight line did not define the extent of the borrow pit, stating that it was extensive, and which Mr Mulenga wanted them to bury.
- 5.140 The evidence that Yolomino Mbewe also gave, was that Mr Mulenga had not shown where exactly Woodlock Limited had excavated on the diagram, as the borrow pit was extensive. He stated that the size of Lot No 7027/M in relation to the gully as depicted, was more than Twenty (20) times the space. Thus, the area covered by the gully as the area that was dug up, was less than Five (5) percent.
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- 5.141 Yolomino Mbewe also testified that the diagram was drawn to scale and therefore, the encroachment was less than Five (5) percent, while Ninety-Five (95) percent was not tampered with.
- 5.142 Premised on the letter that Cyprian Mulenga wrote to Mpika District Council, which was at pages 3-4 of Cyprian Mulenga's supplementary bundle of documents, Yolomino Mbewe denied having trespassed on Cyprian Mulenga's land, as the said letter alleged that Mpika District Council had been dumping waste and allowing China Aid to go to his property.
- 5.143 It was reiterated that on reaching Mpika, Woodlock Limited had followed procedure by going to Mpika District Council and making a request for gravel in writing. Then after, approval was given, and money was paid, officers from Mpika District Council had directed Woodlock Limited from which part of the borrow pit it could dig.
- 5.144 Thus, Yolomino Mbewe disputed that Woodlock Limited should pay for the gravel which it excavated.
- 5.145 In responding to the quotation which was at page 2 of Cyprian Mulenga's supplementary bundle of documents, Yolomino Mbewe's testimony was that it had quoted Two Thousand Kwacha (K2, 000.00) for Fifteen (15) loads of gravel within a radius of Five (5) kilometers.
- 5.146 He explained that the said quotation implied that GM Trading supplied Fifteen (15) loads of gravel by way of loading onto its' vehicle and transporting the same within a
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radius of Five (5) kilometers and offloading. Yolomino Mbewe added that the cost included picking the gravel, transporting and delivering it.

5.147 The continued testimony was that Cyprian Mulenga had picked the Two Thousand Kwacha (K2, 000.00) and multiplied it by the Fifteen (15) loads, to make it Thirty Thousand Kwacha (K30, 000.00), as what Woodlock Limited owed him for the loads of gravel that it had excavated with its' machine, then loaded on its' truck, and thereafter offloaded it themselves.

5.148 The assertion that Yolomino Mbewe made, was that Cyprian Mulenga did not incur costs for transporting and offloading the gravel. Therefore, the quotation was not a reflection of what Cyprian Mulenga claimed, adding that his loss was only gravel which was uprooted from his property. Yolomino Mbewe testified that the said cost could be segregated from the Two Thousand Kwacha (K2, 000.00) at Five Hundred Kwacha (K500.00) being Twenty-Five (25) percent.

5.149 Thus, the said amount when multiplied by Fifteen (15) loads came to Seven Thousand Five Hundred Kwacha (K7, 500.00) at best. Yolomino Mbewe stated that he could deposit that amount into Court, but not as admission of liability.

5.150 In relation to the damages for the ditch, Yolomino Mbewe referred to the proforma invoice which was at page 5 of Cyprian Mulenga's bundle of documents, and stated the amount stated on that document was unjustified. In that regard, his testimony was that Woodlock Limited collected

Fifteen (15) loads of gravel in Two (2) days from Cyprian Mulenga's land, but the quotation from GM Trading had quoted Twenty (20) days of hire to bury excavations which were done for Two (2) days.

5.151 Further in his testimony, Yolomino Mbewe stated that as a Civil Engineer, he would reject such a quotation. He went on to testify that a grader is a machine which has a long blade in the middle, and that the use of a grader is to spread heaps of gravel thinly by about Two (2) millimeters, so that it is compacted by a roller.

5.152 Thus, his evidence was that to suggest that a grader could work for Twenty (20) days to bury a borrow pit was not true. He added that use of the word bury was wrong, as borrow pits cannot be buried, and that the least that is done to them, is to rehabilitate them. It was Yolomino Mbewe's testimony that specialized equipment that is used for such is a bulldozer or an excavator.

5.153 His testimony was that the quotation was issued in total ignorance, and lack of understanding of what work was to be done. It was testified that by Cyprian Mulenga asking for payment of Thirty Thousand Kwacha (K30, 000.00) for Fifteen (15) loads of gravel which was excavated from his land, and also to bury the land where the Fifteen (15) loads of gravel were obtained from, he did not know what he wanted from the Court, and he had duplicated his claims.

5.154 Yolomino Mbewe's evidence was that in any event, Woodlock Limited paid Two Thousand Five Hundred Kwacha

(K2, 500.00) to Mpika District Council, which is a local authority that authorised collection of the said gravel. Thus, if Woodlock Limited compensated Cyprian Mulenga, it would pay twice for the same gravel.

5.155 It was also his testimony, that Cyprian Mulenga was aware that Mpika District Council took Woodlock Limited to the borrow pit, and that it was not the first time that Mpika District Council directed people to go there, having previously directed China Aid there, when it was constructing a dual carriage way in Mpika.

5.156 Yolomino Mbewe stated that in the letter that Cyprian Mulenga wrote to Mpika District Council, which was at page 3 of Cyprian Mulenga's bundle of documents, he alluded to Mpika District Council having taken China Aid to his plot. However, Cyprian Mulenga had not sued China Aid or Mpika District Council, as Mpika District Council was only before Court because Woodlock Limited joined them to the proceedings.

5.157 The evidence that was given, was also that Mpika District Council gave Cyprian Mulenga the plot in 2008, and they were better placed to know the status of his plot than Woodlock Limited. By way of concluding his testimony, Yolomino Mbewe testified that the claims that Cyprian Mulenga had made were unjustified, and they should be dismissed.

**CROSS EXAMINATION OF YOLOMINO MBEWE BY
COUNSEL FOR MPIKA DISTRICT COUNCIL**

- 5.158 Yolomino Mbewe testified that Mpika District Council authorised Woodlock Limited to extract gravel from the borrow pit in TAZARA, which is opposite ZESCO. He agreed that he visited Mpika, but stated that it was not to acquaint himself with the location of the borrow pit. His testimony was that he visited the borrow pit after he had seen the approval. Yolomino Mbewe's evidence was that he did not pay attention to the description of the area.
- 5.159 In continued cross examination, Yolomino Mbewe testified that Lawrence Ngoma was supposed to guide Woodlock Limited on where to extract the gravel. He agreed that he was not there, when officers from Mpika District Council showed Woodlock Limited where to extract the gravel, but rather, his officers showed him the site.
- 5.160 Yolomino Mbewe stated that he did not see a ZESCO sub-station at the site or at TAZARA, adding that it was not of interest to him. He clarified that he had not testified that he had confirmed with Lawrence Ngoma on the location of the site from which Woodlock Limited could extract gravel. It was further Yolomino Mbewe's testimony, that as he was not there when officers from Mpika District Council showed his officers the site from which they could extract gravel, he did not know how many officers from Mpika District Council were present.
- 5.161 On the encroachment on Cyprian Mulenga's land, Yolomino Mbewe testified that he estimated it at Five (5) percent, adding that it could have been less. He did not know the
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extent of Cyprian Mulenga's land, but maintained that his estimation was accurate.

5.162 It was also stated that Yolomino Mbewe had testified that the borrow pit was extensively dug up, and that Cyprian Mulenga had contended that China Aid had also collected gravel from the borrow pit.

5.163 When referred to the letter that Cyprian Mulenga wrote to Mpika District Council on 21st May, 2019, which was at pages 3-4 of Cyprian Mulenga's bundle of documents, Yolomino Mbewe agreed that the said letter did not talk about the dual carriage way or extraction of gravel.

CROSS EXAMINATION OF YOLOMINO MBEWE BY COUNSEL FOR CYPRIAN MULENGA

5.164 The testimony that Yolomino Mbewe gave when Counsel for Cyprian Mulenga cross examined him, was that as seen from the profile for Woodlock Limited which was at page 9 of its' bundle of documents, it was meticulous in construction, as the last paragraph on that page, talked about quality control.

5.165 His evidence was that Woodlock Limited was given a specific location of the borrow pit and therefore, it was not strange that when his officers took him there, he did not look out for TAZARA or ZESCO, as it was not part of the quality control.

5.166 Agreement was made, that Yolomino Mbewe did not get permission to enter Cyprian Mulenga's land and extract gravel from there. He testified that Woodlock Limited applied for One Thousand (1000) tonnes of gravel which translated

into Fifty (50) loads, for the construction of the foundation for the NAPSA building.

- 5.167 Yolomino Mbewe further agreed that he did not personally engage with Engineer Lawrence Ngoma. It was stated that Councils issue a fixed charge for one off extraction of gravel. Yolomino Mbewe could not speak for the Council, with regard to it having control measures to control how much gravel was extracted. His position was that one got what they paid for, and that this did not operate on honesty, and was an estimate.
- 5.168 He maintained that Woodlock Limited got One Thousand (1000) tonnes of gravel, which was what they paid for, even though a receipt for the payment had not been produced.
- 5.169 When referred to the letter that Cyprian Mulenga wrote, which was at pages 3-4 of his supplementary bundle of documents, Yolomino Mbewe stated that it was dated 29th May, 2019. He told the Court that the issues between Cyprian Mulenga and Woodlock Limited arose in July, 2018.
- 5.170 Further in cross examination, he stated that the issue with China Aid arose after the issues with Woodlock Limited. On why Yolomino Mbewe had testified that it was an existing borrow pit, he explained that it was because people had previously extracted gravel from there. However, he had no evidence to show that others had previously extracted gravel from there.
- 5.171 Admission was made, that it was not up to Yolomino Mbewe to say who Cyprian Mulenga could sue, but he testified that

as Cyprian Mulenga was shown all the documents that Woodlock Limited had, Cyprian Mulenga should have sued Mpika District Council. His evidence was that he was not privy to the engagements between Cyprian Mulenga and Mpika District Council over the issues that were before Court.

5.172 Further in cross examination, Yolomino Mbewe stated that the letter that Mpika District Council wrote to Woodlock Limited did not mention the property No 7027/M which belonged to Cyprian Mulenga. He agreed that in the letter which was at page 1 of Woodlock Limited's bundle of documents, which Woodlock Limited wrote to Mpika District Council seeking authority to extract gravel, the quantity of gravel that was requested to be extracted was not indicated.

5.173 It was agreed that by Woodlock Limited extracting gravel from the borrow pit, it contributed to the extensive excavation. When referred to the diagram for the boundary verification for Lot No 7027/M which was at page 24 of Cyprian Mulenga's supplementary bundle of documents, Yolomino Mbewe agreed that when the Surveyor spoke to the report, he did not give the extent of the encroachment.

5.174 However, on page 21, which was part of the report of the said boundary verification, the area of encroachment was stated as 989 square meters. The testimony that Yolomino Mbewe further gave, was that his estimation of the encroachment as being at Five (5) percent, was premised on the assumption, that the diagram which was at page 24 was

drawn to scale, as is professionally done. He stated that his assumption did not collapse if the diagram at page 24 was not drawn to scale, as he did survey as part of the Engineering training.

5.175 Yolomino Mbewe when referred to the survey diagram that was in the certificate of title for Lot No 7027/M, at page 11 of Cyprian Mulenga's bundle of documents, testified that it had a scale of 1:5000. His evidence was that a sketch could be done as a working document not to scale, depending on the use. Whilst stating that he assumed that the diagram which was at page 24 of Cyprian Mulenga's supplementary bundle of documents had a scale, he agreed that it was not indicated.

5.176 In justifying his testimony that the damage that was done to Cyprian Mulenga's land was Five (5) percent, Yolomino Mbewe testified that one looked at the surface area and the depth to see how much gravel was extracted. Reiteration was made, that there was no such thing as burying a borrow pit, but rather rehabilitation, by cut and fill, which involved getting soil from higher areas and pushing it into the ditches which had developed, with a view to reduce the danger to the public.

5.177 Yolomino Mbewe added that if this was not done, and there were steep edges, accidents could be caused to the people who passed there. He also explained that one could not get soil to bury such an area, as it would be in futility, as it

would be digging holes to bury other holes, hence rehabilitation to make the area safe.

5.178 Whilst stating that it was not the standard, a dozer, and depending on the circumstances, an excavator could be used, it was explained that hire of a dozer was subjective from place to place. Yolomino Mbewe stated that factors such as a dry one, that is one without fuel, the cost of the machine, supply and demand were some of the factors that determined the hire.

5.179 Testimony was further given, that some graders had small blades in front, and they could not push gravel in front. Yolomino Mbewe stated that Cyprian Mulenga was demanding burial of the entire borrow pit when Woodlock Limited buried the area where it excavated.

RE-EXAMINATION OF YOLOMINO MBEWE

5.180 He clarified that Woodlock Limited would have difficulties burying Five (5) percent of Cyprian Mulenga's land as the encroachment, was show on diagram with the gully as covering an area of about One Thousand (1000) square meters, when it did not dig to that extent.

5.181 Further clarification was given, that the borrow pit was dug up quite deeply. Yolomino Mbewe stated that he did not look out for ZESCO or TAZARA, as he did not go there to verify the location, and he was satisfied that his officers had done due diligence. In that regard, his evidence was that his officers showed him the correspondence, and all that was

required was for him to look at the suitability of the gravel which was in the pit.

DW2-NEDSON MUPETA

- 5.182 The second witness for Woodlock Limited was Nedson Mupeta, its' Logistics Manager. He explained that his duties included ensuring that everything at Woodlock Limited's sites was moving well, and was in place.
- 5.183 His continued testimony was that in 2018, he was in charge of the project in Mpika where Woodlock Limited was constructing the NAPSA building. Nedson Mupeta testified that they required gravel for the construction, and they went to Mpika District Council, after paying a courtesy call on the District Commissioner's Office, and they were advised to go to the Council Secretary.
- 5.184 Still in his testimony, Nedson Mupeta told the Court that the Council Secretary had called officers from the Buildings and Planning Departments, who said that they could take them to where they could extract gravel, where rubbish was also being thrown. He added that he had provided transport to go there, and he was taken there by Two (2) officers from the Planning Department.
- 5.185 It was stated that the Two (2) officers led Nedson Mupeta to the site which was at TAZARA near ZESCO, as he did not know it, stating that it was big area with deep ditches. Further evidence was given, that at the borrow pit, he was advised of the direction in which they could excavate for the gravel when he asked. Nedson Mupeta testified that he was
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told that Woodlock Limited should excavate in the northern direction, and that there was no place at which he should end, as the place was being used as a dump site.

5.186 He added that he recalled seeing the ZESCO substation as they proceeded to the borrow pit.

5.187 Then on returning to Mpika District Council, Nedson Mupeta was advised to put the request in writing, and he was told that he would be called to be informed of the outcome. Thus, he left after he submitted the letter, and after more than Ten (10) days, he was called and was told that the application had been approved. Nedson Mupeta's evidence was that he was further informed that he had to pay before they started the excavation.

5.188 It was also his testimony, that he paid Two Thousand Five Hundred Kwacha (K2, 500.00) out of the Five Thousand Kwacha (K5,000.00) that was to be paid. In further testifying, Nedson Mupeta stated that he was informed that the amount payable would be reduced, as he was requested to do the culverts at the hospital.

5.189 Page 1 of Woodlock Limited's bundle of documents was identified as the letter that Nedson Mupeta wrote to Mpika District Council, to request for the gravel on 6th July, 2018. It was Nedson Mupeta's evidence, that he was to liase with Lawrence Ngoma, and when he did so, he went to the Director's office, and that the Deputy Director gave him the go ahead.

- 5.190 In his continued testimony, Nedson Mupeta testified that he could not tell that the land belonged to someone, as there was just bush, and they dug where they were shown. Then Two (2) days later, when he was at the office, around 17:00 hours, a worker went and informed him that Mr Mulenga was claiming that they had dug gravel from his plot.
- 5.191 In response, Nedson Mupeta had stated that he had nothing to do with Mr Mulenga, as Mpika District Council took him to the site. His evidence was that the next day, he went to Mpika District Council, and he had explained what had happened. There, he was informed that Mr Mulenga had done the same thing to the Chinese, and officers from Mpika District Council were looking for him.
- 5.192 Thus, officers from Mpika District Council went back to the borrow pit with him, and he was shown the southern direction in which to dig, which was deeper inside and they started excavating the gravel.
- 5.193 However, Mr Mulenga kept going there, and asked him to bury the entire borrow pit. Nedson Mupeta stated that he had informed Mr Mulenga that they could bury where they had dug, and they did so. He explained that they had a Fifteen (15) tonne tipper truck, and they did Ten (10) trips making it One Hundred and Fifty (150) tonnes. It was added that they dug other tonnes of gravel from the other side, whose quantity he could not recall.
- 5.194 Nedson Mupeta testified that Mr Mulenga did not claim ownership of the area that they dug from after his land. He
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concluded his testimony by stating that he did not entertain Mr Mulenga, and he had told him to deal with the Council, and they had paid.

**CROSS EXAMINATION OF NEDSON MUPETA BY
COUNSEL FOR MPIKA DISTRICT COUNCIL**

- 5.195 Nedson Mupeta when cross examined by Counsel from Mpika District Council, stated that officers from Mpika District Council took him to the site. He testified that on being happy, he applied for extraction of the gravel at the Council. Agreement was made, that in the said application letter, he had named the site as TAZARA opposite the ZESCO substation. Nedson Mupeta's evidence was that there was all bush.
- 5.196 In further cross examination, Nedson Mupeta testified that they had dug where they had applied for, in a place called TAZARA, and that to get there, one had to turn at the ZESCO substation.
- 5.197 He stated that it was at a distance, about Two (2) kilometers from the ZESCO substation. Nedson Mupeta also told the Court that Mpika District Council wanted them to pay Five Thousand Kwacha (K5000.00), but the said amount was reduced to Two Thousand Five Hundred Kwacha (K2500.00) as he agreed that Woodlock Limited would lay culverts at the hospital.
- 5.198 Nedson Mupeta clarified that the said agreement was verbal, and that it was not in Woodlock Limited's culture to do so.
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- 5.199 Still in cross examination, Nedson Mupeta stated that he was unaware that the Director at Woodlock Limited had not testified so, stating that they did not always inform the director, and therefore he was unaware. Nedson Mupeta also testified that they had a machine which was used to lay the culverts.
- 5.200 Further in cross examination, his evidence was that he did not go with Lawrence Ngoma to the borrow pit, but that he sought guidance from him. It was stated that Lawrence Ngoma told Nedson Mupeta that the officers from the Planning Department were the right people to direct them, and he assigned Two (2) officers from that department to go with Nedson Mupeta.
- 5.201 He stated that he went to the borrow pit with Two (2) officers from Mpika District Council, whose names he did not recall, with his vehicle. Nedson Mupeta stated that it had been long, but among the Two (2) officers, was a lady.
- 5.202 On why he did not want to entertain Cyprian Mulenga, Nedson Mupeta's evidence was that he did not know him, but the officers from Mpika District Council, and that was why he went back to Mpika District Council the next day. It was stated that Nedson Mupeta did not go with Cyprian Mulenga to Mpika District Council to verify the encroachment, and he told the Court that Cyprian Mulenga kept going back to his office.
- 5.203 He also testified that he continued digging in the southern direction until the quantity of the gravel that he wanted was
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satisfied, despite Cyprian Mulenga continuing to go to his office. Nedson Mupeta agreed that the letter that Mpika District Council authored, authorising Woodlock Limited to excavate for gravel did not state the property number. His testimony was that he did not ask Cyprian Mulenga the property number for his property.

CROSS EXAMINATION OF NEDSON MUPETA BY COUNSEL FOR CYPRIAN MULENGA

- 5.204 Nedson Mupeta testified that he had worked for Woodlock Limited for Twenty-Four (24) years, with Fourteen (14) of those years as Logistics Manager. He therefore agreed that he was key personnel for Woodlock Limited. It was his evidence, that other than the Mpika project, he had also worked at the Dundumwezi and Lufwanyama road projects.
- 5.205 Nedson Mupeta stated that he had been involved in more than Ten (10) projects, and that he had obtained a craft certificate in building and plastering.
- 5.206 On the Two Thousand Five Hundred Kwacha (K2, 500.00) that he paid to Mpika District Council for the gravel, Nedson Mupeta's testimony was that it was in cash, after Mpika District Council issued him with an invoice prior to that. He also told the Court that he sent the receipt for the payment to head office in Lusaka.
- 5.207 It was stated that Philimon Siuluta who was deceased, had dealt with Cyprian Mulenga. The further testimony that was given, was that Woodlock Limited buried the area of the
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borrow pit in Cyprian Mulenga's land where they had excavated, using a TLB using top soil from the same plot.

5.208 He denied that in the application that he had made to Mpika District Council requesting for gravel, he had omitted details by stating that the gravel was from near TAZARA opposite the ZESCO substation. He justified the same as being because they were told that the places for gravel were near TAZARA and also along Great North road, and he did not know the locations.

5.209 That marked the close of the case for Woodlock Limited.

DW3-LAWRENCE REYNOLDS NGOMA

5.210 The sole witness for Mpika District Council was Lawrence Reynolds Ngoma, a Civil Engineer. He told the Court that his duties included road maintenance, construction of public buildings, bridges, maintenance of street lights and drainages.

5.211 In relation to this matter, his evidence was that Woodlock Limited was constructing an office building for NAPSA in 2018, and it applied for gravel. Lawrence Reynolds Ngoma explained that Mpika District Council has a borrow pit which is also used as dump site. He testified that one side of that borrow pit had been exhausted.

5.212 It was his continued testimony, that Mpika District Council wrote to Woodlock Limited under the charge of sand levy at Two Thousand Kwacha (K2, 500.00) and that Woodlock Limited was also informed that they should notify Mpika

District Council, so that it could guide on the boundaries of the borrow pit, when they were going to extract the gravel.

5.213 The letter which was at page 2 of Woodlock Limited's bundle of documents was identified as being the said letter.

5.214 Lawrence Reynolds Ngoma stated that he gave Woodlock Limited his contact details, but when Woodlock Limited went to collect the gravel he was not informed. It was also his testimony, that he later learnt that Woodlock Limited had been sued, as they had encroached on someone's property and that Mpika District Council had also been sued.

5.215 Further testimony was given, that prior to the matter being commenced, and after that, Lawrence Reynolds Ngoma had never spoken with Cyprian Mulenga. Lawrence Reynolds Ngoma's evidence was that Woodlock Limited did not contact him after he gave them the letter, and that he did not go with them to the borrow pit or assign anyone to take them there.

5.216 He did however acknowledge that Mpika District Council gave Woodlock Limited a bill of Five Thousand Kwacha (K5, 000.00). It was also testified that Woodlock Limited had a back-hole loader which Mpika District Council needed to use, and it was verbally agreed that the bill be reduced to Two Thousand Five Hundred Kwacha (K2, 500.00) so that Mpika District Council could use that equipment.

5.217 Lawrence Reynolds Ngoma testified that he had never met the director for Woodlock Limited, and that the said director did not raise any issues of inconvenience in the extraction of

gravel, and neither did Woodlock Limited write a letter of complaint over extraction of the gravel.

CROSS EXAMINATION OF LAWRENCE REYNOLDS NGOMA BY COUNSEL FOR WOODLOCK LIMITED

5.218 In cross examination, Lawrence Reynolds Ngoma's evidence when he was referred to the letter that Mpika District Council wrote to Woodlock Limited, stated that he was aware of the borrow pit that was mentioned in the letter. He told the Court that there was no other borrow pit located near there, and that the other borrow pit was in an area that was far away.

5.219 He explained that he could not say that Woodlock Limited went to the wrong borrow pit. Lawrence Reynolds Ngoma testified that Woodlock Limited were not the first to collect gravel from the said borrow pit, as even Mpika District Council collected gravel from there.

5.220 The continued testimony in cross examination, was that there were beacons on the land to show someone else's land which were made of blocks, which were pillars. Lawrence Reynolds Ngoma's evidence was that the pillars were outside the borrow pit.

5.221 His testimony was that he visited the area after Mpika District Council had been sued, but he did not prepare a report. Lawrence Reynolds Ngoma testified that he was not aware that Woodlock Limited collected laterite from the borrow pit, stressing that the beacons were completely outside the borrow pit.

- 5.222 Still in cross examination, he stated that any person who excavated laterite from the borrow pit would not be trespassing as the beacons were outside the borrow pit.
- 5.223 On being referred to the letter that Cyprian Mulenga wrote which was at pages 3-4 of Cyprian Mulenga's supplementary bundle of documents, he told the Court that it was the first time that he was seeing the letter and he was not privy to Cyprian Mulenga's complaint.
- 5.224 Lawrence Reynolds Ngoma was ignorant that Mpika District Council had directed China Aid to clear Cyprian Mulenga's land. His position was that Mpika District Council was dumping waste on its' land, and that the borrow pit was on its' land, and not on Cyprian Mulenga's land.
- 5.225 Lawrence Reynolds Ngoma also testified, when he was referred to the boundary verification diagram which was at page 24 of Cyprian Mulenga's supplementary bundle of documents, that he was not aware of the gully, adding that if people had been accessing it, it was without Mpika District Council's permission.
- 5.226 He testified that beacon D which was on Cyprian Mulenga's land was damaged by China Aid. It was stated that Woodlock Limited excavated from Mpika District Council's borrow pit which was about Eight (8) kilometres from its' offices.
- 5.227 Lawrence Reynolds Ngoma agreed that there is a Planning Department at Mpika District Council. He told the Court that he gave Woodlock Limited the letter which was at page 2 of its' bundle of documents. Whilst he could not recall the name
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of the person that was given the letter, Lawrence Reynolds Ngoma testified that he was outside, and that he also gave that person his phone number, so that he could contact him.

5.228 In further testifying, Lawrence Reynolds Ngoma stated that Woodlock Limited in the letter specified the area in which it wanted to extract the gravel, so he assumed that they knew where they wanted to get the gravel from.

5.229 On being referred to the letter which was at page 1 of Woodlock Limited's bundle of documents, Lawrence Reynolds Ngoma's evidence was that it was dated 6th July, 2018, and it was addressed to the Council Secretary who delegated to him to reply. He stated that he had no knowledge about what happened in the Council Secretary's office before he was delegated to reply.

5.230 Thus, he could not argue that the Council Secretary assigned Two (2) officers to go with Woodlock Limited to the borrow pit.

CROSS EXAMINATION OF LAWRENCE REYNOLDS NGOMA BY COUNSEL FOR CYPRIAN MULENGA

5.231 Testimony was given that Lawrence Reynolds Ngoma would have guided Woodlock Limited, as there were other borrow pits in the area where the borrow pit that was specified was located, to avoid encroaching on Cyprian Mulenga's land. He testified that the borrow pit was not on Cyprian Mulenga's land, and that there were no complaints when Mpika District Council extracted gravel, because it was not from Cyprian Mulenga's land.

- 5.232 Lawrence Reynolds Ngoma testified that the beacons were visibly clear so one could tell when they were going beyond the pillars.
- 5.233 On being referred to paragraphs 7 and 8 of the statement of claim which was at page 7 of Cyprian Mulenga's bundle of pleadings, Lawrence Reynolds Ngoma stated that paragraph 7 alleged that Mpika District Council dumped waste on Cyprian Mulenga's land, but that he did not understand paragraph 8.
- 5.234 He told the Court that people that he did not know extracted gravel from Cyprian Mulenga's land, which was next to the borrow pit for Mpika District Council. Lawrence Reynolds Ngoma testified that Cyprian Mulenga lodged a complaint against China Aid, but not against Woodlock Limited.
- 5.235 He stated that only in his testimony, had he become aware that Cyprian Mulenga sued, claiming that Woodlock Limited had extracted gravel from his land. In terms of where the borrow pit is located, Lawrence Reynolds Ngoma stated that it is about Two (2) and half kilometers from the ZESCO substation. He however could not point at where the borrow pit ended on the boundary verification diagram for Lot No 7027/M, which was at page 24 of Cyprian Mulenga's supplementary bundle of documents.
- 5.236 Lawrence Reynolds Ngoma testified that there was a site plan which indicated the plots that were adjacent to Cyprian Mulenga's plot. When referred to the said site plan which was at page 5 of Cyprian Mulenga's bundle of documents,
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Lawrence Reynolds Ngoma's evidence was that the borrow pit was on Lot No 7028/M, which was next to Lot No 7027/M.

5.237 He was unsure whether the borrow pit extended beyond Lot No 7028/M, but stated that the pillars were along the perimeter within Lot No 7027/M, and were serial. It was also Lawrence Reynolds Ngoma's testimony that he did not know the distance between the pillars. He however clarified that they were not so far apart, and that if one of them was removed, one could not tell where the borrow pit ended.

RE-EXAMINATION OF LAWRENCE REYNOLDS NGOMA

5.238 In re-examination, Lawrence Reynolds Ngoma clarified that he did not know the area of the borrow pit, that is whether it spanned over one plot or two. He however stated that the said borrow pit did not extend into Cyprian Mulenga's land. In conclusion, his testimony was that Cyprian Mulenga had never approached Mpika District Council when it extracted gravel from the borrow pit.

5.239 That marked the close of the case for Mpika District Council.

6. DECISION OF THIS COURT

6.1 I have considered the evidence and the submissions.

FACTS NOT IN DISPUTE

6.2 The facts that are common cause, are that Cyprian Mulenga is the holder of a certificate of title number 253510 which he contended is for the property known as Lot No 7027/M

Mpika. It is not in contention, that Mpika District Council has a borrow pit which is next to Cyprian Mulenga's land.

- 6.3 Also, not in contention, is that Woodlock Limited in July 2018 applied to Mpika District Council to extract gravel from the borrow pit that is next to Cyprian Mulenga's land, and it was authorised to do so.

ISSUES IN DISPUTE

- 6.4 It is in contention whether Woodlock Limited did trespass on Cyprian Mulenga's land and extracted gravel from there, and therefore, it is liable for trespass. Further in dispute, is whether as a consequence, Cyprian Mulenga is entitled to damages for trespass.
- 6.5 The facts that are further in dispute, are whether Mpika District Council also did trespass on Cyprian Mulenga's land and dumped hazardous waste materials there. It is also in contention whether Cyprian Mulenga is entitled to damages for trespass against the said Mpika District Council. Also, in contention, is whether Mpika District Council should remove the said hazardous waste materials from Cyprian Mulenga's land.

WHETHER CYPRIAN MULENGA IS THE OWNER OF THE PROPERTY LOT NO 7027/M MPIKA?

- 6.6 The testimony as was given by Cyprian Mulenga, was that when he retired in 2012, as a family, they had challenges in Mpika. Thus, they resolved that find land for farming to ensure food security. He stated that he approached Mpika

District Council for a small holding, and he was allocated Lot No 7027/M on which he started farming.

- 6.7 Then thereafter, he approached Mpika District Council to help him obtain title to the land. Cyprian Mulenga took the Court through the procedure that he followed to obtain title to the property, referring to pages 1-6 of his bundle of documents in that regard.
- 6.8 In terms of ownership of Lot No 7027/M Mpika, Felix Halyonda, the Acting Principal Registrar of Lands and Deeds at the Ministry of Lands and Natural Resources, testified that the said property was on a State lease and that he had a printout for the said land from the Lands Register.
- 6.9 His evidence was that the title holder for the property was Cyprian Mulenga, and that the certificate of title was issued on 21st December, 2013, with the lease for the property being for Ninety-Nine (99) years, from 1st January, 2011.
- 6.10 He produced the Lands Register for Lot No 7027/M as 'P1'. Still in testifying, Felix Halyonda stated that the certificate of title was issued after his office received a lease from the Commissioner of Lands, which the Commissioner of Lands signed on behalf of the President of Zambia, and which was also signed by Cyprian Mulenga and the witnesses.
- 6.11 It was also stated that Felix Halyonda's office further received a survey diagram from the office of the Surveyor General. Then thereafter, his office issued a certificate of title, which was signed by the Registrar.

- 6.12 He explained that the survey diagram contained details relating to the property number for the property, the area size with its' coordinates, a diagram number and the year in which it was issued.
- 6.13 Felix Halyonda testified that the lease contained the property number, the tenure of the property, being Ninety-Nine (99) years and the commencement date. It was also in his evidence that the certificate of title had the property number, entries in relation to the lease, the survey diagram, and was signed by the Registrar of Lands and Deeds.
- 6.14 Felix Halyonda explained that the office of the Surveyor General issued the survey diagram, and that the lease was prepared by the office of the Commissioner of Lands, while the certificate of title was prepared by the Registrar of Lands and Deeds.
- 6.15 On the certificate of title for Lot No 7027/M which was at pages 6-15 of the Plaintiff's bundle of documents, Felix Halyonda noted the certificate number for the property at page 7, was indicated as 25310. He stated that the property number at that page, was indicated as 7027/M/2, explaining that the 2 at the end of the property number was indicated as per the Lands Register.
- 6.16 He also testified that the certificate of title was issued on 21st October, 2013 for a period of Ninety-Nine (99) years from 1st January, 2011. Felix Halyonda's evidence was that the property was described, as indicated on the survey diagram
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and that it also had a signature of the Lands and Deeds and the seal.

- 6.17 As regards page 8, Felix Halyonda stated that it was the memorials, which indicated that the lease was signed by the President and Cyprian Mulenga. He told the Court that the property number was indicated as 7027/M/1, with 1 being entry number 1 as per the Lands Register.
- 6.18 The survey diagram was stated as indicating the diagram number and the area size, and that page 12 was the lease agreement which was signed by the Commissioner of Lands on behalf of the President, and Cyprian Mulenga as well as the witnesses.
- 6.19 Felix Halyonda's position was that the property number as could be seen from lease and the survey diagram was 7027/M. He testified that at page 7, the land was described as 5.030 hectares, being Lot No 4831 Mpika, and that the correct property number was Lot No 7027/M.
- 6.20 Therefore, his office made a typographical error in stating the property number as 4831, and his testimony was that the certificate of title was valid despite the typographical error.
- 6.21 Felix Halyonda also testified that **Section 11 of the Lands and Deeds Registry Act** allows for the correction of errors or omissions which are done by his office on the Lands Register. He clarified that the error was on the certificate of title when it was being typed, and not on the Lands Register, as the information on that document in relation to the property was correct.
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- 6.22 Cyprian Mulenga in his submissions, referred to **John Cooke on the Law of Torts 9th Edition** and **Mvunga and Ngambi on Torts, Unza Press for School of Law 2011 Edition** as stating that trespass to land is the unjustifiable interference with the possession of land, and that it may occur where one enters or remains upon the land or places any object upon the land without the permission of the owner and occupier respectively.
- 6.23 Also relied on, was **Clerk and Lindsell on Torts 20th Edition 2010, Thomson Reuters, Sweet & Maxwell in paragraph 19-01** as stating that trespass to land consists of any unjustifiable intrusion by one person upon land, in the possession of another, and that the slightest crossing of the boundary is sufficient.
- 6.24 The case of **Shell & BP Zambia Limited v Conidaris and another** ⁽³⁾ was stated as having adopted the above definition.
- 6.25 It was submitted that Cyprian Mulenga had shown that he holds a certificate of title for the property Lot No 7027/M Mpika, and that Woodlock Limited only raised issue with the property Lot No 7027/M Mpika not being consistent on the certificate of title, as the said certificate of title reflected the property as being 4831.
- 6.26 Cyprian Mulenga submitted that Felix Halyonda, the Acting Principal Registrar in his testimony, had clarified the inconsistency in the Lot numbers on the certificate of title,
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stating that it was merely a typographical error which was due to the certificate of title having been manually typed.

- 6.27 The submission was further that, the error could be rectified pursuant to **Section 11 of the Lands and Deeds Registry Act**, as it did not affect the validity of the certificate of title.
- 6.28 Reliance was also placed on the case of **Elias Tembo v Maureen Chirwa and others** ⁽⁵⁾, stating that the Court of Appeal in that matter, held that where a litigant had a letter of offer and a certificate of title, there was a presumption that they had lodged an application with the Council. On that premise, Cyprian Mulenga submitted that he had followed procedure in obtaining the land.
- 6.29 Woodlock Limited in its' submissions, stated that Cyprian Mulenga had failed to show that he is the owner of the property Lot No 7027/M Mpika. This was stated as being because the certificate of title which Cyprian Mulenga had produced to evidence his ownership of the land, contained Two (2) property numbers. The submission in that regard was that the property was stated as Lot No 7027/M/2 and the land was described as Lot No 4831 in the certificate of title.
- 6.30 It was submitted that the description of a property plays a very important role in providing information relating to the property, and that such information in respect of the property, includes the property number, the size of the property, as well as the location of the property.
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- 6.31 Woodlock Limited contended that when Cyprian Mulenga was cross examined, he testified that he did notice the discrepancy in the property number for the property on the certificate of title in 2013, when he obtained it, but he did not question the discrepancy or make any attempts to correct the same.
- 6.32 The submission was further that Felix Halyonda in cross examination, informed the Court that the Registrar has power to correct errors on a certificate of title, but the error on the property number in the certificate of title had not been corrected. Therefore, there was a dispute as to the true property number for Cyprian Mulenga's property.
- 6.33 The case of ***Kelsen v Imperial Tobacco Co*** ⁽²⁾ was relied on as having held that:
- “In a claim for trespass to land, the Plaintiff must prove that they have a legal right to possession of the land.”***
- 6.34 The case of ***Pye v Graham*** ⁽⁴⁾ was also relied on, as where the House of Lords emphasized that the Plaintiff must prove an actual interest in the land, that is protected by law, and that if they fail to demonstrate such interest, the case is fatal to their claim.
- 6.35 Indeed, it has been seen that when Cyprian Mulenga was cross examined by Counsel for Woodlock Limited, he agreed that there was discrepancy on the certificate of title No 253510 which is at page 6-11 of his bundle of documents.
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- 6.36 Cyprian Mulenga was specifically taken to page 7 of his bundle of documents, being the part of the certificate of title which describes the property. In respect of that page, he agreed that the property was registered as 7027/M/2, and that the property was described as Lot No 4831.
- 6.37 However contrary to the assertion by Woodlock Limited, Cyprian Mulenga's evidence was that he did notice the discrepancy in the property number on the certificate of title, and he had queried the same at the Ministry of Lands. He testified that he was informed that it was for the survey diagram.
- 6.38 Felix Halyonda who was the Acting Principal Registrar Lands and Deeds, testified on how a certificate of title is issued by the office. He explained that entries on the Lands Register are entered based on a lease, which was generated by the office of the Commissioner of Lands and signed by the Commissioner of Lands as lessor, and the lessee, Cyprian Mulenga, in this case.
- 6.39 He further stated that the survey diagram which was issued by the office of the Surveyor General also informed on the details that were entered on the Lands Register.
- 6.40 The Lands Register which was produced as 'P1' by Felix Halyonda shows that the lease indicated the property number for Cyprian Mulenga's property as L/7027/M. The said lease for the property was registered on the Lands Register on 21st October, 2013. The certificate of title for the property was registered on the same date.

- 6.41 It can be seen that the lease which is at pages 12-15 of Cyprian Mulenga's bundle of documents, states at page 12, that it is for the property Lot No 2027/M. The survey diagram which is at page 11 of the said bundle of documents describes the land as Lot No 7027/M.
- 6.42 It is noteworthy that on the said survey diagram in the top right corner, the diagram number is indicated as 4831/2013, and the number 4831 was typed in on the certificate of title at page 7, as being the property number for the property.
- 6.43 Seeing that the survey diagram and the lease which documents inform the registration of properties on the Lands Register, and which documents state that the property number for Cyprian Mulenga's property as Lot No 7027/M, the indication at page 7 of Cyprian Mulenga's bundle of documents that the property is No 7027/M/2 and Lot No 4831 was done in error.
- 6.44 This more so, as it will be seen at page 6 of the said bundle of documents, which is the cover for the certificate of title, that the property number is indicated as Lot No 7027/M.
- 6.45 Going further, one will note that the site plan which the Provincial Planning Authority generated for properties in the area where Cyprian Mulenga's property is situated, which is at page 5 of Cyprian Mulenga's bundle of documents, shows the property as being Lot No 7027/M.
- 6.46 What is also worthy of note, is that in its' defence, Woodlock Limited did not counterclaim any irregularity in the

certificate of title which was issued for Cyprian Mulenga's land as being the basis of denial of his claims. Parties are bound by their pleadings, and once pleadings close, it is that case as pleaded, that the Court will determine.

6.47 Thus, Cyprian Mulenga having demonstrated that he owns the land Lot No 7027/M Mpika, by virtue of the certificate of title which is at pages 6-11 of his bundle of documents, he has satisfied the requirement that he is entitled to possession of the said Lot. Any errors on the said certificate of title are issues that are beyond the scope of the pleadings in this matter.

**CLAIM FOR DAMAGES FOR TRESPASS TO LAND BY
WOODLOCK LIMITED**

6.48 With regard to the trespass to his land by Woodlock Limited, Cyprian Mulenga testified that on 20th July, 2018, he found Two (2) machines on his property, Lot No 7027/M, stating that one was digging gravel on the said land, while the other was a tipper truck, which was loading the said gravel.

6.49 It was his testimony, that on asking the workers who had authorised them to get the said gravel, they had responded that the Site Manager from Woodlock Limited, the company that had been contracted to construct the NAPSA building in Mpika along the Great North Road, as one came from Kapiri Mposhi on the left-hand side, had taken them there.

6.50 Cyprian Mulenga stated that he was informed that he would find the Site Manager there, and he took photographs before left. It was also his testimony, that he had also asked the

employee the tonnage of the truck that was being used to transport the gravel, and he was told that it was a Twenty (20) tonne truck.

- 6.51 Cyprian Mulenga testified that when he went to the NAPSA building, he found Mr Siuluta who introduced himself as the Site Manager, and who asked him what his interest was. It was stated that Cyprian Mulenga had told Mr Siuluta that at the point where the gravel was being picked, that was his land, and therefore, they had trespassed on his land.
- 6.52 Cyprian Mulenga further testified that he had asked Mr Siuluta to bury the land that had been excavated and to stop doing so. His position was that he had counted Fifteen (15) loads of heaped gravel. Then a week later, he went to see Mr Siuluta who informed him that they had not buried the land as they had challenges with the machine, and he had asked for a week to do so.
- 6.53 Cyprian Mulenga also told the Court that Mr Siuluta agreed to the request. However, when he went back to the land, for the third time, he found that nothing had been done, and Mr Siuluta told him that he thought that the land had been buried. Cyprian Mulenga testified that when they went to the site together, Mr Siuluta had apologised, and had assured him that the land would be buried, and this time he asked for Two (2) weeks to do so.
- 6.54 However, after Two (2) weeks, the land had still not been buried, and Mr Siuluta told Cyprian Mulenga that the machine had broken down, and it had been sent to Lusaka

for repairs. Cyprian Mulenga further testified that Mr Siuluta had informed him that the land would be buried when the truck returned from Lusaka.

- 6.55 Then after time expired, Cyprian Mulenga went back to see Mr Siuluta, who now told him that the truck had returned from Lusaka, but that no fuel had been allocated for burying the land, and that fuel would be sent after a week. However, nothing was done and Cyprian Mulenga's patience was exhausted.
- 6.56 Cyprian Mulenga told the Court that Woodlock Limited had not buried his land, as at the date of his testimony.
- 6.57 On the part of Woodlock Limited, the director of Woodlock Limited, Yolomino Mbewe denied that Woodlock Limited trespassed on Cyprian Mulenga's property. Yolomino Mbewe stated that Woodlock Limited was awarded a contract to construct a Three (3) storey office block for the National Pension Scheme Authority (NAPSA) in Mpika, in 2018. Thus, Woodlock Limited went to Mpika for that purpose.
- 6.58 He explained that Woodlock Limited was a visitor there and he constituted a team of officers to go and establish the project and start execution. Yolomino Mbewe testified that amongst the important things that were to be done at the onset, was to source the materials which were required to execute the project, which materials included gravel.
- 6.59 His evidence was that it was not the first time that they had undertaken works of that magnitude, and therefore, they were aware of the procedures for sourcing such materials.

- 6.60 Yolomino Mbewe's evidence was that in sourcing for gravel, the first point of call was Mpika District Council, being the local authority. Therefore, Yolomino Mbewe sent his officers Nedson Mupeta and Sebastian Tembo to go to Mpika District Council to inquire on where they could source gravel.
- 6.61 His position was that Nedson Mupeta and Sebastian Tembo were advised that there was a borrow pit which was near TAZARA, where they could get the gravel. He stated that Nedson Mupeta and Sebastian Tembo were advised to put the request in writing, indicating the quantity of gravel that was sought, and they did so.
- 6.62 Yolomino Mbewe's testimony was that Nedson Mupeta and Sebastian Tembo waited for Two (2) weeks before a response was given by Mpika District Council, who informed them that the request had been approved.
- 6.63 Yolomino Mbewe further testified that Woodlock Limited was required to pay Two Thousand Five Hundred Kwacha (K2, 500.00) for One Thousand (1000) tonnes of gravel. He explained that in the letter, Woodlock Limited was advised to liase with the Engineer Lawrence Ngoma who would provide guidance as they collected the gravel.
- 6.64 It was stated that Mpika District Council assigned Two (2) of its' officers to go with the officers from Woodlock Limited to the borrow pit. Yolomino Mbewe stated that the officers from Mpika District Council gave Woodlock Limited the exact place and location where to uplift the gravel.

- 6.65 Thus, when Yolomino Mbewe travelled to the Mpika site for a routine inspection, he decided to go and see the borrow pit to ascertain the quality of the gravel that was in the said pit, with the help of officers from Woodlock Limited.
- 6.66 His evidence was that he discovered that there was an existing borrow pit there, which had been dug up quite extensively, and that it was also being used as a dump site. Yolomino Mbewe testified that there were bottles, plastics and all sorts of waste disposal materials in the pits which had been dug up.
- 6.67 It was his evidence that he was not put on notice that it was someone's property. Then on inspecting the gravel, he gave his officers the go ahead to collect it.
- 6.68 He referred to pages 16-21 of Cyprian Mulenga's bundle of documents, as showing a vehicle that was on top, which was a 1.6 meters standard of the place as dug up. Yolomino Mbewe further stated that in relation to the heights shown and the excavations, on the picture, it was clear that the place was extensively dug up.
- 6.69 Then hardly a day after he left for Lusaka, his officers who were at the site, called him and informed him that Mr Alex Mulenga had gone to the site, and he had demanded that they stop collecting gravel from the borrow pit as it was his plot.
- 6.70 Yolomino Mbewe's evidence was that the officers had informed him that Mr Alex Mulenga had insisted that they stop doing so, despite having shown him the application and
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the authorization from Mpika District Council. It was stated that he had advised his officers to stop the excavation, barely Two (2) days after they started the exercise, and go back to Mpika District Council and present the problem that had arisen, as Mpika District Council had taken them there so that they could collect gravel.

- 6.71 Yolomino Mbewe stated that at Mpika District Council, his officers were asked who had stopped them from collecting the gravel, and his officers had said that it was Alex Mulenga. His evidence was that the officers at Mpika District Council had stated that they had been looking for Mr Mulenga as he had done a similar thing.
- 6.72 Yolomino Mbewe also testified that his officers had informed him that they went back to the site with officers from Mpika District Council, and his officers were guided to dig in the opposite direction in the same borrow pit.
- 6.73 Then from there, his officers had informed him that Mr Mulenga had visited the site and he had demanded that Woodlock Limited buries the place where it had excavated previously. Thus, he had instructed the officers to make good that area that Woodlock Limited had worked on the previous Two (2) days, and in his belief, the matter had been concluded.
- 6.74 Yolomino Mbewe also told the Court that his officers informed him that Mr Mulenga had continued going back to the site, insisting that the borrow pit be buried. He further testified that his officers had gone with Mr Mulenga to the

site to establish how much of the borrow pit he wanted to have buried, and his officers had informed him that Mr Mulenga wanted the entire borrow pit which had previously been dug, buried.

- 6.75 However, he had advised his officers not to proceed with such an undertaking, as Woodlock Limited had only excavated a small area, which it had made good at the time.
- 6.76 Yolomino Mbewe with reference to the boundary verification diagram for Lot No 7027/M Mpika, which was at page 24 of Cyprian Mulenga's bundle of documents, testified that a small gully was indicated on the document. He also stated that the straight line did not define the extent of the borrow pit, stating that it was extensive, and which Mr Mulenga wanted them to bury.
- 6.77 He contended that Mr Mulenga had not shown where exactly Woodlock Limited had excavated on the diagram, as the borrow pit was extensive. It was Yolomino Mbewe's evidence that the size of Lot No 7027/M in relation to the gully, as depicted, was more than Twenty (20) times in the space. Thus, the area covered by the gully as the area that was dug up, was less than Five (5) percent.
- 6.78 He took the position that the diagram was drawn to scale and therefore, the encroachment was less than Five (5) percent, while Ninety-Five (95) percent was not tampered with.
- 6.79 Then premised on the letter that Mr Mulenga wrote to Mpika District Council, which was at pages 3-4 of Cyprian

Mulenga's supplementary bundle of documents, Yolomino Mbewe denied having trespassed on Mr Mulenga's land, as the said letter alleged that Mpika District Council had been dumping waste and allowing China Aid to go to his property.

6.80 As for the damages for the ditch, Yolomino Mbewe referred to the proforma invoice which was at page 5 of Cyprian Mulenga's bundle of documents, and stated that the amount that was stated on that document was unjustified.

6.81 In substantiating his position, Yolomino Mbewe's testimony was that Woodlock Limited collected Fifteen (15) loads of gravel in Two (2) days from Cyprian Mulenga's land, but the quotation from GM Trading had quoted Twenty (20) days of hire to bury excavations which were done for Two (2) days.

6.82 He stated that a grader is a machine which has a long blade in the middle, and the use of a grader is to spread heaps of gravel thinly by about Two (2) millimeters so that it is compacted by a roller.

6.83 Thus, to suggest that a grader could work for Twenty (20) days to bury the borrow pit was not true. Yolomino Mbewe further testified that use of the word bury was wrong, as borrow pits cannot be buried, and that the least that is done to them is to rehabilitate them.

6.84 He further contended that specialized equipment that is used for such, is a bulldozer or an excavator. Yolomino Mbewe's evidence was that the quotation was issued in total ignorance and lack of understanding of what work was to be done.

- 6.85 It was stated that by Cyprian Mulenga asking for payment of Thirty Thousand Kwacha (K30, 000.00) for Fifteen (15) loads of gravel which was excavated from his land, and also to bury the land where the Fifteen (15) loads of gravel were obtained from, he did not know what he wanted from the Court. Therefore, Woodlock Limited contended that Cyprian Mulenga had duplicated his claims.
- 6.86 Woodlock Limited's other witness was Nedson Mupeta, its' Logistics Manager. He told the Court that in 2018, he was in charge of the project in Mpika where Woodlock Limited was constructing the NAPSA building. Nedson Mupeta testified that they required gravel for the construction, and they went to Mpika District Council after paying a courtesy call on the District Commissioner's Office, and were advised to go to the Council Secretary.
- 6.87 He explained that the Council Secretary had called officers from Buildings and Planning Departments who said that they could take them to where they could extract gravel, where rubbish was also being thrown. He added that he had provided transport to go there, and he was taken there by Two (2) officers from the Planning Department.
- 6.88 Nedson Mupeta further testified that the Two (2) officers led him to the site which was at TAZARA near ZESCO, as he did not know it, stating that it was big area with deep ditches. Nedson Mupeta stated that at the borrow pit, he was advised of the direction in which they could excavate for the gravel when he asked. He explained that he was told to excavate in

the northern direction, and that there was no place at which he should end, as the place was being used as a dump site.

6.89 His evidence was that on returning to Mpika District Council, he was advised to put the request in writing, and he was told that he would be called to be informed of the outcome. Therefore, he left after he submitted the letter and after more than Ten (10) days, he called and told that the application had been approved.

6.90 Nedson Mupeta further testified that he was further informed that he had to pay before they started the excavation. He told the Court that he paid Two Thousand Five Hundred Kwacha (K2, 500.00) out of the Five Thousand Kwacha (K5,000.00) that was to be paid. Then he was informed that the amount payable would be reduced as he was requested to do the culverts at the hospital.

6.91 Nedson Mupeta's evidence that in the letter that granted them authority to excavate for gravel, he was told to liaise with Lawrence Ngoma. It was his testimony that he went to the Director's office, and the Deputy Director gave him the go ahead.

6.92 Nedson Mupeta testified that he could not tell that the land belonged to someone, as there was just bush, and they dug where they were shown. Then Two (2) days later, when he was at the office, around 17:00 hours, a worker went and informed him that Mr Mulenga was claiming that they had dug gravel from his plot.

- 6.93 Nedson Mupeta explained that he had stated that he had nothing to do with Mr Mulenga, as Mpika District Council took him to the site. Then the next day, he went to Mpika District Council and he had explained what had happened. It was his testimony that there, he was informed that Mr Mulenga had done the same thing to the Chinese, and officers from Mpika District Council were looking for him.
- 6.94 He further stated that officers from Mpika District Council went back to the borrow pit with him, and he was shown the southern direction in which to dig, which was deeper inside, and they started excavating the gravel.
- 6.95 However, Mr Mulenga kept going there, and asked him to bury the entire borrow pit. Nedson Mupeta testified that he had informed Mr Mulenga that they could bury where they had dug, and they did so. His evidence was that they had a Fifteen (15) tonne tipper truck, and they did Ten (10) trips making it One Hundred Fifty (150) tonnes. Nedson Mupeta also testified that they dug other tonnes of gravel from the other side, whose quantity he could not recall.
- 6.96 He explained that Mr Mulenga did not claim ownership of the area that they dug from after his land.
- 6.97 As for Mpika District Council, Lawrence Reynolds Ngoma, told the Court that Woodlock Limited was constructing an office building for NAPSA in 2018, and it applied for gravel. He explained that Mpika District Council has a borrow pit which is also used as a dump site, and that one side of that borrow pit had been exhausted.

- 6.98 Lawrence Reynolds Ngoma's evidence was that Mpika District Council wrote to Woodlock Limited under the charge of Sand Levy at Two Thousand Kwacha (K2, 500.00), and that Woodlock Limited was also informed that they should notify Mpika District Council so that it could guide them on the boundaries of the borrow pit, when they were going to extract the gravel.
- 6.99 He stated that he gave Woodlock Limited his contact details, but when Woodlock Limited went to collect the gravel, he was not informed. It was also Lawrence Reynolds Ngoma's testimony that he later learnt that Woodlock Limited had been sued, as they had encroached on someone's property and that Mpika District Council had also been sued.
- 6.100 He testified that, he had never spoken with Cyprian Mulenga prior to and after commencement of these proceedings. His further evidence was that Woodlock Limited did not contact him after he gave them the letter, and he did not go with them to the borrow pit or assign anyone to take them there.
- 6.101 Lawrence Reynolds Ngoma did however testify that Mpika District Council gave Woodlock Limited a bill of Five Thousand Kwacha (K5, 000.00). However, as Woodlock Limited had a back-hole loader which Mpika District Council needed to use, it was verbally agreed that the bill be reduced to Two Thousand Five Hundred Kwacha (K2, 500.00) so that Mpika District Council could use the equipment.

- 6.102 His evidence was that he had never met the director for Woodlock Limited, and that the said director did not raise any issues of inconvenience in the extraction of gravel and neither did Woodlock Limited write a letter of complaint over extraction of the gravel.
- 6.103 In terms of whether the excavation of gravel was done on Cyprian Mulenga's land, Cyprian Mulenga called as his witness, Aden Yenga, who is a Land Surveyor at the Ministry of Lands. This witness told the Court that he was the head of the Chinsali Region office for the Ministry of Lands.
- 6.104 His testimony was that in February, 2020, the office received a letter requesting a boundary verification for the property Lot No 7027. Aden Yenga stated that his supervisor Andrew Mwalimu Silwembe, issued a quotation to Barnaby Chitundu and Khunga Advocates on behalf of their client for the exercise.
- 6.105 Then after Barnaby Chitundu and Khunga advocates paid the amount that was quoted, they had provided logistics, so that the boundary verification could be conducted.
- 6.106 As to what his office did in respect of the said boundary verification exercise, Aden Yenga testified that they prepared for the exercise, by conducting a desk top study by searching for the title for Lot No 7027. His evidence was that they found that the said property was on title, in Cyprian Alex Mulenga's name, and that the property was surveyed in 2005.
- 6.107 Aden Yenga also told the Court that the team proceeded to the site in April, to ascertain the position of Lot No 7027 on

the ground, and to depict the position of the excavations which were in the area in relation to the said property.

- 6.108 It was stated that the team proceeded from Chinsali to Mpika to conduct the boundary verification, and that a Global Navigation System (GPS) or GSS was used to verify the property boundaries, which positioned the features on the ground. Aden Yenga's evidence was that on being set up, the equipment was referenced to a control point that was nearest to the property to verify the coordinates of the boundaries of the points of the property, which were keyed in the GPS system.
- 6.109 Then thereafter, the machine was operated to lead the team to the boundary corners of the property as per the initial survey of the property in 2005. He stated that Two (2) beacons were found on the ground and not the other Two (2). Aden Yenga also told the Court that the machine took them to a corner, which evidenced the existence of a beacon before.
- 6.110 He also testified that as Two (2) beacons were found, they were confident that the craft of check was in place, and the boundaries of Lot No 7027/M were affirmed as per the 2005 survey.
- 6.111 Aden Yenga's further evidence, was that the team proceeded to conduct a second investigation, whose primary objective was to ascertain the position of the excavation in relation to Lot 7027. He explained that in order to achieve this, the team entered a line based on two points being points, A and D of

the property as labelled on the diagram, from which the data was being sourced.

6.112 Then from there, the team walked on the line and reached the excavations and started picking the coordinates along the excavation in the direction towards where Lot 7027 is. Aden Yenga's testimony was that the team went along the excavation until they got back to the line A D so that the excavation which fell within the property could be depicted on a map.

6.113 His evidence was that satisfied with the field work, the team went on to prepare a boundary verification report. It was his testimony that after the calculations were done, it was found that the excavations partly fell within Lot 7027 and covered an area of about 989 square metres.

6.114 Aden Yenga testified that a map was drawn to depict how the excavations related with Lot 7027, and it was compiled and sent to the client.

6.115 The submissions that were made by Cyprian Mulenga on what constitutes trespass to land have been seen above, as well as those that Woodlock Limited and Mpika District Council also made.

6.116 Woodlock Limited went on to further submit that where one enters on another's land with the lawful authority of the occupier, and the act of entry was involuntary, a claim for trespass cannot succeed. It was submitted that the evidence on record showed that Mpika District Council was using the property which has a borrow pit as a dump site.

- 6.117 Thus, Woodlock Limited's contention was that whether or not the authority was given to Cyprian Mulenga or Mpika District Council, did not negate the fact that authority was given to Woodlock Limited. It was also stated that Yolomino Mbewe testified that Woodlock Limited had never operated in Mpika, and therefore it did not have knowledge that the borrow pit which was assigned by Mpika District Council could be on private property.
- 6.118 Also, in submission, Woodlock Limited stated that it did not involuntarily excavate gravel for the borrow pit, but that it did so with the lawful authority, that it obtained from Mpika District Council. Addition was made, that Mpika District Council even took it to the said borrow pit, and showed it where to excavate from. Thus, Woodlock Limited did not trespass on Cyprian Mulenga's land.
- 6.119 Still in submission, Woodlock Limited stated that Cyprian Mulenga testified that he found Mpika District Council dumping waste materials on his land in March, 2018, which was before Woodlock Limited obtained authority from Mpika District Council to excavate gravel.
- 6.120 Therefore, Cyprian Mulenga was aware that Mpika District Council had a borrow pit which was used to excavate gravel and as a dump site for Mpika District Council. However, Cyprian Mulenga took no measures to prevent further excavations on his land, or to show that the borrow pit was on private property.

- 6.121 This it was submitted, was evidenced by the testimony that was given by Yolomino Mbewe and Nedson Mupeta, that when they visited the borrow pit, there was no indication that it was on private property.
- 6.122 Further submission was made, that Nedson Mupeta in his evidence stated that the borrow pit was in a bush area, with no landmarks to show that a person privately owned the land. It was stated that Aden Yenga, Cyprian Mulenga and Lawrence Reynolds Ngoma's testimonies all confirmed that position, as they told the Court that the beacons A and D on the property were at the corner of the property, whereas the borrow pit was in the middle of the property, and the said beacons were not affected by the borrow pit.
- 6.123 It was submitted that even if the beacons could have been identified by Woodlock Limited, the property was big and Woodlock Limited was only interested in excavating gravel, and it had no business searching for the beacons for Cyprian Mulenga's property.
- 6.124 Mpika District Council on the other hand in its' submissions, stated that it granted authority to Woodlock Limited to extract laterite from the borrow pit. However, Lawrence Reynolds Ngoma had told the Court that the borrow pit did not extend to Cyprian Mulenga's land, Lot No 7027/M, which property had beacons within its' boundaries.
- 6.125 Therefore, the defence by Woodlock Limited that Mpika District Council authorised it to excavate laterite in Cyprian Mulenga's property should collapse, as the authority did not

extend to trespassing on the adjacent properties, such as that belonging to Cyprian Mulenga.

6.126 The further submission was that this was compounded by the fact that Woodlock Limited did not seek guidance from Lawrence Reynolds Ngoma as instructed in the letter that granted it authority, as Lawrence Reynolds Ngoma knew the boundaries of the borrow pit.

6.127 Assertion was made, that Woodlock Limited negligently and deliberately defied Mpika District Council's instructions when being granted permission, and that was why it strayed and trespassed onto Cyprian Mulenga's land in the extraction of gravel from the borrow pit.

6.128 In determining whether Woodlock Limited did in fact extract gravel from the borrow pit in line with the authority that Mpika District Council gave it, the letter which granted such authority is critical.

6.129 The said letter which is at page 2 of Woodlock Limited's bundle of documents reads as follows:

13th July 2018

***The Logistics Manager
Woodlock Limited
LUSAKA***

Dear Sir,

**RE: APPROVAL FOR THE COLLECTION OF
LATERITE/GRAVEL**

Reference is made to your letter dated 6th July, 2018 for permission to collect laterite/gravel from our borrow pit near TAZARA area opposite ZESCO substation.

Kindly be informed that Mpika District Council has on 13th July, 2018 approved your request. In light of this, you are requested to pay K50 per 10 tons in line with the Mpika District Council (Sand Levy) By Laws of 2006 read together with the Local Government Act, Volume 16 Cap 281 of the Laws of Zambia. For 1000 tons, it will interpret into K2, 500.00 in total.

You are also required to coordinate with the Engineer Lawrence Ngoma who may give guidance as you collect the material.

Please be notified that the Council may withdraw the permission granted at any time for failure to comply with any condition and for any reasons that the institution may deem fit and proper.

Yours faithfully,

Lawrence Ngoma

DEPUTY DIRECTOR OF WORKS

FOR COUNCIL SECRETARY.

6.130 A careful reading of this letter, shows that Mpika District Council in granting authority to Woodlock Limited to extract gravel from the borrow pit, directed it to coordinate with Lawrence Ngoma.

- 6.131 Lawrence Reynolds Ngoma in his evidence, told the Court that he received the application from Woodlock Limited in 2018, in which the request was made to extract gravel. He stated that Mpika District Council wrote to Woodlock Limited under the charge of Sand Levy at Two Thousand Five Hundred Kwacha (K2, 500.00), and he had further directed Woodlock Limited to inform them, so that Mpika District Council could give them the boundary of the borrow pit, when they were going to the said borrow pit to extract gravel.
- 6.132 He also testified that he gave Woodlock Limited his contact number, but he they did not inform when they were going to the said borrow pit. Lawrence Reynolds Ngoma testified that he later learnt that Woodlock Limited had been sued as they had encroached on someone's land and that Mpika District Council had also been sued.
- 6.133 When cross examined, Lawrence Reynolds Ngoma testified that he could not say that Woodlock Limited went to the wrong borrow pit, and that they were the first to extract gravel from the said borrow pit. He testified that there were beacons on the property, which were made of pillars, to show that there was someone else's land, outside the borrow pit.
- 6.134 This witness also told the Court that Mpika District Council was dumping waste on its' land, and that the borrow pit is on its' land, and not on Cyprian Mulenga's land.
- 6.135 When referred to the boundary verification diagram for Cyprian Mulenga's land which was at page 24 of Cyprian Mulenga's supplementary bundle of documents, Lawrence
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Reynolds Ngoma testified that he was not aware of the gully that was depicted on the said diagram. He agreed that beacon D which was on Cyprian Mulenga's land was damaged by China Aid.

6.136 As to whether Lawrence Reynolds Ngoma was notified by Woodlock Limited that they were going to the borrow pit to extract gravel, Lawrence Reynolds Ngoma's evidence as that he had given his phone number to the person who went to collect the letter that granted authority to Woodlock Limited to extract the gravel from the borrow pit. However, he could not recall who that person was.

6.137 He further testified that by Woodlock Limited specifying where the location of the borrow pit was, he assumed that it had asked where it could get gravel.

6.138 Lawrence Reynolds Ngoma when he was referred to the letter that N. Mupeta, the Site Logistics Officer of Woodlock Limited wrote to the Council Secretary at Mpika District Council on 6th July, 2018, which was at page 1 of Woodlock Limited's bundle of documents, testified that the Council Secretary delegated to him to reply to the letter.

6.139 He stated that he did not know what transpired in the Council Secretary's office, and that he could not argue that Two (2) officers were assigned by the Council Secretary to go with Woodlock Limited to the site.

6.140 Nedson Mupeta in his evidence in chief, testified that he went to the office of the Council Secretary after he paid a courtesy call on the District Commissioner. It was further

his testimony that the Council Secretary had called officers from the Buildings and Planning Departments, who said they could take Nedson Mupeta to the borrow pit, where rubbish was being thrown.

6.141 Thus, Nedson Mupeta provided transport to go there with officers from the Planning Department, and he was shown in which direction they could excavate the gravel from the borrow pit. Nedson Mupeta also stated that from there, they went back to the Council, and he wrote the letter which was at page 1 of Woodlock Limited's bundle of documents.

6.142 He explained that they were only given a response by Mpika District Council in the letter which was at page 2 of the said bundle of documents after Two (2) weeks. His position was that he liased with Lawrence Reynolds Ngoma as he went to the Director's office, and the Deputy Director gave Woodlock Limited the go ahead to extract gravel from the borrow pit.

6.143 In cross examination by Counsel for Mpika District Council, Nedson Mupeta's evidence, was that while he did not go with Lawrence Reynolds Ngoma to the borrow pit, he had sought his guidance. He stated that Lawrence Reynolds Ngoma had told him that officers from the Planning Department were the best people to go with to the site, and he had assigned him Two (2) officers to go to the site.

6.144 It is a question of who is more credible than the other between Nedson Mupeta and Lawrence Reynolds Ngoma, on whether Nedson Mupeta did in fact liase with Lawrence

Reynolds Ngoma on being shown where the gravel could be extracted in the borrow pit.

6.145 Nedson Mupeta told the Court that the Council Secretary assigned officers to take him to the borrow pit in his evidence in chief. His testimony was that after those Two (2) officers had shown him where the gravel could be extracted, they went back to the Council, and he wrote the letter to the Council Secretary requesting for authority to collect the gravel.

6.146 In cross examination, Nedson Mupeta testified that he had liased with Lawrence Reynolds Ngoma, who told him that officers from the Planning Department were the best people to know where Woodlock Limited could extract gravel, and he had assigned him Two (2) officers to go with to the borrow pit.

6.147 It has been seen that Lawrence Reynolds Ngoma testified that he was delegated by the Council Secretary to respond to the letter, and that when he wrote the letter in response, he had given the person who went to collect it, his phone number so that he could guide them on where to extract the gravel. However, they did not do so.

6.148 Nedson Mupeta's evidence was contradictory on who assigned him the officers to go with to the borrow pit. He initially testified that the Council Secretary assigned him Two (2) officers from the Planning Department before he even wrote the request. In cross examination however, he told the Court that Lawrence Reynolds Ngoma told him that officers

from the Planning Department were better placed to know where the gravel could be extracted, and he had assigned him Two (2) officers from that department.

6.149 In view of that contradiction in Nedson Mupeta's testimony, his evidence lacks credibility on the issue of whether he did in fact liase with Lawrence Reynolds Ngoma on where Woodlock Limited could extract gravel. I accordingly believe Lawrence Reynolds Ngoma when he testified that Woodlock Limited did not liase with him as instructed in the letter that granted it authority to extract gravel from the borrow pit.

6.150 Lawrence Reynolds Ngoma's testimony is further more credible in light of the fact that Nedson Mupeta told the Court that he went to the office of Council Secretary to seek authority to extract the gravel, and he was assigned Two (2) officers who took him to the borrow pit, and showed him where to extract gravel.

6.151 Then thereafter, he wrote the letter requesting so, which Lawrence Reynolds Ngoma responded to, entailing that he was satisfied with the area on which to excavate the gravel from before he put in the request.

6.152 The fact that the area where the borrow pit is, was all bush as testified by Nedson Mupeta and Yolomino Mbewe, and therefore one could not be put on notice that Cyprian Mulenga owns a property there, does not help, as Lawrence Reynolds Ngoma testified that the beacons on Cyprian Mulenga's land are visible, being made of pillars, which evidence was confirmed by Aden Yenga.

- 6.153 This is so even though the beacons on points A and D on the land were missing, because Mpika District Council was aware that Cyprian Mulenga's property is adjacent to its' property, and he had complained to it over encroachment on his property. Therefore, the requirement for Woodlock Limited to have liased with Lawrence Reynolds Ngoma before it could extract gravel from the borrow pit.
- 6.154 The boundary verification diagram which is at page 24 of Cyprian Mulenga's bundle of documents shows that there is a gully inside his property, in between the boundaries of the property on the line where the beacons A and D were supposed to be.
- 6.155 Aden Yenga testified that the team on doing the boundary verification, entered a line based on two points being points, A and D of the property as labelled on the diagram from which the data was being sourced.
- 6.156 Then from there, the team walked on the line and reached the excavations and started picking the coordinates along the excavation in the direction towards where Lot 7027 is. He explained that the team went along the excavation until they got back to the line A D so that the excavation which fell within the property could be depicted on a map.
- 6.157 It was testified that the team went on to prepare a boundary verification report, and Adam Yenga stated that after, the calculations were done, and it was found that the excavations partly fell within Lot 7027, and covered an area of about 989 square metres.
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- 6.158 The report which is at pages 19-22 of Cyprian Mulenga's bundle of documents on the boundary verification of Lot No 7027/M Mpika is dated May 2020. Aden Yenga testified that his office received a request for the boundary verification in February, 2020, and that the verification was done after Messrs Barnaby Chitundu and Khunga Advocates paid for the said boundary verification and they did the boundary verification in April 2020.
- 6.159 From the testimony that Nedson Mupeta gave, it can be seen that Woodlock Limited excavated from Cyprian Mulenga's land. The pictures which are at pages 17 and 18 of Cyprian Mulenga's bundle of documents show equipment with the name Woodlock Limited on it, excavating gravel. Cyprian Mulenga's evidence was that he took the pictures himself when he went to his land.
- 6.160 It was contended that Woodlock Limited denied having excavated gravel from Cyprian Mulenga's land, as the letter which was at pages 3-4 of Cyprian Mulenga's supplementary bundle of documents that he wrote to the Council, showed that Cyprian Mulenga wrote that on 15th March, 2018 and 2nd April, 2019, he found Mpika District Council dumping hazardous waste materials on his property and that Mpika District Council had also instructed China Aid to clear the land, and in the process China Aid had removed beacon D from his plot.
- 6.161 That letter is dated 21st May, 2019, and Woodlock Limited was found excavating gravel from the land in July 2018. The
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letter does not state when China Aid was directed to clear the land.

6.162 However, when Lawrence Reynolds Ngoma was cross examined, he testified that Mpika District Council extracted gravel from the said borrow pit, and Woodlock Limited was not the first to extract gravel from there. In view of that evidence, it can safely be said that Woodlock Limited was not the first to extract gravel from the borrow pit which is on Mpika District Council's property Lot No 7028/M and part of which has been extended into Cyprian Mulenga's property Lot No 7027/M.

6.163 As Nedson Mupeta's evidence was that they stopped excavating gravel on the portion of Cyprian Mulenga's land, after Cyprian Mulenga told them to stop doing so, and they proceeded to do so in the southern direction as guided by officers from Mpika District Council when they went back to the said Council, and Cyprian Mulenga did not complain further after that, shows that in fact, Woodlock Limited did excavate gravel from Cyprian Mulenga's land.

6.164 ***Halsbury's Law of England Volume 45, 4th Edition*** in paragraph 1384, explains trespass to land as:

“Every unlawful entry by one person on the land in the possession of another is a trespass for which an action lies, even though no actual damage is done. A person trespasses upon land if he wrongfully ...places or fixes anything on it...”

6.165 The learned authors go on to state in paragraph 19-06, that it is no defence that the trespass was due to a mistake of law or fact, provided that the physical act of entry was voluntary.

6.166 Then in the case of ***Shell & BP Zambia Limited v Conidaris and others*** ⁽³⁾ it was held that:

“(i) Trespass to land is an unlawful entry on land in the possession of another;”

6.167 The evidence in this matter, shows that Woodlock Limited entered Cyprian Mulenga’s property when it was extracting gravel from the borrow pit, after it went there with officers from Mpika District Council, but who were not authorised by Lawrence Reynolds Ngoma, the person who by the letter dated 13th July, 2018, was supposed to guide Woodlock Limited on where to extract the gravel.

6.168 Thus, as Woodlock Limited strayed onto Cyprian Mulenga’s land on doing so, it trespassed on his land as it had no authority to enter on the said land, and the act of so entering on the land was voluntary. The claim for indemnity by Mpika District Council fails.

6.169 Cyprian Mulenga accordingly succeeds on the claim for trespass against Woodlock Limited.

6.170 As for the measure of damages for trespass to land, ***Clerk & Lindsel on Torts, 20th Edition, Sweet and Maxwell, Thomas Reuters, 2010***, in paragraph 19-63 provides that:

“A claimant in trespass is entitled to recover damages, even though he has sustained no actual loss.... When substantial damage has been caused,

the measure of damages varies according to whether the trespass belongs to one or other of the three following classes...”

6.171 Among the classes of trespass, is physical damage to land, which in **paragraph 19-65** of the said **Clerk & Lindsel on Torts** states that:

“Secondly, the trespass may involve actual physical damage to the land, such as where a roadway is cut up by constant use of it, or a bank is dug away. The measure of damages in such a case is the amount by which the value of the land has been diminished, and not the cost of restoration. (But note that if the claimant is able to show that his or her chief concern is with the protection of property rights-rather than with the recovery of damages-then it may be possible to obtain a mandatory injunction requiring the defendant to make such restoration.”

6.172 From the evidence that is on record, Cyprian Mulenga testified that Woodlock Limited did not bury the area where it excavated on his land. His evidence was that he was dealing with Mr Siuluta of Woodlock Limited who kept promising to bury the borrow pit on his land to no avail.

6.173 In the submissions, Cyprian Mulenga stated that had Woodlock Limited buried the borrow pit it would have pleaded so in its' defence.

- 6.174 The defence by Woodlock Limited was that they did in fact bury the area where they extracted gravel, but Cyprian Mulenga wanted the entire area where the borrow pit falls within his land buried.
- 6.175 Cyprian Mulenga when cross examined by Counsel for Woodlock Limited, stated that he would not have asked Woodlock Limited to bury his land if he had allowed it to enter his land. When cross examined, by Counsel for Cyprian Mulenga, Nedson Mupeta's evidence was that Woodlock Limited buried the area where it had excavated using a TLB using gravel that from around the area.
- 6.176 Yolomino Mbewe explained to the Court that there is no such thing as burying a borrow pit, but rather it is rehabilitation, as you cannot excavate holes to bury other holes. His evidence was that soil that is on top is used to bury the holes using a bulldozer or an excavator.
- 6.177 In the submissions, Cyprian Mulenga and Mpika District Council contended that Yolomino Mbewe's evidence as regards the assertion that Woodlock Limited buried the portions of the borrow pit where it extracted gravel was hearsay, as he was not there, and he testified that he was in touch with his officers to find out if they had buried the borrow pit.
- 6.178 The case of ***Subramaniam v Public Prosecutor*** ⁽¹⁾ was relied on, which held that:

“Evidence of a statement made to a witness by a person who is not himself called as a witness may

or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made.”

6.179 Indeed, that portion of Yolomino Mbewe’s evidence with regard to the portion of the borrow pit where Woodlock Limited extracted gravel having been buried was hearsay, as Yolomino Mbewe did not testify that he witnessed it. Rather, he told the Court that his officers informed him so, and in his view, the issue was resolved.

6.180 Cyprian Mulenga’s testimony was that when Woodlock Limited did not bury the area, where it had excavated he went to GM Trading, the only construction company that was in Mpika at the time, which had a grader. There, he obtained a quotation for the sale of gravel for a Fifteen (15) tonne truck on 15th August, 2018. Then on 12th August, 2019, he was given a proforma invoice as Woodlock Limited did not bury his land.

6.181 He explained that the proforma invoice indicated Four Thousand Kwacha (K4, 000.00) after he took the officer to the site, and that it would take him Twenty (20) days at Four Thousand Kwacha (K4, 000.00) per day bringing the total to Eighty Thousand Kwacha (K80, 000.00). Cyprian Mulenga

stated that at the time, fuel cost Fifteen Kwacha Fifty-Nine Ngwee (K15.59).

6.182 Yolomino Mbewe in defence referred to the proforma invoice which was at page 5 of Cyprian Mulenga's bundle of documents, and stated the amount stated on that document was unjustified.

6.183 His evidence was that Woodlock Limited collected Fifteen (15) loads of gravel in Two (2) days from Cyprian Mulenga's land, but the quotation from GM Trading had quoted Twenty (20) days of hire to bury excavations which were done for Two (2) days.

6.184 He stated that a grader is a machine which has a long blade in the middle, and the use of a grader is to spread heaps of gravel thinly by about Two (2) millimeters so that it is compacted by a roller.

6.185 Thus, to suggest that a grader could work for Twenty (20) days to bury a borrow pit was not true. It has also been seen that Yolomino Mbewe further testified that use of the word bury was wrong, as borrow pits cannot be buried, and that the least that is done to them is to rehabilitate them, using specialized equipment such as a bulldozer or an excavator. Yolomino Mbewe's evidence was that the quotation was issued in total ignorance and lack of understanding of what work was to be done.

6.186 It was also submitted that Cyprian Mulenga testified that the proforma invoice was the basis upon which he was informed that it would take Twenty (20) days to bury the pit

at a cost of Four Thousand Kwacha (K4, 000.00) per day bringing, the total to Eighty Thousand Kwacha (K80, 000.00).

6.187 I have noted that Lawrence Reynolds Ngoma testified that Woodlock Limited was not the first to extract gravel from the borrow pit which is next to Cyprian Mulenga's land, as even Mpika District Council extracts gravel from there. It has also been seen that the gully which is part of the borrow pit has been extended into part of Cyprian Mulenga's land.

6.188 Woodlock Limited contended that it buried the portion of Cyprian Mulenga's land where it excavated gravel, but that Cyprian Mulenga wanted the entire part of the borrow pit which falls within his land buried.

6.189 From the evidence, it can be seen that Cyprian Mulenga did not rebut the assertion that he wanted the entire portion of the borrow pit which has been extended onto his land buried, after Woodlock Limited buried that part where it excavated. This supports Woodlock Limited's defence that it buried the portion of Cyprian Mulenga's land where it extracted gravel.

6.190 As such, even if I have found that Woodlock Limited did trespass on Cyprian Mulenga's land it did restore the land where it had excavated gravel in light of this evidence. Thus, the claim for damages for trespass which would have been the restoration of the land, was atoned, as Woodlock Limited buried the area of the ditches that were left by the excavation

on Cyprian Mulenga's land. The claim for damages for trespass fails against Woodlock Limited.

PAYMENT FOR GRAVEL SAND WHICH WAS EXCAVATED FROM CYPRIAN MULENGA'S LAND

- 6.191 Cyprian Mulenga with regard to payment for the gravel in the amount Thirty Thousand Kwacha (K30, 000.00) testified that this was in accordance with the proforma invoice which was at page 2 of his bundle of documents. His evidence was that the said documents quoted One (1) load of gravel for a Fifteen (15) tonne truck within a radius of Five (5) kilometers at Two Thousand Kwacha (K2, 000.00).
- 6.192 Thus, for the Fifteen (15) loads that Woodlock Limited collected from his land, he sought payment of Thirty Thousand Kwacha (K30, 000.00).
- 6.193 Yolomino Mbewe disputed that Woodlock Limited should pay for the gravel which it excavated. His reaction to the quotation which was at page 2 of Cyprian Mulenga's supplementary bundle of documents, was that it had quoted Two Thousand Kwacha (K2, 000.00) for Fifteen (15) loads of gravel within a radius of Five (5) kilometers.
- 6.194 Yolomino Mbewe explained that the said quotation implied that GM Trading supplied Fifteen (15) loads of gravel by way of loading onto its' vehicle, and transporting the same within a radius of Five (5) kilometers and offloading. He added that the cost included picking the gravel, transporting and delivering it.

- 6.195 It was also stated that Cyprian Mulenga had picked the Two Thousand Kwacha (K2, 000.00) and multiplied it by the Fifteen (15) loads to make it Thirty Thousand Kwacha (K30, 000.00) as what Woodlock Limited owed him for the loads of gravel that it excavated with its' machine, then loaded on its' truck, and thereafter offloaded it themselves.
- 6.196 The assertion was that Cyprian Mulenga did not incur costs of transporting and offloading the gravel. Therefore, the quotation was not a reflection of what Cyprian Mulenga claimed, adding that his loss was only the gravel which was uprooted from his property.
- 6.197 Yolomino Mbewe testified that the said cost could be segregated from the Two Thousand Kwacha (K2, 000.00) at Five Hundred Kwacha (K500.00) being twenty five percent.
- 6.198 Thus, the said amount when multiplied by Fifteen (15) loads came to Seven Thousand Five Hundred Kwacha (K7, 500.00) at best. Yolomino Mbewe stated that he could deposit that amount into Court, but not as admission of liability.
- 6.199 Yolomino Mbewe's evidence was that in any event, Woodlock Limited paid Two Thousand Five Hundred Kwacha (K2, 500.00) to Mpika District Council, which is a local authority that authorised collection of the said gravel. Thus, if Woodlock Limited compensated Cyprian Mulenga, it would pay twice for the same gravel.
- 6.200 It was also his testimony that Cyprian Mulenga was aware that Mpika District Council took Woodlock Limited to the borrow pit, and that it was not the first time that Mpika
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District Council directed people to go there, having previously directed China Aid there, when it was constructing a dual carriage way in Mpika.

6.201 Yolomino Mbewe stated that in the letter that Cyprian Mulenga wrote to Mpika District Council, which was at page 3 of Cyprian Mulenga's bundle of documents, he alluded to Mpika District Council having taken China Aid to his plot. However, Cyprian Mulenga had not sued China Aid or Mpika District Council, as Mpika District Council was only before Court because Woodlock Limited joined them to the proceedings.

6.202 The evidence given was also that Mpika District Council gave Cyprian Mulenga the plot in 2008, and they were better placed to know the status of his plot than Woodlock Limited. In the submissions, Woodlock Limited stated that Cyprian Mulenga in cross examination agreed that he did not spend any money on digging or loading gravel.

6.203 The contention is the Cyprian Mulenga did not incur costs to dig and transport the gravel from his land. However, it has been conceded that Woodlock Limited admits that it extracted Fifteen (15) loads of gravel in a Fifteen (15) tonne truck. Cyprian Mulenga therefore succeeds on his claim for the payment of the gravel. The value of the gravel if not agreed at a cost excluding the cost of digging and transportation, shall be assessed by the Registrar.

6.204 This is because, Woodlock Limited extracted gravel from Cyprian Mulenga's property Lot No 7027/M without Cyprian

Mulenga's authority, and gravel is a commodity that it used in pursuance of its' business to construct the NAPSA office in Mpika, as part of its' business, and it gained a benefit.

6.205 It matters not that Woodlock Limited paid for the extraction of gravel at Mpika District Council, as it did not extract the gravel in contention in this matter from Lot No 7028/M which belongs to Mpika District Council, but from Lot No 7027/M which belongs to Cyprian Mulenga.

6.206 The amount found due shall carry interest at the average short-term deposit rate from the date of issue of the Writ of Summons, until Judgment, and thereafter at the Bank of Zambia lending rate until payment.

CLAIM FOR DAMAGES FOR TRESPASS AND THE COST OF REMOVAL OF HAZARDOUS WASTE MATERIALS FROM CYPRIAN MULENGA'S LAND AGAINST MPIKA DISTRICT COUNCIL

6.207 As for the claims against Mpika District Council for trespass and for removal of hazardous waste from Cyprian Mulenga's land, it was stated that on 15th March, 2018, Cyprian Mulenga found Two (2) trucks offloading hazardous waste materials on the same point before Woodlock Limited did the excavation works. He explained that the materials were hazardous, as they included tins, bottles and broken glass.

6.208 Cyprian Mulenga testified that he wrote the letter which was at page 1 of his supplementary bundle of documents to Mpika District Council on 15th March, 2018, over dumping of the hazardous waste on his land.

- 6.209 Then on 2nd April, 2019, he found a tractor with a trailer also off loading at the same point, where Woodlock Limited did the excavation, and he took some photographs which were at pages 26-28 of Cyprian Mulenga's supplementary bundle of documents.
- 6.210 Mpika District Council did not dispute the claims that Cyprian Mulenga made against it in its' defence, and it stated so in its' submissions. It was also submitted that the photographs which were in Cyprian Mulenga's supplementary bundle of documents at pages 26-28, depicted the waste materials that Mpika District Council had dumped on Cyprian Mulenga's land.
- 6.211 It submitted that the measure of damages would be the cost or either burying or removing the said waste materials from Cyprian Mulenga's land.
- 6.212 The further submission was that Mpika District Council could clear the waste material from Cyprian Mulenga's land or that he could be paid the cost of such removal.
- 6.213 Mpika District Council having conceded that it did dump hazardous waste materials on Cyprian Mulenga's and therefore trespassed on his land, as it took waste materials there without his authority, and it is agreeable to removing the same from his land, the claim for trespass against it succeeds. Mpika District Council shall accordingly remove the hazardous waste materials from Cyprian Mulenga's land within Thirty (30) days from today.

- 6.214 Should it not do so, Cyprian Mulenga shall do so at his own cost, and recover the same from Mpika District Council on providing evidence of the cost for doing so.
- 6.215 If the amount is not paid within Sixty (60) days of demand being made by Cyprian Mulenga, Cyprian Mulenga shall be at liberty to levy execution to recover that amount, which amount shall carry interest at the average short-term deposit rate from the date of issue of Writ of Summons until payment, and thereafter at the Bank of Zambia lending rate until payment.
- 6.216 In observing that Mpika District Council operates the property Lot No 7028/M as a dump site and a borrow pit, prudence demands that it secures the said property from the neighbouring properties, such as Lot No 7027/M, which belongs to Cyprian Mulenga, by way of constructing possibly a wall fence around the property to prevent repeated incidences of trespass as the boundary of the borrow pit would be properly defined, as opposed to just beacons being there and to confine the dumping of waste.
- 6.217 Some of the waste moves with wind and it may also be spread by persons who access the dump site. However, Mpika District Council being the occupier of the land, it is responsible for any tortious actions arising out of its' activities.

7. CONCLUSION

- 7.1 Cyprian Mulenga has succeeded on his claim for the payment for Fifteen (15) loads of gravel from Woodlock Limited which shall be assessed, if not agreed.
- 7.2 He has also succeeded on his claim for removal of hazardous waste materials from his property against Mpika District Council, which if not removed within Thirty (30) days from today by the said Mpika District Council, he shall remove at his cost, and recover the payment from Mpika District Council after the lapse of Sixty (60) days on providing proof of the cost of such removal.
- 7.3 The amounts found due shall carry interest at the average short-term deposit rate from the date of issue of the Writ of Summons until Judgment, and thereafter at the Bank of Zambia lending rate until payment. Cyprian Mulenga is awarded costs against Woodlock Limited and Mpika District Council which shall be taxed in default of agreement. Leave to appeal is granted.

DATED AT LUSAKA THE 31st DAY OF MARCH 2025

S. Kaunda
S. KAUNDA NEWA
HIGH COURT JUDGE

