

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)**

2020/HP/1270

BETWEEN:

FLORENCE MWEENDO

AND

CHIRUNDU DISTRICT COUNCIL



PLAINTIFF

DEFENDANT

Before: The Hon. Mr. Justice Charles Zulu

*For the Plaintiff: Mr. B. Hantumbu & Ms. M. Luwi, of Messrs
Muleza Mwiimbu & Company.*

*For the Defendant: Mrs. E. Nenga-Muwowo, In House Counsel,
Lusaka City Council.*

J U D G M E N T

Cases referred to:

- 1. Shell & B.P. Zambia v Conidaris and Others (1975) Z.R. 174.**
- 2. AB and Other v South West Water Services Ltd [1992] 4 All ER 588.**
- 3. Patrick Dickson Ngulube v Rabson Malipenga (SCZ Appeal No. 18/2015).**

Legislation & Materials referred to:

- 1. Halsbury's Laws of England 4th Edition Volume 45 at paragraph 26.**
- 2. Harvey McGregor, of McGregor on Damages Eighteenth Edition (London: Sweet & Maxwell, 2009) at paragraph 34-004 on page 1255**
- 3. Halsbury's Laws of England, 4th Edition – Reissue, Volume 16 (London: Butterworths, 1992) at page 951 and 952.**

1.0 INTRODUCTION

1.1 The Plaintiff, Florence Mweendo, took out a writ of summons and statement of claim against the Defendant, Chirundu District Council (hereinafter called “the Council”), dated November 27, 2020. In her pleading the Plaintiff alleged that the Defendant trespassed on her land, mined and excavated gravel for construction of public roads within the district, without her consent. The Plaintiff’s claims are here-below stated:

- 1.1.1 *i. payment for damages to land diminution in value;*
i. payment for damages for loss of use of land;
ii. payment for damages for trespassing;
iii. payment for repair and reinstatement of the 14 hectares of land;
iv. payment for wire fence destroyed valued at K30,100.00; and
v. payment for aggravated damages.

1.2 The Council entered appearance and defence on December 10, 2020 wherein it stated that from as far back as 2007, the Council mined gravel from the area in issue for maintenance of roads within the district under the belief that the said land was vacant and under customary tenure. It also alleged that the said area was also mined by other entities including members of the Sikoongo Chiefdom.

1.3 It was averred that upon realization by the Council that the land in issue was owned by the Plaintiff, the Council ceased its mining activities at the farm. That the Council continued mining after the parties had engaged in some discussions to

establish how the Council was to pay for its mining activities undertaken on the Plaintiff's land.

1.4 And in reaction to the Plaintiff's allegation stating that the Council unilaterally passed a resolution to pay for its illegal mining activities on the Plaintiff's farm in the sum of K15,000.00 per annum, the Council rejoined and stated that the issue had never been tabled at a Full Council Meeting. That the Plaintiff's son in-law, then an employee of the Defendant, altered the minute book of the Full Ordinary Council meeting held on 31st August 2017 to reflect a resolution which in fact was never deliberated upon or passed. Therefore, the Council counter-claimed against the Plaintiff as follows:

- 1.4.1 **(i) damages for enabling a public officer to commit a crime; and**
 (ii) damages for giving false information to a public officer.

2.0 THE PLAINTIFF'S CASE

2.1 The Plaintiff testified and called two Plaintiff Witnesses (PWs). She recounted how she came to own the subject property, Farm No. L 22374/M in extent of 47.8210 hectares situate in Chirundu District.

2.2 She stated that in June 2005 her late husband applied for a commercial plot from the Village Headman named Choonga. That on November 11, 2006 her husband's application was approved by the Village Committee, and the allocated land was in extent of 47 hectares. She added that later on, her husband

and she applied to Siavonga District Council to convert the land from customary to leasehold tenure and the same was approved on January 2, 2009. She said a certificate of title dated July 23, 2013 was issued in their names as joint owners.

- 2.3 She said around 2015 she visited the farm, and found the Council had stationed machinery at her farm, used to mine gravel, and that her wire fence had been brought down. She said when she confronted the Defendant's employees and agents found at the farm, they retorted that the Council had the power to do so, because, it owned the district.
- 2.4 She said the Council continued to illegally mine on her farm until 2019. And that as a result of the mining activities, she abandoned all her farming activities. She said she was forced to move her livestock and birds from her invaded farm to Shimabala where she was residing because, her animals and birds could not cope with the noise and dust that was coming from the Council's mining activities. She said her vegetables as well could not survive.
- 2.5 She said efforts to have audience with the Council Secretary to register her displeasure over the intrusion proved futile. And that in an attempt to silence her, the Council created charges against her other properties in the district and imposed fines.
- 2.6 She disclosed that when she spoke to her children about the events that were happening at the farm, her children were not happy. And her daughter, Kaiser Mweendo Moyo (DW5), in her capacity as administratrix of her late husband's estate

demanded that the Council pays the value of the gravel it had mined from the farm since 2015. She said the demand by her daughter was without her daughter's knowledge that the land had solely devolved to her, after the death of her husband.

2.7 She said because of her hopelessness in the situation, and given that there was nothing she could do about it, the Council proposed to her daughter that the Council was willing to pay a certain amount for the value of gravel mined, and resolved to pay the sum of K15,000.00 per annum.

2.8 She made reference to a resolution passed by the Council, undertaking to pay the sum of K15,000.00 per annum from 2015. Minutes of the Fourth Ordinary Council Meeting held on August 31, 2017 were exhibited. And the relevant portion under minute number OC/53/05/17 reads:

2.8.1 **OC/53/05/17 ANNUAL PAYMENT FOR EXTRACTION OF GRAVEL FROM THE MWENDOS FARM – K15,000.00 AND A PROPOSAL FOR THE COUNCIL TO BE COLLECTING GRAVEL LEVY**

It was reported for consideration of the Council that management had been collecting gravel for Maintenance of Township Roads from the Mwendo's farm. The Mwendo's farm were asking for the Council to pay K15,000.00 for mining of gravel from their farm.

At the same time the Mwendo's were proposing that the Council be collecting gravel levy from the farm and the same be shared between them and the Council in the ratio 2:3 considering that the Council would be printing receipt books and paying the Revenue Collectors on site.

Further, the Mwendo's are giving the Council an option to buy of their 47 Hector Farm at K980,000.00. However, management is not for the idea because the asking price was too high and would not make economic sense to the Council.

In view of that, Management recommended that Council approves to pay K15,000.00 Annual Fee for extraction of gravel from their Farm and start collecting levies.

Upon a proposal by Councilor Benzia Siamuluwa, duly seconded by Councilor Brema Siazemba, it was RESOLVED THAT

The Management should pay Annual payments of K15,000.00 to the Mwendo's family for collecting gravel.

- 2.9 She said when the resolution was passed she was not formally communicated to, and only saw the resolution when the Council communicated to her advocates. According to her, there was no agreement between the Council and she on the mining of gravel in the farm.
- 2.10 She said it was incorrect for the Council to say it dealt with her daughter, when it was known to the Council that the farm belonged to her and not the estate of her late husband.
- 2.11 She added that she refused to sell the property to the Defendant at the market value, because there was extensive damage done to the land due the Defendant's mining activities. That she would need a lot of resources to restore the land to a usable state.

- 2.12 In cross examination, she said apart from the Council, she did not know the other people that were mining at the site.
- 2.13 She said Jared Moyo was married to her daughter, Kaiser and was an employee at Chirundu Council at the material time. She said Jared did not relay inside information to her over what was happening at the Council. She said when she was advised that her matter would be approved by the Council, Jared Moyo was in Lusaka and not in Chirundu. She denied having any dealings with Jared Moyo in his official capacity over this matter.
- 2.14 PW2 was Jared Timmy Moyo, a Senior Human Resource Officer in the employ of the Local Government Service Commission; at the time of his testimony he was stationed at Mbala District Council. He stated that he was married to Kaiser Mweendo Moyo, the daughter to the Plaintiff.
- 2.15 He said in May 2017 he was stationed at Chirundu District Council as a Committee Clerk. He explained that in his capacity as Committee Clerk, his duties were to take down minutes of Council meetings.
- 2.16 He said in May, 2017 he proceeded on leave for 14 days to attend to his examinations at Zambia Open University and only returned to work on June 13, 2017.
- 2.17 He added that he was aware that on May 30, 2017 the Council passed a resolution to pay the Plaintiff, in consideration of its mining activities undertaken at the Plaintiff's farm. He explained that the appearance of minute number OC/53/05/17 was confirmation of the minutes for the previous Ordinary

Council Meeting held on May 30, 2017. He said the resolution was passed and approved during the Council meeting held on May 30, 2017.

- 2.18 He explained that the position he held as Committee Clerk at the time the said resolution was passed was a junior one, and entailed that he was not part and parcel of management of the Council. He said there was no need to declare interest when he was not in attendance.
- 2.19 He said the allegations against him of altering Council minutes were fabricated. He added that at no time did he use his position to favour the Plaintiff.
- 2.20 In cross examination he stated that once minutes were prepared, they were bound and sent to the Council Secretary for proof reading. He said he has never been a Council Secretary, and that he never came across any incidence where a part in the minute was inserted without application. He said the minutes were verified by the Council Secretary and the same were brought up on August 31, 2017 for confirmation. He denied communicating this issue to the Plaintiff.
- 2.21 PW3 was Chimuka Micky Muwamba. He stated that in May 2017 he was in the employ of the Council as Treasurer. He said as Treasurer, he was tasked to normalize mining activities undertaken by the Council at the Plaintiff's farm. He said the mining activities were done without agreement between the Plaintiff and the Council, neither was there any payment made to the Plaintiff for the said mining activities.

2.22 He said pursuant to the task assigned to him by management, he did engage the Plaintiff's daughter, Kaiser Mweendo Moyo on how best to resolve the issue. He said the Council proposed to pay K15,000.00 per annum for its past and future mining activities, or in the alternative to buy the property from the Plaintiff. He explained that management agreed to his proposal for the Council to pay K15, 000.00 per annum, and the matter was escalated to an ordinary council meeting. He said the issue was tabled at the Ordinary Council Meeting held on May 30, 2017 and the proposal was adopted.

2.23 He added that on August 14, 2017 he prepared a notice of meeting and a report of the Council Secretary for presentation at the Fourth Ordinary Council Meeting held on August 31, 2017 at Mthunzi Nadi Lodge.

2.24 He stated that a copy of the minutes for the meeting held on August 31, 2017 was true and correct. He said Jared Timmy Moyo did not need to declare anything because, when minute number OC/53/05/17 was tabled, he was not present.

2.25 In cross examination, he explained what supposedly informed the decision to pay K15,000.00 per annum. He said the figure was arrived at with the Director of Works after they did the cost benefit. He said they considered the number of tipper trucks needed to rehabilitate township roads in a year. He said they estimated a100 loads in a year.

2.26 He maintained that he prepared the report on behalf of the Council Secretary and it was the Council Secretary that signed the minutes.

3.0 THE DEFENDANT'S CASE

3.1 The Council called five Defence Witnesses (DWs). DW1 was John Aaron Kafunda Mwanza, who at the time of his testimony was the Administrator for Mambwe Town Council. He stated that he was transferred to Chirundu District Council in 2017, and that after acting as Council Secretary, he was placed on suspension for alleged financial irregularities.

3.2 He recounted that sometime in 2018 after assuming office as acting Council Secretary; Mr. Jared T. Moyo (PW2), who by then was serving at Kasama Municipal Council, introduced him to his wife Ms. Kaiser Mweendo, the administratrix and representative of the Mweendo family.

3.3 He said Ms. Kaiser Mweendo complained to him that the Council had failed to honor its agreement with the Mweendo family. He made reference to a letter dated June 12, 2018 by Ms. Kaiser Mweendo, addressed to the Council demanding from the Council to pay K15, 000.00 per annum as resolved by Council.

3.4 He stated that upon further inquiry, he was availed minutes for the Full Council Meeting convened on May 30, 2017. He said it was indicated that the issue had been tabled and that the Council resolved to pay of K15,000.00 per annum to the Mweendo family for collection of gravel from their farm. He

stated that even though Ms. Mweendo mentioned of a council resolution, there was no record indicating that the Council communicated the said resolution to the Plaintiff, neither did he communicate the said minute to anyone.

- 3.5 He said when he called for the file concerning the resolution, he was advised that no such file existed. He said he wondered how then the resolution was tabled before the Full Council without a report by any standing committee or letter from the property owners proposing the said figure.
- 3.6 He stated that he tried to locate the report on action taken, which report he said was required before a subsequent full council meeting to ensure that the items deliberated upon in the full council meeting were acted on as resolved, but he did not come across such a report or any information as to why there was no movement on the particular item. He said that as a result of all the missing information, it was difficult to act upon the said minute. And that the Plaintiff did not revert to the Council regarding the proposal.
- 3.7 He said the Council continued to mine on the understanding that the parties would execute an understanding, but instead on January 10, 2019 the Council was advised to cease its activities on the farm. He made reference to the letter by Ms. Kaiser Mweendo here-below reproduced:

3.7.1 **RE: REFUSAL TO PAY GRAVEL COLLECTION AND ILLEGAL TRESPASSING IN THE FARM**
Reference is made to the above captioned subject matter.

As Mweendo Family we have noticed with sadness that you have continued getting gravel in our farm without payments despite the Council Resolution of August 2017. The payments have now accumulated to three years which is totaling to K45,000.00.

Due to the reason above, the family has forbidden your organization to take your equipment to the farm before the full payments of K45,000.00 and also forbidden your equipment to be passing in the farm because to us that is trespassing. The next time we find your equipment in our farm we will be forced to take legal action against the organization and those individuals who will be found in the farm. It will also interest you to know that we have pictures of your equipment getting gravel and council resolution and that is where we will be basing our reasons when we seek legal action.

Last time we offered you to buy the part which has gravel but you never responded, we wrote series of letters which you never acted upon. Kindy pay all our dues that you owe us and we understand that we owe you too, kindly deduct, give us the necessary receipts and pay us the difference.

Attached, are the letters which we wrote to your organization.

Yours faithfully.

Kaiser Mweendo.

Administrator

CHURUNDU.

- 3.8 He said the Council was willing to resolve the issue pertaining to the Plaintiff's property, and had meetings with the family representative, Ms. Kaiser Mweendo. He admitted that before he was transferred from the Council, he had never met with the registered owner of the property.

- 3.9 In cross examination, he said when he was transferred to Chirundu Council, he replaced Mr. Chimuka Muwamba who was suspended. He said at the time the minutes dated August 31, 2017 were passed, he was not at the Chirundu Municipal Council. He said payment of monies was fraudulently inserted in the minutes because, he never found the action report.
- 3.10 DW2 was Laura Yumba, the acting Town Clerk for Mbala Municipal Council at the time of her testimony. She stated that at the material time, she was the Council Secretary for the Defendant. And that on September 25, 2020 she received a letter of demand from the Plaintiff's advocates, wherein the Plaintiff was demanding the sum of K2, 500,000.00 for damages caused to land, unlawful entry, and loss of use of the land. She stated that the Council responded to the Plaintiff's letter of demand and requested to meet the Plaintiff so that the matter could be resolved amicably.
- 3.11 She said several meetings were held with the Plaintiff's advocates and the Plaintiff maintained her position as demanded in the letter of demand. She said in an attempt to resolve the issue, the Council even offered to purchase the property in dispute, including an offer to pay for mining of gravel as resolved by the Council.
- 3.12 She added that the proposals to the Plaintiff aforesaid were premised on the fact that she also came across minute number OC/53/05/17 of the Full Council Ordinary Meeting. She said the minute was relied on to communicate to the Plaintiff to

amicably settle the matter. She said the Council also proposed to buy the land.

3.13 She said after the exchange of some correspondence with Ms. Kaiser Mweendo, the family representative, the farm was offered for sale at the price of K900,000.00, but the Council counter proposed to purchase the property at the market value, subject to valuation by the Government Valuation Department.

3.14 She added that a search on the Council records as to whether the issue was reported to management or a report from any officer on the Council's undertaking to pay K15, 000.00 per annum proved futile. According to her, it was unclear how the item found itself as part of the Council Secretary's report tabled before the Full Council.

3.15 She stated that for an issue to form part of the council secretary's report or head of department report, and tabled before the full council ordinary meeting, the same ought to have been applied for by a member of the public, or concerned individual, and the council secretary would then report it directly via his report to the Council or the head of department would generate a report to a specific committee where the issue would be deliberated upon, then submitted to the full council. She noted that in the present case, no such report was found in the Council Secretary's records, management reports or any record of heads of departments.

3.16 She stated that the setbacks they came across led them to consult the records officer at the time, Mr. Jared T. Moyo. She

said it was discovered that Mr. Moyo was a son in-law to the Plaintiff. She stated that Mr. Moyo was a Committee Clerk and custodian of the minutes. And that the records indicated that Mr. Moyo was not in attendance at the time the issue was presented to the Full Council, but a perusal of the Standing Committees leading to the Full Council Ordinary Meeting indicated that he was in attendance.

3.17 She said when Mr. Moyo was called and prodded as to his whereabouts at the time the Full Council sat, Mr. Moyo produced two separate leave forms which were not fully signed by the authorized officers. And that a further perusal of the said file from the Kasama Municipal Council, where the said officer was transferred to, indicated that there was no trace of such leave forms. She said there was no proof that Mr. Moyo was at Zambia Open University for his residential school at the material time.

3.18 She added that it was also discovered that Mr. Moyo attended the subsequent Full Council meeting held on August 31, 2017 and did not disclose his interest in the subject matter considering his relationship to the Plaintiff. She stated that based on the foregoing, it was difficult to establish how the resolution was arrived at, without a record, except the minute itself. She admitted that the mining activities did take place at the Plaintiff's property.

3.19 She said the Council had properly indicated its interest in the Plaintiff's property when it dealt with the family representative

who introduced herself to the Council as such. And that the parties engaged and arrived at an understanding, and the Council continued mining and was willing to deal with the issue amicably, but negotiations stalled due to the transfer of principal officers from the Council.

- 3.20 She said the basis for attempting to reach a settlement was a resolution passed at the meeting held on May 30, 2017 confirmed at the meeting held on August 31, 2017. And that the same was communicated to the Plaintiff for the first time by letter dated November 25, 2020.
- 3.21 She alleged that the Plaintiff was not honest in dealing with the Council, because at no time did the Council deny its mining activities at her property. She added that the Council was not the only entity that was mining gravel. She said other entities and members of the public collected gravel from the same. She said in a letter dated September 12, 2016 Ms. Kaiser Mweendo indicated that people collecting gravel from the farm were charged K100 per load. She thus alleged that the Plaintiff's claim was bent on defrauding the Council.
- 3.22 According to her, the Council's claim for fraud was still tenable; in the absence of evidence that the Plaintiff directly approached the Council, excerpt through Ms. Kaiser Mweendo married to Mr. Moyo, who had access to Council records. She suspected that Mr. Moyo's direct access to the Council's records could have been used to advance the Plaintiff's interests.

- 3.23 She reiterated that the Council was willing to resolve the matter amicably save the Plaintiff deliberately avoided the Council.
- 3.24 In cross-examination, she said there was no letter from the Plaintiff granting authority to Kaiser Mweendo to deal with the property. She added that the Council mined on an area measuring approximately 3.5 hectares and that the extent of land that has been mined was unknown to her.
- 3.25 And when cross examined on how the Plaintiff had defrauded the Council, she indicated that Kaiser Mweendo was the wife to the former Committee Clerk, Mr. Moyo, who was responsible for taking minutes. She said since there was no record of the genesis of the matter, it was concluded that the records were manipulated, and that the Plaintiff wanted to defraud the Council through her daughter.
- 3.26 DW3 was Peter Choonga. He said as the Village Headman, he was the one that recommended the Plaintiff and her husband, Mr. Gift Mweendo to be allocated a piece of land in the area in the year 2012. According to him, the said piece of land was part of the area designated for quarry of gravel used for road construction.
- 3.27 He added that from time immemorial, the said piece of land was used for gravel collection by government agencies, the local community and contractors at no cost so long as consent from the headman and the Chief was obtained.

- 3.28 He said as the Village Headman, he was not aware that the Mweendo family had since obtained title to the land. He said there were no landmarks to show the extent of the land until this matter was commenced when the Council approached him to inform him of the state of affairs.
- 3.29 DW4 was Bornface Muzumara, a Human Resource Practitioner in the employ of the Council. He stated that in September 2020, the Council Secretary assigned to him the task to search for information pertaining to the dispute herein. He said he came across Council minutes for May 30, 2017 and August 31, 2017. And that no other information was found.
- 3.30 He added that management decided that the officer who was responsible for compiling the minutes of the meetings, Mr. Jared T. Moyo, be engaged to establish how the resolution found itself in the minute book without any background whatsoever.
- 3.31 He said Mr. Jared Moyo was summoned to a hearing, at which he appeared with a set of leave forms which indicated that he was not at the Council at the time the matter was tabled on May 30, 2017 before the Full Council Meeting. He added that since the leave forms were not accompanied by any attachment, the Council wrote to Mbala District Council and requested to be handed the personal file for Mr. Moyo, and that when the same was availed, no copies of the said leave forms were found. He said a follow up was done with the Ministry of Local Government to find out if the said leave was approved, it was discovered that no such approval was found.

- 3.32 He said Mr. Moyo expressed ignorance on the issue and insisted that he was not in attendance at the time the said resolution was passed. However, he said the record indicated that he attended all the four Standing Committee's Meetings that led to the two Full Council meetings.
- 3.33 He said he later came to learn that the Mr. Moyo was married to the Plaintiff's daughter, Kaiser Mweendo, an employee of the Council. He alleged that at the meeting held on August 31, 2017 Mr. Moyo did not declare his interest given his relationship to the people connected to the issue.
- 3.34 In cross examination, he admitted that there was no attendance list showing that Mr. Moyo was in attendance at the meeting held on August 31, 2017. He reiterated that the resolution was never passed. He said he did not know how the Plaintiff defrauded the Council. According to him, the Council was defrauded through application for leave.
- 3.35 DW5 was Kaiser Mweendo, a subpoenaed witness. She said the Plaintiff was her mother and Jared Moyo her husband, and wondered why she was called to testify on behalf of the Council.
- 3.36 She said she was the administratrix of the estate of her late father, Mr. Gift Mweendo. She denied having any dealings with the Chirundu District Council, over the issue in dispute. However, she admitted authoring the letter dated September 12, 2016 addressed to the Council; advising the Council that the family was concerned with the collection of gravel without

permission from their farm. She said she wrote the letter to provoke the Council in order for the Council to engage her family.

3.37 She said the Council passed a resolution to pay K15, 000.00 per annum for mining of gravel. She added that there was no agreement with the Council for collection of gravel at a fee.

3.38 In cross examination, she said no information regarding the issue herein was obtained from the Council without the knowledge of the Council. She stated that the Council never replied to any of her initial letters and the Council did not pay her family anything. She said she did not receive any information from the Council and that all the information she received was with the knowledge of the Council.

4.0 ARGUMENTS

4.1 As regards the filing of final submissions, directions with timelines were set for the parties to file their respective submissions, but at the time of preparing my judgment no submissions had graced the record. However, I am mindful that the parties filed their respective scheduling briefs wherein they unveiled points of law they sought to respectively rely on.

5.0 DETERMINATION

5.1 I have carefully considered the evidence respectively adduced by the parties. I am satisfied that the Plaintiff's husband, Mr. Gift Mweendo, applied to own land in Siavonga District under customary tenure, and it is apparent that the land now falls under the jurisdiction of Chirundu District Council. Mr.

- Mweendo was allocated 47 hectares by the Village Headman, Choonga and later applied to have the same converted from customary to leasehold tenure.
- 5.2 On July 23, 2013 a certificate of title was issued showing that Lot No. 22374/M, situate in Siavonga District was jointly owned by the Plaintiff and her husband.
- 5.3 I am also satisfied that part of the land that was allocated to the Plaintiff was for many years used for gravel mining by the local settlers of Sikoongo Chiefdom, including the Council.
- 5.4 Notably, the Council had been mining gravel from the land in issue even before the land was exclusively vested in the Plaintiff for road construction works. And even when the land was exclusively vested in the Plaintiff and her late husband, the Council continued to mine gravel from the said land. It is plausible that when the Defendant continued to mine after the land vested in the Plaintiff, it was initially unbeknown to the Council that the land was specifically vested in the Plaintiff. And when the Defendant learnt of this fact, there were some engagements to resolve the issue between the Council and the Plaintiff's daughter, Kaiser Mweendo Moyo.
- 5.5 The Plaintiff's primary claim with the off shoot of other claim is one that is anchored on the tort of trespass. In the case of ***Shell & B.P. Zambia v Conidaris and Others***¹ the Supreme Court defined trespass to land as follows:
- 5.5.1 ***Trespass to land is an unlawful entry on land in the possession of another.***

- 5.6 Therefore, it is befitting to say that the mining of gravel by the Council on the Plaintiff's land without the consent of the Plaintiff from 2015 as stated by the Plaintiff in paragraph 5 of the statement of claim, coupled with her testimony was trespass to land.
- 5.7 Measurably, the Council does not deny the fact that as a result of their activity on the subject land, the Plaintiff is entitled to some damages. And out of this admission, the Plaintiff's daughter (DW5) and the Council engaged in the exchange of several correspondences, which included possible suggestions on how the Council would pay for the gravel it had been collecting, or in the alternative exploring possible chances for the Council to purchase the entire property. However, the Plaintiff in her testimony stated that she did not authorize her daughter to deal with the Council.
- 5.8 And in paragraph 13 of the statement of claim, the Plaintiff alleged that the sum of K15,000.00 resolved by the Council to be paid to the Plaintiff was arbitrary: made without the Plaintiff's knowledge or consultation. And as to whether the Plaintiff authorized her daughter to deal with the Council or not to resolve the dispute, I shall revert to this issue elsewhere.
- 5.9 Granted the concession by the Council, the question that remains to be resolved is in respect of what damages has been proved and, if proved ascertain the applicable measure of damages (quantum).

5.10 The Plaintiff claimed for damages for trespass to land, on the one hand, and damages for diminution in value of the land, on the other hand. In assessing the quantum applicable as regard damages for trespass to land and diminution in value, I will treat these two claims as one and award general damages thereof.

5.11 The approach stated above is permissible on account that in assessing damages for trespass to land, the court takes into account the diminution in value of the land. The learned author of *McGregor on Damages Eighteenth Edition (London: Sweet & Maxwell, 2009)* at paragraph 34-004 on page 1255 provides insight as to what constitutes the normal measure of damages for trespass to land, thus:

5.11.1 ***It was for long said that the normal measure of damages was the amount of the diminution of the value of land (vide Jones v Gooday (1841) 8 M. & W.146)***

5.12 Further, the learned authors of *Halsbury's Laws of England 4th Edition Volume 45* at paragraph 26, shed light on the progressive or cumulative approach the court should take in awarding damages for trespass to land, by stating that:

- 5.12.1
- (a) ***if the plaintiff proves the trespass he is entitled to recover nominal damages even if he has not suffered any loss.***
 - (b) ***if the trespass has caused actual damage he is entitled to receive such amount as would reasonably be paid for that use.***
 - (c) ***where the defendant has made use of the plaintiff's land, the Plaintiff is entitled to***

receive by way of damages such an amount as would be reasonably be paid for that use.

- (d) where there is an oppressive arbitrary or unconstitutional trespass by government officials or where the defendant critically disregards the rights of the plaintiff in the land with the object of making a gain by his unlawful conduct damages will be awarded.**
- (e) If the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages such damages may be increased.**

5.13 As earlier noted, the Defendant without authorization entered on the Plaintiff's land and mined gravel. The trespass was not just mere trespass, but the trespass was accompanied by actual damage to the land caused by the mining activities, thereby causing diminution in value to land. Inarguably, the Council as evidenced by the Council resolution under Minute No. OC/53/05/7, undertook to pay K15,000.00 per year from 2015 for gravel it collected from the Plaintiff's land.

5.14 Before, I proceed to state the specific amount of damages that the Plaintiff is reasonably entitled to as damages; I wish to revert to the issue earlier left hanging, whether the Plaintiff's daughter had authority to deal with the Council over the issue of compensation for trespass/mining of gravel. This issue is material under the circumstances of this case because, the Plaintiff argued that the amount resolved by the Council in the sum of K15, 000.00 per annum was arrived at unilaterally. And that her daughter had no capacity, to her exclusion to directly deal with the Council.

5.15 Without hesitation, I find it probable that the Plaintiff's daughter (DW5) in furtherance of the Plaintiff's interest took centre stage in engaging the Council on how best the Council was to give compensation for the trespass in general.

5.16 The Plaintiff's statement suggesting that her daughter (DW5) was on a frolic of her own when she dealt with the Council over the issue, or that her daughter was under the mistaken belief that she had capacity as administratrix of the estate of her father, is not probable because, the evidence on the record strongly speaks otherwise. Remarkably, the Plaintiff in her letter, signed on her behalf dated February 8, 2018 dubbed: "Debt Swap", acknowledged that the Council by its own resolution was supposed to pay K15, 000.00 per annum. And further it was acknowledged that the Council was in arrears. The relevant portion of the letter is here-below reproduced:

5.16.1 **RE: DEBT SWAP**

Following the debt that as Mweendo Family incurred from the council through ground rate and putting into consideration that as council you owe the family through gravel collections; the family is hereby proposing a debt swap.

From the records and the full council resolution that you will be paying us K15,000.00 per year, you will discover that you are two years behind in payments. The sum up to now is K30,000.00. Kindly deduct what we owe you as a family and pay us the difference.

Yours Faithfully

Signed

Pp Florence Apuleni Mweendo

5.17 And with recourse to rules of evidence, the Plaintiff including her daughter are estopped from denying the fact that a resolution by the Council to pay K15,000.00 per annum for the mining activities undertaken at the Plaintiff's farm was ratified by the Plaintiff, and the Council was made to believe that it was obligated to pay K15, 000.00 for extraction of gravel from the Plaintiff's farm. This resolve is anchored on **Halsbury's Laws of England, 4th Edition - Reissue, Volume 16 (London: Butterworths, 1992)** at page 951 and 952 where the learned editors submit as follows:

5.17.1 ***There is said to be an estoppel where a party is not allowed to say that a certain statement of fact is untrue, whether in reality it is true or not. Estoppels may therefore be defined as a disability where party is precluded from alleging or proving in legal proceedings that a fact is otherwise than it has been made to appear by the matter giving rise to that disability. Estoppel is often described as a rule of evidence, but the whole concept is more correctly viewed as substantive rule of law.***

....

When a party has, by his words or conduct, made to the other a clear and unequivocal promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made by him, but must accept their legal relations subject to the qualification which he himself has so introduced

...

5.18 Having resolved the issue that the Plaintiff's daughter was acting in the interest of the Plaintiff, with the Plaintiff's approval, the issue now to be resolved is the applicable measure of damages payable to the Plaintiff. And in making this determination, the resolution to pay the Plaintiff K15,000.00 per annum is of material consideration.

5.19 Generally, if the tort of trespass is beyond mere trespass or unlawful entry, but includes actual damage to the land as the case herein, the normal measure of damages should include the actual diminution as regards the value of the land. The Plaintiff did not adduce evidence speaking to the value of diminution occasioned to the land as a result of the said trespass. However, under the circumstances, the Plaintiff is entitled to a value ascertainable from the Plaintiff's expectation from the Council to her in the sum of K15, 000.00 per annum for its mining activities it undertook on her property.

5.20 It is important to note that, the Plaintiff in her letter of demand to the Defendant through her advocate, made a demand in the sum of K2, 500, 000.00. As noted above, there was no evidence with particularity and certainty to support this particular amount. However, what is discernable from the evidence is that, the Plaintiff was not averse to the Council paying K15, 000.00 per annum, back dated to 2015 to cover the Plaintiff's loss regarding the Council's mining activities.

5.21 Granted the circumstances herein, I reckon, the sum of K15,000.00 per annum from 2015 to 2019 represents a fair

award of damages awardable to the Plaintiff. The total award of damages for trespass which includes diminution in value of the land is K75, 000.00.

5.22 In connection to the claim for trespass, the Plaintiff also claimed for aggravated damages.

5.23 In an award for exemplary or aggravated damages, the court generally takes into account the conduct of the parties. Therefore, aggravating conduct in respect of trespass to land can be discerned from the comments by the learned authors of ***Halsbury's Law of England*** (supra). Aggravating conduct may include oppressive, arbitrary or unconstitutional trespass by government officials, or conduct that exhibit utter disregard of the plaintiff's right to the land, especially if the trespass is with the object of solely making a financial gain.

5.24 Additionally, in the case of ***AB and Others v South West Water Services Ltd***² Lord Devlin had this to say regarding the head of exemplary damages:

5.24.1 ***Exemplary damages were limited not by the cause of action sued on but by the status of the defendant and the quality of his conduct. Accordingly, if the conduct complained of by the plaintiff consisted of a deliberate, calculated and willful attack upon his rights by a defendant whose status fell within the category of a government servant engaging in oppressive, arbitrary or unconstitutional action, or whose motivation was calculated by him to make a profit for himself which might well exceed the compensation payable to the plaintiff, then the defendant could be liable for exemplary damages***

regardless of the cause of action sued upon. Thus exemplary damages could be awarded in a claim of public nuisance against a public authority where the conduct complained of consisted of a deliberate, calculated and willful interference with a person's rights as a member of the public in circumstances which were oppressive, arbitrary or unconstitutional or where the authority intended to make a profit greater than the compensation which would otherwise be payable to the plaintiff.

5.25 In the present case, I am disinclined to award exemplary or aggravated damages. The extraction of gravel by the Council was for a noble cause directly undertaken by the Council for construction of public roads, rather than for sale with a view to making profit. In fact, in a letter dated February 8, 2018 aforementioned, the Plaintiff stated that it was desirable to sell the pit to the Council, for the Council to continue with its good services to the community of road maintenance.

5.26 And upon realization by the Council that the land belonged to the Plaintiff and was under leasehold tenure, it engaged the Plaintiff through her agent.

5.27 Furthermore, the Council was agreeable to resolve the matter amicably and undertook to pay the sum of K15,000.00 per annum to compensate for its unauthorized mining activities on the Plaintiff's land. Even when there was intent to levy others collecting gravel from the Plaintiff's land, the Council was magnanimous to share the levy thereof.

5.28 I now turn to the claim for loss of use of land. Again here, it can be said that a general award of damages for trespass generally

includes loss of use. However, it is important to note that loss of use was pleaded separately as a special loss.

5.29 Guidelines distilled from case law abound on how a special loss should be proved if specifically pleaded. In the case of **Patrick Dickson Ngulube v Rabson Malipenga**³ the Supreme Court guided as follows:

5.29.1 ***Any party claiming a special loss must prove that loss and do so with evidence which makes it possible for the Court to determine the value of that loss with a fair amount of certainty. There is no such evidence before us, we therefore find no merit in the appeal. we, however, accept that there was some damage suffered, and Mr. Okware did not object to nominal damages being awarded to the appellant. we are of the considered view that this is an appropriate case for nominal damages in the sum of K10,000.00.***

5.30 There is no evidence with a probable degree of particularity and certainty to warrant an award for loss of use. Firstly, there was no evidence adduced speaking to what exactly constituted this special loss as a separate claim. The Plaintiff in her evidence merely mentioned that her farm was used to rear animals and birds, and that she had planted some crops which were disturbed by the mining activities and that she had abandoned the same. The nature of loss and the possible quantum thereof was never stated with particularity and certainty. The failure to do so reacts against the Plaintiff.

5.31 Another special loss pleaded by the Plaintiff relates to a specific amount of K30,100.00 for the alleged damage to the perimeter wire fence. The basis of this special loss in the sum of

K30,100.00 was never stated with particularity and certainty. The Court was at sea as to the nature of damage/loss occasioned to the wire fence: whether or not the wire fence was completely damaged for the entire 47 hectares, or whether or not it was just for the 14 hectares the area which suffered illegal mining activities. It is also not certain whether the amount claimed was for repair of the whole wire fence or part thereof. However, I find it plausible that there was damage caused to the wire fence, and in this regard, the Plaintiff is only entitled to nominal damages in the sum of K5,000.00.

5.32 Finally, I turn to the claim dubbed: “payment for the repair and reinstatement of the 14 hectares of land”. This claim as well falls under the category of special loss. Again, the Plaintiff did not adduce evidence as to the nature of what was reparable or amenable to reinstatement. Therefore, it is not for the court to *suo moto* surmise as to what the Plaintiff conceived in this regard in the absence of proof. In any event, and in the absence of proof for this special loss, the award of damages for trespass which has taken into account diminution in value, covers the loss alleged under this head.

5.33 I now turn to the counter-claim against the Plaintiff. The counter-claim is unfounded and dismissible. Firstly, there is no evidence that the Plaintiff in her pursuit of her claim against the Council enabled an officer of the Council to commit an offence. Even assuming remotely that this was the case, it is uncertain what damage the Council suffered either pecuniary or non-pecuniary. The Council’s resolution under Minute

No. OC/53/05/17, under which the Council resolved to pay the Plaintiff the sum of K15,000.00 per annum, was not a product of fraud in any sense, but a product of deliberations and consensus of the Full Council Meeting held on August 31, 2017.

5.34 And as regards the claim for damages for giving false information to a public officer, equally there is no evidence that the Plaintiff gave false information to a public officer detrimental to the Council in this case. Allegations of impropriety marshalled against a former employee of the Council, who happened to be a relative to the Plaintiff named Jared Timmy Moyo, a non-party to these proceedings are inconsequential. The counter-claim in its entirety is without merit and is amenable to be dismissed.

6.0 CONCLUSION

6.1 In the light of the foregoing, the Plaintiff is entitled to general damages in the sum of K75,000.00 for trespass to land; which sum for the avoidance of doubt takes into consideration the diminution in value of the said land. The sum of K75,000.00 is an aggregate of the sum of K15,000.00 per annum for the period covering the year 2015 to 2019. Including the award of nominal damages in the sum of K5,000.00 for the damaged wire fence, the grand total awarded to the Plaintiff is K80,000.00. The same shall attract interest at the average short term deposit rate from the date of the writ to the date of judgment, and thereafter at the bank lending rate per annum until final payment.

- 6.2 The other claims, that is to say, damages for loss of use of land, aggravated damages and payment for repair / restitution of the Plaintiff's fourteen (14) hectares of land, stand dismissed. Similarly, the counter-claim stand dismissed for the aforesaid reasons.
- 6.3 Costs to Plaintiff to be taxed in default of agreement.
- 6.4 Leave to appeal is granted.

DATED THIS 24TH DAY OF MARCH, 2025



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THE HON. MR. JUSTICE CHARLES ZULU