

**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**LAND CAUSE NUMBER 196 OF 2016**

**BETWEEN:**

**LIWONDE SAFARI CAMP LIMITED**

**CLAIMANT**

**AND**

**DARREN BRUESSOW t/a BUSHMAN BAOBAB LODGE    DEFENDANT**

**CORAM: JUSTICE M.A. TEMBO,**

F. Maele , Counsel for the Claimant  
B. Theu, Counsel for the Defendant  
Mankhambera, Official Court Interpreter

**JUDGMENT**

1. This is the decision of this Court following a trial of this matter on the claimant's claim against the defendant for a declaration or order that the defendant has trespassed on and interfered with the claimant's rights of ownership, peaceful possession, use and enjoyment of the piece of land comprised in Title number 783 at Liwonde Township in Machinga District, for an order of damages for the trespass and interference and an order of prohibitory injunction restraining the defendant or his agents or visitors from the trespass and interference herein plus costs of this action. The defendant contested the claim.
2. The claimant's case is as stated in its statement of case as follows:

1. The claimant was at the at all material times a limited liability company registered in Malawi under the Companies Act (1984) which is in the business of providing hospitality services to tourists who visit Liwonde National Park and surrounding areas.
2. The defendant is an individual registered under the Business Names Registration Act and is also in the hospitality business and owns a lodge named Bushman Baobab Lodge which is adjacent to the claimant's lodge.
3. In or around 2010, the claimant secured a piece of land from Chief Kaudzu and entered into an agreement with Chief Kaudzu for the said piece of land.
4. The claimant wanted to be secured in respect of the said piece of land and the claimant's Director went to the Ministry of Lands, Housing and Urban Development to inquire about the legal status of the land on which the claimant wanted to build the business and the claimant was told that the said piece of land is public land.
5. Upon noting that the land was public land, the claimant was advised that the best course of action was to apply to the Minister of Lands, Housing and Urban Development for a lease of the said piece of land.
6. In or around February, 2011, the claimant applied to the Minister of Lands for a lease of the 13.467 hectares of land next to Liwonde National Park.
7. In or around 2013, the defendant constructed a road cutting across the claimant's piece of land going to the defendant's lodge.
8. The road was constructed by the defendant as an access road to the defendant's lodge but the land on which it was constructed was land that belonged to the claimant herein and that road was constructed without the claimant's consent.
9. Despite repeated demands to the defendant to construct an access road outside the land belonging to the claimant, the defendant without the claimant's consent and with willful defiance continues to pass through, traverse and drive across the claimant's piece of land.

10. The claimant's piece of land was surveyed and a deed plan number 646/2016 was produced which showed that there was no public road cutting across the leased piece of land and all the land surrounding the leased piece of land is public land.
11. On 24<sup>th</sup> February, 2016 the Malawi Government through the Commissioner for Lands Southern Region offered the claimant a lease of 14.40 hectares of public land in the southern border of Liwonde National Park in Machinga District for a period of 50 years from 1<sup>st</sup> March, 2016 at K650 000 yearly rent.
12. The claimant accepted the offer and paid the requisite rent for the lease. The claimant's leasehold land was now known as piece number 783 at Liwonde Township in Machinga District, Southern Region.
13. After being granted a lease, on 12<sup>th</sup> May, 2016 the claimant wrote a letter to the defendant notifying the defendant of the claimant's intention to close the portion of the dirt road leading to the defendant's road which passed through the claimant's leasehold land.
14. The claimant gave the defendant six months' grace period to create a new access road to his lodge.
15. The defendant has, however, until the time the claim herein was filed in November, 2016, not shown any interest to construct his own access road outside the claimant's piece of land.
16. On 12<sup>th</sup> May, 2016, the defendant took out an action for land encroachment against the claimant before the Liwonde Magistrate Court in civil cause number 108 of 2016.
17. The land which both the claimant and the defendant are occupying is public land hence only the High Court has jurisdiction over the alleged land encroachment and not a Magistrate Court.
18. The claimant hence commenced judicial review proceedings in Judicial Review case number 46 of 2016 against the decision of the First Grade Magistrate Court to preside over a matter concerning public land.
19. Events in the judicial review cause number 46 of 2016 taken out by the claimant were overtaken by the defendant who on 5<sup>th</sup> July, 2016

filed an application for leave to apply for judicial review of the Minister of Lands, Housing and Urban Development decision to grant a lease to the claimant on the ground that the leased land encroaches on the defendant's land and further that the lease blocks a public road which gives access to the defendant's lodge. This was in judicial review case number 56 of 2016 which was before Justice Potani.

20. The defendant was granted leave to commence judicial review proceedings and the decision of the Minister of Lands, Housing and Urban Development granting the claimant a lease was stayed pending the hearing of the judicial review application. The defendant claimed that the lease encroached on his land and blocked a public road that passed through the claimant's piece of land.
21. The defendant's lawyers wrote the claimant notifying it of the order of the High Court staying the lease on 10<sup>th</sup> July, 2016.
22. The claimant applied to be added as a party to the judicial review proceedings and by an order dated 13<sup>th</sup> September, 2016 the claimant was added as a party to the judicial review proceedings.
23. The judicial review proceedings which the defendant commenced were set for hearing on 26<sup>th</sup> October, 2016 at 11.00hours before Justice Potani.
24. On the 26<sup>th</sup> October, 2016, neither the Attorney General, representing the Minister of Lands, Housing and Urban Development, nor the defendant herein who had commenced the judicial review proceedings appeared for the hearing.
25. The application for judicial review was therefore dismissed and the injunction against the decision of the Minister of Lands, Housing and Urban Development granting a lease was consequently discharged.
26. The defendant's lawyers were duly served with a copy of the order of dismissal of the judicial review and they acknowledged service of the same.
27. Despite the fact that the defendant was duly served with a copy of the order vacating the injunction against the grant of lease, the defendant, his agents, servants and visitors continue trespassing over

the claimant's land by passing through or crossing or traversing the claimant's piece of land by foot or by motor vehicles.

28. There is a lot of space that the defendant can construct an access road from the main road to their lodge without trespassing on the claimant's piece of land but the defendant is opting to be in conflict with the claimant without constructing their own access road on the available land.
29. The claimant offered to foot the cost of putting a new entrance gate on the Liwonde National Park perimeter fence for the defendant's access road to their lodge but the defendant was uninterested in this proposal.
30. The conduct of the defendant by continuing to trespass onto the claimant's land is interfering with the claimant's right to ownership, use and free enjoyment of their piece of land comprised in Title number 783 Liwonde Township in Machinga District.
31. The defendant continues to trespass on the claimant's land even though the defendant is fully aware that the claimant has a valid lease over the 13.467 hectares of leasehold known as piece number 783 at Liwonde Township in Machinga in Southern Malawi and that the judicial review proceedings that the defendant commenced against the grant of the lease to the claimant and the injunction staying the lease were dismissed.
32. The continued trespass is affecting our business in the following ways
  - 32.1. There is noise emanating from the vehicle passing through our piece of land belonging to the defendant, his servants, agents and visitors.
  - 32.2. There is dust emanating from the cars driven by the defendant, his servants, agents and visitors as they drive across the claimant's land.
  - 32.3. The claimant is currently wasting a lot of business time and money attending to court because of the several court cases that have commenced due to the trespass by the defendant, namely,
    - 32.3.1. Liwonde FGM civil case no. 108 of 2016

- 32.3.2. High Court PR Judicial Review case no. 46 of 2016
- 32.3.3. High Court PR Judicial Review case no. 56 of 2016
- 32.3.4. And the current action.
- 32.4. The claimant is failing to develop and construct new structures on the leased land because part of the land the claimant intends to construct new structures is being continuously trespassed by the defendant.
- 33. Whenever the claimant closes the road, the defendant and his servants or agents violently invade the claimant's property and abuse and harass the claimant's employees.
- 34. Due to the matters aforesaid, the claimant has suffered loss and damage as particularized in paragraph 32 above.
- 35. And the claimant claims:
  - 1) A declaration or order that the defendant has trespassed on and interfered with the claimant's rights of ownership, peaceful possession, use and enjoyment of the piece of land comprised in Title no. 783 at Liwonde Township in Machinga District.
  - 2) A declaration or order that the claimant is entitled to damages for trespass and aggravated damages for trespass of the piece of land comprised in Title no. 783 at Liwonde Township in Machinga District.
  - 3) An order of a permanent prohibitory injunction restraining the defendant, his servants, agents or visitors from trespassing on and interfering with the claimant's rights of ownership, peaceful possession, use and enjoyment of the piece of land comprised in Title no. 783 Liwonde Township.
  - 4) An order that the defendant pays cost of the action.

3. The defendants filed a defence and counterclaim as follows:

- 1. The defendant refers to paragraphs 1 and 2 inclusive of the claimant's statement of case (hereinafter referred to as CSC) and neither denies nor admits the matters stated therein.

2. The defendant refers to paragraph 3 of the CSC and admits the same save that the claimant secured the said land through deception and dishonesty using a third party.

Particulars

- a. The said piece of land was first allocated by Chief Kaudzu to the defendant through a third party who was the defendant's employee at the material time.
- b. The claimant's Director who had been a guest at the defendant's lodge connived with the third party and duped Chief Kaudzu into allocating the land to the duo.
3. The defendant refers to paragraphs 4,5 and 6 of CSC and makes no comment thereon, save that up to that point, the claimant believed the land was customary, and at all material times the defendant honestly believed that the land was customary.

Particulars

- a. There are villages including Kaudzu Village settled on the land since time immemorial.
- b. The Government is aware of and recognizes the villages occupying the land.
- c. The defendant had made inquiries about the status of the land and had been advised that Chief Kaudzu was in charge of the land as customary land.
- d. The defendant, just like the claimant, entered into some lease agreements with Chief Kaudzu on the strength of the advice and presence of villages.
- e. Defendant's lease agreement was endorsed by the Traditional Authority of the area and the Commissioner of Machinga District.
- f. Despite knowledge of occupation of the land by various individuals, the Government has not taken steps to repossess the land.
4. The defendant denies the matters stated at paragraphs 7 and 8 of CSC and puts the claimant to strict proof thereof.

5. Without prejudice to paragraph 4 hereof the defendant avers that there already existed a public right of way used by villagers since time immemorial to access Likwenu river, the road was developed on the right of way by public authorities, and the defendant has simply been maintaining the road and using it as such. Further, the road was developed by public authorities in replacement of another one which the claimant had blocked use of.
6. The defendant refers to paragraph 9 of CSC and denies the same.
7. Defendant refers to paragraph 10 of CSC; admits that the land is public; admits that some piece of land was surveyed at the instance of the claimant; but avers that the claimant acted dishonestly and fraudulently in demarcating the land for purposes of obtaining the lease.

#### Particulars

- a. Claimant surveyed a larger piece of land than had been allocated to it.
- b. At the time of initial allocation, Chief Kaudzu had clearly noted the right of way to the claimant and demanded to be present when claimant would survey the land for lease purposes.
- c. Claimant went behind Chief Kaudzu and had the land surveyed.
- d. In surveying the land, claimant poached a further piece of land in which the defendant has an interest.
- e. In surveying the land, claimant misled or connived with surveyors into not documenting the public right of way as an easement.
8. Save as admitted at and under paragraph 9 hereof, the defendant denies the matters stated in paragraph 10 of CSC and puts the claimant to strict proof thereof.
9. Defendant makes no comment on the matters stated in paragraphs 11 and 12 of CSC, save that the claimant processed its lease dishonestly with the aim of poaching land in which the defendant has an interest and blocking the only feasible access way.



10. Defendant admits the matters stated in paragraphs 13 to 15 of CSC inclusive, save that the continued use of the road is in the nature of a public right of way and as of necessity which shall be proved at trial.

11. Defendant refers to paragraphs 16 to 26 of CSC and avers that:

- a. Until the claimant's judicial review against the defendant's case before the Liwonde Magistrate Court, the defendant honestly believed that the land was customary.
- b. Defendant commenced his own judicial review after noting the nature of the land and the dishonest means by which the claimant had surveyed the land and caused the Minister to grant the lease without taking into account existing interest and easements.
- c. The defendant's judicial review was dismissed for non-attendance and an application for restoration was made, heard and a ruling is pending to date.

12. Defendant refers to paragraphs 27 to 31 of CSC, admits continuing use of the road in question, but:

- a. Denies the matters stated at paragraph 28 of CSC and puts the claimant to strict proof thereof.
- b. Asserts that the continued use is in the nature of a public right of way.
- c. Avers that the right of way is further as of necessity as shall be proved at trial.
- d. Avers that the claimant's suggestion of an alternative private access road is in bad faith.

#### Particulars of bad faith

- i. Claimant knows that the grounds surrounding the defendant's lodge are swampy and unsuitable for a private access road.
- ii. Claimant knows that the current road which is also a public right of way is on the only higher ground that can feasibly accommodate the right of way.

- iii. Claimant knows that the road is a public right of way as he was clearly informed by Chief Kaudzu to maintain it as such.
- iv. Claimant deliberately poached the further piece of land across the public right of way in which the defendant has an interest with the aim of annexing the public right of way and making it impossible for the defendant to access his lodge and the public access to access Likwenu river.
- e. Denies that the continued use of the public right of way interferes with claimant's rights, and maintains that the lease upon which the purported rights are based is void for fraud and the defendant shall seek appropriate remedies by way of counterclaim.

13. Defendant refers to paragraph 32 of CSC and denies the matters stated therein and puts the claimant to strict proof thereof. Defendant further avers that the claimant's bad faith and ill-motive are responsible for the multiple court proceedings including malicious criminal prosecution of the defendant and his employees which was dismissed by the Magistrate Court.

14. Defendant refers to paragraph 33 of CSC and pleads that the same is *res judicata* as the same allegation was made in the criminal proceedings which was dismissed after full trial. Alternatively, and without prejudice to the defence of *res judicata*, the defendant denies the allegations and puts the claimant to strict proof thereof. Further, defendant avers that it is the claimant who has been harassing the defendant's employees and taken several steps to frustrate the defendant's business.

## Particulars

- a. Claimant dishonestly took over land initially allocated to the defendant.
  - b. Claimant fraudulently surveyed the land and demarcated for itself a larger piece of land than had initially been allocated by Chief Kaudzu and poached land in which the defendant has an interest.
  - c. Claimant severally blocked the only feasible public right of way by digging trenches and building walls across the road.
  - d. Claimant attempted to subvert the course of justice by attempting to bribe a crucial witness in the defendant's case against the claimant before the Liwonde Magistrate Court.
  - e. Claimant has been misdirecting defendant's guests to its lodge.
  - f. Claimant has been blocking defendant's guests from accessing the defendant's lodge.
  - g. Claimant has, in blatant disregard of a court order made by the Zomba Chief Resident Magistrate Court, menaced violence against defendant's employees and prevented them from carrying out necessary repair works on the road.
15. The loss and damage particularized at paragraph 32 and the reliefs outlined at paragraph 35 of CS are denied and the claimant is put to strict proof thereof.
16. Save as admitted herein, the claimant's allegations are denied as it the same were set forth herein and traversed *seriatim*.

## COUNTERCLAIM

17. Defendant repeats the foregoing and maintains that the claimant's lease was obtained through bad faith and dishonesty as to the extent of the land in which the claimant acquired an interest through

allocation by Chief Kaudzu and thus fraudulently, and the same is invalid to that extent.

And the defendant claims

- a. A dismissal of the claimant's case *in toto*.
- b. A declaration that the claimant's lease is void to the extent that the said lease covers the further piece of land poached by the claimant in which the defendant has an interest.
- c. An order amending the deed plan for the claimant's lease to exclude the further piece of land poached by the claimant.
- d. A declaration that the road used by the defendant, his employees, his guests and members of the public to access his lodge, Likwenu river and surrounding areas is otherwise a public right of way.
- e. An order for amendment of the deed plan for the claimant's lease to include the public right of way to the extent that the same may still be covered by the lease as may be revised.
- f. Costs of this action.

4. The claimant filed a defence to the counterclaim and stated as follows:

- 1) The claimant refers to paragraph 17 of the counterclaim and denies the contents of the said paragraph and puts the defendant to strict proof thereof.
- 2) The claimant pleads that:
  - i. The defendant is occupying public land without any valid grant, lease or other disposition or legal authority from the Minister of Lands;
  - ii. The defendant is in illegal possession of public land and cannot therefore claim to have any interest which does not derive from the Minister of Lands who has exclusive authority over public land;

- iii. Chiefs do not have any authority to make any disposition of public land hence they cannot grant any right or interest in public land to any person.
  - 3) The claimant claims a dismissal of the counterclaim.
  - 4) Costs of this action.
5. The issues for this Court's determination on the claimant's claim are essentially whether the defendant indeed encroached on the claimant's land and whether the claimant is entitled to the reliefs sought. On the defendant's counterclaim, the issues for determination are whether the defendant has rights within the leased land due to the alleged dishonesty of the claimant in obtaining the lease over part of the land on which the defendant has an interest and whether the defendant has rights to the alleged public right of way as contended by the defendant and whether the defendant is entitled to the reliefs sought including variation of the claimant's lease.
6. As correctly submitted by the claimant, and regrettably the defendant never filed submissions after trial despite making undertaking to do so and despite several reminders from this Court, the burden of proof lies on he who asserts the affirmative, in this case the claimant with regard to its claim and on the defendant with regard to his counterclaim. And the standard of proof in these civil matters is on a balance of probabilities. See *Nkuluzado v Malawi Housing Corporation* [1999] MLR 302 and *Miller v Minister of Pensions* [1947] All ER 372.
7. The claimant called two witnesses to prove its claim. These witnesses were its Managing Director, Frederick Anton Lampe and a Lands Officer Mr. Phillip Manzi. On his part the defendant testified and also called two other witnesses, namely. Lisa Robertson and Macdonald Makanjira. The evidence of the parties is laid down before this Court considers the submissions of the claimant in this matter.
8. Frederick Lampe stated that he is the claimant's Managing Director.
9. He stated that the claimant is a limited liability company registered in Malawi under the Companies Act which is in the business of providing hospitality services to tourists who visit Liwonde National Park and surrounding areas. And that the defendant is also in the hospitality business and owns a lodge named Bushman Baobab Lodge which is adjacent to the claimant's lodge.

And that both the claimant's and defendant's lodges lie on public land which is situated within Liwonde National Park.

10. He then stated that in or around 2011, the claimant secured a piece of land from Chief Kaudzu and entered into an agreement with Chief Kaudzu which he exhibited and marked LSC1. He indicated that, as a business, the claimant wanted to be secured in respect of the said piece of land and he went to the Ministry of Lands, Housing and Urban Development to inquire about the legal status of the land on which the claimant wanted to build the business and he was told that the said piece of land is public land.
11. He explained that upon noting that the land was public land, he was advised that the best course of action was to apply to the Minister of Lands, Housing and Urban Development for a lease of the said piece of land. And that in or around February, 2011, the claimant applied to the Minister of Lands for a lease of the 13.467 hectares of land next to Liwonde National Park. He exhibited the application for lease and marked it LSC2.
12. He then stated that the land in question was surveyed and he exhibited the deed plan for the same marked as LSC3. He then indicated that the deed plan shows that there was no public road cutting across the leased piece of land and that all the land surrounding the claimant's leased piece of land is public land.
13. He then indicated that the claimant was offered a lease in February, 2016 and he exhibited the offer letter marked LSC4.
14. He then asserted that in or around 2013, the defendant constructed a road cutting across the claimant's piece of land going to the defendant's lodge. And that the road was constructed by the defendant as an access road to the defendant's lodge but that the land on which it was constructed was land that belonged to the claimant herein and that road was constructed without the claimant's consent.
15. He asserted further that despite repeated demands to the defendant to construct an access road outside the land belonging to the claimant, the defendant without the claimant's consent and with willful defiance continues to pass through, traverse and drive across the claimant's piece of land.
16. He then stated that around April, 2016, Minister of Lands granted the claimant a lease for 50 years and he exhibited a copy of the lease marked as LSC 5. He indicated that the land leased to the claimant became Title number 783 at Liwonde Township in Machinga District, Southern Region.

17. He indicated that, after being granted a lease, on 12<sup>th</sup> May, 2016 the claimant wrote a letter to the defendant notifying the defendant of the claimant's intention to close the portion of the dirt road leading to the defendant's road which passed through the claimant's leasehold land. He indicated further that the claimant gave the defendant six months' grace period to create a new access road to his lodge. He exhibited the letter marked as LSC6. He observed that the defendant, however, did not shown any interest to construct his own access road and continued to cross over the claimant's piece of land without the claimant's consent.
18. He then stated that on 12<sup>th</sup> May, 2016, the defendant took out an action for land encroachment against the claimant before the Liwonde First Grade Magistrate Court in civil cause number 108 of 2016. He exhibited a copy of the record of the proceedings marked as LSC7.
19. He observed that the land which both the claimant and the defendant are occupying is public land hence only the High Court has jurisdiction over the alleged land encroachment and not a Magistrate Court. And that the claimant then commenced judicial review proceedings against the decision of the First Grade Magistrate Court to preside over a matter concerning public land. He exhibited a copy of the leave that was granted marked as LSC8.
20. He indicated that events in the judicial review taken out by the claimant were overtaken by the defendant who on 5<sup>th</sup> July, 2016 filed an application for leave to apply for judicial review of the Minister of Lands, Housing and Urban Development decision to grant a lease to the claimant on the ground that the leased land encroaches on the defendant's land and further that the lease blocks a public road which gives access to the defendant's lodge.
21. He explained that the defendant was granted leave to commence judicial review proceedings and the decision of the Minister of Lands, Housing and Urban Development granting the claimant a lease was stayed pending the hearing of the judicial review application. And that the defendant claimed that the lease encroached on his land and blocked a public road that passed through the claimant's piece of land. He exhibited a copy of the order marked as LSC9. He added that the defendant's lawyers wrote the claimant notifying it of the order of the High Court staying the lease on 10<sup>th</sup> July, 2016. The letter is exhibited marked LSC10.

22. He then indicated that the claimant applied to be added as a party to the judicial review proceedings and that by an order dated 13<sup>th</sup> September, 2016 the claimant was added as a party to the judicial review proceedings. He exhibited a copy of the order marked LSC11. He observed that the judicial review proceedings which the defendant commenced were set for hearing on 26<sup>th</sup> October, 2016 at 11.00 hours before Justice Potani. He observed further that the Attorney General filed a comprehensive sworn statement disputing the defendant's claims. He exhibited the sworn statement marked as LSC12.
23. He then asserted that on the 26<sup>th</sup> October, 2016, neither the Attorney General, representing the Minister of Lands, Housing and Urban Development, nor the defendant herein who had commenced the judicial review proceedings appeared for the hearing. And that the application for judicial review was therefore dismissed and the injunction against the decision of the Minister of Lands, Housing and Urban Development granting a lease was consequently discharged. He exhibited a copy of the proceedings dismissing the judicial review application marked as LSC13. He added that the defendant's lawyers were duly served with a copy of the order dismissing the judicial review application as is clearly acknowledged on exhibit LSC13.
24. He asserted that despite the fact that the defendant was duly served with a copy of the order vacating the injunction against the grant of lease, the defendant, his agents, servants and visitors continue trespassing across the claimant's piece of land.
25. He then noted that there is a lot of space that the defendant can construct an access road from the main road to their lodge without trespassing on the claimant's piece of land but that the defendant is opting to be in conflict with the claimant without constructing their own access road on the available land.
26. He asserted that the claimant offered to foot the cost of putting a new entrance gate on the Liwonde National Park perimeter fence for the defendant's access road to their lodge but that the defendant was uninterested in this proposal.
27. He posited that the conduct of the defendant by continuing to trespass onto the claimant's land is interfering with the claimant's right to ownership, use and free enjoyment of their piece of land comprised in Title number 783 Liwonde Township in Machinga District.
28. He then asserted that the defendant has through himself, his workers, guests and other agents:



- a) been crossing over the claimant's property, by car, by foot, by truck and bike without the claimant's consent repeatedly and in case of employees, in the morning, at lunch and in the evening.
- b) Created and used various paths on the claimant's land
- c) Insulted the him and his staff
- d) Threatened to send robbers to the claimant's lodge
- e) Threatened to burn the claimant's lodge
- f) Called him a foreigner and a scum and a dog
- g) The defendant has in person tried to run over him with his car
- h) Another member of staff of the defendant, namely, Mr. Ignacio, had also tried to run over him with a car
- i) Lisa Robertson the defendant's employee pushed him against the fence.

29. He then asserted that due to the defendant's actions of trespass, the claimant has been affected in several ways:

- a. The cars and other types of vehicles that cross over the claimant's piece of land to the defendant's lodge make noise that interferes with the peace and silence at the claimant's lodge
- b. The cars and other types of vehicles that cross over the claimant's piece of land to the defendant's lodge create dust that interferes with the peace and silence at the claimant's lodge
- c. The cars and other types of vehicles that cross over the claimant's piece of land to the defendant's lodge make noise that agitates the wild animals in the park and on several occasions wild animals have come running through the claimant's lodge running away from cars going to the defendant's posing a danger to the lives of the claimant's guests and staff
- d. The road that the defendant has constructed on the claimant's piece of land has prevented the claimant from developing that part of the land and is preventing the growth of the claimant's lodge.

- e. The claimant's guards who man the gate are forced to be attending to the defendant, his guests and staff who are frequently coming in and out of the defendant's lodge.
- f. The claimant, its guests and staff have been denied peaceful enjoyment of the claimant's leasehold property due to the conduct of the defendant herein.

30. And the claimant claims the reliefs indicated in its statement of case.

31. This Court visited the disputed land. And the claimant's witness pointed out to this Court the boundary on the disputed side of the land. He showed this Court a number of beacons demarcating the claimant's land on the side adjoining where the defendant's lodge is.

32. He pointed out one beacon demarcating the claimant's land which beacon is located on the right hand side after you enter the gate into the Liwonde National Park. He also pointed out a footpath which he said the defendant's employees use over the claimant's land. Then, he pointed out the second beacon that is near a stream to the left of the National Park entrance gate when you face inside the National Park. The boundary on this side where the two beacons are located runs parallel to the fence to the National Park on where the entrance gate is. He then explained that, from the second beacon, the claimant's land boundary runs parallel to a stream which is located on the left as you face inside the Park, and moves in a straight line demarcating the claimant's land and the land occupied by the defendant for about 300 metres. He also pointed out the next beacon after the 300 metres.

33. He then indicated that outside the National Park fence is a public road that runs beyond the claimant's land boundary up to some baobab trees from which point there is a stretch of about five to ten metres wide land that is always dry and which lies beyond the stream he alluded to and which the defendant can use for access to his property from outside the National Park perimeter fence. This Court observed that this stretch of land lies between the stream and the swamp beyond the claimant's land but on the side of the defendant.

34. Fredrick Lampe then said that during the rainy season the Likwenu river that is nearby the claimant's and defendant's land overflows but that the overflowing water follows the stream and the five to ten metres wide stretch

of land he alluded to remains dry. That stretch of dry land was visible to this Court.

35. He reiterated pointing out a path that the defendant's employees use on foot, bicycle and motorcycles over the claimant's land from the National Park entrance gate turning left and trespassing over the claimant's land.
36. He indicated that when the road to the defendant is closed by elephants the defendant drives over his land to the entrance gate. He added that one time, an employee of the defendant named Lisa asked her driver to push him with the defendant's vehicle.
37. He then pointed out the claimant's guard's house that is located on the left hand side once one enters the National Park gate. He noted that the defendant claimed that this house blocked the access road to the defendant's lodge.
38. He then observed that the National Park entrance gate is in the middle of the claimant's property and that guests of the defendant hoot at the gate to be let in but that the defendant is far from the gate and cannot hear the said guests.
39. He then indicated that the claimant's camp site is located to the right of the road to the defendant's lodge and that cars speed on the same and send animals fleeing dangerously to the claimant's campsite. He pointed out two culverts put by the defendant on the road to his lodge. He noted that the area over which the culverts are gets wet and marshy during the wet season.
40. He then asserted that the road to the defendant's lodge passes over the claimant's best land which the claimant cannot develop as a result. He added that despite a court injunction the defendant still passes on the road.
41. He then observed that the defendant's signage still points at the claimant's road and gate. He also indicated that the defendant's employees insult him and others from the claimant as they pass on the road to the defendant's lodge over the claimant's land. As this Court was taking evidence he pointed out the defendant's Land rover that passed by and indicated how noisy it was and added that sometimes the defendant's vehicle veers off the road to the defendant's lodge onto the claimant's land to the road near the claimant's gate.
42. He then indicated that he is a Wildlife manager and came to Malawi to look for work opportunity at Majete Wildlife Reserve. And that he came to Liwonde National Park and that then there was only Mvuu Lodge when he saw an opportunity for business. He indicated that the Chief found him on the land and visited him and offered him a lease. That was his evidence in-chief.

43. During cross-examination, he stated as follows. He clarified that he had gone and talked to the Chief who then visited him several times. He indicated that he talked to the Chief in the company of Mavuto Maxwell who is a nephew to the Chief. He also indicated that a certain man named Botha was not present at that time.
44. He then indicated that during the criminal trial the Chief pointed out the boundaries of the claimant's land as they appear in the claimant's lease but he later said he did not recall the Chief doing so. He then agreed that the Chief testified after him in the criminal matter as a defence witness. He however had earlier stated that he never observed the Chief testify in the criminal matter since he was yet to testify after the Chief. He then said the Chief actually testified after him in the criminal matter.
45. He then stated that when he alluded to the best land he referred to the higher ground that is along the road to the defendant's lodge. At the second culvert from the Park entrance gate on the road to the defendant's lodge, he stated that the Likwenu river overflow runs to the stream and that Likwenu river is to the right side of the right as you face the direction to the defendant's lodge. He added that the flood water from Likwenu river runs under and over this second culvert which is located on a low lying area. He indicated that some bricks and quarry stones next to the road where the claimant's which were meant to be used to build a guard house next to the road on the claimant's boundary so that the guard would stop those passing on the road. He denied that the claimant dug a trench across the road to the defendant's lodge.
46. He then noted that between the first and second culvert on the road to the defendant's lodge from the National Park entrance gate there is some low lying area over which sometimes water runs across from the claimant's property.
47. At the first culvert on the road to the defendant's lodge, he pointed out that sometimes during the rainy season water from Likwenu river passes there. He indicated that the water does not pass over the claimant's main structures. He then stated that water settles on low lying areas for a while across from the culvert.
48. He then observed that there is a borehole which the defendant made in 2014 and 2015 next to the claimant's guard's house which the claimant built the

previous year before the trial indicating that the borehole is on the claimant's land.

49. He then noted that the swampy low lying areas meander and that the higher land next to the swamp is on the claimant's side according to the lease and the Chief's allocation of the land to the claimant.
50. He then indicated that when elephants block the road the defendant's employs pass over the swamp but not that at the time of trial some water had collected there after some recent heavy rains.
51. He then observed that the meandering swampy stream goes all the way near the baobabs and connects to a march beyond. He however stated that the defendant can construct his access road on the five to ten metres stretch of dry land he alluded to and have a road constructed over the stream. He added that beyond the baobabs near the perimeter fence was a marsh where a road cannot be made. He then indicated that there is a public road running outside the National Park perimeter fence going to the baobab trees and leading to the Shire River.
52. He then reiterated that the defendant's employees pass on a footpath over the claimant's land.
53. He then stated that he came to settle on the land in September, 2010. He added that he stayed on the land for some time and that then the defendant's lodge was still under construction and that nobody was living on the claimant's land then. He then said the claimant built the guard house at the entrance gate in 2016 after getting its lease herein. He then stated that the National Park owns the entrance gate but that the claimant's guard man's it to open for the claimant's visitors and personnel. He indicated that the perimeter fence of the National Park replaced the old one and that previously there was no gate. He added that the National Parks guards arrested people who tried to pass through the gate.
54. He then stated that a certain man named Botha was an ex-employee of the defendant. And that Botha said he would help invest in the claimant for a year. He however noted that Botha had no money and left for the Republic of South Africa after a year. He indicated that Botha stayed on his property for some time.

55. He then stated that when he arrived on the claimant's piece of land he never found the defendant's employees watering young trees there. He did not recall such employees being chased away.
56. He then indicated that between 2010 and 2016 when the claimant got a lease to the land, the claimant was allowed to stay on the land by Ministry of lands who communicated verbally and that he pitched tents during that period. He stated that he waited for the lease to do developments. When referred to the offer of a lease to the claimant from Ministry of Lands for the land herein he stated that the offer never alluded to the alleged prior verbal communication to occupy the land. He then said that he occupied the land initially upon the agreement with the Chief. He indicated that the lease from Ministry of Lands was preceded by the agreement with the Chief.
57. He then indicated that he filed an application for lease on behalf of the claimant end 2010 or in January, 2011. This is at page 40 of trial bundle and he said it may be missing a page on its back. He added that he indicated on the application that he was a director of the claimant together with one Botha. He was then referred to another application for lease for the claimant for the land which is at page 70 of trial bundle and indicated that this was perhaps filed by the District Commissioner's office because it is not in his handwriting and it is not the one that went to Ministry of Lands. He indicated that the entries on this form are correct and shows that the land in question was already occupied. And that the application is dated 11<sup>th</sup> February, 2011. He indicated that he thought the Ministry of Lands received this application and was used to process the application.
58. He was then referred to a lease agreement between the claimant and Chief Kaudzu and indicated that it is dated 24<sup>th</sup> February, 2011 as contained at page 39 of the trial bundle. He noted that some dates are not in his handwriting except the date of 2<sup>nd</sup> August, 2010, the date of commencement of the lease. He indicated that he signed on this agreement and was not sure whether the date of the agreement was already pre written.
59. He reiterated that when he came onto the land he thought it was customary land as stated by the Chief. He then stated that when he came onto the land he did not know whether it customary or public land and came with his tents and then went about to find out how he could occupy the land. And that he later applied for a lease on behalf of the claimant. He reiterated that the land he was

dealing with was one covered by the beacons he had pointed out to this Court. He added that he supplied the map of the area in respect of the lease application.

60. He was referred to a map at page 72 of the trial bundle and indicated that he recognized the said map that was prepared by a surveyor referred to the claimant by the District Commissioner's office. He indicated that the surveyor is stated to be Mr. Chimbiya but he cannot recall this person. He added that the lease was granted for the same area applied for.
61. He was then referred the lease and the deed plan at pages 44 and 51 of the trial bundle respectively. And he stated that the deed plan was prepared by the Surveyor General and that there was a second survey of the claimant's land. He indicated that he did not show the surveyors the claimant's land boundaries this time but that the claimant's manager Mr. Timothy Banda, who came on the land in 2011 after he occupied the land and was there at the time the Chief went through the land boundaries, went around the land boundary with the second surveyors from Ministry of Lands. He thought that the second surveyors used a GPS from the first survey. He agreed that the sketch map on lease application and the deed plan on lease at pages 72 and 51 of the trial bundle have different shapes. He also agreed that some beacons on the two drawings do not correspond. He attributed this to the use of simple equipment on sketch map drawing and use of GPS equipment on the deed plan. He noted that there were more way points on the sketch map than on the deed plan.
62. He then stated that the road from the National Park gate to the defendant's lodge was built in 2013 by the defendant. He indicated that he was around when this happened. He indicated that he had no knowledge that the Government's Malawi Social Action Fund took part in the construction of this road. He also denied that previously there was a footpath where the road is now. He indicated that perhaps there was an animal path. He then indicated that there was a footpath from the public land outside to the gate and a road going to the claimant's campsite which the defendant was using past the claimant's buildings. He indicated that the defendant assaulted a guard of the claimant and the Chief told the defendant to stop using the road past the claimant's buildings and that the defendant constructed the road in contention. He then stated that after the claimant got a lease it wants the defendant to stop using this contentious road. He added that it was not convenient for the

defendant to use the road past the claimant's buildings as it passed right through the claimant's lodge.

63. He then indicated that the defendant can make an access road at several places and that even on the current road that is in contention, the defendant passes several swampy places since water runs through three places on the said road. He then said he does not know at how many places the defendant can build a road outside the claimant's land. He however said he cared that the defendant made a road outside the claimant's land. He indicated that he even offered the defendant assistance with installing an access gate and building a road outside the claimant's land and that the offer was made through the claimant's counsel though not in writing.
64. He then stated that he could see villages outside the National Park gate and noted that there is public land. He was referred to the Malawi Land (Control of Land) Order, 1968 and said it created a forest reserve. He indicated that this Order created a forest reserve in Liwonde. He said it did not create Liwonde Township. He also said he could not say that a kilometer from where this Court sat at the gate of the National Park was public land. He added that the Ministry of Lands said where the claimant's land is located is forestry land and therefore public land. He elaborated that Likwenu River is the National Park Boundary on the other side of the land and that coming to the claimant's land side was once a forest reserve until the claimant leased the same. He reiterated that the Ministry of Lands said the claimant's land was previously part of the forest reserve. He indicated that Ministry of Lands dealt with Ministry of Forestry who said the land was thought to be customary but was later confirmed to be public land.
65. He then stated that the claimant's lease is for 50 years starting from March, 2016 and he expressed lack of any anomaly in the said lease.
66. He then indicated that the defendant commenced judicial review proceedings against the Ministry of Lands and the proceedings got dismissed because the defendant did not attend a hearing. He noted that the Attorney General filed an affidavit in opposition to the judicial review proceedings but did not know the date of filing. He noted that the order dismissing the judicial review proceedings is dated 26<sup>th</sup> October, 2016.
67. He then stated that in 2018, Lisa the defendant's employee pushed him against the electrified National Park perimeter fence and he got some shocks for a few



- seconds though he never got burnt due to low wattage of the electric fence as against the 1200 volts. He however said he is not a physicist.
68. He then asserted that the defendant's case of land encroachment was dismissed through a judicial review. He also said the Chief who was the defendant's witness in that encroachment case against the claimant demanded K1 million kwacha for him not to testify against the claimant which the claimant refused to pay.
69. During re-examination, he stated that he cares about the defendant's access road so that the claimant can enjoy its property and develop the same. He reiterated that he first came to the land and saw a business opportunity after Mvuu Camp. He added that he put up tents and got a lease from the Chief. And that later he went to the District Commissioner's Office who advised him that the land was public land and that the claimant should deal with Ministry of Lands. That marked the end of his evidence.
70. The second witness of the claimant was Phillip Manzi who had been Acting Commissioner of Lands for the Southern Region for five months at the time of the trial.
71. By his sworn statement which was his evidence in chief, he stated that his evidence was based on his knowledge from his office and from a perusal of the claimant's file at his office, documents prepared by his predecessor in this matter and from visiting the land in issue herein.
72. He then indicated that on 22<sup>nd</sup> March, 2011, his office received a recommendation to process an application for a lease of 13.467 hectares of land to be used for commercial purposes by the claimant. He exhibited a copy of the recommendation with the accompanying application marked PM1.
73. He then explained that on 27<sup>th</sup> March, 2011, his office verified that the land in question is public land located within Liwonde Controlled Area and was declared public land pursuant to Government Notice no. 166 of 1968 a copy of which he exhibited marked PM2.
74. He then stated that records in his office showed that the land was available for allocation and was on sketch plan number 92/68 registered in the deeds registry as deed number 3443 a copy of which he exhibited marked PM3.
75. He then elaborated that on 4<sup>th</sup> April, 2011, his office got approval from the Regional Commissioner for Physical Planning in Zomba to process the lease

application for the claimant and exhibited a copy of the approval marked exhibit PM4.

76. He explained that prior to giving approval for processing of a lease, the Regional Commissioner for physical Planning checks among other issues, whether the land in question is encroaching on public roads, road reserves or access roads and whether it is part of a forest reserve. He indicated that the District Forestry Officer for Machinga District confirmed with his office, on 12<sup>th</sup> February, 2013, that the land in issue was not part of forest reserve. He exhibited a copy of the confirmation marked exhibit PM5.
77. He then indicated that his records office visited the land herein and reported on 5<sup>th</sup> June, 2013 and also confirmed that the land in question is not part of forest reserve and that it does not encroach on a public road, road reserve or access road and reported accordingly per copy of report exhibited and marked PM6.
78. He then stated that by reason of the reports, his office made a recommendation to the Secretary for Lands for an approval of the claimant's application for a lease of 13.467 hectares of land at the Southern border of Liwonde National Park. He indicated that on 22<sup>nd</sup> April, 2016 the Minister of Lands granted approval of the application and granted the claimant a lease of 50 years.
79. He asserted that the claimant has a valid registered lease with the Minister of Lands which was registered as Deed number 89018 on 26<sup>th</sup> April, 2016 a copy of which he exhibited marked PM7. He elaborated that the deed plan no. 645/2016 appearing within the lease was prepared by a registered land surveyor and approved by the Surveyor General and shows that the claimant's leased land is public land known as plot number 783 within Liwonde Controlled Area as shown on the map sheet Liwonde 1535 A and sketch plan number 92/68.
80. He then explained that the land on which both the claimant's and defendant's lodges lie is public land and that it is only the Minister of Lands who has powers to grant a person the right to occupy such land and that Chiefs have no power to allow occupation of such land as is the case for the defendant.
81. He then reiterated that he exhibited documents from his office and also inspected the claimant's land in March, 2021. He indicated that his findings were that beacons were intact as per the deed plan on the lease to the claimant.

He also established that the road in contention to the defendant's lodge was not a public road as it never appeared on the deed plan as such.

82. During cross-examination, he stated that he is a Land Manager qualified in 2011. He reiterated that he made his witness statement based on official documents. He added that he reproduced his predecessor's statement from previously filed court process. He reiterated that he inspected the land in March, 2021. He indicated that then the claimant had requested him to come and verify the issues on the claimant's land.
83. He insisted the land claimant's land is public land and that there is no public road per the maps that he was shown. He indicated that he could not dispute that people inhabited some of the public land in the area of Liwonde outside the National Park entrance gate. He explained that after lengthy habitation for over 12 years, people are left to use such land. He however asserted that people are usually removed from public land. He insisted that the land in issue has been public land since 1968.
84. He then stated that he was neither aware that people were removed from the public land nor was he aware of any enforcement against the defendant. He indicated that his office used the lease application form transmitted from the District Commissioner's office that appeared different from the one filed by the claimant's Managing Director. He then indicated that he could not tell why the sketch map from the claimant's application and the deed plan map are different in this case.
85. He was referred to a map from defence counsel and stated that the said map showed the Liwonde Township boundary to be along the Likwenu River. And he said he could not say whether all the land to the river was for the Liwonde Township or was public land. He however insisted that records showed the land in issue is public land. He then indicated that the forestry officer had mistakenly indicated that land herein as customary land when he wrote to his office. He confirmed that he was not party to the land surveying and cannot say whether the claimant was already in occupation of the land herein. That marked the close of the claimant's case.
86. The first witness of the defendant was Macdonald Makanjira. In his affidavit, which was his evidence in chief, he stated that he was a Ward Councilor for the area where the land in contention is. He then asserted that the road to the defendant's lodge which is in contention is the Kaudzu-Chilinde Road and

that it has always been a public road. He indicated that this road extends from the railway in the vicinity to the defendant's lodge. He elaborated that this road has traditionally been used by the local community to get access to the resources in or nearby Likwenu River and Shire River. He added that this road was constructed out of public funds allocated in the Malawi Social Action Fund Phase 3 project championed by the Public Works Department of Machinga District Council. He indicated that this is a public road and that is why public funds were used on it. He indicated that he was overseer of the project on this road in 2010. He added that the defendant contributed to this road construction and not the claimant.

87. He then stated that he was elected Councilor in 2014 and worked with the Public Works Department. He then stated that in June, 2016 his Department was informed of the dispute herein over the road. He indicated that the Public Works Department resolved to write the claimant to indicate that the road in contention is a public road. He exhibited a copy of the letter marked MDM1. He then confirmed that the land on which the claimant and the defendant are, is public land. He indicated that the land was allocated to both parties and two other erroneously by the Chief as customary land.
88. He indicated that it was only in 2014 that Government started to remove some people from some areas of the public land by which time the defendant had invested heavily in his lodge. He stated that despite knowing that this is public land, the Council where he works still consults Chiefs before making decisions on the land usage. He added that when a lease application is being considered, the Ministry of Lands is required to consult with the Council before making a final decision. He felt that a grave injustice would be done to the defendant if he was evacuated from the land as he invested a lot and employs members of the community. This Court quickly observes on this last point that the case before this Court is not about ejecting the defendant from the public land that he occupies.
89. During cross-examination, he stated that he was previously employed by the claimant and got dismissed from employment due to alleged incompetence.
90. He indicated that there was previously no entrance gate to the National Park at the land in dispute, the National Park perimeter fence was always there.
91. He then asserted that he knew that this case was about trespass to land. He stated that he however was not aware that the claimant had been granted a

lease to the land it was occupying. He added that he now knew that the land in question is public land and that the Minister of Lands is responsible over the same. He added further that Chiefs cannot allocate the public land.

92. He then insisted that the road in contention was a public road because the public used it. He however said he did not mean the road to be a public road as defined under the Public Roads Act which requires public roads to be gazzetted. He said that the defendant helped in maintaining the public road and not construction.

93. He then agreed that the case in this matter is not about evacuating the defendant from the land. He asserted that blocking the road to the defendant means villagers will also be blocked and they complained.

94. During re-examination, he stated that he got dismissed by the claimant because staff members had left their work for lunch after he had been sent to stores and he was blamed for alleged incompetence. He then stated that the defendant maintained the road all the way from the railway outside the National Park by putting culverts through to the National Park entrance gate. That was the end of his testimony.

95. The second witness for the defendant was the defendant himself. He adopted as his evidence in chief, an affidavit that he deposed in February, 2017. In a most weird twist and a first for this Court, the defendant essentially refused to answer questions in cross-examination on his affidavit. He looked and sounded weird at that point. This Court took great exception to his conduct in that regard and warned that he was duty bound to answer questions in cross-examination. Regrettably, for inexplicable reasons best known to himself, the defendant decided to persist in not answering questions in cross-examination. Counsel Theu his lawyer looked on helplessly at that point. And Counsel Maele for the claimant had no choice and was compelled to cease the cross-examination as it was clearly futile. The defendant surprisingly also declined to answer some questions in re-examination stating that he did not know the documents he exhibited and on which his own lawyer sought to re-examine him.

96. In the circumstances, this Court is compelled to attach no weight whatsoever to the testimony of the defendant, in so far as it seeks to prove some contentious claims, as it is utterly unjust that he be allowed to put in evidence

in chief and then essentially refuse to be cross-examined. For that reason, this Court will not belabor itself stating the defendant's testimony here.

97. The next witness for the defendant was Lisa Robertson. She also adopted her affidavit deposed on 14<sup>th</sup> June, 2017 as her evidence in chief and stated as follows. She stated that she is a Malawian citizen and resides in Liwonde Township. She indicated that she has been employed by the defendant since 2008. She indicated that one day, whose date she cannot recall, when the claimant's Managing Director put a different padlock on the National Park entrance gate, she was in the defendant's vehicle with the defendant's driver Ignatius Bob on her way out. She indicated that on the way she found that Fredrick Lampe had parked his vehicle across the road. She stated that the driver passed beside him in the bush on the side of the road. She said that she then found the gate locked upon which a village came and cut the lock. She then said Fredrick Lampe arrived at the scene after following her. She indicated that at this point Fredrick Lampe used expletive words on her shouting also that she should use another road and get out of the claimant's land.
98. She then stated that she is scared of Fredrick Lampe and does not use the road in contention but the bush to move to and from the defendant. She added that Fredrick Lampe tried to run over one of the defendant's night guards with his vehicle and that since then she and others try not to walk on the contentious road herein.
99. She added that she cannot push Fredrick Lampe and get him electrocuted due to his stature as a man. She then said there were several incidents of shouting others being those which happened at the trench Fredrick Lampe dug near the second culvert and at the wall he built to stop cars from passing.
100. She denied creating paths over the claimant's land. She indicated that the paths are used by fishermen and women who collect firewood. She insisted that the defendant's employees only use the road in contention. She also denied threatening to burn the claimant's lodge.
101. She then denied that the defendant's driver wanted to run over Fredrick Lampe with a vehicle. She asserted that in fact it is Fredrick Lampe who stood in front of the defendant's vehicle she was told. She indicated that Fredrick Lampe put humps on the road saying he wanted to reduce vehicle speed. And

that when Fredrick Lampe saw the defendant come in he told the defendant the road was not open to the defendant.

102. During cross-examination, she stated that the incidents she described did not occur on a single day but rather on different days. She indicated that the incidents happened on the part of the road that is on the claimant's land.

103. She then stated that the defendant has been processing a lease for two years. She clarified that she now uses the road that is in contention but said previously Fredrick Lampe was violent and she used to move through the bush where there is a footpath. That was the end of her testimony.

104. The defendant sought to rely on hearsay evidence of another witness who was not in Court but this Court is unable to attach any weight to that evidence as there is no submission by the defendant in that regard to motivate this Court on the weight to be attached to any of that hearsay evidence. That marked the close of the defendant's case.

105. As already indicated, only the claimant filed submissions after the trial in this matter. The defendant did not file submissions despite undertaking to do so through his lawyer and despite several reminders from this Court to the said lawyer. After much waiting, this Court decided to make its determination in this matter in the circumstances as it could not afford to delay this matter further at the instance of the defendant who has behaved in a really bizarre manner not only trial but also pertaining to his submissions after trial.

106. This Court therefore considers the claimant's submissions. The claimant noted the provisions of the Land Act prior to 2016 which was applicable at the time the dispute herein arose. Out of abundance of caution, the claimant also referred to the new successor Land Act of 2016 which is the current law and which contains similar corresponding provisions to its predecessor Act.

107. The claimant observed that section 2 of the Land Act provides that (see also section 2 of the new Land Act (2016):

Public Land means all land which is occupied, used or acquired by the Government and any other land, not being customary land or private land, and includes—

any land held by the Government consequent upon a reversion thereof to the Government on the termination, surrender or falling-in of any freehold or leasehold estate therein pursuant to any covenant or by operation of law; and

notwithstanding the revocation of the existing Orders, any land which was, immediately before the coming into operation of this Act, public land within the meaning of the existing Orders.

108. It also noted that the Public Road means a public road as defined by section 3 of the Public Roads Act.

109. It also observed that section 5 of the Land Act provides that (see also section 12 of the new Land Act (2016):

The Minister may make and execute grants, leases or other dispositions of public or customary land for any such estates, interests or terms, and for such purposes and on such terms and conditions, as he may think fit:

Provided that the Minister shall not make a grant of—

customary land to any person for an estate greater than a lease of 99 years;

any public land or, notwithstanding paragraph (a), any customary land to any person who is not a citizen of Malawi for an estate greater than a lease of 50 years, unless the Minister, in relation to a particular case or class of cases, is satisfied that a greater estate is required for the realization of investment.

The Minister shall, in every grant of a lease of public or customary land, reserve a rack-rent in respect thereof:

Provided that—

the Minister may, in his discretion, reserve a rent which is less than a rack-rent in leases granted under this section to local government or public utility bodies, statutory corporations, Chiefs, missions or religious bodies, scientific and philanthropic bodies, or any other organizations, associations, bodies or undertakings;

where, having regard to all the circumstances of the case the Minister is satisfied that it is neither expedient, equitable or necessary to reserve a rack-rent in any lease granted, or to be granted, under this section, he may, in his discretion, reserve in any such lease a rent which is less than a rack-rent.

110. The claimant also noted that section 10 of the Land Act Provides that (see also section 20 of the new Land Act (2016):



Any person who uses or occupies any public land and is not entitled to such use or occupation by virtue of a valid grant, lease or other disposition made by the Minister under any law for the time being in force at the date of such grant, lease or disposition, shall be liable to a fine of £100 and to imprisonment for six months, and, in the case of a continuing offence, to a further fine of £5 in respect of every day during which the offence continues.

111. On the law of trespass, the claimant observed that the learned authors of Clark and Lindsell on Torts 15<sup>th</sup> Edition para. 22:01 define trespass to land as consisting in any unjustifiable intrusion by one person upon land in possession of another. See also Tort Law 3<sup>rd</sup> Edition, Kisty Horsey et al Oxford University Press, (2013) pages 485-491 and Winfield and Jolowicz on Tort 16<sup>th</sup> Ed. Sweet and Maxwell, (2002) pages 487-502.

112. The claimant then submitted that in the case of *Tikafika Estates Limited and Kachale (Female) v Ashani* [1998] MLR 424 at 427 Nyirenda J as he then was stated that trespass to land is constituted by unjustifiable interference with possession of land.

113. It then noted that in the case of *Msonthi v Tikumbe Ltd* 12 MLR 161 at 168 it was stated that

In order to succeed in an action for trespass, the plaintiff must prove; (a) that he was in actual possession at the time of the trespass; See *Thomson v Ward* (1953) 1 All ER 1169; He must have effective possession. It is immaterial whether his possession is rightful or wrongful; and (b) direct interference with the land though there is no need to prove damage since trespass is actionable per se; see *Gregory v Piper* (1829), 9 B.& C. 591, 109 E.R. 220.

114. The claimant next observed that in the case of *Ellis v Loftus Iron co.* (1874) L.R. 10 C& P 10 Coleridge C.J stated at page 12 that

Every unwarrantable entry on another's soil the law entitles a trespass by breaking his close; the words of the writ of trespass commanding the defendant to show cause quare clausum querentis fregit. For every man is in the eyes of the law enclosed and set apart from his neighbour's; and that either by a visible and material fence, as one field is divided from another by a hedge; or by an ideal invisible boundary existing only in the contemplation of law as, when one man's land adjoins to another in the same field.

115. The claimant further noted that in the same case of *Ellis v Loftus Iron co.* (1874) L.R. 10 C& P 10 Coleridge C.J stated at page 12 that

If the defendant place a part of his foot on the plaintiffs land unlawfully, it is in law as much a trespass as if he had walked on it half a mile.

116. It then observed that in the case of *Holmes v Wilson* (1839) 10 A & E 503 it was held that

Every continuance of a trespass is a fresh trespass, in respect of which a new cause of action arises from day to day as long as the trespass continue. One who built on the plaintiff's land some buttresses to support a road and pad damages in an action was held liable in damages in a second action for not removing the buttresses after notice.

117. It also noted that in the case of *Tea Brokers (Central African) Limited v Bhagat* [1994] MLR 339 at 343 Mwaungulu J stated that

It must be appreciated that trespass is an unjustifiable interference with possession of land (*Hegan v Carolan* (1916) 2TR 27). An action for trespass is a common law action. As it was put by Lord Chief Justice Camden in *Entick v Carrington* (1765) 2 Wils 275, by the law of England, every invasion on private property, however minute, is a trespass. An action in trespass will lie for injury to that right although no appreciable damage has been caused (*Warren v Desplippes* (1872) 33 UCR 59 (Canada)).

118. The claimant then observed that it was stated in the case of *Kelsea v Imperial Tobacco Company (of Great Britain and Ireland) Ltd* [1957] 2 All ER 343 as approved in *Tea Brokers (Central African) Limited v Bhagat* [1994] MLR 339 at 34, that a court has powers to grant an injunction to stop a trespass.

119. It also noted that it was stated in the case of *Union Lighterage v London Graving Dock Co.* [1902] 2 Ch 577 that a right of way of necessity will not arise where there is an alternative access available however inconvenient or impracticable that access might be. And that this position was also confirmed locally in the case of *Msonthi v Tikumbe Ltd* 12 MLR 161 (HC) in which Makuta CJ stated as follows on page 167-168:

It seems therefore, that the right of way claimed by the plaintiffs would be a right of way of necessity which the law implies in favour of a grantee of land over the land of the grantor, where there is no other way by which the grantee can get to the land so granted him. If there is any other means of access to the land so granted, no matter how inconvenient, no right of way of necessity arises, for the mere inconvenience of an alternative way will not of itself give rise to a right of way of necessity; See *London Corp v Rigs* (1880), 13 Ch D. 798; 42 L.T. 580.

120. The claimant then noted that the learned authors of *The Law on Landlord and Tenant*, P.F. Smith 6<sup>th</sup> Edition (2002) at page 26 and *Land Law Texts and Materials*, Ben MacFarlane et al 2<sup>nd</sup> Edition (2009) at page 929 are also of the firm position that no right of way of necessity arises no matter how inconvenient, any other means of access to the land can be.

121. It next noted that in the case of *The State and Blantyre City Council Ex parte Aniettie Chikwiri and Six Others* Miscellaneous Civil Application Number 27 of 2015 (unreported) this Court stated as follows on page 96 that:

The view of this Court is that as the conduct of the applicants, in hosting celebratory functions in residential areas of the City of Blantyre, sought to be banned by the respondent was itself illegal and unlawful it would be contrary to public policy to award damages. The respondents would benefit from an illegal and unlawful activity if damages were to be awarded.

122. The claimant then observed that the learned authors of *Tort Law*, 3<sup>rd</sup> Edition, Kisty Horsey et al Oxford University Press, stated as follows on page 64:

The defence of illegality denies recovery to certain Claimants injured while committing unlawful activities. Like *volenti* it is a complete defence. Lord Hoffman in *Gray v Thames Trans* (2009) identified two formulations of the illegality. At its most narrow, the defence ensures that a Claimant cannot recover in civil law for the consequences of a criminal sanction imposed as a result of one's criminal act. (at [29]). If the law imposes a harm or a loss (e.g imprisonment or a fine) on someone as punishment for their wrong doing, they cannot seek compensation for that loss by bringing an action in tort against a defendant they claim caused them to commit the wrong. Its wider formulation rests on the principle that a claimant ought not to be able to recover damages for losses they suffer whilst engaged in a criminal

activity. *Ex turpi causa non oritur action* (literally no action may be founded on an illegal act). Whilst the former is justified on the grounds of consistency, the latter rests on the view that it is offensive to public notions of fair distribution of resources that a claimant should be compensated (usually out of public funds) for consequences of his own criminal conduct ...

123. The Claimant then indicated that the evidence of Frederick Anton Lampe was basically that he originally obtained the land which it is occupying from Chief Kaudzu. And that he subsequently applied for a lease of the land upon noting that the land in question was public land which only the Minister of lands had the authority to grant a lease over.
124. It noted that Frederick Anton Lampe showed this Court the beacons which are the boundaries for its land. And that he also showed the paths that are used by employees from the defendant over its land. Further, that he also gave evidence of the noise, the dust and disturbances that are caused by the defendant whenever they are crossing over the claimant's piece of land.
125. The claimant also observed that Frederick Anton Lampe also showed this Court the area where the defendant can construct an access road to his lodge. It observed that Frederick Anton Lampe was cross examined but the cross examination did not in any way discredit these pieces of evidence which were crucial in proving the claimant's case against the defendant.
126. The claimant then submitted that the evidence of Phillip Manzi confirmed that the claimant was given a lease over the pieces of land in question by the Minister of lands. Further, that he personally came and verified the beacons and the lease. And that he confirmed that the land on which both the claimant and the defendant's lodge were lying was public land but the defendant did not have any lease over his piece of land. It added that he also confirmed that the dirt road in contention herein going to the defendant's lodge was not a public road.
127. The claimant then submitted that both Lisa Robertson and Macdonald Makanjira confirmed that the defendant's lodge is on public land and that the defendant does not have any lease over the land. Further, that these two witnesses also confirmed that employees from the defendant cross over the claimant's piece of land whenever they are going to the defendant's lodge.

128. It then noted that the defendant himself also gave evidence but he basically denied his own statement that he did not know it and stated that he had just seen it the same day. Further, that the claimant did not bother cross examining him on a statement that he had disowned.
129. The claimant then submitted that it has clearly shown the Court that it has a lease granted by the Minister of land over the piece of land on which its lodge lies.
130. It submitted further that it has also shown this Court, with strong evidence, that the defendant, his employees and visitors cross over the claimant's piece of land and that when they cross there is noise from the moving vehicles, dust from the passing vehicles and that sometimes wild animals are disturbed and they come running into the its lodge thereby threatening the security and peace at its lodge.
131. It posited that the defendants witness admitted that the defendant has no lease from the Minister of land even though the land on which the defendant's lodge is lying on public land.
132. The claimant then submitted that the law makes it a criminal offence for any person to occupy public land without the authority from the Minister. And that the defendant herein is therefore in course of committing a criminal offence and is a trespasser.
133. It then noted that the defendant was pleading a right of way of necessity. It submitted that, however, the law is clear that a right of way of necessity will not arise where there is an alternative way however inconvenient. It noted further that that it showed this Court a place where the defendant could easily create a way to his lodge. And further that the protestation by the defendant that the area gets flooded is of no consequences as the law does not mind the inconvenience of the alternative way.
134. The claimant submitted that it has therefore proved its claim on a balance of probabilities and that this Court should enter judgment in its favour and grant the reliefs sought.
135. The claimant further prayed that the defendant's counterclaim be dismissed with costs. It observed that the defendant is occupying public land without any lawful authority from the Minister of Lands. And that the defendant is actually continuously committing a criminal offence in terms of section 10 of the Land Act. It contended that it is contrary to public policy to

allow the defendant to bring a counterclaim when the defendant is in the act of committing a criminal act.

136. This Court finds, as submitted by the claimant, that it has been satisfactorily proved by the claimant that the land in question herein on which both parties are, is public land. This aspect has been conceded by the defendant in his evidence as well. The Minister of Lands is the one that has authority to deal with such land and not the Chiefs. See sections 2 and 5 of the Land Act. See also the corresponding sections cited by the claimant in the Land Act, 2016.
137. This means that, as correctly submitted by the claimant, the claimant was properly granted a lease over the land in issue by the Minister of Lands. The suggestion by way of cross examination that the defendant's part of land was poached by the claimant is therefore untenable since the Minister of Lands responsible for the land properly exercised his or her powers to allocate the land in the lease herein. No Chief had any authority to deal with such land to the contrary. On the evidence, there is also not sufficient proof of poaching of land by the claimant from the defendant given that the defendant declined to be cross-examined and his evidence has been given no weight and he could not therefore prove the allegation of poaching of his land by the claimant.
138. This Court agrees with the authorities cited by the claimant on trespass to land. That this involves interference with possession. And that setting foot on the claimant's land herein by the defendant is trespass. See *Tea Brokers (Central African) Limited v Bhagat* [1994] MLR 339.
139. In the present matter, the defendant's passing on the claimant's leased land constitutes trespass and this Court finds that the claimant has proved the trespass. The witnesses of the claimant, Fredrick Lampe, was not impeached in cross examination on this aspect that the defendant has been passing over the claimant's leased land. Even the defendant's evidence shows that there has been interference with the claimant's land by the defendant and his agents by passing over such land. The defendant's visitors also follow the defendant's signage over the claimant's land and also trespass at the instance of the defendant.
140. This Court agrees with the claimant as well that the claimant has shown that the defendant has an alternative route to his lodge. This Court carefully considered the topography of the land and is convinced by the claimant's

evidence that the defendant could build an access to his lodge outside the claimant's land. That is an alternative access. There is a road that runs parallel to the National park gate and at the end of that road there are some baobab trees. This Court is convinced that, from that place, the defendant could build an access road across the stream by way of a cross-over and then take the road all the way over the five to ten metre all season dry stretch of land that leads to his lodge. There is therefore no proof that it was necessary that the defendant pass over the claimant's leased land due to the topography of the area being swampy. There is no proof of necessity on the part of the defendant to use the claimant's leased land.

141. In any case, the law is as correctly stated by the claimant that even if the alternative route was inconvenient to the defendant that in itself would not create a right of way of necessity recognized at law to warrant the defendant to be trespassing over the claimant's land herein. See *Msonthi v Tikumbe Ltd* 12 MLR 161 (HC).

142. This Court having examined the evidence also concludes that the road in contention herein as used by the defendant over the claimant's land is not a public road at all as defined under the Public Roads Act. The Surveyor General and Ministry of Lands both are emphatic on this point that there is no public road on the claimant's land as evidenced by the deed plan to the claimant's lease. The evidence of the defendant's witness McDonald Makanjira on this aspect is found to be unreliable as he could not show legally how the road herein could be a public road. He was also prevaricating between saying that the defendant contributed to the road construction and that only Malawi Social Action Fund solely constructed the road in issue. He is also a former employee that got dismissed by the claimant and his evidence need to be taken with a pinch of salt in the circumstances. Therefore, the defendant cannot claim that he is using a public road over the claimant's leased land. There is therefore no justification for the defendant's use of the said road.

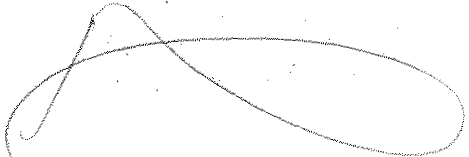
143. With regard to the defendant's counterclaim, this Court has not found any evidence by the defendant to prove to the requisite standard that the claimant's lease was obtained through bad faith and dishonesty as to the extent of the land in which the claimant acquired an interest through allocation by Chief Kaudzu and thus fraudulently. It must be recalled that the defendant declined to be subjected to cross-examination and that has led this Court to

attach no weight to most of his evidence on his contentious claims and that proved fatal to his claims as they remain unsupported. Furthermore, the Chief had no authority to give any interest in public land to anyone. Additionally, as correctly submitted by the claimant, the defendant cannot, as a matter of legal policy, be allowed to make a legal claim to land arising out of illegal occupation of public land. See *The State and Blantyre City Council Ex parte Aniettie Chikwiri and Six Others* Miscellaneous Civil Application Number 27 of 2015 (unreported) and Tort Law, 3<sup>rd</sup> Edition, Kistly Horsey et al Oxford University Press at 64. This Court therefore finds that the counterclaim has not been proved, is untenable and it is dismissed with costs.

144. In the totality of the foregoing circumstances, this Court finds that the claimant has proved its claim and this Court grants all the reliefs sought by the claimant with costs.

145. The Registrar shall assess the damages and costs.

Made in open court at Blantyre this 20<sup>th</sup> May, 2022.



M.A. Tembo  
**JUDGE**