JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 257 OF 2016

BETWEEN:

CHARLES KAPONDA ..... PLAINTIFF

-AND-

BLANTYRE CITY COUNCIL ..... 1ST DEFENDANT

THE REGISTERED TRUSTEES OF MALAWI ASSEMBLIES OF GOD [NAMILANGO CHURCH] ..... 2ND DEFENDANT

CORAM: **THE HONOURABLE JUSTICE KENYATTA NYIRENDA**
Mr. Tandwe, of Counsel, for the Plaintiff
Dr. Kapulura, of Counsel, for the 1st Defendant
Mr. Katuya, of Counsel, for the 2nd Defendant
Mr. O. Chitatu, Court Clerk

JUDGEMENT

Kenyatta Nyirenda, J.

INTRODUCTION

The Plaintiffs commenced the present proceedings by way of originating summons seeking the Court's determination of the following questions:

> "1. *Whether the 1st Defendant, after having duly allocated plot no.SL2/80/50 to the Plaintiff, would properly withdraw the said plot from the Plaintiff on the*

purported ground that the said plot was allocated to him without following proper procedures.

2. *Whether, after the Plaintiff having started developing the said plot to great expense, the 1st Defendant's said purported decision to withdraw the plot from the Plaintiff in the manner done by the 1st Defendant was proper, lawful and fair.*

3. *Whether, if at all, the 1st Defendant's decision can be legally sustained in the circumstances of this case.*

4. *Whether the 1st Defendant's demolition of the Plaintiff's house under construction on the said plot was itself legal and lawful and did not therefore amount to trespass which would entitle the Plaintiff to damages?*

5. *Whether the 2nd Defendant had any right to claim ownership of the Plaintiff's said plot when they had no basis to support their claim.*

6. *Whether the 2nd Defendant's demolition of the site house on the Plaintiff's said plot on the purported basis that the said plot belonged to them did not amount to trespass which would entitle the Plaintiff to damages."*

The Plaintiff also seeks the following orders and reliefs:

"i) An order that the 1st Defendant's decision to withdraw a plot duly allocated to the Plaintiff was wrongful, illegal and unfair in the circumstances.

ii) An order that the 1st Defendant's demolition of the house [under construction] on the said plot was itself illegal and unlawful and therefore amounted to trespass which entitles the Plaintiff to damages.

iii) An order that the 2nd Defendant's demolition of the site house on the said plot also amounted to trespass which would entitle the Plaintiff to damages.

iv) An order that the Plaintiff, having been duly allocated the said plot, ought to be left to enjoy quiet possession of the said plot.

v) Costs of this action and such further or other relief as the Court may determine.

vi) Such further or other relief as the Court may determine."

The action by the Plaintiff is strenuously resisted by the 1st and 2nd Defendants respectively.

PLAINTIFF'S AFFIDAVIT

The originating summons is supported by an affidavit sworn by the Plaintiff [hereinafter referred to as the "Plaintiff's Affidavit"]. The Plaintiff's Affidavit provides as follows:

"3. On 19th June 2013, I was offered plot number SL2/80/50 at South Lunzu [at Machinjiri, Area 2] with the City of Blantyre by the 1st Defendant. I exhibited hereto a copy of the said offer from the 1st Defendant marked ***"CK 1"***

4. After acceptance of the said offer, the 1st Defendant allocated the said plot to me on or around 17Th July, 2013. I exhibit hereto a copy of the said letter of allocation from the 1st Defendant marked ***"CK 2"***

5. After the allocation of the said plot to me, I started to develop the plot. I first constructed a site house and later started construction of a residential house.

6. I have also been duly paying ground rent for the said plot to the 1st Defendant who has been duly accepting my said payments. I exhibited hereto copies of receipts issued on behalf of the 1st Defendant marked ***"CK 3"***

7. However on or around 20th June, 2015 of the Malawi Assemblies of God [Namilango Church] lodged a complaint against me at South Lunzu Police Unit claiming that my plot SL2/80/50, which the 1st Defendant had allocated to me, belongs to 2nd Defendant. The Police invited me but when I went to the Police the church officials did not show up.

8. On 22nd June, 2015, the 1st Defendant's officials led by Mr. Kanache accompanied by some members of the 2nd Defendant visited my plot and demanded that copies of the plots documentation be sent to Civic Centre through the 1st Defendant's South Lunzu which I promptly did.

9. On 3rd July 2015, the 1st Defendant's officials this time led by Ms. E. Kaipa again visited my plot again in the company of the 2nd Defendant's members. They demanded that I show them papers providing of my title to the said plot which I did.

10. Apart from these stated visits, there were several other visits to my plot by South Lunzu Ward Councilor, Mr. Taulo and also by the 1st Defendant's officers on the same issue.

11. On Sunday 19th July 2015, members of the 2nd Defendant took the law into their own hands and began to demolish part of the site house I built at the plot, refilling the already dug foundation, and the pit latrine. The said members on the day made a lot of defamatory statements against me, my family and my church. This happened soon after the said members had just come out of their Sunday Service.

12. I reported the matter to South Lunzu Police Unit where I was advised to report the matter to South Lunzu Site Office. However, after visiting the plot, the Assistant Estate Management Officer wrote a report to the Chief Estate Officer at the 1st Defendant's head office. There is produced to me a copy of the said report marked ***"CK 4".***

13. *However on 30th July 2015, the 1st Defendant delivered to me a STOP NOTICE requiring me to stop any development on the said plot because the plot belongs to the 2nd Defendant. I exhibit hereto a copy of the said Stop Notice marked* ***"CK 5".***

14. *Thereafter I visited the 1st Defendant's head office to verify the allegation in the said Stop Notice that plot number SL2/80/50 belongs to the 2nd defendant but to the contrary the 1st Defendant records showed that I was at the time registered as the holder of the said plot.*

15. *On 6Th January, 2016 I received another "Stop Order/Withdrawal" letter from the 1st Defendant through its South Lunzu office stating that the plot had been withdrawn from me purportedly because the 1st Defendant did not follow the proper procedure in allocating the plot to me. I exhibit hereto a copy of the said notice/withdrawal marked* ***"CK 6".***

16. *On the night of 21st June, 2016 between 22:00 hours, the 1st Defendant's officers went to my said plot and demolished my house which was under construction and had reached window level. The plan for the house was 2 units of 3 bedrooms each semi-detached]. I exhibit hereto a copy of the picture showing the damage to the said project marked* ***"CK 7".***

17. *It is my understanding that, in the circumstances obtaining in this matter, the Defendant's conduct herein amount to trespass for which I am entitled to damages and further that I should be left to enjoy quite possession of my said plot the same having been duly allocated to me.*

18. *I further understand that the 1st Defendant is in the process of re-allocating my said plot to someone else."*

It is necessary, as it will soon be appreciated, that Exhibit CK 5 be quoted in full. It is dated 16th July 2015 and it provides as follows:

"TOWN AND COUNTRY PLANNING (FEES AND FORMS) REGULATIONS

STOP NOTICE

(SECTION 49 (1))

From: ***The Chairman, Blantyre Town*** *For official use only*

Planning Committee *File No. TP/BL/56*

(Being the Responsible Authority) *Stop Notice No.: 9/2015*

To: Surname: ***CHARLES N. KAPONDA***

Other Names/Initials:

Postal Address: ***SOUTH LUNZU***

You are hereby informed that----

(a) the developments, subdivision of the land or display of advertisement described in paragraph 2 has been carried out by you without the grant of development permission as required by section 35 of the Act; or

(b) the following conditions-----

(i) ……

(ii) ……

(iii) ……

Subject to which permission for the development, subdivision of land or display of advertisement as described in paragraph 2 was granted have not been complied with by you.

2. Description of development, subdivision of land or display of advertisement to which this notice relates------

(a) ***ILLEGAL CONSTRUCTION OF A STRUCTURE ON PLOT NO. SL2/80/50 WHICH BELONGS TO ASSEMBLIES OF GOD CHURCH***

(Specify development, etc.)

(b) ***SL2/80/50 SOUTH LUNZU***

(Specify Plot No. or Place)

(a) ***SOUTH LUNZU***

(Specify area or township)

3. You are hereby, and in accordance with section 49 (a) of the Act, required to cease

CONSTRUCTION OF THE SAID STRUCTURE ON PLOT NO. SL2/80/50 WHICH BELONGS TO ASSEMBLIES OF GOD CHURCH

4. If you are grieved by this stop notice you may appeal against it to the Board within thirty days from the date this notice is served on you.

(5) For avoidance of any doubt, if you ignore this stop notice you will be guilty of an offence under section 72 (j) of the Act."

1ST DEFENDANT'S AFFIDAVIT

The 1st Defendant contests the action and it has filed an affidavit in opposition to the originating summons. The affidavit was sworn by the 1st Defendant's Chief Estates Management Officer, Mr. Precious M.S. Tembo [hereinafter referred to as the "1st Defendant's Affidavit"]. The substantive part of the 1st Defendant's Affidavit reads:

"4. One of my duties as Chief Estates Management Officer is to ensure that the Estates under the control of the 1st Defendant are properly managed in line with Applicable Blantyre City Council by –laws.

*5. I have been shown and read the affidavit of **CHARLES KAPONDA** who ... I make my comments and observations in the paragraphs below.is the Plaint*

6. Regarding paragraph 1 and 2, I note the contents therein and make no comment thereof.

*7. Regarding paragraph 3, I make the following comments and observations. The Plaintiff was never offered plot number SL/80/50 and this is evidenced by the defective offer letter exhibited by the Plaintiff as **CK 1***

8. I repeat the contents of the paragraph above and states that when normal procedure is followed a Plot Allocation Committee Minutes number is indicated on an offer letter. Exhibit CK 1 has no such minute number. Furthermore, section C of the statement of fees and charges is cancelled and this is highly irregular as in normal circumstances a new letter would have to be issued before the Chief Executive sign off.

*9. Regarding paragraph 4, I make the following comments and observations. According to the allocation letter that the Plaintiff relies and exhibits as **CK 2** the Plaintiff was required to commence and complete development of the said plot within the period of 7th August, 2013 and 17th August 2014. At the time that this dispute arose in 2015 the Plaintiff had not completed development of the plot. The Plaintiff was therefore in breach of the terms of this allocation letter and the plot automatically reverted to the 1st Defendant.*

10. Regarding paragraph 5, I note the contents therein and make no comment thereof.

11. Regarding paragraph 6, I make the following comments and observations. The system used at BCC is that the bank where payments are made is not linked to the estate office. This means that anybody can pay at the bank and later fraudulently

claim to have been paying for land. The payment is not therefore proof of allocation of a plot.

12. *Regarding paragraph 7, I make the following comments and observations. The 1st Defendant never offered the Plaintiff plot SL2/80/50 in South Lunzu as shown by the defective offer letter*

13. *Regarding paragraph 8 – 11, I note the contents thereof and make no comments therein.*

14. *Regarding paragraph 12, I make the following comments and observations. The plaintiff did indeed report the matter to the Assistant Estates Management officer at the South Lunzu Blantyre City Site and the said officer did write a memo to the Chief Estate Officer requesting that the true boundaries in the area be established. The actions of the officer were correct in the circumstances as he was not in a position to know the true boundaries for the plots.*

15. *Regarding paragraph 13 – 15, I make the following comments and observations. The Plaintiff does not appear on record as being the registered holder of plot number SL2/80/50. For this reasons the 1st Defendant was correct to issue the Plaintiff with a Stop Notice and there again with a Withdrawal Letter.*

16. *Regarding paragraph 16, I make the following comments and observations. Since plot number SL2/80/50 had been withdrawn from the plaintiff it was correct and within the rights of the 1st Defendants to demolish any and all structures found on the plot.*

17. *Regarding paragraph 17, I make the following comments and observation. That since the Plaintiff obtained ownership of the land by illegal and inappropriate means the Plaintiff has no good title to the land in question and is therefore not a true tenant of the land. This being the case the actions of the 1st Defendant cannot amount to trespass. Furthermore, the 1st Defendant is the Landlord and controller of the piece of land and cannot commit an act of trespass on unregistered land.*

18. *Regarding paragraph 18, I make the following comments and observations. To date there are no plans to reallocate the land nor has any process of reallocation begun.*

19. *I verily believe that the conduct of the Plaintiff is a clear illegality and require the court intervention to be put right. I hold this opinion based on the following:-*

    a. *The Plaintiff never obtained legal title of the land in question and is therefore not a tenant on plot number SL2/80/50*

20. *Based on the above, I entreat the Honourable Court not to grant the Plaintiff the reliefs prayed for and instead make the following orders*

a. *An order of mandatory injunction compelling the Plaintiff or their servants or agents to demolish any structure placed on the land, failing which the 1st Defendant is authorised to enforce the by-law and demolish the properties;*

b. *An order authorizing the 1st Defendant to clear the area of any structure.*

c. *A declaration that the Plaintiff has obtained the land illegally and therefore has no good title to the land.*

d. *A declaration that the conduct of the Defendants in its entirety an illegal.*

e. *Costs."* – Emphasis by underlining supplied

I momentarily pause to observe that the 1st Defendant does not deny, but rather chose to make no comment, regarding the statement by the Plaintiff that (a) he constructed a site house and later started construction of a residential house on plot no. SL2/80/50 [hereinafter referred to as "plot in dispute"], (b) on 22nd June, 2015, the 1st Defendant's officials and some members of the 2nd Defendant visited the plot in dispute and demanded copies of the plots documentation, (c) on 3rd July 2015, the 1st Defendant's officials visited the plot in dispute in the company of the 2nd Defendant's members, (c) there were several other visits to the plot in dispute by South Lunzu Ward Councilor, Mr. Taulo, and the 1st Defendant's officers on the same issue.

THE 2ND DEFENDANT'S AFFIDAVITS

The 2nd Defendant filed four affidavits in opposition to the originating summons. The four affidavits were sworn by Rev. Francisco Antonio, Rev. Ethel Nzumwa (rtd), Neddie Lamson Mbewe and Madalitso Kaponda respectively.
The affidavit by Rev. Francisco Antonio states as follows:

"1. I am a pastor serving God in the Malawi Assemblies of god. I minister at Namilango Assemblies of God at Area 2 in Blantyre and have authority to make this affidavit.

2. Except where I state otherwise, I make this affidavit from facts that are within my knowledge. Where I had relied on facts outside my personal knowledge, I am informed of those facts by the source stated and I believe those facts to be true to the best of my information and belief.

3. I was posted to Namilango Assemblies of God by the national leadership of the church in March, 2014. As soon as I assumed my role as pastor at the local congregation, I quickly familiarized myself with the history of establishment of

that local congregation including the acquisition of the land on which the church building was sitting and its extent. I ascertained from the available records, my predecessor, the Rev Ethel Nzuma and church elders, especially those who had been at the church from its inception as a local congregation in the late 1990s on how the land was acquired. I established that the church's land extended from down behind the newly constructed church on the south side all the way up to the north side of the building terminating on the outer wall of a small old structure that used to the City Council's site office when the land used to be a market place under the Blantyre city Council.

5. *One day, not long after my arrival at the church, we noticed that the plaintiff had deployed people to clear the land just in front of the entrance into the church building. When we inquired as to whom they were working for they informed us that it was the plaintiff who had tasked them to clear the land. This was on the exact spot where the church had erected a temporary shelter for worship services in 1998 after the land was allocated to the church. The temporary shelter has been there for over eight years. The floor and pulpit area of the structure were made of concrete and these are still there to date. We ordered the workers to immediately cease working on the land because we wanted the issue to be clarified by the city officials responsible for land administration. In particular, we desired an explanation from the council as to when, how and why they allocated our land to the plaintiff without our knowledge or consultation. We did not think that the City council could lawfully dispossess us of our land and offer to someone else without consulting us and without our consent*

6. *We also wanted to meet and discuss the matter with the plaintiff whose house is just across the road opposite our church. To my surprise, the plaintiff has never been willing to meet discuss with us. He always enters the church premises clandestinely and carries out activities there in absence without wanting to meet us.*

7. *We then decided to approach the city Council and sent one of the members, Mr. Madalitso Kaponda to engage with the Council at Civic Centre on this issue. I understand that he went to city and met one, Ms. Kaipa who promised to come to the site to establish what was going on. She visited the site once as far as I can recall but never came back with any feedback.*

8. *While we were still waiting for the council to resolve the issue, we received court papers which showed that the plaintiff had sued us as a local church. We forwarded these documents to the national church headquarters in Lilongwe who instructed the church's lawyers to deal with the matter. The lawyers had the court case dismissed because I understand the plaintiff wrongly sued and served court documents on a local church congregation which had no capacity to be sued. I also understand that the court gave the plaintiff time to regularize the mistake but he never complied with the court order. There are produced and shown to make copies of the court documents exhibited hereto marked* ***"FA1"***

9. *We continue to follow up with the City Council through Mr. Madalitso Kaponda and eventually, about three officials came, one from the planning committee, another from the estates management office and the third was their legal service manager. They saw what had happened on the plot and told us that the plaintiff was improperly offered Plot No. SL2/80/50. They said that someone had created that plot out of land which already belonged to the Church. They said the mistake arose from the officers at their site office at South Lunzu who were reputed for corrupt dealings with the public land belonging to the City Council. They assured us that since the error arose from within their ranks, they were going to deal with it internally. They also said that they were going to offer the plaintiff onother piece of land within South Lunzu.*

10. *The said City Council officials also informed us that since the small old structure which marked the boundary of the church's land on the north side was no longer needed by them they would be prepared to swap the remaining piece of land from the small old structure up to the road with the same size of the land at the back of the church building on the south side. However, they told us to make a formal application to that effect. We were happy with the arrangement and were planning to submit the application.*

11. *I understand that the plaintiff was made aware of the city Council's determination on the dispute and they asked him to cease carrying out any works on the disputed piece of land as it belonged to the church. However he did not give up and continue to make attempts to effect developments on the land. We reported this matter to City who tried to stop him. They served him with a Stop Notice and formally wrote him advising him of the withdrawal of the offer of the plot to him. The council provided us with a copy of the withdrawal notice to assure us that the plot belonged to us and that the offer of part of our plot (Plot No. SL2/80/49 to his as Plot No. SL2/80/50 was erroneous. We thought this had brought the dispute to rest.*

12. *Surprisingly, despite being served with a stop notice and notice of withdrawal of the offer of the plot to him by the City Council, the plaintiff defiantly continued to commit acts of provocation on our land by among other things digging a pit latrine light in front of the church entrance and ferrying bricks into the yard thereby evincing an intention to start building. Given that the City Council who are the lessors of the land had determined that the piece of land in dispute belongs to the church we felt it was our duty to defend our title. We indeed filled up the pit latrine. We felt it was an act of provocation to us and sacrilege to our God for the plaintiff to come into our land and dig a pit latrine right in front of the church entrance.*

13. *He later came and dug a foundation and started building some structures and because we did not want any confrontation with him we reported the matter to City Council who came and demolished the structure. Following this development, I received court papers which showed that he had again sued the church together with the Blantyre City Council. One of the court documents was*

described as an interim order of injunction which stated that the Plot No. SL2/80/50 "was already duly allocated to the plaintiff" and ordered that the defendants were not interfere with the plaintiff's construction project on the said plot pending a further order of the court or pending determination of the matter.

14. *To say the least that the order is unfair and complicates an already delicate issue by assuming that the plaintiff was duly allocated the plot. The court assumed that the plaintiff lawfully acquired the disputed piece of land. It assumed that he has a good title to it. It gave him the right to continue developing the plot without interference before hearing us. Essentially, the court declared the plaintiff's right to the disputed land allowed him to have a final relief. We believed that is the reason why since July, 2016 he has not caused the inter partes summons for injunctions to be heard. He has also not brought the originating summons to be heard so that this case can be determined on the merits.*

15. *Since the city council's official came and demolished the structure that the plaintiff was erecting on the disputed piece of land he has not built anything else. He has only been ferrying bricks to the site. The debris arising from the city Council's demolition of the plaintiff's structure was an eyesore in front of our church building. The court should bear in mind that after we had demolished what used to be our temporary church structure, we started using the space as car park and so one day we decided to clear the debris so the space could look nice again. We did not in that manner interfere with any alleged works of the plaintiff because there were none.*

16. *I believe that the fairest order in this manner would have been for all parties concerned to desist from doing anything on the disputed piece of land until this court hears all the parties concerned in the main case and declares the rights of the parties once and for all. It is totally unfair for the court to allow the plaintiff to continue with the construction work on the disputed piece of land as if it has already determined that he is entitled to occupation and use of that land. I am very certain that the order was made because the court was not given all the facts about the ownership and history surrounding the piece of land in the manner we have done now."*

The affidavit of Rev. Ethel Mzuma (Rtd) reads:

"1. *I am a retired Pastor of the Malawi Assemblies of God. I used to pastor the Namilango Assemblies of Church as a local congregation of the Malawi Assemblies of God at Machinjiri, Area 2 in Blantyre. This local church is commonly known as Namilango Assemblies of God. I have authority to make this affidavit.*

2. *Except where I state otherwise, I make this affidavit from facts that are within my own knowledge. Where I have relied on facts outside my personal knowledge, I am informed of those facts by the source stated and believe those facts to be true to the best of my information and belief.*

3. *Towards the end of the 1990s Blantyre City Council decided to move its market place from Machinjiri, Area 2 to a place near the main road at Luwanda Trading centre at Machinjiri. At that time, as a church, we had a need for land where we could build a church and other outbuildings that traditionally any Malawi Assemblies of God church is supposed to have within the church premises. These such structures as class rooms for children for use during Sunday Schools and the senior pastor's house among other structures.*

4. *We identified the place which used to be Blantyre City Council's market place at Area 2 and were satisfied that we could allocate that whole place our aspirations to have a church building and those other structures would be fulfilled. At that time we were a new local congregation after the leadership of the national church had split members residing at Area 1, 2 and 3 from the church congregation at Area 10 as part of the church's growth strategy. We first approached the Blantyre City Council and presented our issues and identified to them the place we had found to be suitable. They asked us to make a formal application in writing. We did this on 17Th March, 1997. There is now produced and shown to me a copy of our application letter exhibited hereof marked* ***"EN 1"***

5. *We were duly offered the piece of land in writing but due to passage of time we are unable to locate the offer letter. We paid all the development charges in 1998. After receiving the offer letter, officials from Council's estate management office came and showed us what were the boundaries of the plot. The piece of land allocated to us was essentially the whole old market area from down the south side all the way northwards to a small structure which used to be a site office for the council within the market area. They told us not to tamper with the structure because it was a public property; otherwise the plot could have gone beyond that structure up to the dusty road in front of that structure. At that time the council officials were not sure what they were going to turn that structure into. They had no immediate plan.*

6. *We then build a temporary structure as a place of worship about 20 metres away from the council's structure or the dusty road leading to Luwanda trading centre. We build this temporary church structure in same year, 1998. We also erected a sign post made of bricks and concrete next to dusty road in front of the council's small building. There were about less than 10 metres between the boundaries of the land allocated to us and the edge of the dusty road on the north site. It is within this same space that the council building was allocated. It is still there. We reserved the land on the south side of our temporary shelter for the construction of the permanent church building and possible some more buildings beyond it. There is now produced and shown to me a picture of the temporary church structure that we built in 1998 exhibited hereto marked* ***"EN2".*** *There are essentially three pictures on* ***"EN2".*** *The one on the top is the temporary church structure before the new permanent building was constructed. The second and third shows the temporary structure and the permanent church building during various stages of its development.*

7. *Since then we had been fundraising for the construction of the permanent church building after which we would embark on other developments such as classrooms and the pastor's house.*

8. *Over the years we developed the plan for the permanent church. We submitted the plan to the city Council and the approved them. They also used to come to inspect the work. I recall they come at least on three occasions for such inspection. First, they came when the construction was at slab level and later, on two occasions, during the raising of the walls to the roof. During all the materials time, we were still worshiping in the temporary structure.*

9. *Seeing that the Council had no plans to make use of the small site structure we developed an interest to buy off from Council the piece of land on which the structure sat so that the church's landholding could stretch up to the edge of the dusty road. The council officials told us that we would have to make a formal application but that in the meantime we could use it if we wanted. They had removed the roof (that is to say, iron sheets and trusses) and advised us not to roof it using iron sheets but use traditional material such as thatching grass.*

10. *Eventually, we manage to construct the main church building up to a point where we could move into it. We moved and razed down the temporary structure.*

11. *Sometime in 2014 we noted that surveyors came into our church yard and started surveying the land. They then fixed beacons right in front of the entrance of our main church building across the exact location where the temporary church structure stood for over 8 years.*

12. *Soon after this we heard that Mr. Charles Kaponda who lives across the dusty road directly opposite our church on the north side, had bought the piece of land from where the new beacons had been fixed all the way up to the dusty road. We did not believe this could be true. We believe this was a mistake because all the piece of land from where the temporary structure stood up to the Council's old site structure belonged to the church. we believed the surveyors had make a mistake and so we reported the matter to City Council and this was handled by a church member called Madalitso Kaponda who will also give evidence.*

13. *I then retired from service around, 2014 and handed over the role of pastor to Rev. Francisco Antonio who had been transferred there by the national church leadership. I now no longer worship at Namilango Assemblies of God. I worship at the church at Area 11 because it is closer to where I stay. However, I understand that since I left Mr. Charles Kaponda has continued to cause trouble at Namilango church despite the city council resolving the issue in the church's favour in that someone from the City Council South Lunzu office wrongly and I should say fraudulently allocated a part of the church's land to him and he is now using the erroneous land allocation as a springboard to harass the church at Namilango."*

The affidavit of Neddie Lamson Mbewe is in the following terms:

"1. I am a member of the Malawi Assemblies of God and worship at Namilango Assemblies of God Church at Machinjiri, Area 2 and have authority to make this affidavit.

2. Except where I stated otherwise, I make this affidavit from facts that are within my knowledge. Where I have relied on facts outside my personal knowledge, I am informed of those facts by the source stated and believe those facts to be true to the best of my information and belief.

3. I lived across the road opposite Namilango Assemblies of God Church premises and I am next door neighbor to Charles Kaponda, the plaintiff in this matter. I joined this local congregation in the year 2011.

4. One day in the year 2014 on a Thursday in July in the morning as I was getting ready to go to work I had a visit from the plaintiff. He informed me that he wanted to inform me as a neighbor and member of Namilango Assemblies of God that he had acquired the land in front to the church and that it should not come to me and the rest of the church as a surprise if we saw him carrying out activities on that land. I asked him exactly which land he was talking about. He informed me that he was referring to the piece of land in front of the church entrance all the way up to the City Council's old structure. I was shocked and could not believe I was hearing that from the plaintiff. The reason from my shock is that the piece of land belonged to the church and I was not sure how he managed to acquire the piece of land without the church being involved or knowing anything before his alleged acquisition. Not knowing what to say by way of comment, I simply told him that he should expect discussions to take place between him and the church because that was church land. I left for work.

14. On Saturday, that is, two days after I met the plaintiff, I met the Pastor, the Rev. Francisco Antonio who informed me that earlier that day the plaintiff had sent people to clear the land and group of church elders asked the workers to halt any activities on the land because we needed to discuss the matter with plaintiff.

15. We continued to discuss this development during the subsequent days and then resolve to approach the City Council for intervention. We assigned Mr. Madalitso Kaponda, a member of the church to engage the City Council. I understand that he went to City and reported the matter to them. They promised to come and see what was happening but they never did. Eventually, officials from City responded and they did come to see what had happened. Among them were Mr. Matandika, a Legal Service Manager for the Council and Mr. Tembo presumably from the Council's estate management office. After they had inspected the plot, they plainly told us that there was a mistake in allocating that

piece of land to the plaintiff because the land belonged to the church based on the allocation of 1998. They said it was someone from their South Lunzu site office who was responsible for that mistake. The offer of the piece of land to the plaintiff had been made irregularly without any consultation with the estates management office at the Civic offices and without following the zoning regulations. They said that all the old market land was land meant for institutional buildings not residential and it could therefore not be allocated principally for residential purposes. They promised us that they would deal with the issue internally because there were internal flaws in the manner the plaintiff acquired that piece of land which was the church's.

16. *There were a series meeting with the City Council and in the same time as a church we were sued by the plaintiff in the high Court. The matter was referred to the church's national office in Lilongwe which in turn referred it to the church's lawyers and I understand that the case was dismissed by the court.*

17. *As a way forward on the dispute, the city council informed us that they were withdrawing from the plaintiff the unlawful offer of that piece of land and were going to give him another piece of land in its place because the land he was laying a claim belongs to the church. They were going to offer him another piece of land because although the land was irregularly offered to him, he had paid development charges to the City Council and the amicable way of resolving the issue was to offer him another piece of land.*

18. *The Council then served him with a Stop Notice for him to stop any developments on the land. This is the document marked* ***"CK5"*** *to the plaintiff affidavit filed and served in support of the originating summons. Under paragraph 2, on page 2 of the stop notice, the Council unequivocally stated that the plaintiff was constructing on the land belonging to the church and that the so called Plot No. SL2/80/50 was in fact land belonging to the church.*

19. *On 14th December, 2015, the Council's Acting Chief Executive officer wrote the plaintiff informing him that the Council had withdrawn the plot (Plot No. SL2/80/50) from him and that they would allocate to him another piece of land. The letter, a copy of which was provided to the church by Council, also shown that the plaintiff had a meeting with Messrs. P. Tembo and M. Matandika at Civic Offices where the issue of ownership of the plot was discussed with him. There in now produced and shown to me a copy of the letter exhibited hereto marked* ***"NM1"***

20. *As far as we are concerned, as a church, the piece of land which the plaintiff claims to be his or to have acquired from City was already allocated to the church as far back as 1998. The plaintiff exploited the weaknesses in the City's*

land administration systems by colluding with the City's site officers at South Lunzu to get an offer for a piece of land belonging to the church. Under these circumstances it cannot be that the plaintiff has a better or stronger title to the land than the church has. The Church was already in possession of and had occupied and enjoyed its use from 1998 to 2013 when the same was purportedly and under questionable circumstances offered to the plaintiff. As a church we do not see why the plaintiff should have a better and stronger title to the land when the lesser of the land (that is, the Blantyre city Council) acknowledges its internal flaws which led to the plaintiff being improperly offered that piece of land and acknowledges that the land belongs to the Church.

21. *It occurs the plaintiff is determined to have that piece of land regardless of whether or not the church already owned it even prior to the offer which he got from the city Council in 2013. This is shown by the fact that despite the stop notice which was served on him by the City Council and the withdrawal of the offer made to him in respect of that piece of land, he continued to carry out activities on the plot by digging the foundation and attempting to build some structure. When the City Council became aware of the development they came and demolished the structure."*

The contents of the affidavit by Madalitso Kaponda are very much similar in material respects to those of the other three deponents. Mr. Kaponda confirms that he was assigned by the 2nd Defendant to engage the 1st Defendant regarding the Plaintiff's occupation of the plot in dispute. He went to the 1st Defendant's Civic Offices and met Ms. Kaipa who eventually visited the site. He stated that Ms. Kaipa handed over the matter to Mr. Tembo and Mr. Matandika.

BURDEN AND STANDARD OF PROOF

The burden of proof lies upon the party who substantially asserts the affirmative of the issue. The rule means that where a given allegation, whether affirmative or negative, forms an essential part of a party's case, the proof of such allegation rests on the party: see Phipson on Evidence (16th Edition), 127, **Commercial Bank of Malawi v. Mhango [2002-2003] MLR 43 (SCA) and Milner v. Minister of Pensions [1974] 2 All E.R. 372.**

It is also well settled that the standard of proof in civil cases is on balance of probabilities. In **Msachi v. Attorney General [1991] 14 MLR 287**, at 290, Tambala J (Rtd) put the point thus:

"[t]his is a civil action and the duty of the plaintiff, in a civil case, is to prove his case on a balance of probabilities.' – See also Phipson, infra, 154. A balance of probabilities

> *simply means that a Court is entitled to say that, based on the evidence led before it, it is of the view that 'it is more probable than not' that the fact asserted is made out"*

The party on whom lies a burden must adduce evidence of the disputed facts to the required standard or fail in his or her contention. It, therefore, follows that in the present case the burden of proof is on the Plaintiff as the party who has asserted the affirmative to prove on a balance of probabilities his case against the Defendants.

ISSUES FOR DETERMINATION

On the basis of the Originating Summons and the respective affidavit evidence before the Court, there are ultimately five issues for the determination of the Court. The five issues are whether or not (a) the Plaintiff was offered the plot in dispute by the 1st Defendant? (Issue No.1) (b) if the offer was made, the Plaintiff accepted the offer? (Issue No.2) (c) the 1st Defendant could lawfully withdraw the plot in dispute from the Plaintiff? (Issue No.3) (d) if so, the proper procedure was followed in having plot in dispute withdrawn? (Issue No.4) and (e) the 1st Defendant and/or the 2nd Defendant committed acts of trespass in demolishing the Plaintiff's structures on plot in dispute? (Issue No.5).

ANALYSIS AND DETERMINATION

I have considered the five issues and it seems to me that the Issues No.1 and No.2 (relating to offer and acceptance of the plot in dispute), on one hand, and Issues No. 3 and No.4 (regarding withdrawal of the plot in dispute and proper procedure to be followed), on the other hand, can be conveniently dealt with together. I will now proceed to consider the fives issues in turn in that manner.

Issue No. 1 and Issue No. 2 (Whether or not the Plaintiff was offered the plot in dispute by the 1st Defendant and whether or not the Plaintiff accepted the offer?)

It is commonplace that the plot in dispute is under the 1st Defendant's management or main lease. Counsel Tandwe submitted that there is no question that 1st Defendant allocated the plot in dispute to the Plaintiff through its letter dated 19th June 2013 (Exhibit CK1). The letter states as follows:

> *"**OFFER OF RESIDENTIAL/INSTITUTIONAL PLOT SOUTH LUNZU***
>
> *We are pleased to inform you that you have been offered plot no. SL2/80/50 at South Lunzu Estate. The allocation of this plot is subject to your acceptance of the following statement of fees and charges...*

"Would you therefore call at Civic Centre, Town Planning and Estates Services department (Estate Section) with some form of identification such as passport driving licence or Malawi Electoral Commission Voter Registration Certificate identity Card etc to pay the above amount and obtain Allocation Documents.

"You are required to respond to this offer within thirty (30) days from the date of this letter."

Counsel Tandwe also placed reliance on Exhibit CK2 which reads as follows:

"ALLOCATION OF TRADITIONAL HOUSING AREA PLOTS PLOT NUMBER SL2/80/50 AT SOUTH LUNZU

The above plot is hereby allocated to you, on a temporary monthly basis, subject to strict conformation with the particulars of intended development given below, and with the following conditions:

(a) Development must begin by 17/08/13 and be completed by 17/08/14.

(b) All plot charges must be paid promptly to the Blantyre City Assembly. Charges will be reassessed periodically and must be paid in advance.

(c) Failure to comply with (a) and (b) above will render the plot liable to re-allocation without further notice..."

The 1st Defendant espouses the view that the Plaintiff was never offered the plot in dispute, in the strict sense of the word, as the proper procedures for the offer were not followed. The following arguments were advanced in support of this submission:

"a. ***This is an alleged offer letter showing MK 5, 000 as the price for the Plot being allocation fee only.*** *There is no way the plot would have been offered without the condition of payment of development charges. This is highly irregular and support the Defendant's position that in the offering of the plot, procedures were not followed and hence the plot could not have been validly offered.*

b. ***In the statement of fees and charges, the Part D: Development Charges is crossed out.*** *There is no way the price for the plot would only consist of the Allocation Fee. The price normally consist of the item populated in the table on fees and charges. The Alteration of the document regarding development charges supports the submission that the plot was not properly allocated to the Plaintiff*

c. ***There is no evidence that any development charges were paid for the plot.*** *In the allocation of plot, development charges are always payable by the person being allocated the plot. These development charges go towards the provision of sanitation, water, electricity, roads and other public services in the area. There is no way this fee would be waived or not payable by the Plaintiff. This is highly irregular and supports the submission by the Defendant that the Plaintiff was not validly offered the plot and the procedures were not followed.*

d. ***The Offer Letter has not specified whether the plot is residential or institutional:*** *This is also highly irregular. In normal procedures, the Defendant always indicates whether the plot is residential or institutional depending on the zoning of the area. Failure to indicate in the letter means one thing only: the offer letter did not pass through the normal channels.*

e. ***Conclusion:*** *The above observations offer concrete support for the submission that the offer letter was not made via the proper channels employed by the Defendant. This lends credit to the argument that the letter is a fraud and hence liable to be revoked by the Defendant after discovery of its true nature: a fraud."*

Counsel Dr. Kapulura cited the cases of **City Motors Limited v. Unilever South East Africa (Pvt) Ltd [2005] MWHC 23, Chidanti-Malunga v. Fintec Consultants (A Firm) and Another, Commercial Case No. 6 of 2008, Abeles v. Viola 15 MLR 1** and **Martin and Economic Resources Ltd v. Gwanda Chakuamba Phiri and Gada Company Ltd Civil Cause No. 1376 of 1992.** These cases basically discuss the law relating to the creation of an agreement between parties.

It is trite law that if a court is to determine whether parties have reached an agreement, it has to ask itself if an offer was made by one party and accepted by the other party. Further, it is common place that in resolving whether there has been an agreement, the court is at law enjoined to apply the objective test. Counsel Dr. Kapulura laid emphasis on the point that *"an acceptance is a final and unqualified expression of an assent to the terms of the offer made by the offeror*".

I have considered the two issues and I am satisfied that the Plaintiff was offered the plot in dispute by the 1st Defendant. In addition to Exhibits CK1 and CK2, there is uncontroverted evidence that the Plaintiff paid to the 1st Defendant plot charges: Exhibits together marked CK3 refers. Further, the affidavits filed by the 2nd Defendant state that the 1st Defendant's officers kept telling the 2nd Defendant that the plot in dispute had been allocated to the Plaintiff. This is fortified by Exhibits CK4 and CK6.

Exhibit CK4 (an Internal Memorandum dated 21st July 2015 from the Assistant Estates Management Officer/Mr. D.J. Namondwe to the Chief Estates Management Officer) provides as follows:

"SUBJECT: OWNERSHIP DISPUTE OVER PLOT NO. SL2/80/50 CHARLES N. KAPONDA vs THE ASSEMBLIES OF GOD CHURCH AREA 2

The above subject refers.

The plot in question was allocated to Mr. C.N. Kaponda on 17/07/13. We have thus received a complaint from him that The Assemblies of God Church, registered holder of plot no. SL2/80/49 are also claiming for the same.

This being the case that members of the said church, last Sunday on 19th July 2015 began to demolish a 5 m by 3.4 m servant quarters standing on SL2/80/50. Site visit conducted today [21/07/15] has proved the demolition true.

The purpose of this memo is to request your good office with the help of the surveyor to establish the actual boundaries of plots stated in this case so that each tenant must be working within their plot boundaries." [sic]"

Exhibit CK6 is dated 14th December 2015 and it reads:

"WITHDRAWAL OF PLOT NUMBER SL2/80/50 AND SUBSEQUENT REPLACEMENT OF SOUTH LUNZU

Reference is made to the copy of offer letter for plot number SL2/80/50 dated 19 June 2013 and the meeting you had with our Mr. P. Tembo and Mr. M. Matandika at Civic Offices in November 2015.

We write to inform you that the above mentioned plot has been withdrawn from you since proper procedures were not followed when the offer of the plot was made to yourself. The plot was meant to be an institutional one but you were allocated as a residential plot.

You are therefore advised to stop doing anything on the plot that may interfere with the City Council's ownership of the plot.

Further be advised that the City Council will offer you another plot in replacement of plot number SL2/80/50.

Your understanding on the matter is greatly appreciated.

Yours faithfully

Dr. A W D Chanza.
ACTING CHIEF EXECUTIVE OFFICER" - Emphasis by underlining supplied

It is clear from the foregoing that the offer which was made by the 1st Defendant was accepted by the Plaintiff. Exhibit CK2 speaks for itself. I cannot understand how the 1st Defendant could have issued Exhibit CK2 allocating the plot in dispute to the Plaintiff if the offer had not been accepted.

There is no ARBITRARY DEPRIVATION of property: *The letter in paragraph 4 clearly states that the plot would be withdrawn and another plot offered to the Plaintiff instead."*

Counsel Dr. Kapulura concluded by submitting that the facts and the law reveal a rather clear case of the 1st Defendant acting within its right as supported by both the Town and Country Planning Act (Act) and Exhibits CK 1 and CK2, being the documents forming the contract regulating the relationship between the Plaintiff and the 1st Defendant. Counsel Dr. Kapulura put the argument in the following terms:

> *"20. The offer clearly shows that the offer was temporary on a monthly basis. This means that there was reserved every month the right to take over the plot by the 1st Defendant. This term of the contract was assented to by the Plaintiff when he accepted the offer for the plot.*
>
> *21. Secondly, the evidence shows that the Plaintiff breached the contractual condition to complete development within the contractually stipulated time.*
>
> *22. Thirdly, the offer was a temporally allocation on a monthly basis. And since the contract stipulated this clearly, the 1st Defendant had the right to take over the plot at any time as the plot was a temporally allocation.*
>
> *23. This means that the 1st Defendant had reserved the right to take over the plot at any time because the offer was temporary."*

Finally, Counsel Dr. Kapulura advanced the following alternative argument regarding the legality of the contract between the Plaintiff and the 1st Defendant:

> *"a. Firstly, the offer is not valid for being an offer whose development charges were not paid. This is clear from the evidence as analyzed above. Therefore, the Plaintiff never complied with the contractual terms and hence the offer is not valid in the strict application of the laws of contract.*
>
> *b. Secondly, the offer was made against zoning regulations and this means that it was not legal to construct a residence on an institutional plot. This is clear evidence of the frustration of the contract and this is why the 1st Defendant offered the Plaintiff an alternative plot to suit his residential requirements."*

The Plaintiff holds the view that the allegation of fraud is misplaced and lacks merit. Counsel Tandwe invited the Court to note that the 1st Defendant, in Exhibit CK6, offered to allocate another plot to the Plaintiff. Counsel Tandwe contended that there is just no way that an offer of an alternative plot could have been made if at all the Plaintiff had obtained the plot in dispute by dubious means. The contention was framed as follows:

> *"By the way **CK6** was authored by no less officer than the then Acting Chief Executive Officer for the 1st Defendant. If it were true that the Plaintiff obtained the plot fraudulently the 1st Defendant would have no business promising to allocate the Plaintiff another plot. Going by **CK6,** the only basis on which the 1st Defendant was withdrawing the plot from the Plaintiff was that "the plot was meant to be an institutional one but you were allocated as a residential one."[sic] That letter does make any mention of fraud. It is also pertinent to note that **CK6** was written following a meeting between the Plaintiff on one hand & the 1st Defendant's officers [Mr P. Tembo & Mr M. Matandika] on the other hand and referred to the offer letter exhibit **CK1.** Our contention is that had there been any substance in the allegation of fraud, the 1st defendant would have raised the matter during those earlier interactions with the plaintiff. To raise such an allegation only at this stage renders the whole assertion completely suspect. Why did the 1st defendant not just tell the Plaintiff off on the basis of the alleged fraud at that early stage? Or indeed why not institute criminal proceedings against the Plaintiff for fraud?"*

I cannot agree more with Counsel Tandwe. I fail to understand why the 1st Defendant would choose to reward a person that it accuses of having committed fraud by offering him another plot instead of having him prosecuted. In any case, the established rule is that fraud must be precisely alleged and strictly proved. In short, to make a charge of fraud is a serious thing, and before a party makes it, he or she should be clear as to the grounds and facts upon which he or she relies as the basis of the charge. In the present case, I am far from being satisfied that the Defendants adduced evidence to prove that the Plaintiff obtained the plot in question by fraudulent means.

In any case, the evidence shows that the Plaintiff complied with all the conditions which the 1st Defendant set for the allocation of the plot in dispute to him. It would be unfair, to my mind, for the 1st Defendant to outline the procedure for the Plaintiff to follow and set conditions for the Plaintiff to comply with in the process of allocating the plot in dispute to him and then after the Plaintiff has followed the procedure and complied with the conditions contend that the procedure was tainted with fraud. That line of reasoning by the 1st Defendant cannot be entertained by this Court: see also **Re 56 Denton Road, Twickenham [1953] Ch. 5** discussed hereinafter.

I now turn to the argument by Counsel Dr. Kapulura that, in terms of the contract between the Plaintiff and the 1st Defendant, the plot in dispute was offered to the Plaintiff on a temporary (monthly) basis and, as such, the 1st Defendant reserved to itself the right to take over the plot in dispute from the Plaintiff at anytime. It was thus argued that the allegation that the Plaintiff developed the plot in dispute at great expense does not arise:

> *"31. The fact that the Plaintiff commenced development of the plot does not divest the 1st Defendant of the right to take over the plot in rectification of a zoning irregularity.*
>
> *32. Again, the **Town and Country Planning Act** allows the 1st Defendant to issue the stop notice at any time and the extent of the development is irrelevant.*
>
> *33. Regarding the procedure for the issuance of the stop notice, there is no right to be heard before a stop notice is issued. In any event, the Plaintiff has not raised the alleged proper procedure which would be in the eyes of the Plaintiff a fair procedure.*
>
> *34. As already argued the issue of expense on the plot does not arise when a stop notice is being issued. In any event the plot was a temporary allocation open to take over by the 1st Defendant. Any expense on the land is therefore an act of volens."*

In his response, Counsel Tandwe only agreed with Counsel Dr. Kapulura this much: the 1st Defendant has the right to withdraw the plot in dispute from the Plaintiff but only after complying with the proper procedure, particular regard being had to the fact that the Plaintiff had carried out some developments on the plot in dispute:

> *"5.6 There is need to understand **the chronology of events in this matter**. Such understanding is necessary to clear a lot of confusion which the defendants' affidavits raise in the matter. The chronology/timeline is as follows:*
>
> *(1) **19/06/2013**: The offer of plot no. SL2/80/50 by the 1st defendant to the plaintiff [CK1]*
>
> *(2) **17/07/2013**: The plot allocation document **[CK2]** in clause (a) required the Plaintiff to develop the plot beginning **17/8/13** and to be completed by **17/8/14** [that is within one year] failing which the plot would be withdrawn.*
>
> *(3) **16/7/2015:** The 1st Defendant issued an alleged stop notice **[CK5]**. By this time development of the plot was supposed to have been completed almost a year before. Although the Plaintiff had not yet completed development of the plot, he had commenced development of the plot as required by the plot allocation document **[CK2]**.*
>
> *(4) **19/07/2015**: The 2nd defendant demolish the plaintiff's servant quarters on plot no. SL2/80/50. **[CK4]***
>
> *(5) **30/07/2015**: The Plaintiff is served with the 1st defendant's alleged stop notice [see Certificate of Service in exhibit **CK5**]*

> *(6) **14/12/15**: The 1st Defendant followed up the stop notice by the alleged withdrawal of the plot from the Plaintiff and promising to give him another plot [see **CK6**].*
>
> *It is therefore clear from the above chronology of events that development of the plot before **16/7/15** [date of the alleged stop notice] or **30/07/15** [date of service on the plaintiff of the alleged stop notice] was authorized by the 1st Defendant [the responsible authority]. This contention proceeds on the assumption that the alleged stop notice was regular, which the plaintiff will submit [below] was not."*

It is also the position of the Plaintiff that the procedure was flouted in that he was not given an opportunity to be heard as required by law:

> *"On a related note, there is an assertion made by the 2nd defendant that the dispute involving the plaintiff's plot was resolved by the 1st defendant. The plaintiff's position is that the plot allocation dispute was not resolved to the knowledge of the plaintiff. There was no hearing by the PAC. If there was such a hearing, then the plaintiff as an interested party was not informed late alone heard by the PAC as required by law. [Reg.4 (c) of the By-Laws and section 43 of the Constitution]."*

I have carefully considered the respective submissions. With due respect to Counsel Dr. Kapulura, I am unable to appreciate how it can be said that the Plaintiff has failed to prove that the 1st Defendant did not follow the right procedure in having the plot in dispute withdrawn. In the first place, the Plaintiff's assertion that he was not given an opportunity to be heard has gone unchallenged. I have read and re-read the 1st Defendant's Affidavit and searched in vain for any evidence to counter the assertion.

By not given the Plaintiff an opportunity to be heard, the 1st Defendant was in breach of its own by-laws. In 2003, there were promulgated by-laws called the Local Government (Blantyre City Council) (Plot Allocation in Township and Improvement Areas) By-Laws: see G.N. No. 14 of 2003. By-law 3 requires the 1st Defendant to establish a committee known as Plot Allocation Committee. The Committee is mandated to allocate plots, enforce allocation covenants and hear and settle disputes in Townships and Improvement Areas.

By-law 7 deals with plot dispute management and it provides as follows:

> *"(1) Any plot dispute shall first be reported to the estate office of the relevant Township for resolution thereof and if the dispute is not resolved, it shall be referred to the Director of Town Planning and Establishment.*
>
> *(2) Where a plot dispute is not resolved by the Director, it shall refer the dispute to the Plot Allocation Committee with recommendations as how the dispute may be resolved."*

Demolition of buildings is the subject of by-law 17 and it reads:

> *"(1) The Council may request a plot holder to demolish any building and part thereof constructed in contravention of these By-Laws.*
>
> *(2) The Council shall give the plot holder thirty (30) days notice to demolish the building or part thereof.*
>
> *(3) The Council shall demolish the building or part thereof if the plot holder does not demolish the same within the time limit and the expenses incurred during the demolition exercise shall be recovered from the plot holder as a civil debt."*

By-law 19 makes provision regarding withdrawal of plots:

> *"The Council may withdraw a plot from a plot holder who contravenes or fails to comply with these By-Laws and allocate it to another applicant on the waiting list"* – Emphasis by underlining supplied

It is commonplace that a plot dispute arose in the present matter. By-law 7 lays down the procedure to be followed in such a situation. As there is no evidence that the plot dispute had been resolved by the Director one way or the other, the dispute ought to have been referred to the Plot Allocation Committee with recommendations as to how the dispute could be resolved. No such reference took place. In the premises, the 1st Defendant acted illegally in proceeding to take the measures that it took in the absence of a decision by the Plot Allocation Committee on the plot dispute.

Further, it is important to remember that where an entity is vested with a power to decide questions affecting legal rights, courts will generally be strongly inclined to hold that the decision, once validly made, is an irrevocable legal act and cannot be recalled or revised. Unless expressly provided otherwise, a statutory power to decide is often a power to decide once and once only. In **Re 56 Denton Road, Twickenham**, supra, Vaisey J accepted the principle in these words, at p.56:

> *"Where Parliament confers on a body such as the War Damage Commission the duty of deciding or determining any question, the deciding or determining of which affects the rights of the subject, such decision or determination made and communicated in terms which are not expressly preliminary or provisional is final and conclusive, and cannot, in the absence of express statutory power or the consent of the person or persons affected, be altered or withdrawn by that body."*

Of course, an act will not be conclusive if it has been obtained by fraud or misrepresentation: see **Lazarus Estates Ltd v. Beasley [1956] 1 Q.B. 702** wherein

Denning LJ remarked that *"No judgement of a court, or order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything."*

As already discussed, no fraud has been proved in the present case. It is also not in question that the Plaintiff expended a lot of money in developing the plot in dispute. In the premises, the argument by the 1st Defendant that it had reserved to itself the right to take over the plot in dispute at any time without giving the Plaintiff an opportunity to be heard cannot be sustained.

It will also be observed that, in terms of by-law 19, a plot that has been withdrawn has to be allocated to an applicant on the waiting list. This means that the plot in dispute could not be allocated to the 2nd Defendant which was not on any waiting list.

For the reasons above stated, I have come to the conclusion the 1st Defendant did not follow the proper procedure in having the plot in dispute withdrawn from the Plaintiff.

Issue No. 5 (Whether or not the 1st Defendant and/or the 2nd Defendant committed acts of trespass in demolishing the Plaintiff's structures on the plot in dispute?)

It is the case of the Plaintiff that the Defendants committed acts of trespass. In **Nkhukuti Beach Resort Ltd et al v. Mwafulirwa et al, MSCA Civil Appeal No. 65 of 2009 (unreported)**, trespass was defined as follows:

> *"Trespass to land has been defined as an unauthorized interference with a person's possession of land. It is, therefore, a wrong against the possession of land and not the ownership of it. It follows that only the person who has possession of the land in question can sue. And whether a person has possession or not is a matter of fact or evidence signifying "an appropriate degree of physical control" - **Powell v. McFarlane** (1977) 38 P & CR 452 at 470. It is not necessary, therefore, that the claimant should have some lawful estate or interest in the land for him to bring a suit in trespass to land. A person who enters the land cannot, therefore rely, in his defence, upon another person's superior right see **Cahmbers Vs Donaldson**, (1849) 11 East 65; **Nicholls Vs Ely Beet Sugar Factory** (1931) 2 Ch. 84."*

The submissions by Counsel Tandwe were couched as follows:

> *"As shown above, the 1st Defendant's purported stop notice to the Plaintiff was issued on **16/7/2015** but was only received by or on behalf of the Plaintiff on **30/7/15** [see the certificate of service in **CK5**]. However the court will note that **CK4** [a report by the Assistant Estates Management Officer/Mr D.J. Namondwe] reported to the 1st Defendant's Head Office that the 2nd Defendant had demolished the Plaintiff's structures on the plot on **19/7/15**. By that time there was no authority for anyone to demolish the Plaintiff's structure on the plot. Reg.17 of the By-Laws gives the 1st Defendant power to*

*demolish buildings that are constructed in contravention of the By-Laws. The 1st Defendant however cannot demolish buildings under Reg.17 without giving the plot holder 30 days' notice. So on **19/7/15** there was no authority for the 1st Defendant to demolish the structures on the Plaintiff's plot. What is more disturbing is that it was the 2nd Defendant's members who demolished the Plaintiff's structures, who would have nothing to do with this even if there was authority for the 1st Defendant to demolish the said structures."*

It is clear that the Plaintiff's claim for trespass relates to two distinct acts. The acts in the first group are those that were committed by members of the 2nd Defendant on 19th July 2015, that is, demolishing part of the site house, refilling the already dug foundation and the pit latrine [hereinafter referred to as "Claim of trespass against the 2nd Defendant"]. The acts in the second group consists of the demolition of the Plaintiff's house on the night of 21st June, 2016 by the 1st Defendant's officers [hereinafter referred to as "Claim of trespass against the 1st Defendant"].

Claim of trespass against the 2nd Defendant

The 2nd Defendant does not deny committing the complained acts but contends that the said acts did not constitute trespass in that the same took place on its own property. The 2nd Defendant's position is that the plot in dispute was part of its plot number SL2/80/49. The 2nd Defendant states that in 1997 it applied to the 1st Defendant for a piece of land at what used to be the 1st Defendant's market place at Machinjiri Area 2. It is alleged that the 1st Defendant offered the 2nd Defendant the said piece of land but due to the passage of time they could not locate the offer letter. The 2nd Defendant paid development charges in 1998.

The 2nd Defendant's argument that the plot in dispute was a subset of Plot No. SL2/80/49 was dealt with in the 2nd Defendant's Closing Submissions as follows:

"3. It could be that semantics and logic have a prominent place in philosophy but their place in truth and justice is little known. It does not necessarily follow that because plot number SL2/80/49 is the one that belongs to the 2nd defendant and the plaintiff was offered a nominal Plot No. SL2/80/50 then in truth those plot descriptions refer to two plots that are spatially mutually exclusive.

4. The uncontroverted testimony of the 2nd defendant is that what the plaintiff claims to be Plot No. SL2/80/50 offered to him in 2014 is in fact a subset of its Plot No. SL2/80/49 as allocated to it in 1998. Plot No. SL2/80/50 did not predate or co-exist with Plot No SL2/80/49 prior to being allocated to the plaintiff. Plot No. SL2/80/50 never existed prior to 2014. It was irregularly created in 2014 out of the 2nd defendant's Plot No. SL2/80/49. It is not spatially distinct from Plot No. SL2/80/49.

5. *As the 2nd defendant's affidavits show, what is claimed to be the plaintiff's Plot No.SL2/80/50 was in fact confirmed by the 1st defendant's officials (namely Mr Matandika – Legal Services Manager, Mr Tembo – Chief Estates Management Officer and a third official from the 1st defendant's Planning Office) to be land inside of Plot No. SL2/80/49 belonging to the 2nd defendant. The said officials informed the 2nd defendant's representatives that Plot No. SL2/80/50 was fraudulently created out of the 2nd defendant's plot and that the irregularity arose from their site office at South Lunzu and that they would resolve the anomaly internally.*

6. *Further, the fact that what is claimed to be a separate plot (Plot No. SL2/80/50) is in fact land belonging to the 2nd defendant is apparent from the stop notice issued by the 1st defendant on 16th July, 2015 under paragraph 2 thereof. See exhibit "**CK5**" to the plaintiff's affidavit in support of the originating summons."*

The Plaintiff's response to the 2nd Defendant's arguments is concise and succinct. The response is to be found at paragraphs 5.3 to 5. 7 of the Plaintiff's Final Submissions. These paragraphs read as follows:

*"5.3 The other point that the court must note is that in this matter, **as between the Plaintiff and the 2nd Defendant, we are talking of two different plots**: **SL2/80/49** [which was allocated to the 2nd Defendant] and **SL2/80/50** [which was allocated to the Plaintiff]. From their numbers it should be obvious that these are neighbouring plots. The documentation brought to this court by the 2nd Defendant confirms the fact that the 2nd Defendant's plot is SL2/80/49, see the unmarked exhibits to the 2nd Defendant's 1st Affidavit in opposition which appear after exhibit **EN1.** Further, a look at exhibit **CK4** in the plaintiff's affidavit clearly shows that what we have are two different plots. Exhibit **CK4** is an internal memorandum dated 21st July 2015 from the 1st defendant's Assistant Estates Management Officer [Mr D.J.N. Namondwe] to the Chief Estates Management Officer. It states as follows:*

[the text of CK4 has already been reproduced above]

*5.4 Related to this point is the fact that under **Regulation 14 of the By-Laws [The Local Government Blantyre City Council Plot Allocation in Townships & Improvement Areas By-Laws] requires the 1st Defendant to produce layout maps to facilitate plot demarcation and plot allocation by the 1st Defendant's Plot Allocation Committee [PAC]**. The PAC uses these maps to allocate plots and no plot could therefore be inside another plot. That would only be possible if the 1st Defendant failed its obligation under Reg. 14 to produce an accurate layout map for the area or if it chose to ignore the layout map. On the basis of this position, the argument by the 2nd Defendant that the Plaintiff's plot **[SL2/80/50]** was inside their plot **[SL2/80/49]** is not sustainable, these are two separate plots. Prior to the 1st Defendant allocating plot SL2/80/50, the 1st Defendant's surveyors surveyed the area and fixed beacons on the plot no. SL2/80/50. [paragraph 11 of the 2nd Defendant's 1st Affidavit in opposition to the Originating Summons].*

> *5.5 Although the 2nd Defendant alleges that SL2/80/50 is part of its plot [SL2/80/49, the 1st Defendant in its affidavit in opposition sworn by Mr Precious M.S. Tembo [para. 18] states clearly that* ***"To date there are no plans to reallocate the land nor has any process of reallocation begun"****. The 1st defendant's said affidavit proves the point that plot no. SL2/80/50 does not and has not at any point belonged to the 2nd defendant.*
>
> *It is also pertinent at this point to state that the affidavits of the 2nd defendant contain a lot of hearsay evidence. There are many statement attributed to officers of the 1st defendant particularly Mr M. Matandika and Mr Precious Tembo who are said to have told the 2nd defendant among other things that the piece of land which the plaintiff was allocated belonged to the 2nd defendant. It is very curious that the same Mr P. Tembo swore an affidavit in opposition to the plaintiff's originating summons but did not at any point make the assertions attributed to him by the 2nd defendant. In some places actually he contradicts the 2nd defendant's allegations*
>
> *[such as in paragraph 18 of his affidavit]. One would have expected Mr Tembo to make the said statement attributed to him himself in his affidavit. He sure would have better recollection of those matters than those who claim to have been told the same by him.*
>
> *At this point we therefore call upon the court to consider the said hearsay evidence by the 2nd defendant with serious caution. Hearsay evidence is generally inadmissible and in the current matter there is no exception applicable."*

Having given the respective submissions a careful consideration, it is my firm view that the arguments by the 2nd Defendant cannot be sustained for a variety of reasons. Firstly, the 1st Defendant in Exhibit CK6 offered to allocate another plot to the Plaintiff after they had allegedly withdrawn the plot in dispute from the Plaintiff. It is noteworthy that Exhibit CK6 was authored by no less officer than the then Acting Chief Executive Officer for the 1st Defendant. If it were indeed true that the Plaintiff obtained the plot in dispute fraudulently, the 1st Defendant would have no business promising to allocate the Plaintiff another plot.

Secondly, going by Exhibit CK6, the only basis on which the 1st Defendant was withdrawing the plot in dispute from the Plaintiff was that *"the plot was meant to be an institutional one but you were allocated as a residential one."*[sic]. Exhibit CK6 makes no mention of fraud.

Thirdly, it is also pertinent to note that Exhibit CK6, which was written following a meeting between the Plaintiff, on one hand , and the 1st Defendant's officers [Mr. P. Tembo and Mr. M. Matandika], on the other hand, refers to the offer letter, that is, Exhibit CK1. I have no doubt that that had there been any substance in the allegation of fraud, the 1st Defendant would have raised the matter during those earlier interactions with the Plaintiff. To raise such an allegations as late as at trial

stage renders the whole assertion most suspect. Why did the 1st defendant not just tell the Plaintiff off on the basis of the alleged fraud at that early stage? Or indeed why not institute criminal proceedings against the Plaintiff for fraud.

Fourthly, and perhaps most importantly, the 1st Defendant was categorical that as at 24th April 2017, *"there are no plans to reallocate the land nor has any process of reallocation begun."*: paragraph 18 of the 1st Defendant's Affidavit. This damning piece of evidence went uncontroverted.

Fifthly, the argument by Counsel Katuya proceeds on a fundamentally false premise: the assumption that the demarcation of plots in South Lunzu ended with Plot No. SL2/80/49. No evidence was led to support such an assumption. As such, subdividing Plot No. SL2/80/49 into Plot No. SL2/80/49 and Plot No. SL2/80/50 would entail renumbering the existing Plot No. SL2/80/50, Plot No. SL2/80/51, Plot No. SL2/80/52, etc., as Plot No. SL2/80/51, Plot No. SL2/80/52, Plot No. SL2/80/53, etc. Such an argument would make a mockery of By-law 14 which requires, among other matters, that demarcation of plots must be based on accurate base maps. The by-law provides as follows:

> *"(1) The Council shall produce Township and Improvement Areas lay outs based on accurate base maps at 1:2,500 or 1:1,250 Scale in order to facilitate plot demarcation.*
>
> *(2) After production of the layouts referred to in paragraph (1), engineering designs and infrastructure construction shall be implemented.*
>
> *(3) The Council shall supply layouts to licensed surveyors for block perimeter cadastral survey for the purpose of title plans for title registration.*
>
> *(4) The Council shall ensure that throughout the survey, a layout showing survey of plot numbers is produced in order for the Committee to allocate plots.*
>
> *(5) The Council shall furnish an applicant who has been allocated a plot in a Township or an Improvement Area with all the details of the allocation."*

Neither the 1st Defendant nor the 2nd Defendant adduced cogent evidence to establish that plots in South Lunzu were not layed out as required by by-law 14. I am satisfied that the Plot Allocation Committee used the relevant layout maps to allocate the plot in dispute to the Plaintiff and I cannot, therefore, comprehend how the plot in dispute could have been created within Plot No. SL2/80/49.

That being the case, I agree with Counsel Tandwe that the Plaintiff was offered the plot in dispute and not Plot No. SL2/80/49 which belongs to the 2nd Defendant. The plot in dispute is not the same thing as Plot No. SL2/80/49: the two plots are spatially exclusive.

To sum up, as the plot in dispute belonged to the Plaintiff, and not the 2nd Defendant, the acts committed by members of the 2nd Defendant on 19th July 2015 were clearly trespass as defined by the Supreme Court of Appeal in **Nkhukuti Beach Resort Ltd et al v. Mwafulirwa et al**, supra. It is, therefore, my finding that the 2nd Defendant interfered with the Plaintiff's possession of the plot in dispute.

Claim of trespass against the 1st Defendant

The response by the 1st Defendant is that it was not guilty of trespass. The 1st Defendant took a three-pronged approach. Firstly, it denies demolishing any of the Plaintiff's property. Secondly, it is said that, in the event that the 1st Defendant demolished the Plaintiff's property, such action was part of the corrective action taken by the 1st Defendant in making sure that an institutional plot was not used for residential purposes. Thirdly, it was contended that the 1st Defendant is vested with a statutory right under the Act to enter any property including the plot in dispute. It was thus argued that such entry cannot be trespass.

The arguments on the issue of trespass were summarized as follows:

> *"ANALYSIS*
>
> 1. *As the analysis of the documents forming the contractual relationship between the Plaintiff and the 1st Defendant reveal, the plot was offered on a temporary basis and this meant that the plot was not permanent and could be taken away from the Plaintiff at any time.*
>
> 2. *Secondly, the Town and Country Planning Act allows the 1st Defendant to exercise the power to issue the stop notice. The conduct of the 1st Defendant is therefore supported by the law.*
>
> 3. *Thirdly, the conduct of the 1st Defendant was corrective of a zoning anomaly and the 1st Defendant being charged by the Local Government Act and the Town and Country Planning Act to manage the zoning and enforce zoning restrictions, the 1st Defendant was only doing their job as demanded of them by the law.*

CONCLUSION

4. *Based on the above analysis, it is clear that the 1st Defendant's decision can be and is legally sustained in the circumstances of this case. This ground should therefore fall off."*

Counsel Dr. Kapulura specifically cited sections 49 and 69(1) of the Act. Section 49 of the Act makes provision regarding stop notices:

> *"(1) Where a responsible authority is of the opinion that a person is carrying out unauthorized development the responsible authority may serve a stop notice requiring that person to cease the activity or such portion of it as may be specified in the stop notice.*
>
> *(2) If a person feels aggrieved by the stop notice issued pursuant to subsection (1), he may appeal to the Board within thirty days from the date of the service of the notice.*
>
> *(3) The Board may confirm, vary or rescind the stop notice appealed from and in doing so the Board may take into account any matters provided for in section 44 respecting enforcement notices."*

Section 69(1) of the Act deals with powers of entry and it reads:

> *"For the purpose of this Act, the Commissioner or an authorized officer may, at all reasonable times, enter any land or building—*
>
> *(a) to inspect or survey the land or building for the purpose of preparing a plan;*
>
> *(b) to determine whether any unauthorized development is being or has been undertaken on the land or in the building;*
>
> *(c) to determine whether an order under Part VI shall be made in respect of the land or to enter such land in exercise of the powers under any order so made;*
>
> *(d) to assess compensation under Part VIII; and*
>
> *(e) to obtain information relevant to the determination of an application for development permission."*

I have carefully reviewed the evidence and the submissions by Counsel regarding the issue of trespass. It is not disputed that the 1st Defendant demolished the Plaintiff's structures on the plot in dispute. The Plaintiff's claims that the demolition was done without the Plaintiff's licence, consent or prior warning and without compensating the Plaintiff. The Plaintiff, therefore, claims damages for trespass. In its defence, the Defendant contends that its conduct in demolishing the

structures on the plot in dispute is supported by the law, that is, sections 49 and 69 of the Act and the Local Government Act.

It is noteworthy that the Plaintiff had possession of the plot in dispute at all material times. Needless to say, even a landlord may be liable to his tenant for trespass if the landlord behaves in a manner which amount to *"unauthorized interference with the tenant's possession of the land"*: see **Nkhukuti Beach Resort Ltd et al v. Mwafulirwa et al,** supra.

That the 1st Defendant committed the complained acts is not disputed: see paragraph 16 of the 1st Defendant's Affidavit, paragraph 15 of the affidavit by Rev. Francisco Antonio and Exhibit CK4. The 1st Defendant sought to rely on Exhibit CK5 (Stop Notice] but the same was irregular. Exhibit CK5 was issued under section 49 (1) of the Act. The provision deals with *"unauthorized developments"*. But the issue in this matter was a plot allocation dispute whose resolution lies under the jurisdiction of the Plot Allocation Committee pursuant to by-law 7.

The dispute was reported by the Plaintiff to the estates office of the Township for resolution, which office was supposed to refer the matter to the Director of Town Planning and Establishment who then was supposed to refer the dispute to the Plot Allocation Committee with recommendations on how the matter should be resolved. The matter had nothing to do with *"unauthorized development"* and as such did not fall under Part V of the Act.

In any case, the development of the plot in dispute by the Plaintiff was a "permitted development" under s. 34 of the Act which states that *"the types and classes of development set out in the First Schedule shall, to the extent provided in that Schedule, be permitted development under this Act and shall be exempted from the requirement for development permission under this Part."*.

The relevant part of the First Schedule provides as follows:

> ***"PERMITTED DEVELOPMENT***
>
> *The following developments shall, subject to such conditions as may be imposed by a responsible authority be permitted developments within a Planning Area and a Land Development Control Area, namely—*
>
> *(a) the building by the lessee or licensee of a house on a defined plot and in accordance with any conditions in the lease or licence under which the plot is held and any rules regulating building operations within a traditional housing area and subject to the provisions of section 33 of this Act."*

As already observed, the complained acts against the 1st Defendant pertain to demolition of the Plaintiff's house. Any case in which a responsible authority requires demolition of a permitted development falls under s. 64 (1) (c) of the Act which reads:

> *"(1) There shall be a right to the payment of compensation assessed, in accordance with the provisions of this Part in the following cases, namely –*
>
> (c) *where the Minister or a responsible authority requires a building to be demolished, altered, removed, relocated or to cease being built or being used or a use of land to cease, such building and use of land, being at the time authorized and in accordance with any law or in respect of which the Minister has approved that compensation should be paid in the interests of the implementation of a plan or the proper control of land or the exercise of powers under Part IV."*

Section 64 (1) (c) of the Act gives right to compensation to person who is a lessee or licensee. The Plaintiff is, therefore, entitled to compensation under the provision.

Having regard to the foregoing analysis, the inescapable conclusion is that both the 1st Defendant and the 2nd Defendant committed acts of trespass in demolishing the Plaintiff's structures on the plot in dispute.

CONCLUSION

In these circumstances and by virtue of the foregoing, I am satisfied that the Plaintiff has managed to prove his claim herein to the requisite standard. The Plaintiff was offered the plot in dispute and the Plaintiff duly accepted the offer. Further, much as the 1st Defendant could withdraw the plot in dispute from the Plaintiff, the withdrawal had to be done in accordance with statutorily requirements and these requirements were not fully complied with. It is also my finding that both Defendants committed acts of trespass by their separate acts of demolition of the plaintiff's structures on the plot in dispute.

All in all, the Plaintiff is entitled to the reliefs and orders sought in the originating summons, including party and party costs. It is so ordered.

For avoidance of doubt, the 1st Defendant's prayer for (a) an order of mandatory injunction compelling the Plaintiff or their servants or agents to demolish any structure placed on the land, failing which the 1st Defendant is authorised to

enforce the by-law and demolish the properties, (b) an order authorizing the 1st Defendant to clear the area of any structure, (c) a declaration that the Plaintiff has obtained the land illegally and therefore has no good title to the land (d) a declaration that the conduct of the Defendants in its entirety an illegal and (e) costs cannot be sustained. The 1st Defendant's prayer is, accordingly, not granted.

Pronounced in Court this 13th day of December 2017 at Blantyre in the Republic of Malawi.

Kenyatta Nyirenda
JUDGE